



EMPLOYMENT TRIBUNALS

Claimant: J Ritchie

Respondent: Lakeland Pony Treks Limited

HELD AT: Manchester (by video platform) **ON:** 27 August 2021

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Z Myers, HR Consultant

JUDGMENT having been sent to the parties on 31 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form dated 12 August 2020, the claimant presented complaints alleging unpaid wages, holiday pay due at the termination of her employment and breach of contract in respect of notice pay. On 30 August 2020, the respondent submitted a response to the claim together with an employer's contract claim for an alleged overpayment of wages for night checks.

Evidence

2. Each party presented a bundle of documents at the commencement of the hearing. The claimant produced a written witness statement and was subject to cross-examination. The respondent told the Tribunal that it was relying on the documents in the bundle(s) alone and did not call any witnesses to give evidence.

Issues to be determined

3. At the outset of the hearing, the Tribunal discussed the complaints and issues with the parties. It was agreed that the issues to be determined by the Tribunal at this hearing were as follows:

- 3.1 Whether the respondent had failed to pay the claimant all wages due to her and, if not, what wages were outstanding and owing;
- 3.2 Whether the claimant had undertaken night checks and, if not, whether the respondent has overpaid the claimant for night checks. If so, is the respondent entitled to a refund of wages paid and how much;
- 3.3 Whether the claimant was dismissed in breach of contract and, if so, what notice/pay in lieu of notice is due to her;
- 3.4 Whether the claimant had accrued outstanding holiday entitlement at the termination of employment and, if so, what holiday pay is due to her?

Findings of fact

4. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved conflicts of evidence on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues to be determined are as follows.
5. The claimant started working for the respondent on 24 February 2020, as a yard groom at its stables near Ulverston, Cumbria. The claimant agreed to work 2 days per week and she lived in a caravan on site. The claimant was studying for a BTEC Level 2 qualification at the material time and occasionally works additional hours.
6. In accordance with the respondent's procedural documentation, if an employee undertakes night checks on the horses at the stables, the employee has to report on each occasion to the respondent's senior management that the night checks have been done.
7. In mid-June 2020, the claimant told the respondent that she was not going to do night checks anymore and, instead, she had arranged for another employee, Georgia, to do them. The respondent raised no objection to this change in arrangements. The change is reflected in the claimant's payslips which show that, in June 2020, the claimant was not paid for a full month of night checks; she was paid for doing night checks for half of the month of June 2020 and she was not paid for any night checks in July 2020 because she was not performing those duties.
8. In the week of 6-10 July 2020, the claimant worked on Monday and Tuesday, 6 and 7 July 2020 - she was taking her BTEC Level 2 assessment on the Thursday. She performed the usual checks on the horses. She did not undertake any night duties because Georgia was, by then, doing night duties.
9. On Tuesday 7 July 2020, around 4.00pm, the claimant reported her concerns about a horse called Phoebe, to Mr Michael Myers who is an owner and

director of the respondent's business. He is the husband of the senior manager, Mrs Myers. It is not clear whether Mr Myers checked the horse himself at the time nor if anybody else did, but Mr Myers decided not to call the vet until the next day and he took no immediate action. A qualified veterinary surgeon visited the next day to examine the horse and then returned 24 hours later. Sadly, however, the horse did not recover or improve and, on Friday, a decision was made to put the horse to sleep.

10. On the evening of Thursday 9 July 2020, the claimant was asked to work the following day, Friday 10 July 2020. This was at very short notice, and the claimant declined because she had already made plans to go away for the weekend. The claimant was told "it's your boyfriend or your job" and was dismissed on the spot. She was also told to vacate the caravan by the end of the week. The respondent did not, at that time on the Thursday, know that the horse was going to be put down. It was only on Friday 10 July 2020, when the vet returned, that it was decided that the horse should be put down.
11. On Friday 10 July 2020, the claimant's mother messaged the respondent asking for the claimant's notice pay, being 1 week's notice. In response, the respondent then produced an allegation of gross misconduct, namely that the claimant had failed to complete a horse welfare check and report an incident. It called the claimant to a meeting. The respondent said that it had commenced an investigation into the claimant's conduct.
12. On Monday 13 July 2020, the respondent told the claimant that she was dismissed (for a second time) for gross misconduct despite that it has already dismissed the claimant on Thursday 9 July 2020.
13. When the claimant was dismissed, she was not paid notice pay nor was she paid her accrued untaken holiday entitlement. In addition, the respondent made a deduction from the claimant's final pay of £455 which was not explained on the claimant's final payslip and which resulted in the claimant receiving no pay for July 2020.

The applicable law

14. A concise statement of the applicable law is as follows.

Unauthorised deductions from wages

15. A worker is entitled to be paid for work done under his or her contract of employment. The Employment Rights Act 1996, Part II, provides that a failure to pay wages owing constitutes an unauthorised deduction from wages.
16. Wages are defined in section 27 of the Employment Rights Act 1996. Section 27(1) (a) provides that:

"wages includes any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise."

17. The Employment Rights Act 1996, section 13, governs circumstances in which an employer can make deductions from an employee's wages. Section 13 provides that an employer:

"shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction"

Holiday Pay

18. The Working Time Regulations 1998, Regulations 13 and 13A, provide that every worker is entitled to a minimum of 5.6 weeks' paid holiday entitlement in each holiday year.
19. Regulation 14 of the Working Time Regulations 1998 provides that a worker is entitled to payment for untaken holidays pro-rata the leave year or the portion of the leave year in their final year of employment, and they are entitled to that payment at termination of employment. The non-payment of holiday pay can also be an unauthorised deduction from wages. There is no provision in the Working Time Regulations 1998 or elsewhere for any withholding of holiday pay because of a dismissal for gross misconduct or for any other reason.
20. In the absence of any express contractual provisions as to holiday entitlement, the holiday year for calculation purposes is determined in accordance with Regulation 13 and commences on the anniversary of the date on which the worker's employment began.

Breach of Contract - Notice Pay

21. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his or her contract of employment. The minimum period of notice required, where the employee has been continuously employed for one month or more, is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. However, an employer is entitled to terminate the contract of an employee without notice in circumstances of gross misconduct.
22. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, section 4, an employer is entitled to present a contract claim (counterclaim) for the recovery of damages or any other sum in the event that an employee presents a breach of contract claim in the Employment Tribunal.

Conclusions

23. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Unpaid wages and the counterclaim in respect of night checks

24. The claimant seeks payment of wages for work done in July 2020. Her payslip for that month shows wages earned in the sum of £322.50. This amount has not been paid because the respondent deducted £455.00 from the claimant's final pay, leaving a negative balance on the payslip. The amount of £455.00 is the subject of the respondent's contract claim (the counterclaim) which alleges that the claimant had not been doing night checks from April to June 2020 when she should have been and so had been overpaid for such.
25. In respect of the night checks, the Tribunal has found that the claimant did these until mid-June 2020 and she was paid for them accordingly. It was the claimant's unchallenged evidence that she told the respondent in mid-June 2020, that she was not going to do night checks anymore and that she had arranged for Georgia to do them instead. The claimant's payslips support that position because they show that the claimant was not paid for a full month's worth of night checks for June 2020; instead she was paid for half a month's worth of night checks. Her July 2020 payslip shows no payment for night checks in July 2020. The Tribunal concluded from this evidence that the respondent knew that the claimant stopped undertaking night checks in June 2020; hence they stopped paying the claimant for those night checks in June 2020.
26. The respondent brought no evidence to support its allegation that the claimant had not been carrying out night checks from April to June 2020 despite being paid for them. The burden of proof is on the respondent, in pursuing its counterclaim, to bring evidence to prove what it alleges. The Tribunal noted the respondent's rules and procedures which provide that employees shall report to the senior manager every night that they have done the night check. It was not apparent whether such reports were or were not done. The respondent's evidence was that there were no written records and the stable record sheets that were presented to the Tribunal do not include a record of any night check. The respondent called no witnesses to give oral evidence on the matter. The Tribunal considered what the respondent alleges for its counterclaim, namely that the claimant had not undertaken night checks for around 3 months. The respondent's stables house a number of horses which are valuable and prized animals. The Tribunal considered it to be inconceivable that a respondent would go 3 months without any reports of night checks being received, and yet pay for such without a manager raising it with the person or persons who should have been doing those checks. In those circumstances, the Tribunal concluded on a balance of probabilities that the claimant had done her night checks, the respondent had been content with her work and had paid her for it.
27. The respondent has also, at this hearing, attempted to suggest without any evidence in support of its contention, that it "thought" the claimant had carried on doing half the night checks after mid-June. This was raised in submissions on the issue of whether the claimant had committed gross misconduct in her care of the horse in early July 2020. If the respondent thought the claimant was doing half the night checks in July 2020, as was suggested, the Tribunal would have expected to see a payment appearing on the claimant's payslip in July 2020 for half of the night checks, but there were no night checks paid

after mid-June 2020. In addition, the respondent brought no evidence that the claimant had reported any night checks after mid-June 2020, as might support the respondent's suggestion that she had been undertaking night checks in that period. In those circumstances, the Tribunal rejected the respondent's unsubstantiated assertions and accepted the claimant's evidence. Therefore, the claimant is entitled to keep the money which she has earned for the night checks she has done and which the respondent has unlawfully deducted from her final pay. There was no evidence of any overpayment for night checks. The respondent's counterclaim must fail and the claimant's claim of unauthorised deductions succeeds, in the sum of **£322.50** gross, which is agreed to be the amount of the wages earned by the claimant for the month of July 2022 as shown on the payslip.

Holiday Pay

28. The respondent had no defence to this complaint. It was the respondent's mistaken belief, due to advice from consultants, that the claimant was not entitled to be paid for outstanding holiday entitlement if dismissed for gross misconduct. Therefore, when the claimant was dismissed, the respondent did not pay her for her accrued outstanding untaken holiday entitlement as it should have done.
29. It was agreed that the claimant took no holiday during her employment with the respondent. The contractual holiday year was 1 April to 31 March. Using the hours worked by the claimant in the months of April, May and June 2020, the claimant worked an average of 22 hours per week and was employed for 14 weeks of the holiday year. She had therefore accrued 33.17 hours of holiday entitlement. At a rate of pay of £6.45 per hour, the claimant is due holiday pay at the termination of her employment in the gross sum of **£213.95**.

Notice pay

30. The respondent's case was that the claimant was dismissed for gross misconduct and is therefore not entitled to notice or pay in lieu. The respondent said that the gross misconduct was that the claimant had failed to complete a horse welfare check and report an incident. The Tribunal has found that the claimant did report her concerns about the horse, on Tuesday 7 July 2020, to Mr Myers, an owner/director of the respondent and the husband of the senior manager, Mrs Myers. The vet was called the following day and returned daily. It was not until Friday 10 July 2020 that a decision was made, by the vet, to put the horse to sleep. However, it was on Thursday 9 July 2020, that the respondent asked the claimant to work on Friday 10 July 2020 at very short notice. The claimant said that she could not do so because she had already made plans for the weekend. In response to this, the claimant was sacked on Thursday 9 July 2020. There is no evidence to support the respondent's assertion that the claimant was sacked on Thursday because of the horse's demise and in any event the respondent did not then know that the horse was going to be put down. In addition, the suggestion of gross misconduct is at odds with the fact that the respondent asked the claimant to work on the Friday.

31. It was only when the claimant's mother messaged the respondent asking for the claimant's notice pay that the respondent produced its allegation of gross misconduct relating to the care of the horse and commenced what it said was an investigation into that allegation. Then, the next Monday, the respondent purported to dismiss the claimant a second time for gross misconduct. The Tribunal took the view that this was in an effort to save itself a week's pay, but the respondent could not dismiss the claimant for gross misconduct on the Monday when it had already dismissed the claimant on the previous Thursday for refusing to work on the Friday.
32. In light of the above, the Tribunal concluded that the claimant was not dismissed for gross misconduct nor was she guilty of any misconduct; she was dismissed because she had been unable to work on Friday and because she had refused to do so at short notice. Even if the claimant had been dismissed because of the horse or some failure on her part (and there was no evidence of such failure) the Tribunal considered that the claimant's actions as alleged did not amount to gross misconduct. She had reported her concerns on the afternoon of Tuesday 7 July 2020 to senior management and, thereafter, the claimant had not been at work. In reaching its conclusion, the Tribunal took into account the fact that the claimant is 18 years old and she was unqualified at the time, albeit she achieved her Level 2 qualification, literally, on Thursday 9 July 2020. On Tuesday 7 July 2020, she was working as an unqualified yard groom and presumably was supervised as such. The claimant was not exclusively responsible for the horse in question. There were a number of qualified and senior staff around including Georgia, and others, who would have undertaken night checks after the claimant finished work. The decision to call the vet was made by management a number of hours after the claimant had reported her concerns, and a vet had inspected the horse over several days. There was no evidence to suggest that the horse's demise was the fault of the claimant nor because of anything she had done or not done. The Tribunal therefore considered that, to lay the death of the horse solely at the claimant's door, was unjustified and unreasonable. The claimant is therefore entitled to be paid damages for breach of contract in respect of the respondent's failure to give or pay her a week's notice, being the agreed sum of **£159.26**.

Employment Judge Batten
10 January 2022

REASONS SENT TO THE PARTIES ON
18 January 2022

FOR THE TRIBUNAL OFFICE

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