



EMPLOYMENT TRIBUNALS

Claimant: Miss Sarah Loffman

Respondent: Ladybird Day Nurseries Ltd t/a Ladybird Nursery

Heard: Remotely (by Cloud Video Platform) – Midlands West

On: 4 April 2022

Before: Employment Judge Power (sitting alone)

Representation

Claimant: In person

Respondent: Did not attend

RESERVED JUDGMENT

1. The name of the Respondent is amended to “Ladybird Day Nurseries Ltd t/a Ladybird Nursery”.
2. Claim number 1306054/2020 and claim number 1306483/20 are consolidated into one claim under number 1306483/20.
3. The Claimant’s complaint of unfair dismissal is well-founded and succeeds.
4. The Claimant is entitled to compensation. She was dismissed by reason of redundancy. She is entitled to a redundancy payment of 4 weeks at £346.24 per week = **£1,384.96**. The Respondent is ordered to pay this sum to her.
5. The Claimant is not entitled to a separate basic award for unfair dismissal. This is extinguished by the redundancy payment.
6. The Claimant is awarded a compensatory award of **£4,912.18**. The Respondent is ordered to pay this sum to her.
7. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply in respect of the above compensatory award. The total award for the purposes of the Regulations is £4912.18. The prescribed element is £4,282.18. The period of the prescribed element is 25 April 2020 to 4 April 2022. The excess of the total over the prescribed element is £630. The annex to this Judgment explains the operation of the Regulations.
8. The Claimant’s complaint of breach of contract is well founded and succeeds. She was dismissed in breach of contract and is entitled to notice pay.
9. The Claimant’s entitlement to damages for breach of contract is: £346.24 x 4 = **£1,384.96**. This is the gross figure. The Respondent is ordered to pay this sum to

the Claimant after accounting to HMRC for tax and national insurance payments on it. In addition, the Respondent is ordered to pay **£30** to the Claimant in respect of damages for unpaid pension contributions in respect of the notice period.

10. The Claimant's complaint of unlawful deduction from wages is well founded and succeeds.
11. The Respondent made an unlawful deduction from wages by not paying the Claimant in lieu of 5.7 days' accrued but untaken annual leave upon termination of employment and is ordered to pay **£374.37** to the Claimant, being the gross sum due. The Respondent will need to account to HMRC for tax and employee's national insurance contributions due on this amount before payment to the Claimant.

REASONS

Issues

1. The Claimant lodged two claims with the Employment Tribunal. The first, on 3 June 2020 with claim number 1306054/2020 is a claim for redundancy pay and holiday pay and was originally due to be heard on two dates in December 2021. The second, lodged on the Claimant's behalf by a solicitor on 3 July 2020 with claim number 1306483/20 is a claim for unfair dismissal, notice pay, redundancy payment and holiday pay.
2. At the start of the hearing, the Claimant confirmed that all of her claims are set out in full in the second claim form. Her solicitor had stated the intention for only this second claim to be pursued in correspondence with the Tribunal in December 2021. I ordered that both claims should be consolidated under the second claim number 1306483/20.
3. The Claimant claims that she was unfairly dismissed on 27 March 2020 by the Respondent. She claims a redundancy payment, notice pay, holiday pay and compensation for unfair dismissal.

Procedure

4. I had the claim and response forms, a short statement from the Claimant and a schedule of loss. A bundle of documents from the solicitor who had been representing the Claimant until last week had not reached the Tribunal. The Claimant was unrepresented at the hearing.
5. At the start of the hearing, I ordered an adjournment to allow the Claimant to gather the missing documents together and send them through to the Tribunal.
6. Following the adjournment, I was provided with a copy of the Claimant's contract of employment (dated 3 April 2019), three payslips (January, February, March 2020), two emails (18 and 19 March 2020) and a letter the Claimant had received from the Respondent (undated but received by post on 26 March 2020) and a copy of an email sent to parents of children at the Respondent nursery dated 19 March 2020. During the hearing the Claimant also produced a copy of a letter dated 5 May 2020 confirming payment of state benefits.
7. Although responses had been submitted by the Respondent to both claims, these were struck out by the Tribunal on 31 March 2022 as a result of the Respondent's failure to comply with orders/actively to pursue the responses. The hearing of claim number 1306483/20 had originally been listed to be heard over two days 4 and 5

April 2022. However, following the strike out of the responses, the time allocation for the hearing had been revised to 3 hours. The Respondent did not attend the hearing.

8. The Claimant gave evidence under affirmation and explained that her unsigned witness statement and Schedule of Loss had been prepared by a solicitor who no longer represented her. The Claimant wished to make a minor amendment to her witness statement, which I permitted her to do. She confirmed the salary information provided in the Schedule of Loss was correct. I asked the Claimant some questions to clarify the information provided in the claim form, witness statement and Schedule of Loss.

Facts

9. Having considered the evidence as detailed above, I find the following facts on the balance of probabilities:
10. The Claimant was employed by Ladybird Day Nurseries Ltd t/a Ladybird Nursery as a nursery nurse from 22 June 2015. She was a permanent employee. Her most recent contract of employment was dated 3 April 2019. The Claimant was contracted to work 36 hours per week at National Minimum Wage although she regularly worked overtime taking her overall hours to 42 per week. The Respondent paid approximately £30 per month into a pension scheme for the Claimant.
11. As a result of the Covid-19 pandemic, on 18 March 2020, the Respondent sent an email to staff, including the Claimant, which read *"nursery will be closing on Friday for an unknown time, I am totally unsure what will happen but as soon as I know more will make sure I let you all know ASAP. Don't panic we will sort something"*.
12. On 19 March 2020 the Respondent sent another email to staff, including the Claimant, which read *"staff do not need to panic, pay will go forward each month until business resumes as usual (hopefully no more than one month) ... funding will still continue which will go a long way to helping to maintain payroll for staff, so tell everybody to relax. Hope you can stop stressing for a while now"*. The Claimant continued to attend work, up to and including 25 March 2020.
13. On 26 March 2020 the Claimant received a letter through the post from the Respondent. The letter was undated. The letter stated *"it has become necessary for Ladybird Nursery to temporarily and significantly reduce its workforce ... I regret to inform you that you will be laid off effective Friday 27 March"*. The letter went on to thank the Claimant for her *"loyal and dedicated service to date"* and stated *"we will strive to return to normal business as soon as possible at which time of course you will be contacted with the option to return"*.
14. The Claimant's contract of employment does not contain a right to lay off and the Claimant did not immediately understand the implications of this letter for her. The Claimant telephoned the Respondent after receiving the letter and asked about whether she would be put onto furlough. The Respondent said that she was not being furloughed and suggested that she applied for job seeker's allowance.
15. After that discussion, it was apparent to the Claimant that her employment with the Respondent would terminate on 27 March 2020. Indeed, the Respondent accepted in the response forms that her employment terminated on 27 March 2020.
16. The Claimant's employment terminated on 27 March 2020. The Claimant was paid on 31 March 2020 for the work that she had undertaken in March.
17. The Respondent did not pay the Claimant a redundancy payment.

18. The Claimant is entitled to statutory notice of four weeks. She was not given effective notice – she was advised of the intention to dismiss the day before the dismissal took effect - and was not paid in lieu of a period of notice.
19. The Respondent's annual leave year ran from January of each year. The Claimant's contract of employment stated that she was "*entitled to 20 days of paid holiday per full working year, in addition to statutory/bank holidays*". As at the date of termination, the Claimant had been paid for one bank holiday (1 January 2020) and had taken no other holiday.
20. The Claimant looked for other employment but, as a result of the Covid-19 pandemic lockdown it took her some time to find alternative employment.
21. During this period she applied for Universal Credit, and it was confirmed in a letter dated May 2020 that this would be paid to her. The Claimant received three payments of Universal Credit – in June, July and August 2020 – each time receiving £409.95.
22. Towards the end of May 2020, the Claimant was contacted by the Respondent, with a view to her returning to a new role for the Respondent on a zero hours contract. The Claimant met the Respondent to find out more about the contract available which was due to start in June 2020 but decided that she wanted to find a new role with more job security and therefore continued her job search.
23. On 3 August 2020 the Claimant succeeded in obtaining new employment as a nursery nurse. Although she earned more in her new role than she had with the Respondent, she had more travel time and costs to get to the new job.
24. In February 2022 the Claimant obtained new work on a higher rate of pay and with reduced travel. She has no losses beyond 13 February 2022.

Law

Unfair dismissal

25. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95.
26. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two potential stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Redundancy is a potentially fair reason for dismissal. Second, if the respondent shows that it has a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason (s98(4)). Case law has established that in redundancy dismissals, the question of fairness essentially turns on the key factors of consultation, any pool for selection, selection criteria and alternatives to redundancy.
27. S118(1) of the 1996 Act provides for compensation for unfair dismissal to consist of a basic award and a compensatory award. 123(1) of the 1996 Act provides that the amount of a compensatory award for unfair dismissal shall be such amount as the Tribunal considers to be just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. This can include compensation for loss of statutory rights to reflect the fact that an employee has to acquire a period of continuous employment to qualify for certain statutory rights.

28. Compensation may be reduced by as much as 100% if the losses suffered by the complainant would have been the same had the employer followed a fair procedure, pursuant to the case of *Polkey -v- AE Dayton Services Ltd 1988 ICR 142 HL*

Redundancy

29. Part XI of the 1996 Act sets out an employee's right to a redundancy payment. Section 135 confers on employees the right to receive a redundancy payment if they are dismissed by reason of redundancy.
30. Section 139(1) of the 1996 Act provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed or to the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to do so.

Breach of contract

31. Required notice periods to terminate a contract of employment are provided for in the contract of employment or through the statutory scheme contained in section 86 of the Employment Rights Act 1996. Section 86 of the Act provides a statutory minimum notice entitlement. An employer must give an employee who has been continuously employed for more than two years at least one week's notice for each year of continuous service.
32. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee had committed a fundamental breach of contract which would entitle the employer to dismiss without notice. The aim of damages for breach of contract is to put the employee in the position they would have been in had the contract been performed in accordance with its terms.

Holiday pay

33. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.
34. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to s23 of the Employment Rights Act 1996. The definition of "wages" in section 27 of the Employment Rights Act includes holiday pay.

Application of law to facts

Redundancy Payment

35. I find that the Claimant was dismissed by reason of redundancy on 27 March 2020. Pursuant to s139(1)(a) of the Employment Rights Act 1996, the Claimant's

dismissal was wholly or mainly attributable to the fact that the Respondent had closed the business as a result of the first Covid-19 lockdown.

36. The Claimant is entitled to a statutory redundancy payment calculated in accordance with the provisions of Part XI of the Employment Rights Act 1996. The Claimant was 27 years old at the time of dismissal. Her average gross weekly pay was £346.24. She had 4 complete years of service. The Claimant's entitlement to a redundancy payment is $1 \times 4 \times £346.24 = \underline{\underline{£1,384.96}}$. She is not entitled to a separate basic award as this is extinguished by the redundancy payment.

Unfair Dismissal

37. As no warning, notice or consultation was given to the Claimant ahead of the letter of termination received by post on 26 March 2020 and, in the Claimant's subsequent discussion with the Respondent, it was confirmed that her employment would terminate with effect from 27 March 2020 without consideration of any alternatives – such as the availability of furlough - I find the Claimant's dismissal was unfair.

38. Compensatory Award I find that the Claimant is entitled to a compensatory award for her losses, taking the following into account:

- a. There is no evidence that, had the Respondent followed a fair procedure, the Claimant would have been dismissed in any event. Indeed, the Claimant was offered work by the Respondent on a zero hours basis at the end of May/beginning of June 2020. Accordingly, there is no reduction to the Claimant's compensatory award pursuant to *Polkey*.
- b. It was acceptable for the Claimant to decline that new role, given the zero hours nature of the offer, and in view of the abrupt termination of her employment by the Respondent in March. Declining the new role was not a failure to mitigate her losses.
- c. The Claimant was out of work for 18 weeks from 27 March 2020 until 3 August 2020 with an average net weekly pay loss of £305.87 per week. The first four weeks of this would, however, have been her four week notice period.
- d. From 3 August 2020, the Claimant had a new job, earning £10.72 net more per week than she had earned with the Respondent. Although the Claimant estimated that she had increased fuel costs of £139 per month as she had to travel 42 miles further each day to get to work, these costs were not shown on the Schedule of Loss prepared by the Claimant's solicitor and no receipts were provided to show when these costs were incurred. The additional travel ceased on 14 February 2022 when the Claimant found a new job on higher pay with less travel. I determined it was not just and equitable to make an award in respect of the increased fuel costs in the circumstances.
- e. The Claimant's entitlement to a compensatory award is therefore calculated for the remaining 14 week period of loss (25 April – 3 August 2020):

14 weeks at £305.87 per week = **£4,282.18**

Plus

3.5 months of lost pension contributions at £30 per month = **£105**

- f. I find that it is just and equitable to award the sum of **£525** in respect of loss of statutory rights. The Respondent is ordered to pay this sum to the Claimant.
- g. As redundancy was the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance does not apply to the Claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions.

Breach of contract

- 39. The Claimant was entitled to notice of termination of employment, there being no evidence of a fundamental breach of contract by the Claimant which would have entitled the Respondent to dismiss without notice.
- 40. The Claimant's contract provides for her to be given statutory notice. She was employed for four complete years and was therefore entitled to four weeks' notice.
- 41. Tax will be payable on the award for notice pay, so I conclude that the amount of damages should be the gross amount of wages that the Claimant would have received for four weeks which, after deduction of tax, should leave the Claimant with the correct amount of compensation. The gross weekly pay was £346.24 x4 = **£1,384.96**. The Respondent will need to account to HMRC for tax and employee national insurance contributions due in respect of this sum. In addition, the Claimant is entitled to **£30** in respect of the pension contribution the Respondent should have made during the notice period.

Holiday pay

- 42. The Claimant's contract of employment sets out the Claimant's right to annual leave (20 days plus statutory/bank holidays). The Claimant's holiday year began on 1 January. The calculation set out in the Claimant's schedule of loss was incorrect. The Claimant had worked for 12.5 weeks. She had therefore accrued $12.5/52 \times 28 = 6.7$ days.
- 43. I found that the Claimant had not taken any paid leave during the period up to termination on 27 March 2020 save for the public holiday on 1 January. The Claimant confirmed that she had been paid in respect of that public holiday in her January pay. Her remaining entitlement was therefore to 5.7 days of leave. The Claimant's evidence was that she would be paid 8 hours (at £8.21 per hour) in respect of a days' leave. She was therefore entitled to be paid the equivalent of 5.7 days' leave.
- 44. I conclude that the Respondent made an unlawful deduction from wages by not paying the Claimant **£374.37** in lieu of accrued but untaken annual leave and I order the Respondent to pay this amount to the Claimant. This is the gross sum due and the Respondent will need to account to HMRC for tax and employee's national insurance contributions due on this amount before payment to the Claimant.

Employment Judge Power

Date: 07/04/2022