

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100026/2018

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Held in Glasgow on 23 April 2018

Employment Judge: Mel Sangster (sitting alone)

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Ms J Tominey

Claimant

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DX Recruitment Limited

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the claim does not succeed and is dismissed.

REASONS

Introduction

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1. The claimant presented a complaint of breach of contract, namely wrongful dismissal. The respondent admitted that the claimant had not been paid her full notice entitlement, but stated that she was not entitled to this, as she committed gross misconduct during her employment.

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2. The claimant gave evidence on her own behalf. The respondent led evidence from Steven Boyack (SB), their Managing Director. The claimant produced some documents at the outset of the Hearing. The respondent produced and lodged some additional documents during the Hearing.

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Issues to be determined

3. Had the claimant committed gross misconduct during her employment? If so, having breached the contract herself, she would not be entitled to payment of her full contractual notice entitlement. If the claimant did not commit gross misconduct, then she would be entitled to payment of the remainder of her contractual notice period.

Findings in Fact

4. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
5. The respondent is a recruitment company providing services to the construction industry. It was started in 2013 by SB and his father. SB is currently the managing director. His father is now retired. SB has three other businesses and accordingly spends approximately one third of his time engaged in matters relating to the operation of the respondent company.
6. The respondent has three employees, in the following roles:
- a. a resourcer, who finds individuals whose services may be provided to construction companies;
 - b. a salesperson, who liaises with the construction companies; and
 - c. an office manager.
7. The respondent operates with assistance from a factor company, Bibby Financial Services Limited (**Bibby**). Bibby collect payments from the respondent's customers and provide invoice finance to the respondent. Accordingly, Bibby require to be informed of all invoices issued by the respondent and, in terms of the respondent's contract with Bibby, there are strict monthly reporting requirements to Bibby. Fines may be imposed if these are not complied with. It is unlikely the respondent would be able to operate without the cashflow assistance provided by Bibby. It is accordingly in the

respondent's interests to ensure that all reporting requirements specified by Bibby are complied with.

- 5 8. When the company was first established, the respondent employed an office administrator. She was later promoted to office manager. She ran the office very efficiently. Due to personal circumstances she required to leave at short notice in late March 2017. The respondent then sought to recruit a replacement office manager.
- 10 9. The claimant was successful in her application for the role. The claimant was a part qualified accountant. She had stopped her accountancy course in April 2010, when her mother passed away. From April 2010 to December 2016 she worked on a part time basis as an office manager. From December 2016 onwards she worked on a full-time basis. She had experience of accounts, Sage software packages (which the respondent worked with) and office management.
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- 20 10. The claimant's employment as office manager for the respondent commenced on 15 May 2017. She was contracted to work from 8am to 4pm, Monday to Friday. She was provided with a contract of employment which provided a brief, non-exhaustive, description of the work she would require to undertake in that role. This is included:
- 25 a. Manage operative timesheets, recording the relevant detail in the database system, and related weekly excel models;
 - b. Liaise with and communicate payments with outsourced payroll company, to ensure timely payments to operatives on a weekly basis;
 - c. Ensure full data collection and review for all operatives;
 - d. Manage a weekly excel summary of invoicing and margin models;
 - 30 e. Manage supplier invoices and payments;
 - f. Data entry of all accounting information onto Sage;
 - g. Manage the monthly accounting information, to enable monthly reporting from Sage to management, including bank reconciliation;
 - h. Liaise with Bibby Invoice Finance and upload all client invoicing;

- i. Highlight issues to the director, as required, to ensure timely management; and
- j. Provide general administrative duties in the office environment.

- 5 11. On the commencement of her employment, the claimant was provided with a lever arch folder, split into relevant sections, detailing each of the procedures which required to be done on a daily, weekly and monthly basis to ensure the efficient and effective running of the office. This was also discussed with her. It had been prepared by the previous office manager. The information
10 contained in the lever arch folder detailed that, on a monthly basis, the claimant, as office manager, required to complete reports for Bibby (from information she had inputted in Sage during the course of the month), as well as completing Employment Intermediaries reports and Construction Industry Scheme returns. She also required to make PAYE payments to HMRC, in accordance with
15 figures provided by the respondent's outsourced payroll provider. As office manager, the claimant's duties also involved opening the office mail on a daily basis.
12. The respondent had a book keeper who provided services for a couple of hours
20 each month. She retired in June/July 2017 and the respondent saw no need to replace her, given the claimant's experience and expertise, which was more extensive than that of her predecessor.
13. The claimant was on holiday from 16 to 29 August 2017. No concerns had been
25 raised by either party prior to the Claimant's absence on annual leave. Following her holiday however, SB raised a number of small issues in relation to the claimant's performance on regular basis. The claimant also raised that she felt she required additional assistance to undertake the role of office manager. The claimant's request was not further considered by SB, as the role
30 had always been undertaken by one individual and the previous office manager, who had held the role for over 5 years, was able to undertake all aspects.

14. On 8 September 2017, SB noted that the Construction Industry Scheme return had not been completed and required to be done that day. The claimant stayed late in the office to complete this, for submission to HMRC.
- 5 15. In mid-September 2017, the claimant raised with SB that she felt she would benefit from a Sage refresher course. She indicated that she would complete this in her own time, but enquired with SB whether the respondent would be willing to meet half the cost of this. SB was concerned that the claimant felt she required such training, as he had understood she was fully conversant in Sage.
- 10 He recognised however that Sage was an integral part of their business and no one else within the business knew how to operate this system. It was essential therefore that the claimant knew how to operate this fully. SB agreed to meet the full cost of the course (£522) and allow the claimant three hours of paid leave each Thursday, for six weeks, to enable her to study. The course
- 15 commenced on 28th September 2017.
16. On 4 October 2017, SB had a one-to-one meeting with the claimant to express his concerns about her performance.
- 20 17. On Monday 16th of October 2017, after the claimant had left the office for the day, SB received a call from Bibby. They informed SB that they had not received the required monthly report from the respondent. They also informed SB that this was the second month in a row where the monthly report had not been submitted on time and that the respondent had incurred a fine of £350 the
- 25 previous month, as a result. SB was not aware of this.
- 30 18. SB then telephoned the claimant, at around 4.50pm. She confirmed that she had not delivered the required reports to Bibby by the required deadline. She acknowledged that the respondent had incurred a financial penalty as a result of the late submission the previous month. She also indicated to SB that she did not feel capable of completing this task going forward. In light of this, and the other concerns which SB had in relation to the claimant's performance, he indicated to her that things were not working out and she should not return: her employment was terminated. SB indicated that he would pay the claimant for

her contractual notice period of one month. A letter dated 16 October 2017 and an email dated 17 October 2017 were sent to the claimant confirming this.

19. The claimant was paid in full for the month of October 2017. She did not however receive any further payments. She did not receive payment from 1 to 15 November 2017, being the balance of her contractual notice period.
20. Following the termination of the claimant's employment with the respondent, SB discovered a number items of correspondence which had not been brought to his attention. These letters would have been opened by the claimant, in her capacity as office manager. They were found hidden in the office. The letters were from HMRC. The letters indicated that the respondent had:
- a. failed to timeously submit Employment Intermediaries reports. The penalty notices were dated 25 May and 9 August 2017;
 - b. failed to timeously submit Construction Industry Scheme returns in May July 2017; and
 - c. underpaid PAYE in September & October 2017.
21. The respondent has since been fined by HMRC for these failures, as well as receiving notices that PAYE and CIS tax had been incorrectly underpaid in September & October 2017 and demands to pay these sums. The respondent had not been fined previously.
22. To try to rectify the situation, the respondent engaged the services of an accountant. That individual, who has over 17 years' account industry experience and a diploma in accountancy and finance, reported to SB that she had never seen a company's books in such disorder: invoice reconciliation had been incorrectly carried out and there were numerous other errors in relation to information inputted on the respondent's Sage system. This is almost resulted in the respondent paying approximately £40,000 in VAT which was not in fact due. The respondent has engaged the services of this individual to rectify matters.

23. The claimant contacted to the respondent on a number of occasions during November 2017 to ascertain when she would be paid the balance of her notice pay. She received no response from the respondent until 1 December 2017. On that day, at approximately 5:45pm, she received a call from SB. The claimant did not find this a pleasant telephone call. SB indicated to the claimant that he felt she should not be allowed to work in an office. He indicated that numerous errors had been discovered in relation to her work and she would not be receiving any further payments from the respondent. He indicated that if she contacted the respondent again, they would consider raising action against her for the errors they believed she had made.
24. On 4 January 2018 the claimant submitted her claim to the employment tribunal.

15 Relevant Law

Wrongful Dismissal

25. Wrongful dismissal is a claim for breach of contract - specifically for failure to provide the proper notice provided for by statute or the contract (if more). An employer does not however have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice).
26. When defending a wrongful dismissal claim, an employer may rely on facts they discovered after the dismissal (see *Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339*).

30 Submissions

27. The claimant and SB gave very brief oral submissions, summarising the evidence they had already given as detailed above.

Discussion & Decision

28. Following the termination of the claimant's employment with the respondent, the respondent discovered that important correspondence, from HMRC, had not being brought to the attention of the managing director. This correspondence highlighted that certain documentation had not been lodged with HMRC, as required, and that PAYE had been underpaid by the respondent. The claimant opened the mail on a daily basis and failed to bring this correspondence to the attention of SB. In so doing so, she failed to comply with her express contractual obligation to highlight issues to the respondent's director (SB), to ensure timely management.
29. The respondent also discovered that a number of actions, which were the responsibility of the claimant, had not been undertaken by her - specifically timeous submission of Employment Intermediaries reports and Construction Industry Scheme returns. In failing to submit these documents the claimant failed to comply with her implied contractual duties to the respondent to take reasonable care and skill and to follow reasonable instructions.
30. In addition, there had been a shortfall in the amount of PAYE paid to HMRC. The claimant was responsible for making these payments. In failing to make the appropriate payments she failed to comply with her implied contractual duty to the respondent to take reasonable care and skill.
31. These issues resulted in the respondent incurring fines from HMRC. The respondent also required to make up the shortfall in payments, which they were not anticipating.
32. In addition, the respondent identified that invoice reconciliation was incorrectly carried out by the claimant. They engaged the services of a third party to try to rectify this matter and incurred additional fees in relation to those services. By failing to carry out invoice reconciliation correctly, the claimant failed to comply with her express contractual obligations to the respondent to manage data entry of all accounting information onto Sage and manage supplier invoices and

payments. She also failed to comply with her implied contractual duty to the respondent to take reasonable care and skill.

5 33. In the circumstances, given the facts found by the Tribunal, the Tribunal find that the claimant failed to comply with her express obligations to the respondent and breached the implied obligation to use reasonable care and skill and follow reasonable instructions. Given the extent of the failures, and the implications for the respondent as a result, this constituted a fundamental breach of her employment contract with the respondent.

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34. As the claimant was in fundamental breach of contract, the respondent was not bound by its obligations under the employment contract. The claimant is accordingly not entitled to any further sums in respect of her notice period.

15 35. The claimant's claim is accordingly dismissed.

20 **Employment Judge: M Sangster**
Date of Judgment: 16 May 2018
Entered in register: 22 May 2018
and copied to parties

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