EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110361/2021

Held in Glasgow on 5 July 2022

Employment Judge B Campbell
Members M McAllister and L Brown

Mrs C Hernandez	**Claimant** **Represented by:** **Mr L McKay -** **Trainee Solicitor**
Evolve Accountancy Limited	**Respondent** **No appearance and** **No representation**

JUDGMENT ON REMEDY OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that the claimant is entitled to:

1. A basic award of £1,615.40 in respect of her successful unfair dismissal claim;

2. The sum of £1,002.31 in respect of the respondent's failure to provide her with a written statement of terms and conditions of employment;

3. The sum of £1,336.40 as damages for the respondent's breach of contract by not providing notice of termination of her employment, or payment in lieu;

4. The sum of £334.10 in respect of accrued and untaken holidays at the date of termination of her employment;

5. The sum of £668.20 in respect of the respondent's failure to provide her with written reasons for her dismissal following her request for same; and

6. The sum of £406.11 as compensation for an unlawful deduction from her wages.

REASONS

Introduction

1. This claim arises out of the claimant's employment with the respondent which began on 1 August 2016 and ended on 31 March 2021. The claimant raised a number of complaints arising out of the termination of her employment and those were determined on their merits after a hearing on 1, 2 and 3 March 2022. A judgment on liability was issued by the tribunal on 18 March 2022.

2. The liability judgment outlined the issues the tribunal had to determine and the relevant law. Findings of fact were made. Those are not repeated here unless necessary to deal with outstanding questions of remedy.

3. In advance of this hearing certain directions had been issued to the parties, aimed at ensuring that the remaining issues were narrowed down as far as possible and that any relevant documents were available. The claimant for her part, through her solicitors, provided an updated bundle and a note of submissions on remedy. The respondent in turn intimated to the tribunal and the claimant by email dated 29 March 2022 that Ms Kerr, the principal of the respondent, 'will no longer be representing the Respondent and will not be attending any further in the proceedings.' No appearance was made by or on behalf of the respondent at this hearing. The tribunal therefore finds that the respondent had due notice of this hearing in terms of its timing and purpose, and elected to play no further part.

Further factual findings

4. The claimant briefly gave evidence and as that covered matters which were not directly dealt with at the liability hearing, the tribunal records here that it found the following to be fact based on that evidence:

    a. The claimant utilised two days of paid annual leave in the leave year 2021, both immediately following New Year;

    b. The claimant was not paid any additional sums by the respondent in relation to holidays in that holiday year, and the annual total of holiday

pay referred to in her final payslip of 31 March 2021 covered those holidays and/or holidays taken in 2020; and

c. The claimant has not received any further payments from the respondent since payment of her final salary as per that payslip.

5. Calculation of any award in respect of each successful claim is dealt with below.

Unfair dismissal

6. The tribunal found that the claimant had been dismissed unfairly. A basic award is sought. The claimant completed four full years of employment. She was under the age of 40 throughout her employment. Her gross weekly pay is calculated at £403.85 based on a gross annual salary of £21,000. A basic award is therefore calculated at £1,615.40.

7. The claimant does not seek a compensatory award as she commenced her new role immediately after dismissal and earned sufficiently much from the clients who followed her.

ACAS Code uplift

8. The claimant seeks an uplift in her basic award to reflect the respondent's failure to follow the ACAS Code of Practice on disciplinary and grievance procedures. The maximum uplift of 25% is sought.

9. The claimant recognises that she did not raise a grievance and does not claim that the respondent breached the code in dealing with one in any way. The tribunal found that there was a lack of evidence to support an argument that the claimant was dismissed for any of the potentially fair statutory reasons under section 98(1) and (2) of the Employment Rights Act 1996 ('ERA').

10. Mr McLay for the claimant relies on the authority of ***Lund v St Edwards School Canterbury UKEAT/0514/12/KN***, in which the EAT stated at paragraph 12 of its judgment that *"The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee".* He referred to paragraph 16 in which the EAT stated that where an employee's conduct

was called into question, and that issue of conduct might lead to dismissal, then it should be considered that disciplinary proceedings ought to have been applied at that point. He also drew attention to paragraph 17, in which the EAT clarified that this may be so even if the reason for dismissal turned out not to be conduct related.

11. With reference to the above principles Mr McLay referred to paragraph 62 of the liability judgment in which the tribunal found that on 8 April 2021 the respondent emailed the claimant to say firstly that it understood the claimant to have already resigned, and secondly that if that was not the case, then the claimant should confirm as much as the respondent had 'a number of issues' which it wished to formally investigate with her input. The email mentioned two issues in particular, namely:

    a. alleged misappropriation by the claimant of client money by way of providing a different bank account to clients related to future work to be carried out by her new business venture; and

    b. payment of furlough pay to the claimant which she herself authorised, there being an implication that the claimant may not have been on furlough conform to those payments.

12. Mr McLay also referred to the claimant's cross-examination by the respondent, in the course of which the claimant's loyalty to the respondent was questioned and it was suggested that she would have been dismissed for gross misconduct. We note however in relation to this point that the respondent did not give evidence to the tribunal, and any questions or remarks put to the claimant in cross-examination cannot be taken to be evidence. We also note that the claimant did not accept that she would or should have been dismissed for her conduct. We made no findings of fact to that effect.

13. On balance we find that the ACAS Code did not apply to the circumstances of this case. The EAT confirmed in Lund that *"The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee."* We do not find that either applied in the current claim. There was not the same

connection or even proximity between the claimant's conduct and her dismissal as there was in ***Lund.*** Nor was there any evidence of 'poor performance' on the claimant's part. The evidence we had pointed to a parting of the ways between two individuals whose goals and priorities were once closely aligned, but who as time progressed wanted different things from the respondent's business. The only evidence before the tribunal in support of the claimant's conduct being part of the picture was Ms Kerr's email of 8 April 2021. Whilst this referred to matters which could be treated as misconduct, the email came after the claimant's dismissal. We have found that the two issues raised, if they existed at all, were not part of the reason for her dismissal. To the extent that it was not clear in our liability judgment, we find that these were issues formulated after the event as a means of either persuading the claimant to agree she had already left the respondent's employment, or signalling that if she had remained in employment she would find herself dismissed on conduct grounds. In that second scenario we have no evidence on which to conclude that disciplinary action would have been appropriate. The first issue raised in the email related to the claimant providing clients with details of her new business, including banking details for the payment of invoices, but we found that nothing improper had taken place. She was simply providing new contact details to clients that the respondent had agreed she could continue having a business relationship with. On the second matter we had no evidence at all. We cannot find that disciplinary proceedings ought to have been invoked.

Written statement of employment particulars

14. As we recorded in the liability judgment, the respondent accepted that the claimant was not provided with a statement of her key employment particulars under section 1 ERA.

15. The tribunal has discretion to award between two and four weeks' pay for this default. We have opted to award two weeks' pay. This is because we find that the respondent's omission was inadvertent and caused by a genuine, albeit wrongly held, belief that the claimant was not an employee because of the senior status she had historically held. The respondent issued written

statements to other employees and we did not see this as a case where the respondent was particularly negligent or cynical in failing to provide the claimant with the necessary particulars.

16. We have calculated the net value of three weeks' pay to be **£1,002.31.** This is based on the net monthly pay figure of £1,447.78 taken from her payslips. Multiplying this by 12 and then dividing by 52 produces a weekly net pay figure of £334.10. We have used that as our base figure.

Notice entitlement/breach of contract

17. The tribunal found at the liability stage that nothing had expressly been agreed between the parties as to the amount of notice the claimant was due, whether in writing or verbally. She was therefore entitled to her statutory right to four weeks' notice under section 86(1)(b) ERA based on completion of four full years as an employee.

18. We also found that she was not given notice of her dismissal and did not receive payment in lieu.

19. Accordingly the claimant is entitled to be compensated equivalent to four weeks' net pay, which amounts to **£1,336.40,** again using the above base figure.

Claim for accrued annual leave

20. The tribunal previously found that the claimant's annual leave entitlement was renewed at the start of each calendar year, and that she had accrued six days of annual leave by the date of her dismissal on 31 March 2021.

21. As noted above, the claimant took two days of paid annual leave and therefore had four days remaining when her employment ended. She was not paid for those.

22. We therefore calculate the amount due to the claimant to be the net equivalent of four days of pay. We note that the claimant worked four days per week and therefore this equates to a week's pay. Again it should be adjusted for tax and other normal deductions. The figure therefore is **£334.10.**

Statement of written reasons for dismissal

23. In the liability judgment we found that the claimant made a request for written reasons for her dismissal by way of an email dated 8 April 2021, that her employment was terminated without notice, that her service period was more than two years, and that consequently she was entitled to a statement of reasons within 14 days in terms of section 92 ERA. No statement was provided. The respondent's reply to her email was that she had not been dismissed.

24. We made a declaration under section 93 as to the reasons for the claimant's dismissal. We made a finding that the reason for the claimant's dismissal was the breakdown of her working relationship with Ms Kerr.

25. We are also bound to make an award that the respondent pay the claimant a sum equal to the amount of two weeks' pay. As such there is no discretion in relation to the award. The amount is therefore **£668.20**.

Unlawful deduction from wages

26. We find that a deduction was made from the claimant's salary for March in the sum of £500. This is based on the email of Ms Kerr dated 8 April 2021. She confirmed that £500 was being withheld from the claimant's salary in security for the return of property, namely a laptop computer.

27. We found that such a right to make deductions would have had to be established in writing between the parties, but never was. As such, and leaving aside from the question of whether the claimant was obliged to return any property to the respondent, the respondent had no right to hold back a part of the claimant's salary.

28. We found that the date of the deduction was 31 March 2021, which was the last date on which she was paid any salary for that month. The claim was within time.

29. We have calculated the amount of the deduction in net terms by comparing the claimant's net pay for March 2021 with a previous month in which she was

paid as normal. Her usual net monthly pay was £1,447.78. For March 2021 she received £1,041.67 net. The difference is **£406.11** and this is the amount we find to be due.

Employment Judge: Brian Campbell
Date of Judgement: 19 July 2022
Entered in register: 21 July 2022
and copied to parties