



EMPLOYMENT TRIBUNALS

Claimant: Marinilza Nazareth

Respondent: NP3 Building Services Ltd (in Voluntary Liquidation)

Heard at: London South via CVP On: 16/02/2022

Before: Employment Judge Krepski

Representation:

Claimant: Andrés Lukomski – Lay Representative

Respondent: Not present

RESERVED JUDGMENT

1. The Claimant's claim for wrongful dismissal is well founded. The Respondent is in breach of contract, the Claimant is entitled to one month's notice and is awarded £4000 gross.
2. The Claimant's claim for breach of contract in respect of her untaken holiday is well founded. The Respondent is in breach of contract and the Claimant is entitled to payment in lieu of 21 days' untaken holiday and is awarded £3,876.92 gross (£184.61 per day gross x 21 days).
3. The Claimant's complaint that there was an unauthorised deduction from her wages is well-founded. This means the respondent unlawfully deducted the following sum which is to be awarded to the Claimant gross £21,406.09.

4. The complaint of unfair dismissal is well-founded. This means the respondent unfairly dismissed the claimant. The Claimant is awarded a compensatory award of £23,368.75 gross.
5. Where a sum has been awarded gross, the Claimant is responsible for any income tax or employee national insurance contributions which may become due.

REASONS

Evidence

1. In the course of the hearing, I heard evidence from the Claimant and, although I was expecting to hear evidence from John Gilmartin, I was unable to do so as, at the time of the hearing, he was in the Republic of Ireland.
2. The Claimant asked that I nevertheless take Mr Gilmartin's written statement into account, which I have done, albeit ascribing lesser weight to it than I would to live evidence.
3. I also considered a bundle of around 155 pages received from the Claimant.

Preamble

4. The Claimant was employed by the Respondent as a Contract Manager.
5. She initially worked via an agency, before joining the Respondent (under its previous name, Comhar Building Services Ltd) as an employee on 1st September 2019.
6. I find that she was initially employed on a salary of £42,000 (gross) for 40 hours a week.
7. I further find that, upon joining, she was told she would be paid overtime at a rate of 1.5x her usual rate for hours worked over 8 hours during the week, 1.5x for work on Saturdays, and 2x the normal rate for work carried out on Sundays.
8. She was also told she would receive a Christmas bonus of around £5,000-£7,000 and an April bonus of £10,000-£16,000.

9. Additionally, her (albeit incomplete and unsigned) contract specified 28 days of annual leave and that, after working successfully completing her probationary period (which I find she did), she would be entitled to one month's notice.
10. I further find that the Claimant had a discussion with Niall Connolly, a director of the Respondent, in November 2019 and that it was agreed that her salary would be increased to £48,000 as of December 2019. Not only did the Complainant give consistent evidence on this point, but it was also supported by the statement of Mr Gilmartin.
11. The Claimant states she did not receive her full salary in December 2019 or indeed in any of the months that followed and I accepted her evidence on this point.
12. On 6th March 2020, she received a letter from the Respondent stating (in part):

“This notice is to inform you that your position is included in this furlough and as such, we would like to place you on a temporary leave of absence effective, 06 March 2020. [...] [You] will continue to be paid 100% of your salary”.
13. An “AGREEMENT FOR FURLOUGH LEAVE”, signed by the Respondent on 23rd March 2020 and by the Claimant on 1st April 2020 also states that “We [the Respondent] will pay you 100% of your salary during [the Furlough Leave] time”.
14. On 30th April 2020, the Claimant received an email stating:

“I feel I should alert you at this juncture that we may have to look at reducing hours or worst case losing staff [...] I am most anxious to give you as much notice as possible to that you could begin the search for alternative employment”.
15. On 7th May 2020, she received an email stating that her “Furlough will end on the 29/05/20” and that:

“In the interests of fairness we are trying to give you as much time as possible to find new employment in this period as with the downturn your position is one of a couple we have had to look at unfortunately”.
16. When the Claimant asked on 9th May 2020 whether this was a dismissal letter, the Respondent replied that same day saying:

“No Nina categorically this is NOT a letter of dismissal – it is merely to highlight that upon our return to work when restrictions are lifted that there may be some changes afoot as a result of this unprecedented event which has impacted not just our company but the global economy”.

17. An undated email entitled “*Summary of Yesterdays[sic] Call*” states:

“Thank you for taking the time to call me via what’s app @13.48 13/05/2020.

“JS [Joan Sreenan – Executive Director] then advised this call is serving to put us on a formal footing that regrettably due to the downturn in business and the non-transferability of skillset to another position within the company leaves us with no choice as to end your employment when your furlough period ends with Comhar Group now re branded as NP3”.

[...]

“I also am waiting on detail as to what will be owed to you in relation to holiday pay etc.”

“You [meaning the Complainant] asked is notice being served from 13/05/20 – JS said she would need to have that confirmed”.

18. A further email from Joan Sreenan to the Claimant on 22nd May 2020 stated “*[unfortunately] we cannot honour the additional 20 % furlough top up payment. Also please note your salary is £35,300pa*”.

19. The Claimant then received an undated letter of dismissal and a P45 dated 29th May 2020 with a leaving date of 22nd May 2020.

20. A letter attached to an email sent on 1st June 2020 stated “*Your length of service entitles you to one month’s notice 8 days of which will be paid in lieu and your employment will end as advised on 22nd May 2020*”.

21. Lastly, the Respondent’s ET3 states “*The claimant was to have been paid £1,086.16 in lieu of notice as she was given notice on May 13 2020 with a finish date of May 22 2020- so required 8 days payment in lieu of the remaining notice period*”.

22. I find the Claimant’s Effective Date of Termination (“EDT”) to be 22nd May 2020.

Notice Pay

23. I am satisfied that the Claimant was entitled to one month's notice as per her contract and the Employee Handbook which I have had sight of.
24. The Respondent claims that the Claimant was given notice of the termination of her employment on 13th May 2020. However, when, in the WhatsApp call of 13th May 2020 the Claimant asked whether she was being given notice, the Respondent's representative was unable to confirm this.
25. Given the above, and the generally chaotic nature of the ending of the Claimant's employment, I find that the Claimant was not given any notice of the ending of her employment, in breach of her contract of employment.
26. I am also satisfied that the Claimant received no pay in lieu of notice and is therefore entitled to one month's pay in lieu of notice.

Holiday Pay

27. I am satisfied that, as per her contract, the Claimant was entitled to 28 days of leave. Having heard evidence from her, I am satisfied that she did not take any annual leave in 2019 as a result of her being asked not to take any by the Respondent due to the heavy workload at the time.
28. I am further satisfied that she was asked to take it in the next year, the Respondent allowing her to carry it over, which would otherwise have been in breach of her contract of employment.
29. She would therefore have accrued 9.3 days of holiday in 2019 and 11.6 days in 2020 for a total of 21 days of untaken holiday which she confirmed when giving evidence. I note that the employee handbook allows for payment in lieu of untaken holidays at page 47.
30. I accept the evidence of the Claimant that she was not given payment in lieu of the untaken holiday and, as such, find the Respondent in breach of contract and I award payment in lieu of 21 days of untaken holiday.

Unpaid wages

31. I accept the Claimant's evidence that she was not paid overtime or indeed much of her basic salary from October 2019 onwards.
32. I also accept that the figures she gives in her schedule of loss are accurate, namely that she is owed £9,497.72 net in unpaid salary and £9,927.15 net in unpaid overtime.

33. I find that these are unlawful deductions from the Claimant's wages and the Respondent is ordered to pay the gross equivalent, £21,406.09.
34. The Claimant also claimed that she was owed a £10,000 bonus that she should have received in April. I do not accept, however, that this bonus was "guaranteed". The Claimant herself stated in the course of giving evidence that this bonus was based on company performance which implies a discretionary nature.
35. Her bonus was neither declared and quantified in contrast to the case of Tradition Securities & Futures SA v Mouradian [2008] 1 WLUK 508 and so cannot be an unlawful deduction from wages.
36. Additionally, in view of my finding that this was not a guaranteed entitlement but rather based on company performance, and it seems as though the Respondent was putting employees on furlough during this time, I am not satisfied that there has been a breach of contract in relation to the non-payment of a bonus.
37. As such, I make no award in respect of the Claimant's claim for a bonus payment.

Unfair dismissal

38. Claims for unfair dismissal were presented under s103A of the Employment Rights Act 1996 ("the Act") and s104(1)(b) of the Act.
39. The Claimant lacks qualifying service (i.e. two years) for ordinary unfair dismissal and so has the legal burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason as per the Court of Appeal case of Smith v Hayle Town Council 1978 ICR 996.
40. The basis of the claim under s104 was that in breach of sections 104(a), (b) and (d), the Respondent had dismissed the Claimant for asserting her statutory rights.
41. When I asked the Claimant what she believed the Respondent's reasons were for dismissing her, she said it was because she started being aggressive about getting her payments, started asserting her rights, and started calling the director every day. She did this in order to feed her family. She went on to say that she told the Respondent, if they were receiving furlough money but not paying employees under the furlough scheme, that was a crime. She said that she believed that to be the last straw which led to her dismissal.

42. When I asked for specific dates on when she complained about not getting paid and mentioning HMRC to her employers, the Complainant was unable to provide these, although stated she believed she began towards the end of February or beginning of March onwards. She then stated that the HMRC disclosure occurred in May. Despite the lack of specificity offered by the Claimant on these points, she was clear as to the time period involved.
43. I therefore turn to the claim under s104(1)(b) which were raised during the hearing, albeit without a great deal of specificity. In a claim brought under s104 of the Act, three requirements must be met:
- a. The employee must have asserted a relevant statutory right;
 - b. The assertion must have been in good faith; and
 - c. The assertion must have been the reason or principal reason for the dismissal.
44. I am satisfied that the Claimant asserted the relevant statutory right given by s13 of the Act, namely, the right not to suffer unauthorised deductions.
45. I am also satisfied that the assertion was made in good faith, since the Claimant was asking for the wages that she had earned but that had been unlawfully deducted from her.
46. Lastly, whilst I'm not satisfied that the assertion was the sole reason, having heard evidence from the Claimant, I am satisfied that it was the principal reason for the Claimant's dismissal and that the mentioning of HMRC was merely, as she put it, the "last straw".
47. As such, I find that the Claimant was unfairly dismissed contrary to s104(1)(b) and s104(4)(a).
48. No basic award is given in view of the Claimant's length of service. I find it just and equitable to grant a compensatory award for the period between 15th June 2020 and 30th November 2020 which is £16,656 net of tax (24 weeks x £694 per week net). Additionally, I award £300 in respect of the Claimant's statutory rights.
49. I also find it appropriate to increase the award by 25% under s124A of the Act in view of the Respondent's failure to comply with the Acas Code in relation to grievances (as this is what the Claimant's complaints about not being paid were, in essence), to £21,195 net of tax.
50. Accordingly, the compensatory award for the Claimant's unfair dismissal shall be £23,368.75 gross.

Employment Judge Krepski

Date: 22 March 2022

Sent to the parties on

Date: 7 April 2022

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