



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs. Kokib Lodhi

**Respondent:** Monas Beauty Lounge

**Heard at:** Nottingham Employment Tribunal      **On:** 13 March 2023

**Before:** Employment Judge Omambala KC

## Representation

Claimant: Mr. G Hussain

Respondent: Mr. R Dinghra

# RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent. The Respondent must pay the Claimant:-
  - a. A basic award in the sum of **£912**.
  - b. A compensatory award in the sum of **£17,176**.
2. The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and a 20% uplift shall be applied to the Claimant's compensatory award - **£3,435.20**.
3. The Claimant's claim of unlawful deduction from wages succeeds in part and the Respondent must pay the Claimant the sum of **£50.00**.
4. The Claimant's claim in respect of holiday pay is dismissed.
5. The Respondent shall pay to the Claimant **£500** in respect of loss of statutory rights.
6. **Accordingly, the total sum which the Respondent must pay to the Claimant by way of compensation is: £22, 073.20**

# REASONS

## Introduction

1. This was an in-person hearing. The Claimant was represented by Mr. Hussain, her brother-in-law and was supported at the hearing by her husband. The Respondent was represented by Mr. R Dinghra, owner of the Respondent business and husband to Mrs. Dinghra who manages and runs the business. I am grateful to them both for the courteous and helpful way in which they presented their cases and conducted the hearing.
2. The Respondent runs a beauty lounge and salon offering a range of beauty treatments and services. The Claimant, Mrs. Lodhi, was employed by the Respondent as a beauty therapist from 2 September 2019 until the date her employment came to an end.
3. There is a dispute as to the date and the circumstances in which the Claimant's employment came to an end.
4. By her claim form received by the Employment Tribunal Service on 10 October 2022 Mrs. Lodhi alleges that she was dismissed on 12 August 2022. She has brought complaints of unfair dismissal, unlawful deductions from wages in respect of arrears of pay, holiday pay and other payments.
5. The Respondent disputes the claim brought by Mrs. Lodhi. It says that the Claimant resigned from her employment on or about 14 August 2022 and has received all sums properly payable to her.
6. I heard sworn evidence from the Claimant and from Mr. and Mrs. Dhingra on behalf of the Respondent. Each party had prepared a bundle of documents which I read. There was a substantial overlap in contents. Page references will be preceded by the letter 'C' or 'R' to indicate which bundle is being referred to.
7. The Claimant's bundle contained a 'statement of dismissal and employment' [C1-5] which at her request I treated as a witness statement. Mr. Dhingra did not produce a witness statement but confirmed the truth of the matters stated in the grounds of resistance document [R25]. Mrs. Dhingra produced a witness statement [R1-2]. The Respondent also produced three undated and unsigned from its employees: Saima Akhtar [R5], Geeta Aryal [R6] and Neetu Batra.

## Preliminary Matters

8. At the start of the hearing, I clarified with the parties that:
  - a. the correct name of the Respondent was the Beauty Lounge;
  - b. the Claimant's weekly pay was agreed at £304 gross;
  - c. the Respondent contended in the alternative that the Claimant was dismissed for a reason related to her conduct;
  - d. Duplication in the schedule of loss should be struck through so as to avoid double recovery in the event that the claims succeeded.

## Issues for the Tribunal to decide

### Unfair Dismissal

9. The parties agreed that the issues for the Tribunal to decide were: -
  - 9.1 Was the Claimant dismissed?
  - 9.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?
  - 9.3 Was it a potentially fair reason?
  - 9.4 The Respondent says the reason was a reason related to the Claimant's conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.
  - 9.5 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?  
In particular, whether:
    - 9.5.1 there were reasonable grounds for that belief;
    - 9.5.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
    - 9.5.3 the Respondent otherwise acted in a procedurally fair manner;
    - 9.5.4 dismissal was within the range of reasonable responses.
  - 9.6 Does the Claimant wish to be reinstated to their previous employment?
  - 9.7 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?
  - 9.8 If there is a compensatory award, how much should it be? The Tribunal will decide:
    - 9.8.1 What financial losses has the dismissal caused the Claimant?
    - 9.8.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    - 9.8.3 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    - 9.8.4 If so, should the Claimant's compensation be reduced? By how much?
    - 9.8.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    - 9.8.6 Did the Respondent or the Claimant unreasonably fail to comply with it by [specify alleged breach]?
    - 9.8.7 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

- 9.8.8 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 9.8.9 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
- 9.8.10 What basic award is payable to the Claimant, if any?
- 9.8.11 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what?

**Holiday Pay (Working Time Regulations 1998)**

- 10. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

**Unauthorised deductions**

- 11. Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted?

**Findings of Fact**

- 12. The Respondent business comprised of two business units at the Victoria Centre market, Nottingham. Mona's Beauty Lounge offered pedicure, manicure, gel polish, nail extensions and spray tan services. Mona's Beauty Bar offered face and body waxing, massage, eyebrow lamination, waxing, tinting and threading services, eyelash tinting and extensions. There were four employees including the Claimant who worked across both business units. Mrs. Dhingra, the wife of the Respondent's owner managed the units on a day-to-day basis.
- 13. The Claimant is an experienced and well-regarded beauty therapist. She was approached by Mrs. Dhingra to work in the Respondent business and had been employed since 2 September 2019.
- 14. The Respondent is a small family run business which had been established for eight or nine years. Mrs. Dhingra is responsible for the management, staff supervision and administration of the business. The Respondent used a third party to provide payroll services at the material time and did not have any external HR support. Mrs. Dhingra said that she regarded employees as friends as much as employees and did not use formal procedures if there were concerns about members of staff. The Tribunal accepts her evidence in this regard.
- 15. The Respondent's busiest days were on a Friday and Saturday. The Respondent tried to ensure that no more than one employee was on leave at any particular time to ensure that its business could continue to function.
- 16. The Respondent had a system where employees could request leave either verbally or by text or WhatsApp message. The requests would be made to Mrs. Dhingra who would decide whether leave could be accommodated or not and respond by text or WhatsApp message. The Respondent used text messages to notify employees of their rotas and working times.

17. From time to time the Claimant asked the Respondent to explain how her holiday pay was calculated but the Respondent did not provide any explanation to her.
18. The Respondent admitted in evidence that its business remained open throughout the pandemic notwithstanding government-imposed periods of lockdown. The Respondent accepted that the Claimant was asked to come into work during the pandemic and received wages calculated in accordance with the furlough scheme. He confirmed that the Respondent claimed and received benefits under the Coronavirus Job Retention Scheme during this period. The Claimant worked 179 days during the periods of furlough.
19. On 12 August 2022 around lunchtime the Claimant asked Mrs. Dhingra if she could have the following day, namely Saturday 13 August 2022, as holiday because a death in the family meant that her family planned to travel to Bradford to pay their respects.
20. Mrs. Dhingra explained to the Claimant that one employee was due to be on leave that day and another had been given compassionate leave because her father had died.
21. Shortly before the salon was due to close the Claimant asked Mrs. Dhingra to let her know that evening whether she could have the Saturday off. The Claimant urged her to see whether it would be possible for her to take leave. The Tribunal finds that Mrs. Dhingra told her that she would see what she could do. Mrs. Dhingra said in evidence that she intended to check with the employee on bereavement leave whether she could work on Saturday.
22. At 19.50 Mrs. Dhingra texted the Claimant to tell her that she was unable to give her the Saturday off because “two other members of staff are not available.”
23. At 19.53 the Claimant replied, “Sorry Mona Baji I’m on the way to Bradford.” Mrs. Dhingra responded at 19.58, “This is not on. Do not come to work on Monday. Sorry.”
24. At 20.04 the Claimant said, “That’s up to you. Does this mean you are dismissing me from work?” To which Mrs. Dhingra replied at 20.06, “Yes.” At 20.07 she added, “Redundant.” At 20.08 she texted, “Not need.” At 20.09, “No on. Bad employee behaviour.” At 20.10 she asked, “Anything to say?” and then, “Call me now.” [C/29, R/29].
25. The next contact between the Claimant and Mrs. Dhingra was on 14 August 2022 when the Claimant telephoned her. The Claimant asked Mrs. Dhingra to let her know if she could come to work on Monday. It is common ground that Mrs. Dhingra did not attempt to contact the Claimant until the afternoon of 16 August 2022. The Respondent was aware that the Claimant had an appointment to receive her citizenship certificate that afternoon and had previously agreed that she could work a half day. The Claimant missed the Respondent’s call but sent a text message asking Mrs. Dhingra to call or text her the following day. [C/29/R29].

26. The Claimant sought advice from the Citizens Advice Bureau and as a result wrote to the Respondent on 24 August 2022 seeking an explanation for her dismissal [C/15]. She did not receive a response and was therefore advised to submit a letter appealing against the decision to dismiss her. That letter was dated 5 September 2022 [C/17-18] and elicited a response from the Respondent dated 14 September 2022 [C/19, R/39-40,95]. The Respondent said it strongly disagreed with the Claimant's "false claims of being made redundant and dismissed." It accused the Claimant of "bad behaviour" in taking time off work when it is not authorised and only communicating with her manager when it suited her. The letter asserted that:
- "You were asked not to come in on Monday, not from Monday. We do not need to dismiss anyone as you are fully aware that city council is closing the Victoria Centre Market and redundancy are naturally on the way very soon."
27. The Respondent asserted that the Claimant had exceeded her statutory holiday entitlement and had work performance issues. It accused the Claimant of breaching her contract of employment by leaving without giving notice."
28. The Claimant subsequently received a final pay slip dated 31 August 2022 in the net sum of £1,442.24. A sum of £50 was deducted from the Claimant's final pay slip for unreturned property.
29. Mr. Dhingra confirmed that the Respondent continues to operate. It has not been given a definitive closure date by the City Council. The Respondent employed somebody to replace the Claimant. Mrs. Dhingra accepted that the Respondent business might relocate when a closure date was confirmed but denied that any steps had been taken to secure suitable alternative premises.

## **Relevant Law and Conclusions**

### **Dismissal**

30. Section 94(1) (a) of the Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed. Section 95 sets out the circumstances in which an employee is dismissed. It includes at s.95(1)(a) where the contract under which he is employed is terminated by the employer (whether with or without notice).
31. The burden of proof is on the employee to establish that she has been dismissed. In this case that means that it is for the Claimant to prove that it is more likely than not that her contract of employment was terminated by dismissal or mutual agreement.
32. The general rule to be derived from case law is that unambiguous words of dismissal may be taken at face value without the need for any analysis of the surrounding circumstances.
33. The Tribunal finds that the text message exchange between the Claimant and Mrs. Dhingra between 20.04 and 20.06 on 12 August 2022 is unambiguous and amounts to a dismissal in law.

34. Even if recourse to the surrounding circumstances were necessary (and this Tribunal finds that it is not), the exchange between the Claimant and Mrs. Dhingra on 12 August 2022 constitutes a dismissal within the meaning of section 95(1) (a).

### Unfair Dismissal

35. Section 98 ERA deals with the fairness of dismissals. Section 98(1) requires an employer to show that the reason or principal reason for dismissal is one which falls within section 98(2) of ERA.
36. If the employer shows that it had a potentially fair reason for the dismissal, then the Tribunal must consider whether the Respondent acted fairly or unfairly in dismissing for that reason. There is no burden on either party here.
37. In this case the Respondent has identified a potentially fair reason for the Claimant's dismissal, namely a reason relating to her conduct.
38. There are well established legal principles in dealing with misconduct dismissals: ***BHS Stores Ltd v Burchell* [1978] IRLR 379; *Post Office v Foley* [2000] IRLR 287.**
39. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. The Tribunal must not substitute its view for that of the reasonable employer.
40. The Tribunal finds that the Respondent assumed that in travelling to Bradford on Friday evening when she had not been given permission to take leave on Saturday 13 August 2022 the Claimant was not intending to return to work on Saturday. The Respondent considered that this amounted to an act of misconduct which entitled it to dismiss her without notice.
41. The Tribunal finds that the Respondent through Mrs. Dhingra held a genuine belief that the Claimant was guilty of misconduct or "bad behaviour" as she put it. However, the Tribunal has concluded that at the time Mrs. Dhingra formed her belief, the Respondent had not carried out a reasonable investigation into that belief nor had it otherwise acted in a procedurally fair manner.
42. The Respondent did not ask the Claimant whether she would be attending work on 13 August 2022. It did not ask her whether she would or could return to Nottingham in time to work. The Respondent moved straight to dismissal. It did not ever provide the Claimant with an opportunity to state her case or explain her intentions.
43. The Tribunal has considered whether that decision was fair or unfair having regard to the Respondent's size and administrative resources. It has concluded that the Respondent's actions in treating the Claimant's conduct as a sufficient reason to dismiss her fell outside the band of reasonable responses of a reasonable employer. Notwithstanding its limited

administrative resources, the Respondent could have given the Claimant an opportunity to explain her intentions and state her case and any mitigation before it decided on her continued employment. It did not do so in any meaningful or reasonable way and as a result the Respondent acted unfairly in dismissing the Claimant.

### **Contributory Fault**

44. The Respondent asks the Tribunal to consider the question of whether the Claimant contributed to her dismissal.

45. Section 122(2) ERA provides:

“Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”

46. Section 123(6) of ERA provides:

“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

47. The conduct said to give rise to contributory fault is the Claimant travelling to Bradford on Friday evening when she had not received permission to take leave on the Saturday. The Tribunal does not accept that this conduct is blameworthy conduct which caused or contributed to her dismissal. The Claimant gave unchallenged evidence that she had discussed matters with her husband, and he had agreed that if she did not get permission to take leave, they would leave Bradford early in the morning on Saturday and travel back to Nottingham so that she could attend work.

48. The Tribunal has concluded that it is not just and equitable to make any reduction in either the basic or compensatory awards.

### **Polkey**

49. Having regard to the evidence of the Respondent the Tribunal has concluded that there is no basis for a finding that the Claimant would not have remained employed had she not been unfairly dismissed. The Respondent's business continues to operate and has recruited an employee to replace the Claimant.

### **Remedy: Unfair Dismissal**

#### **Basic Award**

50. The Claimant was aged 45 at the time she was dismissed. It is agreed that her gross weekly pay was £304, and her net weekly pay was £262.97 per week. Accordingly, she is entitled to a basic award of 3 x £ 304 being £912.



## Compensatory Award

51. The Claimant remained unemployed at the date of the hearing. The Tribunal noted the Respondent's submission that there are plenty of job vacancies in and around Nottingham and that the Claimant ought to find it relatively easy to obtain alternative employment.
52. The Tribunal has seen details of the Claimant's search for new employment [C/33]. It finds that the Claimant has been reasonable in seeking to mitigate her loss and obtain new employment by looking for work in her own field and in the retail sector.
53. The Tribunal accepts the Claimant's evidence that she visited her doctor as a result of stress arising from her dismissal. The Claimant has been prescribed medication and counselling and is currently unable to work.
54. The Tribunal notes the Claimant's submission that her search for new employment has been hampered by the absence of a reference from the Respondent. However, the Tribunal accepts Mr. Dhingra's evidence that the Claimant has not requested a reference from the Respondent since her dismissal.
55. The Tribunal accepts that the Claimant is a skilled Beauty Therapist. It also considers that because the beauty services market in Nottingham in which she worked is small and close-knit, it is likely that the Claimant is at a disadvantage in the labour market because the fact and circumstances of her dismissal will be known and discussed for a period of time. The Tribunal has determined that the Claimant is entitled to receive compensation from the date of her dismissal to the date of the hearing. That is  $30.5 \times \text{£}304 = \text{£}9,272$ .
56. On balance the Tribunal considers that the proposition that the Claimant is likely to need a period of six months from the date of this hearing to secure comparable employment, is reasonable. Accordingly, the Tribunal makes an award of six months pay in respect of future loss of earnings. That is  $26 \text{ weeks} \times \text{£}304 = \text{£}7,904$ .
57. The Claimant is entitled to an award in respect of loss of her statutory employment rights. The Tribunal orders a sum of £500 in compensation for that loss.

## Failure to Follow ACAS Code

58. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an Employment Tribunal may increase or decrease any compensation awarded by up to 25% where there has been an unreasonable failure to comply with any relevant provision of the Code of Practice on Disciplinary and Grievance Procedures.
59. The claim of unfair dismissal is a matter to which the Code applies. The Respondent has failed to comply with the provisions of the Code in a number of material respects.

60. The Respondent did not conduct any disciplinary process to consider the Claimant's alleged misconduct. The Respondent did not put any allegations to the Claimant. It did not carry out any investigation and it did not give the Claimant a chance to state her case before it took the decision to dismiss her. Further, it refused the Claimant an opportunity to appeal against the decision to dismiss her. The Respondent's failure to comply with the Code is flagrant and appears to have been deliberate.
61. The Tribunal has found that notwithstanding the Respondent's size and the resources at its disposal these failures to comply with the Code of Practice were unreasonable. In these circumstances the Tribunal considers that it is just and equitable to increase the compensatory award payable to the Claimant. The Tribunal has concluded that an uplift in the award of 20% is appropriate in this case.

### **Arrears of Pay, Holiday Pay, Other Payments**

#### **Arrears**

62. The Claimant originally sought payment of arrears of pay for August 2022. However, on 31 August 2022 the Claimant received a payment from the Respondent of £1,543.03 net pay. There is no evidence before the Tribunal that there are any other arrears of wages. Accordingly, the claim in respect of unpaid wages is dismissed.

#### **Holiday pay/Furlough Holiday Pay**

63. The Claimant also alleged that she had not been paid the correct holiday pay for her period of furlough. She sought a sum of £1448.95 in respect of unpaid holiday pay and furlough holiday pay.
64. In October 2022 the Claimant received a payment from the Respondent of £441.74 in respect of furlough holiday pay from 2020-2021 and 2021-2022. The Respondent explained to the Claimant how these sums were calculated in a letter dated 7 December 2022 [R79]. The Claimant's representative did not agree with the Respondent's calculations but was unable to provide a reasoned basis for disputing the sums paid or to provide the Tribunal with evidence that would have enabled an alternative calculation to be carried out.
65. Further, and in any event, it appeared to the Tribunal that the Claimant's representative was seeking to argue that because the Claimant was working when she should have been furloughed, she was entitled to receive holiday pay based on her full weekly wage rather than on her furlough wage.
66. The Tribunal finds that the Claimant received all sums properly payable under her contract of employment having regard to the operation of the Coronavirus regulations. It would be contrary to public policy for the Tribunal to reward the Claimant for working during lockdown by acceding to her claim.
67. The Tribunal accepts that there was a marked disparity in the parties' bargaining power and culpability. However, there was admitted conduct which was illegal. The Tribunal considers that conduct to be serious.

68. The Tribunal has concluded that denial of this claim would be a proportionate response to the illegality of the conduct in issue. In these circumstances the Claimant's holiday pay claim is dismissed.

**Deductions**

69. The Respondent deducted the sum of £50 from the Claimant's final pay slip. It contended that the deduction was in respect of uniform and equipment which the Claimant failed to return when her employment came to an end. The Respondent did not request the Claimant to return its property. There is no provision in the Claimant's contract of employment which entitled the Respondent to make the deduction. It is not a deduction required or authorised by statute. There is no evidence that the Claimant agreed to the deduction in writing before it was made.

70. In these circumstances the Tribunal has concluded that the deduction of £50 is an unauthorised deduction from the Claimant's wages and she is entitled to be reimbursed.

**Pension Contributions**

71. The Claimant received a letter from NEST dated 4 October 2022 which advised her that the Respondent had failed to pay employer pension contributions for the period 29 May-28 June 2022 [C/65]. As a result, NEST had reported the Respondent to the Pensions Regulator. The Claimant sought payment of £77.54 being the value of employer pension contributions for that period.

72. The Respondent presented an email dated 8 November 2022 from its accountants, M Aslam Accountants, which stated that the NEST payments for the Claimant were up to date.

73. The Tribunal accepted that the arrears of employer pension contributions in respect of the Claimant had been addressed by the Respondent. In any event the contributions are due to NEST rather than to the Claimant herself.

Employment Judge **Omambala KC**

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Date 29 March 2023