



EMPLOYMENT TRIBUNALS

Claimant: L Cwiklinski

Respondent: Flossie's Wedding Limited

Heard at: Manchester by video **On:** 7 March 2023

Before: Employment Judge K Hunt

Representation

Claimant: in person

Respondent: Ms Barlay (representative)

RESERVED JUDGMENT

1. The correct name of the respondent is as set out above.
2. The claimant's claim for wrongful dismissal in breach of contract is not upheld and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent, Flossie's Wedding Limited, as a venue stylist/stationery assistant from 29 March 2022 to 23 August 2022. The claimant was dismissed at a hearing on 23 August 2022, the respondent says for poor performance after an extended probation period. The claimant was dismissed with immediate effect and paid in lieu of notice. The claimant commenced early conciliation on 4 November 2022 and the certificate was issued on 7 November 2022. On 20 November 2022, the claimant filed a claim for wrongful dismissal.
2. It is noted in this matter that there is a judgment dated 18 January 2023, striking out a claim of unfair dismissal on the basis that the claimant did not have the necessary 2 years' qualifying service to bring such a claim.

Claims and Issues

3. The claim and issues were discussed at the outset of the hearing. It was confirmed with the claimant that this was a claim for wrongful dismissal,

which I explained is a form of breach of contract claim meaning, for example, that the contract has been terminated without notice or insufficient notice. In looking at the pleadings it was discussed that this was not a claim for unfair dismissal which was not in issue, which the claimant acknowledged. The claimant confirmed that the breach or breaches of contract that she relied in her claim of wrongful dismissal were outlined at paragraph 8.2 of the ET1 claim form, (the list of points numbered 1 to 6 set out in full at page 10 of the Bundle), being in summary that:

- 1) correct processes had not been followed;
 - 2) no procedures followed or written grievance or disciplinary procedures provided;
 - 3) no written grounds of evidence provided;
 - 4) no proper induction re health & safety, training and in other respects;
 - 5) no written contract of employment provided;
 - 6) no grievance policies and procedures given to support preparation for meeting at which she was dismissed;
4. In the course of discussing and identifying the issues in the claimant's case and the damages claimed (heads of damages including 2 months' loss of pay when not working and stress and anxiety/mental health), the claimant said it was also her complaint that she was not given any notice on the termination of her employment. Ms Barlay objected that this complaint was not pleaded in the claimant's ET1 claim form and that the Respondent had pleaded to the claim that was set out and this was a new factual allegation and an amendment to the claim.
5. It being within my general case management powers to consider an application to amend at any stage of the proceedings including at a hearing (**The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1, rules 29 and 30**), I decided that this new complaint would be considered as an application to amend the claimant's list of complaints set out in her ET1 that she says form the basis of her wrongful dismissal claim. That application and outcome is set out in the section below.
6. The issues to be considered by the Tribunal were identified as follows:
- 6.1 Did this claim arise or was it outstanding on termination of the claimant's employment?
 - 6.2 Is there a breach of contract by the employer, the claimant relies on the matters in the ET1 as referenced at paragraph 3 above?
 - 6.3 If so, how much should the claimant be awarded as damages?
 - 6.4 If applicable, was there a failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures on the part of either party and if so, should there be an increase or deduction in any award payable to the claimant?
 - 6.5 Was the respondent in breach of its duty to provide a written statement of employment particulars? If the claim succeeds, should the claimant be

awarded the minimum of two weeks' pay or the tribunal may award four weeks' pay?

Procedure - preliminary issues, documents and evidence heard

Claimant's application to amend claim

7. I considered the Claimant's application to amend her claim to include the additional complaint that she had not been given any notice on termination of her employment. The Respondent objected to the application.
8. I explained in summary the matters I would need to consider in deciding the claimant's application to amend her claim with reference to the case law: *Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650* and *Selkent Bus Co Ltd v Moore [1996] ICR 836* which establish that the Tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and the relative injustice and hardship that may be caused to the parties in allowing or refusing the application to amend. I explained the factors to consider including the nature of the amendment, any time limits, the timing and manner of the application and any other relevant factors and explained to the parties that they should address me on these matters.
9. After a short adjournment for the parties to prepare, I heard submissions from the claimant and Ms Barlay for the respondent and I set out the relevant factors, my findings and decision below.
10. In her submissions the claimant reiterated her complaints that the correct process was not followed and it was not a fair process, which she said was relevant to the question of why she thought it was an injustice. In answer to whether there were any other points she wanted to add to her list of complaints other than those already covered in her claim form, she confirmed the amendment she wished to make was that she was 'not given the correct notice period', as a new point 7 of the ET1.
11. The claimant explained this was an oversight on her part and the reason she was making the application was because it was relevant and important and there had not been a fair process followed in relation to the Acas code of practice. When asked why she did not include the point 'not given the correct notice period' in her original claim, she responded it was an oversight.
12. In her submissions, Ms Barlay argued that this issue was not in the original ET1 and was out of time; that it was a new claim and new factual issue and that the claimant was paid in lieu of notice and this was explained to her and broken down in an email; that as this was a new complaint to which the respondent would have to respond, they would need to gather evidence, take instructions on it and submit or draft new evidence in response; that it would be an injustice and prejudicial to the respondent as it was doubtful they would have enough time to do so at today's hearing and if unable to deal with it (after rushing around trying to gather evidence/emails) that would be prejudicial to the respondent.

13. After hearing from the parties and consideration of the pleadings in the case, and in considering the application and making my decision, I had regard to the matters set out at paragraph 8 above.
14. In considering the nature of the amendment, I do not find that the amendment sought is a new 'cause of action' giving rise to time limit issues as submitted by Ms Barlay, on the basis that the claim already brought is a claim of wrongful dismissal meaning a breach of contract claim. I consider the amendment sought of a further or new alleged breach is an alteration of an existing claim rather than bringing a new claim.
15. However, I find that the claimant's application to amend her claim to add a 'new point 7' that she was 'not given the correct notice' to her list of complaints relied on at points 1 to 6 of her claim, is a new factual allegation or issue that was not raised on the face of the pleadings and I find it is a substantial alteration of the basis of her claim.
16. The claimant says by way of explanation for not including this complaint in her original claim that it was an oversight. I note that in her ET1 at paragraph 6.3 in answer to the question '*If your employment has ended, did you work (or were you paid for) a period of notice?*', the claimant answered in the affirmative by ticking the box 'Yes' and that when discussing the damages that she is seeking, she did not include notice pay nor include a claim for notice pay on the claim form.
17. I accept Ms Barlay's submission that the respondent will need the opportunity to respond to this new factual allegation and complaint, as the ET3 response is pleaded on the case and points raised as set out in the ET1. I accept that if new evidence is needed and new instructions are taken in order to respond to the amended claim (a written witness statement for the respondent having already been prepared and submitted in advance of the hearing), the respondent will be put to greater relative hardship, with limited, if any, time to deal with this at the hearing today.
18. In considering the timing and manner of making the application and why the application was not made earlier and why it was being made now, I took account of the fact that it was made at a very late stage, during discussion of the issues at the outset of the hearing and that the claimant's explanation for this was that it was an oversight on her part. I find that in submitting her claim and in light of the damages she is seeking, the claimant was aware of and acknowledged that she had been paid for a period of notice and did not seek to bring a claim for damages in respect of notice pay. There were no new facts or information not known to the claimant at the time of issuing her claim, that she now relies on as the reason for making the application to amend her claim. There were no reasons put forward by the claimant as to why this issue and an application to amend her claim could not have been made earlier. She continues to rely on points 1 to 6 set out in her ET1 as being breaches of contract forming the basis of her claim for wrongful dismissal and did not make any submissions on the hardship that would be caused to her if her application to amend to include the new allegation is refused.
19. In reviewing all of the circumstances and in weighing the balance of injustice and hardship as between the parties if I were to allow or refuse the

application, I also considered it a relevant factor that allowing the application would cause delay, added cost and the need for additional resources, in the likely event that the hearing would have to be adjourned to enable the respondent to respond to the amended claim and a new hearing re-listed. In addition to this and in circumstances where the claimant is not seeking damages for notice pay, I consider that this would be disproportionate and cause greater injustice and hardship to the respondent in this regard. I am also mindful of the over-riding objective that requires amongst other things that cases are dealt with proportionately and avoiding delay, so far as compatible with proper consideration of the issues to be decided and saving expense.

20. On balance and for the reasons outlined above, I gave my decision that:

The claimant's application to amend her claim is refused.

Documents and Evidence

21. I had before me an electronic bundle of documents of 118 pages prepared by the Respondent that was sent to the Tribunal and the claimant the day before the hearing. At the end of the hearing, during her submissions, the claimant referred to a schedule of loss in the bundle and it became apparent that she also had her own hard copy bundle of documents. Although she had sent a hard copy to the tribunal prior to the hearing, this had not been provided to me and it was confirmed by the claimant that she had not sent a copy to the respondent. I asked the claimant to forward a copy of the schedule of loss to the tribunal and to Ms Barlay by email, which she did. I gave Ms Barlay time to consider and make representations on the schedule of loss, which she did. Having had access to and been referred to documents in the electronic bundle during the hearing, the claimant confirmed that there were no key pieces of evidence in her hard copy bundle that she wished to rely on and given this and more importantly the fact that a copy of the bundle had not been sent to the respondent prior to the hearing, no further new documentary evidence was considered.

22. The claimant relied on her ET1 claim form and the information set out at page 10 of the Bundle as her witness statement and I heard oral evidence from the claimant and I had a short written witness statement and heard oral evidence from Ms Marsh, as owner and director of the respondent.

Fact Findings

23. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have therefore not made findings in every area of dispute between the parties where that is not necessary for the proper determination of the complaint before me.

24. The claimant was employed by the respondent, Flossie's Weddings Limited, as a venue stylist/stationery assistant from 29 March 2022 to 23 August 2022.

25. The claimant was informed at a meeting on 18 August 2022 that she was suspended pending an investigation and that there would be a further

meeting on 23 August 2022. A letter dated 18 August 2022 confirming the suspension and time and date of the next meeting was provided to the claimant in person.

26. A second letter dated 19 August 2022 was sent by email to the claimant inviting her to a meeting on 23 August 2022 and warning her that the respondent was considering dismissing her due to a failure to reach satisfactory standards of conduct/behaviour/performance during her probationary period. She was informed of her right to be accompanied at the hearing.
27. The claimant replied on 20 August 2022 stating that she was unable to take professional advice until Monday 22 August and needed more time to prepare; requesting detailed examples of the alleged 'gross misconduct', which she understood to be the case against her given the letter stated the possibility of ceasing her employment; requesting a copy of the respondent's disciplinary and grievance policies and procedures and suggesting she would be happy to reschedule the meeting in order for both parties to prepare for it.
28. The hearing went ahead on 23 August 2022 and the claimant was unaccompanied. The hearing was held by Ms Marsh accompanied by a colleague to take notes. During the hearing examples of complaints and concerns raised were outlined and discussed with the claimant. After an adjournment to consider, Ms Marsh informed the claimant that she would be terminating her employment effective immediately as she did not pass her probation due to poor performance.
29. The outcome of the meeting and the decision to terminate the claimant's employment and reasons for this were confirmed in writing by letter sent on 25 August 2022. In the letter Ms Marsh mentioned that the term 'gross misconduct' had not been used. The claimant was informed that she was not required to work her notice period and would be paid in lieu of notice, that the accountant was working on all salary owed to the claimant, which would be paid in her next payslip and that she would receive her P45 in due course. The letter also stated that the respondent had taken account of ACAS guidance and Codes of Practice but had not yet put in place written policies and procedures. The claimant was offered a right of appeal.
30. The claimant appealed and the appeal was heard on 15 September 2022 and was not upheld.
31. Ms Marsh in her witness statement accepted that the respondent did not provide the claimant with a written statement of Terms and Conditions of employment. I also find on the evidence that the respondent did not have any of its own company policies or procedures in place with respect to grievance or disciplinary matters.
32. In her witness evidence (adopted at page 10 of the Bundle) and in oral evidence and cross examination, it was the claimant's evidence that the process followed including her suspension and leading up to her dismissal was not a fair process and also that in various aspects was in breach of the Acas Code of Practice on Disciplinary and Grievance Procedures. These alleged breaches included the fact of her suspension, the lack of time to

prepare for the hearing, the lack of detail or copies of written evidence provided prior to the hearing, the lack of or skipping of steps in the Acas stages in that she was not given verbal or written warnings or a final written warning prior to dismissal or put on a performance improvement plan or similar.

33. In her oral evidence and in cross examining Ms Marsh, the claimant also challenged the evidence in the Bundle relating to the concerns raised about her performance and the fact, detail and seriousness of complaints was disputed. In her evidence and submissions, the claimant alleged that evidence now produced in the Bundle was manufactured and that there was a lack of proper evidence to show that she had done anything that merits dismissal, which she suggested was for gross misconduct because of the way she had been treated. The respondent disputes this. Based on the evidence before me, I do not find that the respondent dismissed the claimant for gross misconduct and on balance find that the claimant was dismissed for the reasons given at the hearing on 23 August 2023 and set out in the decision letter and that the claimant was paid in lieu of notice, which she did not dispute. I make no further findings with regard to any alleged breaches of the Acas Code of Practice for reasons I explain in my conclusions below.

Law

34. A claim for wrongful dismissal is a common law claim based on breach of contract. The tribunal's jurisdiction to hear breach of contract claims is governed by **The Employment Tribunals Act 1996** ("ETA 1996") and **The Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994** ("the 1994 Order")
35. A contractual claim can only be heard under these provisions where the claim '*arises or is outstanding on the termination of the employee's employment*' (Article 3 of the 1994 Order) and relates to any of the following:
- (a) a claim for damages for breach of the contract of employment or other contract connected with employment;*
 - (b) a claim for a sum due under such a contract; and*
 - (c) a claim for recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract'*
- (section 2 ETA 1996)
- and '*does not apply to a claim for damages, or for a sum due, in respect of personal injuries*' (section 3 ETA 1996 and Article 3 of the 1994 Order).
36. The Acas Code of Practice on Disciplinary and Grievance Procedures is a statutory document issued under and having the effect set out in **s.207 and 207A of The Trade Union & Labour Relations (Consolidation) Act 1992** ("TULRCA").
37. The legal effect of the Acas Code of Practice as set out in s.207(1) TULRCA is that:

"a failure on the part of any person to observe any provision of a Code of Practice.....shall not of itself render him liable to any proceedings"

it is further set out in s.207A(2) that "*if in the case of proceedings to which this section applies it appears to the Tribunal that:*

- (a) *the claim to which the proceedings relate concerns a matter to which a relevant Code applies,*
- (b) *the employer has failed to comply with the Code in relation to that matter, and*
- (c) *that failure was unreasonable,*

the Tribunal may, if it considers it is just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.”

Conclusions

38. I will address each of the agreed issues in the case separately for ease of reference but note that each conclusion has been drawn taking account of all the evidence I have heard both in writing and orally.
39. Did this claim arise or was it outstanding on termination of the claimant's employment? A wrongful dismissal claim is ordinarily understood to relate to the termination of employment, meaning that the dismissal itself is in breach of a term of the contract or other contract connected with the employment. A claim for damages for breach of contract may include a claim for dismissal in breach of a contractual disciplinary procedure. In the circumstances, I conclude that the claimant's claim for wrongful dismissal arose or was outstanding on the termination of the claimant's employment.
40. Is there a breach of contract by the employer, the claimant relies on the matters in the ET1 as referenced at paragraph 3 above? In her claim form (adopted as her witness statement), the claimant relies on the points listed at points 1 to 6 of her ET1 as the alleged breaches of her contract. The primary focus of the claimant's complaints and alleged breaches relate to the process undertaken by the Respondent in the period prior to her dismissal. In her evidence and submissions the claimant did not refer specifically to a company policy or procedure or any terms of such a document, whether contractual or otherwise, of which she claimed that the respondent was in breach and nor was any such policy or procedure put in evidence. The claimant did, however, in her evidence and submissions specifically refer to various alleged failings in the process undertaken by the respondent as breaches of the Acas Code of Practice.
41. On balance, I conclude on the evidence before me that there were no company policies or procedures for disciplinaries or grievances in place or applied at the time and that the respondent followed a process in the form of the steps outlined in my findings, in the absence of any company policies or procedures.
42. In so far as the claimant relies on alleged breaches of The Acas Code of Practice in bringing her claim for wrongful dismissal, I must consider and take account of the status and legal effect of the Acas Code of Practice as outlined in the relevant legislation set out in the section above and conclude that the Acas Code of Practice is a statutory code and does not have contractual effect or confer contractual rights or obligations between an employee and their employer. I conclude that any alleged breaches of the Acas Code of Practice do not constitute a breach of contract giving rise to

contractual claims against the respondent, so as to establish a claim of wrongful dismissal. On that basis, I make no further findings in respect of alleged breaches of the Code as they are not necessary to determine the case before me.

43. In conclusion, on the case before me I do not consider that there was a breach of contract by the respondent.
44. If so, how much should the claimant be awarded as damages? In light of my conclusion above, no damages are awarded.
45. If applicable, was there a failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures on the part of either party and if so, should there be an increase or deduction in any award payable to the claimant? As the claimant has not succeeded in her claim and no damages are awarded and as any alleged failure to comply with the Acas Code of Practice does not in itself render the respondent liable to proceedings, this issue is not engaged.
46. Was the respondent in breach of its duty to provide a written statement of employment particulars? If the claim succeeds, should the claimant be awarded the minimum of two weeks' pay or the tribunal may award four weeks' pay? As the claimant has not succeeded in her claim, this issue is not engaged.

Employment Judge K Hunt

Date 17 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 April 2023

FOR EMPLOYMENT TRIBUNALS