# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Smith
**Respondent:** Philippa Wood t/a Bambinos

**Heard at:** Liverpool **On:** 21 October 2022

**Before:** Employment Judge Horne

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr Maratos, consultant

**Judgment** was sent to the parties on 24 October 2022. The respondent has requested written reasons in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. The following reasons are accordingly provided.

## REASONS

**Issues**

The claim

1. By a claim presented on 16 May 2022, the claimant raised the following complaints:
   1.1. unauthorised deductions from wages, contrary to section 13 of the Employment Rights Act 1996 ("ERA");
   1.2. unauthorised deductions from holiday pay, contrary to section 13 of ERA and regulation 14 of the Working Time Regulations 1998 ("WTR"); and
   1.3. a claim for damages for breach of contract by failing to give notice of termination, otherwise known as "wrongful dismissal".
2. In her claim form, the claimant also ticked a box to indicate a complaint of unfair dismissal. Following a letter from the tribunal, the claimant accepted by e-mail that she could not pursue that complaint. No judgment has been issued to dispose of the unfair dismissal complaint, but there appears to be little point in issuing one now.

Restriction on defending the claim

3. The respondent's ability to defend the claim was restricted under rule 21 of the Employment Tribunal Rules of Procedure 2013. This was partly a consequence of my decision to refuse her application for an extension of time to present her response to the claim. I allowed Mr Maratos to participate in the hearing to a limited extent. The limits of his participation, together with my refusal to extend time for the response, are set out in a separate case management order sent to the parties on 7 November 2022. Neither party has asked for written reasons for those decisions.

4. Mr Maratos helped to clarify the issues, both in his submissions as to why time for the response should be extended, and in his final closing submissions on the question of whether the claim was well-founded or not. I am grateful to him for his help.

Wages

5. The claimant's hourly rate of pay was £9.18. For 4 weeks from 7 April 2022 until the termination of her employment, she worked 8 hours per week and was paid only for those hours.

6. The claimant's case is that wages were properly payable for 16 hours per week, and not just the 8 hours she was allowed to work. On the respondent's behalf, Mr Maratos conceded that the claimant's contract had initially guaranteed her 16 hours' work per week. Where an employee has a contractual guarantee of working hours, and is ready, willing and able to work those hours, wages for those hours are properly payable. Mr Maratos did not suggest otherwise. That was not the end of the story, however. According to the respondent, the contractual hours had been varied down to 8 hours per week by an oral agreement. Alternatively, the respondent argued, the claimant had agreed to a unilateral reduction to 8 hours per week by her conduct in continuing in employment for four weeks after being informed of the reduction.

7. The issues are:

    7.1. Did the claimant agree orally to vary her contractual hours?

    7.2. If not, did the claimant agree to a unilateral variation by her conduct in continuing to work?

Holiday pay

8. There was much common ground underpinning the holiday pay claim. The claimant was not paid any holiday pay. She was employed for almost exactly three months. Neither party contended that the leave year started on a date provided for in a relevant agreement. Her leave year therefore started on the first day of her employment. By the time her employment ended, she had worked a quarter of the leave year. The claimant told me that she had not taken any paid annual leave during her employment, not even bank holidays. The respondent did not seek to contradict her on any of those points. For the purposes of regulation 14(3)(b) of WTR, the relevant period of leave was therefore:

    5.6 weeks x ¼ - 0 = 1.4 weeks.

9. It was agreed that that figure would be rounded up to 1.5 weeks for ease of calculation.

10. The amount that would be due under regulation 16 in respect of that period was one week's pay for each week of leave. For an employee with normal working hours, and whose remuneration in normal working hours does not vary with the amount of work done, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his or her normal working hours in a week. It is at this point that the dispute emerges. What were the claimant's normal working hours? Were they 16 hours, or only 8? It was agreed that, to resolve that question, I had to determine the same two issues as in the wages complaint. If the claimant continued to have a guaranteed minimum of 16 hours' work per week, and had been ready, willing and able to work those hours, the respondent did not suggest that it would be entitled to restrict her holiday pay to 8 hours per week.

Wrongful dismissal

11. Again, there was a considerable amount of common ground when it came to the claim for damages for breach of contract. The claimant was dismissed without notice. She was not given any payment in lieu. Under section 86 of ERA, the notice required to be given by the respondent to terminate the contract was one week. It was the respondent's case that she was entitled to terminate the contract without notice by accepting the claimant's repudiation. Or, in language that non-lawyers are more likely to understand, the claimant allegedly committed gross misconduct. As Mr Maratos contended on the respondent's behalf, the gross misconduct consisted of shouting at the respondent on 3 May 2022, against a background of persistent lateness.

12. The issues are:

    12.1. Did the claimant do these things?

    12.2. Did they amount to gross misconduct?

**Evidence**

13. The claimant gave oral evidence. She described what happened and answered questions from me and from Mr Maratos.

14. The respondent did not connect to the hearing. In any case, the permission I gave to the respondent to participate in the hearing did not include the giving of oral evidence.

**Facts**

15. The respondent runs a children's clothing shop. The claimant was employed by the respondent to work in the shop, starting on 2 February 2022.

16. From the start of her employment, the claimant worked regular 8-hour days on Wednesdays and Thursdays. Before her employment started, she received messages from the respondent telling her that she would be working 16 hours per week. She was not told that those hours would or could change.

17. On 7 April 2022, the claimant was informed that her hours were being reduced to one 8-hour day per week. She never agreed to the change. Shortly afterwards, she texted the respondent to say that she was employed for 16 hours per week and would have to start looking for another job. She kept asking the respondent to "up my hours".

18. The respondent alleges that the claimant was "late a few times for work", but I accept the claimant's evidence that she was not.

19. The claimant continued working for the respondent until early May 2022. On 3 May 2022, the claimant arrived late for work. She spoke to the respondent in the shop. There was a security guard outside the door. The claimant was annoyed about her drop in hours. She told the respondent that she believed that the respondent was trying to get rid of her. She complained about her days being changed. Both the claimant and the respondent raised their voices. The claimant was first to raise hers. The argument escalated to the point where they were, in the claimant's words, "screaming at each other…speaking very loudly over each other". The security guard came in. The respondent asked the claimant to leave.

20. On 4 May 2022 the respondent dismissed the claimant without notice.

**Relevant law**

Variation of contracts

21. In order for a contract to be made or varied, the parties must intend to create or alter their legal relations. The test of whether there was such an intention is objective: *Barbudev v. Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at paragraph 30.

22. In *Sheet Metal Components Ltd v. Plumridge* [1974] ICR 373, Sir John Donaldson observed at page 376E:

> "…the courts have rightly been slow to find that there has been a consensual variation where an employee has been faced with the alternative of dismissal and where the variation has been adverse to his interests."

23. An employee continuing to work under protest whilst being compelled to accept a wage that is less than she is contractually entitled to will not amount to implied acceptance of the purported variation: *Rigby v. Ferodo Ltd* [1988] ICR 29, HL.

24. It is not necessary for an employee to embark on systematic or vociferous complaints in order to prevent an agreement from being foisted on him unilaterally by his employer. As long as he has made it clear that he is not agreeing to the reduction in wages he cannot, by continuing to work, be bound by an agreement to accept a reduction: *Arthur H Wilton Ltd v. Peebles* EAT 835/93 *per* Mummery P.

Gross misconduct

25. Where notice is required to terminate a contract of employment, the employer may nevertheless terminate the contract without notice if the employee repudiates the contract by committing gross misconduct.

26. "Gross misconduct" for the purposes of a claim of wrongful dismissal, has been defined in the report of Lord Jauncey in *Neary v. Dean of Westminster* [1999] IRLR 288. For conduct to come within the definition, it must so undermine the relationship of trust and confidence that the employer can no longer be expected to keep the employee in employment.

**Conclusions**

Wages

27. The claimant did not agree to vary her contract by reducing her hours.

28. I have found as a fact that there was no oral agreement.

29. The claimant did not by her conduct indicate any acceptance of a unilateral variation of her contract. She carried on working, but she protested against the reduction in guaranteed hours that was imposed on her. She asserted her contractual right to 16 hours per week in a text message and she asked for her hours to be increased.

30. The respondent argues that the passage of "two months was a long time if it is not to be a variation". The actual time between the unilateral variation and the termination of employment was one month, not two. More fundamentally, the claimant during that time was demonstrating the opposite of an intention to accept the change to her contract.

31. In the absence of any variation of the contract, the respondent continued to be bound to give the claimant 16 hours' paid work per week. Each week for four weeks, the claimant remained ready, willing and able to work the extra day. Wages were properly payable for 16 hours per week for each of those weeks.

32. On each occasion when she was paid, the amount she was paid was 8 hours' pay per week less than the amount that was properly payable. The amount of the deficiency on each occasion has to be treated as a deduction from her wages.

33. The total deductions were:

    4 weeks x 8 hours x 9.18 per hour = £293.76.

34. The respondent is accordingly ordered to pay that sum to the claimant.

Holiday pay

35. Having determined the contract variation issues in the claimant's favour in relation to her wages, I can deal with the holiday pay claim briefly.

36. The claimant's normal working hours at the calculation date were 16 hours per week.

37. The amount payable under the contract if she had worked all those hours in a week would be:

    £9.18 per hour x 16 hours = £146.88.

38. That is a week's pay.

39. The claimant was therefore entitled under regulation 14 to be paid:

    1.5 weeks x £146.88 = £220.32.

40. She was not paid any holiday pay. The respondent therefore made a deduction from her wages on the occasion when her regulation 14 payment was properly payable. The sum of £220.32 must now be paid by the respondent to the claimant.

Wrongful dismissal

41. It might fairly be described as misconduct on the claimant's part to escalate an argument with her employer by being the first one to raise her voice. But it was not gross misconduct. Once the claimant had raised her voice, both the claimant and the respondent started shouting over each other. That is entirely different from a one-sided tirade, which would be highly damaging to the relationship of trust and confidence. An employer who has engaged in a shouting match, albeit

initiated by the employee raising their voice, is not, in my view, generally entitled to regard the relationship of trust and confidence as being irreparably damaged. This is because the relationship would generally be capable of being restored once both parties quieten down and start behaving themselves.

42. Mr Maratos asked me to bear in mind the context. I do, but not in the way that the respondent wants. The claimant was late that morning, but was not persistently late. The real context was that the claimant had a genuine and well-founded sense of grievance. Raising one's voice in that context is less likely to amount to gross misconduct than where the employee is completely unprovoked.

43. The respondent was not therefore entitled to terminate the contract without notice. By doing so, she breached the claimant's contract.

44. The claimant's damages are agreed in the sum of £146.88.

Employment Judge Horne
3 January 2023

SENT TO THE PARTIES ON
6 January 2023

FOR THE TRIBUNAL OFFICE