



Case Number 1304923/2021
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant MISS KATIE HAYES

AND

Respondent FREIGHTLINE CARRIERS LIMITED

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (by CVP) **ON** 18 July 2022

EMPLOYMENT JUDGE CLARKE

Representation

For the Claimant: In person

For the Respondent: Mr Colin Baran, Counsel

JUDGMENT

The Judgment of the tribunal is that:

1. The name of the Respondent is amended to Freightline Carriers Limited.
2. The claim for wrongful dismissal is upheld with damages assessed at £628.49.
3. The claims for outstanding commission, holiday pay and unlawful deductions are dismissed.
4. The claim for "loss of new employment" is withdrawn.

REASONS

(Judgment with reasons was delivered orally on 18 July 2022 and the Claimant requested written reasons by email of 21 July 2022)

Preliminary matters

1. The Grounds of Resistance took a point about an apparent inconsistency in Claimant's claim as to the identity of the Respondent (between the EC Certificate and the ET1) but agreed today that the correct Respondent is the Limited Company named above and the name is amended accordingly.

Issues

2. The Issues were agreed at the outset of the hearing as follows:
 - a) Wrongful Dismissal:
 - i. It was agreed that the Claimant was dismissed without notice on 29 September 2021.
 - ii. Was the Respondent entitled to dismiss the Claimant without notice because she had committed a fundamental breach of contract by:
 - A. Travelling to Dundee in May 2021, in a company car, without authorisation.
 - B. Working on a project alongside a family member on a company opportunity, sharing key information with someone outside the company in breach of trust and confidence.
 - C. Her productivity being insufficient
 - D. Taking of confidential material from a company laptop on 28 September 2021.
 - iii. What losses arise from the breach:
 - A. Notice Pay. What notice was the Claimant entitled to?

This is contingent on whether the Claimant's probationary period had been extended, which the parties dispute. It was agreed that she was entitled to one week's notice if the probationary period had been extended and otherwise four weeks.
 - B. Car Allowance.
 - C. Phone allowance.

b) Unlawful deductions from wages

i. Commission

The Claimant claims a contractual entitlement to commission for the period 8 February to 29 September 2021 arising out of a verbal contract with Sav Aulakh, at 10% of turnover and amounting to £850.

ii. Car Damage

The Respondent deducted £280 from the Claimant's wages because her company car was returned with damage. The Claimant denied having caused or being responsible for the damage.

3. The holiday pay claim was withdrawn as was the "loss of new employment" claim. It was agreed that there were no other issues.

The Evidence

4. The parties had produced their own bundles of documents.
5. The Claimant relied on her own witness statement. The Respondent relied on statements from Sav Aulakh, Lucy Roberts and Karl Hill. I heard oral evidence from all of those witnesses.
6. The Claimant said that she had travelled to Dundee during the Covid-19 lockdown having obtained oral permission from Sav Aulakh about two days beforehand. Her sister, who had worked in the industry but no longer did, passed on "leads" to the Claimant.
7. The Claimant admitted sending an email from the Company account to her personal account on 29 September 2021 at 8.30 a.m. (Page 82 of the Respondent's bundle) that included data sent to her from Operations@freightlinecarriers.co.uk earlier that morning. She said that these were relevant to her commission entitlement, which she believed was going to be a topic of conversation in the meeting that morning. She had to send it to her personal account, she said, because that was the only way she could print the information on her home printer.
8. She also admitted sending herself a list of customers (Page 75 onwards of the Respondent's bundle) because these were opportunities/leads of hers that she wanted to discuss at the meeting.

9. The Claimant did not believe that her probationary period had been extended and relied on the fact that she had been given company healthcare as indicating that it had not been extended, as this was something only available to full employees. She said that she found it strange that the meeting invitation for 29 September was called "Probation Review".
10. The Claimant denied that there had been "weeks of inactivity" on her part.
11. She denied that the car was damaged when she returned it to the Respondent. She denied using the car for the purpose of other business.
12. Sav Aulakh denied giving the Claimant permission to travel to Dundee. In cross-examination, he stated that Paragraph 5(ii) of his witness statement was incorrect. Where it said that the Claimant had confirmed to him that she had worked with her sister on a confidential work project, this conversation had not taken place with him, but with Lucy [Roberts] and the Claimant.
13. Lucy Roberts stated that she had phoned the Claimant when reviewing fuel usage and noting the Dundee trip. The Claimant had said that she had been working on an opportunity with her sister there. The Claimant did not say that Sav had authorised the trip in that conversation.
14. Lucy Roberts agreed reference to the above conversation had not been included in her witness statement but reiterated that her recollection was that the Claimant said she had "travelled to speak to her sister to discuss an opportunity, to work with her sister on an opportunity".
15. Karl Hill stated that he inspected the Claimant's company car immediately when the Claimant dropped it off, and when the Claimant was within a few metres of it. He immediately noted the damage but did not raise it with the Claimant because the conversation between her and others had become heated by then and he did not want to make matters worse.

The Law

16. A repudiatory breach of contract by an employee can justify summary dismissal by the employer, *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698.
17. There must be, on the balance of probabilities, an actual repudiation of contract by the employee and it is not sufficient for the employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct, *Shaw v B and W Group Ltd* EAT 0583/11.

18. An employer can rely on an employee's breach that it was not aware of at the time of the dismissal, *Boston Deep Sea Fishing and Ice Co v Ansell* 1888 39 ChD 339.
19. An employee can bring a claim under section 23 of the Employment Rights Act 1996 that her employer has made a deduction from her wages contrary to section 13.

Discussion and conclusions

20. There was a conflict on the evidence as to whether the Claimant had been given authorisation to travel to Dundee. The Claimant's evidence that she had been authorised was raised by her for the first time in today's hearing. The dismissal letter made it clear that the Respondent's position was that there had been no authority: "you did not inform the business or gain approval from your line manager".
21. On the balance of probabilities, I preferred the Respondent's evidence that no authority had been given because:
 - a) The very line manager said to have given authority (Sav Aulakh) was the author of the dismissal letter. It would be surprising for him to have referred to the absence of authority if he had given it, particularly where this was a matter that the Respondent relied on in justifying summary dismissal.
 - b) The Claimant had failed to mention that she had been given authority before today. That was a surprising omission given the importance of the issue in this claim.
22. The question is whether, on my objective analysis, the Claimant's behaviour in travelling to Dundee without authority was repudiatory conduct that justified summary dismissal.
23. Companies can decide whether company vehicles can be used for personal travel and to what extent. The Respondent's evidence on this point was contained in Sav Aulakh's statement:

Whilst Freightline does not have a set policy, it was agreed between Katie and I that she was responsible for the Company car and that her use of the Company car would be reasonable. It was my honest belief that Katie shared this understanding and I trusted that she would look after the Company car and act in a reasonable manner whilst it was in her possession. Freightline does not limit the use of Company vehicles to business use only and we allow employees to use Company vehicles for reasonable personal use.

24. There was, therefore, no express contractual term about company car usage and no documented policy. The highest the Respondent puts the case is that there was a “shared understanding of reasonable use”. I am not satisfied that a single trip to Dundee was unreasonable use. Whilst it was a long way (260 miles), it was not disputed that there was a business element to the trip or that it was taken during the Covid-19 pandemic, when travel by public transport carried greater risk.
25. Neither am not satisfied that a single trip of that sort amounted to a fundamental breach of contract. First, as I have observed, there was no express term about company car usage. Even if the “shared understanding of reasonable use” was a term of the contract, it was not breached for the reasons set out above. Secondly, as to any other term of contract, I consider whether such usage breached an implied term of trust and confidence. The Respondent does not dispute that there was a business element to the trip and has not suggested that there was any dishonest or fraudulent aspect to the fact of the journey. Accordingly, I do not conclude that it was in fundamental breach of an implied term of trust and confidence.
26. The Respondent’s case in Sav Aulakh’s statement was that:

..Katie had confirmed to me that she had worked with her sister, Emma Hayes (“**Emma**”) on a confidential work product which not only divulged confidential information belonging to Freightline to a non-employee, but to someone who actually worked in a similar business to Freightline’s and was therefore considered a competitor;
27. Before me in evidence, Mr Aulakh retracted that statement in its entirety. It was a strange error to have made, particularly since he had adopted the statement in examination-in-chief as being correct and true. In fact, he said, the discussion had taken place with Lucy Roberts. Her witness statement made no mention of the conversation at all. In oral evidence, as noted above, she stated that the Claimant had said she had visited her sister to “discuss an opportunity, to work with her sister on an opportunity”.
28. In my judgment that is consistent with the Claimant’s evidence that she was given “leads” by her sister. In other words, the information was being given by the Claimant’s sister and not to her. To the extent that there is any inconsistency, I prefer the evidence of the Claimant because of the way in which the Respondent’s evidence arose, namely by the error in Mr Aulakh’s statement and the omission in Miss Roberts’.
29. On the balance of probabilities, therefore, I conclude that the Claimant did not divulge confidential information to her sister and she was not, therefore, in fundamental breach of contract in that respect

30. As to the Claimant's productivity, there was no evidence of any performance process or any analysis of figures. Even if it could be said that her performance was below par, that is the sort of matter that would lead to imposition of a performance management scheme, not something that would justify summary dismissal. There was no fundamental breach of contract in that respect, in my judgment.

31. As to the confidential material allegation, there was an express term in the contract of employment that prohibited divulging confidential material and such a term would be implied in any event:

"12.4 .. you will not disclose any Confidential Information which has come to your attention during the course of your employment and You will at all times protect and maintain the confidential nature of such Confidential Information"

32. I accept the Claimant's evidence that she had sent herself the data as alleged so that she could print it off for the meeting. First, the data at page 83 had been sent to her that morning on her own request from a colleague. Such an open request for data from a colleague is, in my judgment, inconsistent with some dishonest intent. Secondly, the content of that data is equally inconsistent with any dishonest intent. It records the fact, date and sums of sales to a single customer. I can see little nefarious benefit in the Claimant having such information. Thirdly, the customer list, the Claimant says, is customers she was trying to bring to the business. I accept that. I note that they all have a "commencement date" after the Claimant's commencement of employment and that the majority are marked as "new". I accept her evidence that she intended to show the meeting that she was trying to garner new clients and business. In my judgment there was no dishonest intent on the Claimant's part.

33. Further, there is no evidence that the Claimant actually disclosed this information to any third party as the express term of the contract would require. I find as a fact that she did not. Neither, in my judgment, would sending that information to a personal email address amount to a breach of an implied term without more.

34. For all of those reasons, I conclude that the Claimant was not in fundamental breach of contract and that her dismissal was therefore wrongful.

35. What notice, then, was the Claimant entitled to? The contract provided for a six-month probationary period and then states:

"3.1 ... At the end of your probationary period You will be informed in writing if you have successfully completed your probationary period."

36. The contract also provides for extension of the probationary period. It was not in dispute that the Claimant was not informed in writing that she had successfully completed her probationary period. On a proper interpretation of the contract, and taking account of the Respondent inviting the Claimant to a Probation Review meeting in late September, I conclude that her probationary period was extended and remained in place at the time of her dismissal. Under the contract, as was not in issue, that entitled her to one week's notice.
37. The parties agreed that the figure for one week's notice was £520.99. It was also agreed that the Claimant would be entitled to £100 for car allowance and £7.50 for her telephone contract for that week and I order accordingly.
38. As to commission, the Claimant's case was that there was an oral agreement about commission between her and Mr Aulakh. It was agreed that there was no documented commission scheme. The Respondent averred that there was a threshold of sales for entitlement to commission and that the Claimant had not reached the threshold. It was for the Claimant to prove her entitlement to commission. The Respondent's witnesses were not challenged about the threshold and I accept their evidence. It follows that that the Claimant did not prove her entitlement to commission and that her unlawful deduction of wages claim in that respect fails.
39. I accept Mr Hill's evidence that he noticed damage to the Claimant's company car when she dropped it off and that he did not raise it because the conversation was heated at that time. I note the quote for repair (Page 89 of the Respondent's bundle) is dated 5 October 2021, less than a week after the Claimant had dropped the vehicle off. On the balance of probabilities, I conclude that the vehicle was damaged when the Claimant dropped it off with the Respondent and that the damage must have therefore been caused when the vehicle was under her control or responsibility. The Claimant is therefore responsible for the cost of the repair and the Respondent was entitled to deduct that cost from her salary under clause 6.3 of the contract. In my judgment, the deduction was lawfully made.

Employment Judge Clarke
4 August 2022