



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105904/2022

Held via Cloud Video Platform (CVP) on 17 March 2023

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Employment Judge S MacLean

Mr C Cubitt

**Claimant
In person**

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The Pollokshields Trust

**Respondent
Not present and
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that (1) the claims of unfair dismissal; redundancy payment and failure to pay holiday are withdrawn and are dismissed under rule 52 of schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013; and (2) the respondent is order to pay to the claimant the sum of TWO THOUSAND TWO HUNDRED AND TWENTY SIX POUNDS AND FIFTEEN PENCE (£2,226.15) as damages for breach of contract (failing to pay all contractual notice pay due on termination).

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REASONS

Background

1. In the claim form sent to the Tribunal on 7 November 2022, the claimant complains of unfair dismissal, failure to pay a redundancy payment, wrongful dismissal and failure to pay holiday pay. The claimant seeks compensation.
- 30 2. On 9 November 2022 the Tribunal sent a copy of the claim to the respondent advising that the Tribunal required to receive a response by 7 December 2022 at the latest. The correspondence also explained what the respondent should

do if the respondent required to apply for an extension of time to present the response.

3. No response was received. The claim form was referred to an Employment Judge who directed the Tribunal to write to the claimant advising that there was insufficient information to issue a judgment at this stage. The claimant was asked to confirm if he intended to proceed with the claim of unfair dismissal and redundancy pay which ordinarily required two years' continuous service. If so, the claimant was invited to set out reasons why he believed he was entitled to do so with less than two years' service. The claimant was also asked to provide details of what sum he was seeking with a note of how he arrived at the figures, showing his working and providing the evidence to back up the sums sought. The claimant was asked to provide a copy of his response to the respondent who would be given a further 14 days to comment.
4. The claimant provided the additional information requested on 25 December 2022 which he copied to the respondent at their email address. The claimant confirmed that he was not claiming unfair dismissal.
5. On 5 January 2023, Fatima Uygun emailed the Tribunal without copying in the claimant seeking clarification of the claim and advice on how to proceed. The Tribunal replied by letter dated 13 January 2023 asking Ms Uygun to confirm that she was acting for the respondent and reminding of the requirement to copy correspondence sent to the Tribunal to the claimant. Enclosed with the letter was a copy of the Tribunal's letter of 9 November 2022. The respondent was advised that as the response should have been lodged by 7 December 2022 and had not been lodged, the case was proceeding as undefended. The letter dated 13 January 2023 again set out the steps that the respondent must take if it wished to defend the proceedings.
6. On 20 January 2023, the respondent wrote to the Tribunal setting out its position and asking for advice. The Tribunal replied by letter dated 27 January 2023 referring to the earlier letter dated 13 January 2023 setting out what the

respondent was required to do should it wish to defend the claim, and enclosed a further copy of the claim form and notice of claim letter.

7. On 26 January 2023, the claimant provided the Tribunal and copied to the respondent setting out his calculation of the claims and providing supporting documentation.
8. The parties were advised that the case was to proceed to a final hearing on 17 March 2023. The notice of hearing was sent to the respondent as information only as no response had been received.
9. On 6 February 2023, the respondent wrote to the Tribunal (failing to copy the claimant) regarding the proposed hearing.
10. On 8 February 2023, the Tribunal wrote to the respondent again referring to the correspondence of 13 and 27 January 2023. The respondent was referred to the steps required should it wish to defend the claim. The respondent had not lodged its response on the prescribed form, nor had an extension of time been sought and, as such, it would proceed to the final hearing undefended. The respondent was also advised that in accordance with rule 21(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules), the respondent was entitled to notice of any hearings or decisions but, unless and until an extension of time is granted to lodge the response, the respondent would only be entitled to participate in any hearing to the extent permitted by the Judge.
11. A further email was sent from the respondent seeking advice from the Tribunal on 8 February 2023. The Tribunal again wrote to the respondent on 15 February 2023 reiterating the advice previously provided.
12. On 17 March 2023, Mr James Monaghan, volunteer advisor for TPT, sent an email to the Tribunal (which was not copied to the claimant) attaching an ET3 response form. The email advised:

‘We are not able to have anyone represent us at today’s Tribunal and none of our trustees are available due to work commitments. I attach an ET3 form on behalf of TPT. I am carrying out this role as the trustees are busy with other

work this week. Further contact for the Trust is, per the ET3, Ms Fatima Uygun.”

Final hearing

13. At the final hearing the claimant appeared remotely by cloud video platform.
5 There was no appearance by or for the respondent.

14. I explained to the claimant that I have received an email from Mr Monaghan just before the start of the hearing. As that email was not intimated to the claimant I directed the clerk to forward a copy to him. I said that the response form was attachment to the email but notwithstanding the correspondence
10 that had been sent to the respondent in January and February 2023, there was no accompanying application for an extension of time to present it. There was no explanation why this had not been done sooner and why it was not copied to the claimant.

15. In these circumstances, I advised the claimant that while I would put to him the points that had been raised by the respondent in the correspondence, the case was proceeding as undefended.

16. Before hearing any evidence, I suggested to the claimant that it would be of assistance to clarify which claims I was considering and identify the issues that I had to determine.

20 *The claims and issues*

17. In discussion with the claimant he confirmed that he was not pursuing claims of unfair dismissal or a redundancy claimant. He also confirmed that he was not persisting in his holiday pay claim. These claims are withdrawn and are dismissed under rule 52 of the ET Rules.

25 18. I noted from the additional information provided that it appeared that the considered that the respondent had not paid all the wages to which he was entitled. This had not been as claim included in the original claim form. The claimant said that, while this was something that had only recently come to

light, he was not seeking to amend his claim form as it was not something he had noticed during his employment.

19. The focus for the claimant was the wrongful dismissal claim. I considered that the issues that I had to determine in relation to the wrongful dismissal claim were as follows:
- a. What was the claimant's notice period?
 - b. Was the claimant paid for that notice period?
 - c. If not, was the claimant in repudiatory breach of contract?

Relevant law

20. A claim in respect of contract may be pursued in the Employment Tribunal under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, provided that it is outstanding on termination of employment.
21. An employer may be entitled to dismiss an employee without notice where the contract includes a pay-in-lieu of notice clause or where the employee has committed a repudiatory breach of their employment contract. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach of contract is a question of fact for the Tribunal.
22. In determining whether something is gross misconduct justifying summary dismissal, all the circumstances of the case will be relevant including whether that type of conduct is listed in the employer's disciplinary policy or company handbook as amounting to gross misconduct. However, just because the conduct is listed as being gross misconduct in a contract or a contractual disciplinary procedure, does not mean that summary dismissal will automatically be justified if the employee conducts themselves in that way. The Tribunal must also consider whether the conduct is sufficiently serious to be repudiatory.
23. In respect of a wrongful dismissal claim, the Tribunal must consider whether a breach of contract occurred.

Findings in fact

24. The claimant gave evidence on his own account. I was also referred to the document that he sent on 26 January 2023. I also referred to the correspondence received from the respondent.
- 5 25. The respondent was formed in 2016 with the aim of improving the environment in several unused spaces in Pollokshields and for the general improvement of the local environment. The respondent is governed by its trustees which at the relevant time were Fatima Uygun (chair), Joe Donnelly, and Sara Wassu.
- 10 26. Following an interview, the claimant was employed by the respondent as a community gardener.
27. The respondent issued the claimant a contract of employment which provided that his employment commenced on 1 June 2022 and would continue until its termination on 30 November 2022 in accordance with the notice provisions set out in the contract. The claimant's rate of pay was £12 an hour. He was contracted to work 30 hours a week, Wednesday to Saturday. There was a probationary period of 12 weeks.
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28. The contract provided that the claimant was entitled to a minimum notice of termination of one month after 12 weeks' service and after 12 weeks' service he was entitled to receive six weeks' notice. The respondent had discretion to terminate his employment without notice and make a payment in lieu. The respondent was also entitled to dismiss the claimant at any time without notice or a payment in lieu if he committed a serious breach of his obligations as an employee. The contract referred to disciplinary procedures which were set out in a handbook. A copy was not provided to the claimant.
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29. On 30 June 2022, the claimant received basic pay of £1,440 which was subject to tax and national insurance leaving a net pay of £1,280.05. In July and August 2022, the claimant received the same basic pay but received a monthly net pay of £1,309.86.

30. Following his interview, the claimant had little or no contact with the trustees. The claimant reported to his line manager, Tabassum Niamat with whom he had a good working relationship. The claimant was conscientious and willing to engage with the community. They had communication issues with the trustees and the project lead about the challenges faced on the ground in terms of adequate funding to carryout maintenance and ground work. The claimant worked alongside a third-party organisation, Urban Roots, and had a good working relationship with their volunteers and the project coordinator.
31. At meeting took place with the claimant on 19 August 2022, at which the claimant was advised that he was being made redundant. He was told that the circumstances of the staff redundancy were historic and were beyond the control of the respondent's trustees. The claimant was shocked. He was baffled at the explanation, particularly as he had only recently been offered six months' employment and was now being told that he was being made redundant.
32. On 22 August 2022 the claimant received a letter dated 19 August 2022 confirming that the claimant was being made redundant. It had been agreed to give the claimant 11 weeks' notice of termination. The letter stated that the claimant's last day of employment would be 28 October 2022. The letter thanked the claimant for the commitment he had shown, and the hard work he had put into the development, growth, and popularity of the bowling green.
33. The claimant discovered that Ms Niamat was also being made redundant in October 2022. Ms Niamat was absent due to compassionate leave.
34. On 31 August 2022, the claimant had a discussion with the project lead. The claimant asked about the possibility of the reasons for redundancy being improved. The project lead gave no insight but did indicate to the claimant that he was welcome to do whatever he could.
35. At no point during his employment had the claimant been informed that communication with third parties required any authorisation. The claimant had regularly communicated with partners to ensure the delivery of workshops, volunteer service sessions, and events at the bowling green.

36. The claimant was naïve about how funders operate in the third sector. The claimant innocently thought that he should contact the funder about advice on how the funds that had been awarded should be used. The claimant sent an email to the funders on 2 September 2022. The email was polite and friendly. The claimant introduced himself as the community gardener. Given the sporadic communication from the trustees he sought any information the funders could offer concerning the funding for the space and any insights for site improvement that the other recipients of the fund had reported back to them. The claimant received a genial response advising that the funders communicated only with the project lead.
37. The claimant then received an email from the respondent on 5 September stating that it had come to the respondent's attention that the claimant had written to one of the funders without prior authorisation. The claimant was advised that the respondent was currently investigating this and requested a copy of the email from the funders. The respondent requested that the claimant forward a copy of the email and also advised that he would be suspended from his post with immediate effect and was told to hand his keys to his line manager. The claimant was advised that the respondent would be in touch within the next seven days.
38. On 6 September 2022 the claimant was informed through members of partner groups that his employment had been terminated. The claimant attempted to clarify his status through email. He received no communication from the respondent.
39. On 7 September 2022, the claimant received a letter advising him that his employment had been terminated with immediate effect due to behaviour that constituted gross misconduct.
40. The claimant received his final salary on 30 September 2022 of £270. The termination letter referred to the claimant displaying 'aggressive behaviour'. The claimant was shocked at such accusations which he considered to be wholly untrue. He was horrified to find that his relationship with the respondent would be described in this way.

Observations on the evidence

41. I considered that the claimant gave his evidence in a thoughtful, understated manner. While I appreciated that he was not subject to cross-examination, I did put to him the various assertions made by the respondents in the correspondence.
42. My impression of the claimant was that he had acted throughout his employment in a professional manner. He appeared conscientious and dedicated to the project. I was provided with written statements from his line manager and the project coordinator of Urban Roots. These had been copied to the respondent. While I place little weight on these statements as they did not provide oral evidence, they did appear to be consistent with my own impression of the claimant.
43. I did not have the benefit of hearing evidence from the respondent. However, the manner in which the respondent has approached these proceedings appeared to be consistent with the claimant's experience: the trustees have other priorities; the responses are sporadic and infer that previous correspondence has not been considered or understood. I felt that it was significant that none of the allegation warnings to which the respondent referred in the termination letter recorded and appeared to be contrary to the comments in the letter sent to the claimant dated 19 August 2022.
44. I also considered that the claimant's approach to the potential claims that he may have against the respondent was measured. In contrast, the respondent's position appeared to be an embellishment and created after the fact.

Deliberations

45. The claimant had been given notice that his employment would terminate on 28 October 2023. The respondent terminated his employment on 7 September 2023. He was not paid a payment in lieu of his remaining notice period of seven weeks.

46. The wrongful dismissal claim is different to a complaint of unfair dismissal. The reasonableness or otherwise of the respondent's action is irrelevant. The question for me was whether the claimant was guilty of conduct so serious as to amount to a repudiatory breach of contract entitling the respondent to summarily terminate the contract.
47. I then turned to consider if the claimant was in repudiatory breach of contract. The contract does not provide any examples, nor was the claimant provided with a copy of the employee handbook. From the evidence before me, the claimant was a committed and hardworking employee who had regular communication with the third-parties involved in the project. The claimant had not been informed that he should not have any direct contact with funders without prior authorisation from the trustees. The claimant's line manager was on bereavement leave. The claimant raised the matter initially with the project lead. There was no indication from the project lead that this was not a matter in which the claimant should get involved. To the contrary, it was suggested that he may wish to pursue the matter.
48. The communication with the funders was polite and friendly. The funders indicated that they would communicate through the project lead. The claimant accepted that and did not pursue the matter further. There was no indication that this communication caused any concern with the funders or that the claimant had been told that to make such contact would be deemed to be gross misconduct. There was no evidence to suggest that this was an attempt to commit a serious breach of the claimant's obligations.
49. I concluded that the conduct was not serious enough to fall within the terms of gross misconduct.
50. The claimant's notice period ought to have come to an end on 28 October 2022. The claimant was only paid until 7 September 2022. As the claimant was not in repudiatory breach of contract, he was entitled to the remaining period of notice.

51. I calculate this to be £1,440 x12/52 that is £332.30 gross for seven weeks:
£2,226.15.

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Employment Judge: S MacLean
Date of Judgment: 24 March 2023
Entered in register: 24 March 2023
and copied to parties

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