



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Laura Shepherd

v

Milton Royal Blairgowrie Ltd

Heard at: Cambridge ET Centre (via CVP) **On:** 22nd November 2021

Before: Employment Judge Conley

Appearances

For the Claimant: Mrs Laura Shepherd, in person

For the Respondent: No representative attended

JUDGMENT

1. The Respondent unfairly constructively dismissed the Claimant, and the Respondent is Ordered to pay the Claimant:

Basic award: £3,450

Compensatory award: £500

2. The Claimant's claim of unauthorised deduction from wages is well founded. The Respondent made unauthorised deductions from wages by failing to pay the claimant the full amount of wages due for January, February and March 2020 and is ordered to pay to the claimant the sum of £4899.17 being the total gross sum deducted.
3. The Claimant's claim of unpaid accrued holiday pay is not well founded and is dismissed.
4. The Claimant's claim of Breach of Contract is proved but I make no award of damages under this head.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 27th March 2020, following a period of early conciliation starting on 6th March 2020, the Claimant sought to pursue the following complaints against the Respondent:
 - a) Unfair Dismissal;
 - b) Redundancy Payment;
 - c) Arrears of Pay; and
 - d) Holiday Pay.
2. The claim was resisted by the Respondent and they presented a Response on the 1st June 2020 (having first been given an extension of time for service) which included comprehensive Grounds of Resistance to the Claim.
3. A Full Merits Hearing of this matter was due to be heard on the 23rd June 2021 before Employment Judge Hawksworth, but due to the non-compliance by both parties with a number of important Case Management Orders, the decision was taken to postpone the hearing until the 22nd and 23th November 2021.
4. In outline, the case is brought by the Claimant who was, for approximately 4 and a half years, an employee of the Respondent, a company which runs a hotel in the Scottish town of Blairgowrie. She began her employment as a Receptionist but in due course was promoted to the position of Duty Supervisor.
5. During 2019 and the early part of 2020, the hotel ran into some financial problems. The cause of these problems is to an extent in dispute. The Respondent appears to lay at least some of the blame at the feet of the Claimant, who in turn vehemently denies responsibility. From December 2019 onwards, there were irregularities in the way in which the Claimant was being paid. The Claimant says that she was not being paid at all and her grievances with the Respondent fell on deaf ears.
6. Eventually, in March 2020 she tendered her resignation, which she says she was forced to do because of the actions of the Respondent and accordingly she was constructively dismissed. The Respondent denies this and asserts that this was a genuine resignation and that they had not committed any repudiatory breach of contract.

THE ISSUES

7. At the Hearing on the 23rd June 2021, the issues were crystallised and the complaints to be determined at this hearing were set out as follows:
 - i. That the Claimant was constructively unfairly dismissed when she resigned her employment by email on the 4th March 2020 ('the Constructive Unfair Dismissal claim');
 - ii. That the Respondent was in breach of contract by failing to pay the Claimant in lieu of her period of notice ('the Wrongful Dismissal claim');
 - iii. That the Respondent made unauthorised deductions from her wages, namely that she was not paid at all from December 2019 to the date of termination of her employment ('the Unauthorised Deductions claim');
 - iv. That the Respondent failed to pay her for annual leave the Claimant had accrued but not taken when her employment ended ('the Holiday Pay claim')

8. I have been guided in my conduct of this hearing, and in my preparation of my Judgment and Reasons, by a comprehensive List of Issues prepared by EJ Hawksworth, to whom I am indebted. I do not propose to rehearse this here.

PRELIMINARY MATTERS

Non-Attendance of the Respondent

9. The Respondent does not appear before me today to defend the claim. This was indicated to the Tribunal in advance by way of an email sent from Harshal Vyas, the Director of Operations from the Respondent company who has attended all previous hearings of this matter and who is the named individual on the ET3, on 18th November 2021, in which he stated that the Respondent company is no longer trading and accordingly he would not be attending the hearing and nor would he be dealing with any further matters in connection with this claim. He directed all further correspondence and communication to be made to an address in Bicester, Oxfordshire.

10. Before proceeding to hear the claim, I had to satisfy myself of whether it was appropriate in the circumstances to continue with the hearing notwithstanding Mr Vyas' non-attendance. I noted that the email purportedly from Mr Vyas came from the same email address that he has used previously for correspondence with the Tribunal. I also took the opportunity to make checks with Companies House to ensure that the Respondent company was not subject to any insolvency proceedings. The search revealed that the company is still active. There is no question as to whether Mr Vyas was aware of the hearing: he plainly was from his previous conduct of this matter and in light of the email that he sent last week.

11. In the circumstances I had no hesitation in allowing the claim to proceed in the absence of any representative from the Respondent company.

However, I nevertheless had regard to the issues identified by the Grounds of Resistance and the documents that had been supplied by the Respondent in the bundle during the course of my consideration of the issues.

Failure by the Claimant to provide a Witness Statement

12. At the start of the hearing it transpired that Mrs Shepherd had not prepared and exchanged her Witness Statement, although it was clear to me that she had misunderstood the detail of the Case Management Orders in relation to her own Witness Statement. She had been in full compliance with the majority of the Case Management Orders, including provision of a Schedule Of Loss, a Witness Statement on behalf of Robbie Shepherd, and provision of a bundle of documents. She apologised and candidly explained that she had misunderstood but that her evidence was broadly in line with the matter she had raised in her claim form and in her Schedule of Loss. In order to ensure that I had the information that I needed in order to determine her claim, and being mindful of the overriding objective, I gave Mrs Shepherd permission to prepare a Witness Statement in short form and allowed her an hour in which to do so. She emailed the document to the Tribunal, and during the course of the hearing I invited her to expand upon her short form statement in oral evidence in response to my questioning.

THE EVIDENCE

13. The evidence in this case came from the following sources:

- a) The unchallenged oral evidence of the Claimant;
- b) A short, bullet-point Statement in the form of an email that the Claimant prepared on the morning of the hearing, for which I gave her leave;
- c) The Claimant's Schedule of Loss;
- d) A Statement from Robbie Shepherd, who did not attend the hearing as it was indicated that he would be training with the Royal Navy as at the date of the hearing
- e) A Bundle of documents prepared by the Claimant amounting to 59 pages
- f) A Bundle of documents prepared by the Respondent amounting to 72 pages
- g) Miscellaneous correspondence between the parties and the Tribunal.

14. The unchallenged evidence of the Claimant was that she had not been paid as required for either the months of January or February 2020. Her evidence was that payment of wages contractually took place on the 5th day of every month by way of bank transfer. For the majority of her employment at the hotel, this had taken place without issue. However, from around the middle of 2019, when issues had come to light concerning the hotel's accounting procedures, payments of wages became more erratic. Sometimes the wages would not be in her bank account until the afternoon of the 5th day, and on other occasions not until the following day. However, from January 2020, wages were not paid at all.

15. Initially she received an apology for this non-payment of wages and was assured the payment would be made in due course. However, around three or four days later, a message was conveyed to her from the Managing Director of the company, Dr Chen, to the effect that she would not be paid her wages because over suspicion that she may have been responsible for a shortfall in the banking of cash from the hotel, one of the additional duties that had been given to her when she had been promoted from receptionist two duty supervisor in June of 2018. The Claimant strongly disputes any allegation, either implicit or explicit, that she was responsible for any shortfall, and instead suggests that they were serious problems with the hotels accounting systems which meant that the takings did not reconcile with the cash present in the hotel safe.
16. I have seen a series of emails in the bundle going back as far as October 2018 contained within the bundle which appear to demonstrate there some issues had been identified in the account system. It was the Claimant's case that she was being scapegoated for these problems.
17. I have also seen exchanges of emails between Nicole (surname unknown), who, whilst working as a receptionist at the hotel was required to complete the accounts spreadsheet, and the hotel companies accounts team, in which discrepancies in the accounts have been identified and staff have been instructed to make corrections.
18. in paragraph 11 of the Respondent's Grounds of Resistance, it is asserted that the Claimant was in fact paid her salary in a somewhat unorthodox way in that she was authorised to take her salary for the months of January and February from cash in the hotel safe. The Claimant states that she was extremely reluctant to do so for a variety of reasons. Firstly, the cash in the safe was generally insufficient to pay her salary as it rarely exceeded £850. Secondly, because the cash was intended for petty cash and floats for the hotel bar, it generally consisted of loose coinage. Thirdly the Claimant did not consider it was appropriate for her to have to help herself to her wages in this rather haphazard way. She was entitled, she said, to be paid her full salary by bank transfer on the 5th day of each month as stipulated by her contract. In any event she denies that she helped herself to her salary in this manner as asserted by the Respondent.
19. The Claimant voiced objection to the non-payment of her wages in a formal letter of grievance addressed to Dr Chen on the 12th February 2020. It appears that this grievance was never dealt with and no reply was ever received. Likewise, requests made by the Claimant for evidence that she was in some way responsible for the accounting shortfall were never responded to.
20. Once again turning to the Grounds of Resistance, the Respondent indicates in paragraph 13 that the allegations against the Claimant and others in relation to the accounting shortfall were reported to the police and, according to the Respondent, it was anticipated that by now she and others would have been spoken to as part of a police investigation. The Claimant vehemently denies that she was ever spoken to and casts doubt as to whether the matter was ever reported to the police as the Respondent asserts.

21. Alongside the issue in relation to her wages, the Claimant was also served, along with her colleagues, with a notice indicating that the hotel was to be closed at short notice and all staff were to be laid off due to a downturn in the business as a result of the impending coronavirus crisis. She accepted that the Respondent was contractually entitled to do this.
22. In the Grounds of Resistance, the Respondent had indicated (at paragraph 12) that the decision to close down the hotel was directly attributable to the shortfall in the takings which was in turn attributed to the actions of the Claimant.
23. The Claimant complains that, although she accepts that the Respondent was entitled to do this under the terms of her contract, the manner in which it was conducted was inappropriate and notwithstanding the fact that the hotel was closed down she was nevertheless required to come into work every day to carry out a number of duties including ensuring that the property was left secure, whilst not being paid to do so, and having no confidence that she would ever be paid.
24. It was against this background that the Claimant sent an email on the 4th March 2020 resigning her position and giving four weeks' notice to the Respondents. Having done so she commenced a new job the very next day on the 5th March 2020 which I'm told she still has.
25. She would have been due to be paid on the 5th March 2020 but she was not; nor was she ever paid any monies in lieu of her notice period, which on her evidence would have expired on the 1st April 2020.
26. I have had sight of a document from HMRC setting out the taxable income that the Claimant received from the Respondent during the period 5th June 2019 to 5th April 2020. This appears to show that the Claimant was in fact paid during the months of January, February and March 2020. However this conflicts with the evidence of the Claimant but perhaps more significantly it conflicts with the assertion by the Respondent that the Claimant was merely authorised to take money from the safe that was rightfully hers.
27. The Claimant asserts that this document demonstrates that whilst the Respondent was accounting to HMRC, it was not in fact paying her wages. The Claimant gave evidence that she was not provided with a P45 for many months after leaving the Respondent, and this document although I have not had an opportunity to examine it indicated that she remained employed by the company for a number of months after her departure.

FINDINGS OF FACT

28. The Claimant commenced employment with the Milton Royal Hotel, Blairgowrie on the 15th September 2015 as a Receptionist. At that time she was 40 years of age. Her previous employer was Oldbrook Ltd, but this was transferred to the Respondent under TUPE. The Claimant does not know the date of this but it

was on 1st July 2019, according to the Respondent's response. This is not in dispute and nothing turns on it.

29. Her average weekly wage was £575.00
30. The Annual Leave year mirrors the calendar year and the Claimant had an annual entitlement of 28 days per year. As of the date of her resignation 4th March 2020, on the Claimant's own evidence, she had taken 7 days leave already. On a pro rata basis she would have been entitled to no more than 7 days by this point and therefore had no accrued holiday at this point in time.
31. The Claimant was promoted to the position of Duty Supervisor. Once again she does not know the date on which this happened but according to the Grounds of Resistance this was the 30th June 2018. Again nothing turns on it.
32. The Claimant felt uncomfortable with the part of her role relating to submitting returns to the accounts department, and according to an annotated job description in the bundle, she asserts that she was inadequately trained in this part of her role. I accept this, and I further accept that from the emails that I have read this was a task which was primarily carried out by a woman called Nicole who was herself a receptionist at the hotel.
33. It is apparent from those emails that the account system at the hotel was in a certain amount of disarray and a number of discrepancies in the accounting system were identified and staff were requested to make corrections.
34. I find that these discrepancies were not attributable to the Claimant because of fraud, theft or any other malpractice on her part.
35. I am satisfied that the Claimant was not paid her salary by bank transfer (or at all) on the 5th day of January, February or March of 2020, as required under the terms of her contract.
36. I am similarly satisfied that she did not help herself to her salary from the petty cash in the hotel safe as she appears to have been invited to do by the Respondent.
37. I find support for this in the fact that the Claimant's concerns about non-payment of her wages were articulated in a letter of grievance to the managing director of the Respondent company on the 12th February which appears to have gone unanswered.
38. The salary due to the Claimant (gross) for each of those months was as follows:

January 2021 £1997.74
February 2020 £1622.70
March 2020 £1278.73

39. In February 2020, the hotel was shutdown at very short notice, perhaps understandably in light of the impending Coronavirus crisis that was looming at the time, particularly in view of the fact that many of the hotel's customers were Chinese tourists. I accept that given the unprecedented circumstances of the time the decision to do so might well have been a necessity for the Respondent.
40. Nevertheless I find that that despite the hotel having supposedly been "shut down" the Claimant was required to continue to come into work with no assurances as to whether she would be paid; and indeed she was not paid for doing so.
41. The Claimant offered her resignation to the Respondent by email on 4th March 2020. She gave the Respondent her contractual 4 weeks notice, although in fact she commenced new employment the following day.

THE LAW AND CONCLUSIONS

The Constructive Unfair Dismissal Claim

42. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by her employer (Section 94 of the Employment Rights Act 1996). The Claimant plainly had worked the relevant qualifying period at the point of her resignation.
43. The relevant law is contained within Section 95 of the Employment Rights Act 1996, which reads as follows:
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –
...
(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
44. The Claimant claims that she was forced to resign by reason of the Respondent's conduct, and that as a result, this was in fact a dismissal for the purposes of Section 95, rather than a resignation.
45. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then the employee must actually resign in response to the breach and not delay unduly in relying upon the breach in bringing the employment relationship to an end.
46. In this case, the Claimant alleges that the Respondent breached their contract with her in two fundamental ways: firstly, by breach of the express term in her contract in relation to remuneration; and secondly by breach of the 'duty of trust and confidence' which is implied into all contracts of employment.
47. A unilateral reduction in pay will amount to repudiation of the contract. In Cantor Fitzgerald International v Callaghan and Others [1999] IRLR 234 the Court of

Appeal emphasised the importance of pay in any contract of employment; it said there was a crucial distinction between an employer's failure to pay or delay in paying agreed remuneration, perhaps due to a mistake or oversight, which would not necessarily go to the root of the contract, and a deliberate refusal to do so, which the court said would undermine the whole basis of the contract.

48. In this case I find that there was a deliberate failure on the part of the respondent to pay the Claimant her salary. Whilst there had been, on earlier occasions in her employment, late payment, which perhaps may have been attributable to mistake or oversight, during the relevant period it is clear that the Respondent was fully aware that they had failed to pay the Claimant's salary. This is in some ways self-evident by the fact that it was never paid, but further support can be found in the suggestion that she should help herself to her salary from the hotel safe. This in my judgment demonstrates a cynical disregard on the part of the Respondent to its obligation to pay the Claimant in the contractually agreed manner, or at all.
49. Accordingly, I find that each occasion of non-payment of salary, both individually and collectively, constitute a fundamental breach of the contract employment between the Claimant and the Respondent. This alone would be cause for the Claimant to resign without notice.
50. The 'duty of trust and confidence' was defined in the well-known decision of Malik and Mahmud v BCCI [1997] ICR 606, HL as being an obligation that the employer shall not:
"...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
51. In resigning, the Claimant alleges (as identified from the Claim for and set out in the Case Management Orders by Employment Judge Hawksworth on June 2021) that the Respondent breached the implied term of trust and confidence in the following ways:
- i. They did not pay the Claimant for two months due to accounting issues;
 - ii. They gave the Claimant a week's notice to close the hotel down;
 - iii. Told the staff to change the figures to suit the accounts team;
 - iv. They did not contact the Claimant with any warning that her wages were to be stopped;
 - v. They did not contact the Claimant with any written evidence regarding the accounting issues;
 - vi. They told the Claimant that she had to look for the accounting problem.
52. My conclusions are that, in answer to the question posed at paragraph 1.1.2 of the CMO's, the Respondent did all of these things. Moreover, I have identified numerous other examples of the behaviour of the Respondent that could all, individually and collectively, contribute to a finding that the duty of trust and confidence was fundamentally and irrevocably breached by the Respondent.

53. These can be summarised as follows: the Respondent made unfounded allegations, both implicitly and explicitly, that by theft, fraud or incompetence, the Claimant was personally responsible for shortfalls in the hotel's takings which led to irregularities in the Respondent's accounts; the Respondent failed to respond adequately, or at all, to a grievance raised by the Claimant in relation to these allegations; the Respondent, rather than paying her salary by bank transfer on an agreed date, suggested to the Claimant that she simply take the monies that she was owed from cash from the safe; and, once the hotel had been 'closed down', the Claimant was still required to come into work and undertake numerous duties, such as ensuring that the premises were secure, whilst having no confidence that she would ever receive payment for so doing.

54. I therefore conclude that the Claimant was constructively dismissed.

55. In certain circumstances, a dismissal may be 'fair' notwithstanding the fact that it came about because of a repudiatory breach of contract by the employer, if it was for a potentially fair reason, and that, if so, the employer acted reasonably in treating it as a sufficient reason for dismissing the employee, as per Employment Rights Act 1996, Section 98(1) and (4) which reads as follows:

98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

56. The Respondent alludes in the Grounds of Resistance to the suggestion that the Claimant was, or may have been, the cause of the discrepancies in the hotel's accounts; that some sort of internal investigation was in process which had not yet concluded before the Claimant resigned, and that subsequent to her resignation the matter was referred to the police who were conducting their own investigation. However, I find no support for these assertions anywhere in the bundles, and of course, the Respondent has not served a witness statement nor have they sent a representative to the hearing to give evidence before me. On the contrary, I have heard evidence from the Claimant, which I accept, that she played no part in the accounting procedures, because she felt that she had

not been adequately trained to do so; and that there was no investigation, either internal or external, of which she was aware. To this day she has not been spoken to by police. Accordingly, I have no hesitation in finding that the dismissal was unfair.

57. I am required to consider whether it could be said that there was any affirmation of the contract by the Claimant. However, due to the continuing uncertainty over her pay, among other matters, that persisted at the time of her resignation/dismissal, I do not find that there was any such affirmation. I find that, in accordance with her evidence, she only remained with the Respondent as long as she did out of a sense of duty and loyalty, and in the belief (misplaced as it turned out to be) that matters would be sorted out.
58. The Claimant had attained 4 complete years employment with the Respondent whilst over the age of 41. I therefore calculate the Basic Award as being $4 \times (1.5 \times \text{weekly pay of } \pounds 575) = \pounds 3,450$
59. Because of the fact that the Claimant was able to commence a new job with comparable salary the day after her dismissal, I limit the Compensatory Award to £500, in recognition of the Claimant's loss of statutory employment rights.

The Wrongful Dismissal Claim

60. Section 95 of the 1996 Act recognises that an employee may elect to resign on notice. What is important is that the employer's conduct must be such as to warrant summary termination. For the same reasons as set out above in paragraphs 40 – 50, I find that the conduct of the Respondent warranted summary termination by the Claimant.
61. Employment Tribunals are given power to deal with breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1984.
62. An employee who has not been given the notice of termination to which they are entitled, or who has been given no notice, may therefore pursue a breach of contract claim for this failure (often referred to as wrongful dismissal).
63. Accordingly, I find that the Wrongful Dismissal claim is proved. However, in dealing with the question of damages, I must have regard to the fact that the Claimant, having given 4 weeks Notice to the Respondent upon resignation/dismissal, she nevertheless commenced new employment the following day (5th March 2020); thereby mitigating her loss 100%. I therefore award no additional sum against the Respondent under this head.

The Unauthorised Deductions Claim

64. Section 13 of the Employment Rights Act 1996 provides protection of wages for workers:
- (1) An employer shall not make a deduction from wages of a worker employed by him unless –*

- (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

65. As stated above, I accept the evidence of the Claimant that she was not paid in the months of January and February 2020. I also find that she received no payment either upon her dismissal from the Respondent, or on or after the 5th March 2020 which would have been the next date upon which she was due to be paid were it not for her dismissal.
66. The deduction was not made under any statutory or contractual provision, nor does it fall within any of the excepted deductions contained within section 14 of the Employment Rights Act 1996.
67. Accordingly, I find that unauthorised deductions amounting to £4899.17 were made and I order the Respondent to pay that sum to the Claimant.

Holiday Pay Claim

68. Regulations 13 and 13A of the Working Time Regulations 1998 of the Working Time Regulations 1998 set out a worker's statutory entitlement to paid annual leave. It is not necessary to rehearse those provisions.
69. Regulation 14 provides that where employment terminates part-way through a leave year in circumstances where the worker has accrued more annual leave than he has taken he is entitled to a payment in lieu of accrued but untaken annual leave.
70. The Claimant's evidence was that, at the time of her resignation/dismissal, she has taken 7 days of annual leave. On the basis that she would have been entitled to 7 days annual leave pro rata by the end of March 2020 (at the conclusion of what would have been her notice period) I find that she had no accrued annual leave entitlement and accordingly this part of her claim is dismissed.

Employment Judge Conley

Date: 17 January 2022

Sent to the parties on:

21 January 2022

For the Tribunal Office