Claim number 2409605/2022

EMPLOYMENT TRIBUNALS

Claimant: Amanda Carnegie

Respondent: Valves and Engineered Products Limited

Heard at: Manchester **On:** 20 & 21 March 2023

Before: Employment Judge Rhodes

Representation
Claimant: Alan Derby
Respondent: Matthew Gresty (of the respondent)

JUDGMENT

1. The claim for a statutory redundancy payment is well founded and succeeds. The respondent is ordered to pay £6,665.

2. The complaint of unfair dismissal is well founded and succeeds. The respondent is ordered to pay a compensatory award of £2,762.58. No basic award is made because of the award of a statutory redundancy payment.

3. The complaint of unauthorised deductions from wages is well founded and succeeds. The respondent is ordered to pay £1,800 (gross).

REASONS

Introduction and issues

1. It was not the role of the Tribunal to determine a dispute between Mr Derby and Mr Gresty concerning the sale of the respondent. There clearly is a dispute about what may or may not have been disclosed during pre-sale negotiations but that was not the issue before the Tribunal. Insofar as that needs to be resolved, it is a battle for another day in a different forum between different parties.

2. The claim before the Tribunal was the claimant's claim against the respondent. She complained of unfair dismissal, unauthorised deductions from wages and a redundancy payment.

3. In deciding that claim, the only points of contention were:

    a. who was the claimant's employer? Was it the respondent, as she claims, or was it Total Technology (Northern) Limited ("Totec"), as the respondent claims?
    b. was the claimant paid her wages for the weeks ending 30th October and 6th November 2022 and, if not, who is liable to pay her? It is not disputed that she ought to have been paid by one company or the other for those two weeks;
    c. finally, if the claimant was employed and dismissed by the respondent (as opposed to Totec), was her dismissal by reason of redundancy and was it fair? It is not disputed that her services were dispensed with on 4th November 2022.

4. On behalf of the claimant, I heard evidence from the claimant herself, Alan Derby (formerly a director and shareholder of the respondent) and Jim Derby (Alan Derby's son). The claimant had also produced a witness statement from Gerald Walker (the respondent's former accountant) but he did not attend to give in person and the respondent would have challenged his evidence if he had attended so I did not attach a great deal of weight to his evidence as a consequence.

5. The respondent had not prepared any witness statements but I allowed its current director, Matthew Gresty, to give evidence on its behalf and a treated a letter he had written to the claimant on 15th November 2022 as his evidence in chief. The claimant, via her representative, did not object to this.

6. Each party had produced its own set of documents for the hearing but, as the total number of documents involved was small, and all parties had copies of everything before me, I decided that it was manageable to proceed without a single agreed bundle and that it was in keeping with the overriding objective to do so.

7. At the outset of the hearing, Mr Gresty challenged whether it was appropriate for Mr Derby to represent the claimant because of a conflict of interest. His contention was that Dr Derby had a commercial interest in the claimant's establishing that she was employed by the respondent, not Totec. The claimant indicated that she was happy for Mr Derby to represent her and that his position aligned with hers, namely that she was employed by the respondent, not Totec. Mr Derby is not a lawyer and does not have the same duties to the claimant that a lawyer would. Ultimately, it was a matter for claimant to choose her representative and she wanted Mr Derby to represent her and that is how the matter was left.

Law

8. Section 1 Employment Rights Act 1996 ("ERA") provides that an employer must provide to an employee a written statement of employment particulars which must specify, amongst other information, the name of the employer (s1(3)(a)) and the date on which the employer's continuous period of service began (s1(3)(c)).

9. Section 13 ERA confers upon workers the statutory right not to suffer unauthorised deductions from wages, the definition of which in s27 ERA includes holiday pay.

10. Section 98 ERA provides:

"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—…

(c)is that the employee was redundant…

(4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case."

11. Section 139 ERA provides:

    "(1)For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

    (a)the fact that his employer has ceased or intends to cease—

    (i)to carry on the business for the purposes of which the employee was employed by him, or

    (ii)to carry on that business in the place where the employee was so employed, or

    (b)the fact that the requirements of that business—

    (i)for employees to carry out work of a particular kind, or

    (ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

    have ceased or diminished or are expected to cease or diminish."

12. The leading case on reasonableness in relation to redundancy dismissals is the decision of the House of Lords in **Polkey v A E Dayton Services Ltd [1987] IRLR 503**. An employer will not normally act reasonably unless it: (1) warns and consults employees, or their representative(s), about the proposed redundancy; (2) adopts a fair basis on which to select for redundancy by identifying an appropriate pool from which to select potentially redundant employees and selecting against proper criteria; and (3) considers and offers (if available) suitable alternative employment.

13. *Polkey* is also authority for the proposition that a compensatory award may be reduced to reflect the chance that an unfairly dismissed employee would have been dismissed in any event. When making a so-called *Polkey* reduction, the Tribunal must assess the chance that the actual employer, not a hypothetical reasonable employer, would have dismissed the employee in any event. This requires consideration of the employer's likely thought processes and the evidence that would have been available to it.

Findings and conclusions

Who was the employer?

14. In addressing this point, it is necessary to describe briefly the relationship between the respondent and Totec. They are both companies which were under the control of Mr Derby until the respondent's entire issued share capital was sold to a company under Mr Gresty's control with effect from 29th September 2022. Mr Derby continues to control Totec.

15. The respondent manufactures and supplies valves and other engineered products. Totec is a management consultancy and employment agency which operates in a similar industry to the respondent.

16. The claimant's written statement of employment particulars dated 2nd April 2018 states that the respondent was her employer and had been since 4th February 1994. That is the document which the claimant said (and I accepted, there being no evidence to the contrary) was still in force at the point at which the respondent was sold. If that had been the only document before me, that would have put the matter entirely beyond dispute.

17. However, it was common ground that the claimant's wages were paid by Totec and that, for tax and auto-enrolment pension purposes at least, Totec was her employer. It was this that gave rise to the dispute. The claimant's case was that the respodnent's payroll software did not have a weekly pay function and, as she was accustomed to receive her wages weekly, her pay was administered by Totec which re-charged the cost to the respondent. There were two other weekly-paid staff and they each had the same arrangements. Two monthly-paid employees were on the respondent's payroll and the respondent accepted that they were its employees.

18. The claimant's case is that this was a wholly administrative matter and that the substance of the relationship between her and the respondent was as employee and employer, as stated in the statement of employment particulars. Her evidence was that she had only ever performed duties for and at the behest of the respondent.

19. The respondent's case, on the other hand, was that the claimant was an agency worker employed by Totec and supplied by Totec to the respondent. Mr Gresty's evidence was that he had been told, during pre-sale due diligence, that the respondent had two employees (the two monthly-paid staff referred to above) and engaged three agency workers (the claimant and the two other weekly paid staff) but he did not produce any documentary evidence to support this.

20. I preferred the claimant's case on this point for the following reasons:

    a. I attach significant weight to the written statement of employment particulars. It is a legal requirement under s1 ERA 1996 for an employee to be provided with a written statement which confirms, amongst other things, the name of his/her employer. Whether or not Mr Gresty was supplied with a copy of that document before or after the purchase is relevant only to a dispute between him and Mr Derby.
    b. At the time that document was issued, the claimant was being paid via Totec and, if it had been the case that the claimant was employed by Totec and supplied to the respondent, the statement of particulars would legally be required to reflect that.
    c. The contract is also consistent was the claimant's own evidence about her role and duties.
    d. The explanation for why the claimant was paid by Totec is a plausible

one and is consistent with arrangements in place with the other two weekly-paid staff. To put it another way, there was no evidence before me that the respondent had any weekly staff which it was able to pay through its payroll software.

e. This arrangement is also consistent with what happened in the weeks after completion of the purchase of the respondent. It is common ground that transfer of control of the respondent's bank accounts lagged behind legal completion of the purchase and that Mr Derby continued to have a role in administering those accounts and processing payroll payments. For the first three weeks of October 2022, during this interim period, the claimant continued to receive her wages from Totec but Mr Gresty's business (Georgian Gates) financed this.
f. On 31st October 2022, Mr Derby asked Mr Gresty whether he was in a position to take over the processing of the respondent's payroll for the claimant and the two other weekly-paid staff. Mr Gresty replied "*we will be doing the wages this week, please can you send over the P45s*". This would have been an obvious opportunity for Mr Gresty to challenge the claimant's status but he did not do so. I agree with Mr Derby's interpretation of Mr Gresty's response, namely that Mr Derby/Totec was to have no further involvement in paying the claimant.
g. Consistent with this interpretation, Totec issued the claimant with a P45 which stated that her leaving date was 21st October 2022. Totec did not make any further payments to the claimant after this date.
h. The claimant continued to work as normal between 21st October and 4th November 2022 and Mr Gresty accepts that she was entitled to be paid by someone for those two weeks. His evidence was that Mr Derby/Totec had continued to pay the claimant for those two weeks but that is contradicted by both the content of the 31st October email and the fact that the claimant's Totec P45 was dated 21st October 2022. If Totec had continued to pay the claimant until 4th November 2022, her P45 would have reflected that.
i. Mr Gresty places much reliance on the pre-sale due diligence disclosure which refers to two employees (the two monthly-paid staff) being in the respondent's auto-enrolment pension scheme but that disclosure appears only to be directed at the number of the respondent's *pensionable* employees (which is not necessarily the same as its total workforce) and is not inconsistent with the claimant's case that she was on Totec's books only for administrative purposes. Insofar as weight can be attached to that disclosure, it is far less weighty than the claimant's written statement of employment particulars and her own evidence.
j. I was not convinced by Mr Gresty's interpretation of the summary of weekly payments made to the claimant as being suggestive of an 'as and when needed' agency staff arrangement. For the most part, they show that the claimant was paid for three days per week @ £120 per day, as per her statement of employment particulars. Although there were weeks when she was paid for only two days per week, her statement of particulars also states that she works "flexi-time". In any event, Mr Gresty did not put this interpretation to the claimant during cross-examination.

21. In reaching these conclusions, I do not find that Mr Gresty was dishonest about

anything (as Mr Derby invited to me to find). I think Mr Gresty genuinely but mistakenly believed that the claimant was not employed by the respondent and some element of confusion is understandable given that Totec did pay her wages and administer her pension. However, whatever impression Mr Gresty may have formed during the due diligence process does not change what I find to be the reality of the situation, namely that the claimant was employed by the respondent.

Deductions from wages

22. For the reasons set out above, I find that:

    a. The claimant was entitled to be paid for her two weeks' work between 21st October and 4th November 2022
    b. She was not paid for that work
    c. The respondent is liable to pay her for that work.

Unfair dismissal

23. It was not disputed that Mr Gresty, acting on behalf of the respondent, dispensed with the claimant's services with effect from 4th November 2022.

24. It is clear that Mr Gresty did not need the claimant's services any longer and that might therefore have been a potential redundancy situation but he did not have that specifically in mind at the time. He (wrongly) believed that she was employed by Totec and that he was at liberty to end her engagement at any time. That is not a potentially fair reason for dismissal under s98 ERA.

25. However, even if redundancy had been the reason, there was no prior warning and no consultation with the claimant. There was no selection process or consideration of alternative employment.

26. Her services were summarily dispensed with. That was undoubtedly a dismissal and, in the absence of any sort of process, that dismissal was unfair. Indeed, Mr Gresty did not seek to argue that there was a fair process (his case solely relied on his contention that the respondent was not the claimant's employer).

Redundancy payment

27. Mr Gresty's evidence was that, having reviewed the respondent's financial position in the weeks immediately after purchase, it could not afford to retain the claimant in the business. In answer to my question about what would have happened if he had accepted at the time that the respondent had five staff and not the two staff he believed it to have, he said that there would have been a redundancy exercise.

28. For the purposes of a redundancy payment claim under Part XI ERA 1996, "*an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to [amongst other things] the fact that the requirements of the business for employees to carry out*

work of a particular kind had ceased or diminished."

29. That is the situation here and I found that the claimant was entitled to a redundancy payment.

Remedy issues

Unauthorised deductions from wages

30. It was accepted that the claimant had worked six days between 21st October and 4th November 2022. Her daily rate was £120 (gross). Six days' pay is therefore £720 (gross).

31. In addition, the claimant's unchallenged evidence was that she had accrued nine days' untaken holiday, based on statutory entitlement. She is entitled to be paid in lieu of that untaken holiday. Nine days' pay @ £120 per day is £1,080 (gross).

32. Accordingly, the total amount due to her under this heading is **£1,800** (gross).

Statutory redundancy payment

33. There was a dispute between the parties as to the length of the claimant's continuous service. The claimant's evidence was that she had been continuously employed since 1994. This was consistent with her statement of employment particulars which recorded her continuous start date as being 4th February 1994.

34. Mr Gresty challenged this and asserted that the claimant had had a break in service and had only been continuously employed since 2018. The claimant's evidence in response was that her only breaks had been for maternity leave around the time of the births of her two children (born on 9th February 2015 and 29th January 2016 respectively) and that she had not taken anything longer than her statutory entitlement. If either of those periods of maternity leave had exceeded statutory entitlements and broken her continuity of service, this would have been reflected in the April 2018 statement of employment particulars, which was created after the birth of the claimant's second child but which still recorded 4th February 1994 as her continuous start date.

35. The difficulty for Mr Gresty (as with much of the respondent's case) was that he did not adduce any evidence to support his contention and I therefore accepted the claimant's evidence on this point.

36. Given that a woman's contract of employment continues throughout statutory maternity leave (s71(4) ERA and Regulation 9 Maternity and Parental Leave etc Regulations 1999), I found that the claimant had been continuously employed since 4th February 1994, as recorded in her statement of employment particulars.

37. Accordingly, for the purposes of calculating the claimant's statutory redundancy

payment, she was entitled to the maximum 20 years' service.

38. The claimant was 44 years old when her employment ended.

39. In her final 12 weeks of employment earned £3,720 (including the £720 awarded in respect of her final two weeks) at an average of £310 per week. This is one week's pay for the purposes of s224 ERA.

40. Pursuant to s162(2) ERA, the claimant is entitled to one week's pay for each of the 17 years that she worked under the age of 41 and 1½ weeks' pay for each of the three years that she worked aged 41 or over, amounting to 21½ weeks' pay @ £310 = **£6,665**.

Unfair dismissal

41. The claimant was not seeking re-engagement or reinstatement.

42. The claimant's entitlement to a basic awarded is reduced to nil by the award of a statutory redundancy payment (s122(4)(a) ERA).

43. The claimant's average net weekly pay with the respondent was £294. The claimant started new employment on 15th February 2023. During the period between her dismissal and starting new employment, she suffered loss of earnings of £4,321.80.

44. In her new employment, the claimant is earning an average of £180 net per week, resulting in a loss of £104 (£294 – £180) per week.

45. Between 15th February 2023 and the hearing, the claimant has suffered further financial loss of £503.36.

46. It would not be just and equitable to award the claimant losses beyond the remedy hearing. Nearly five months have passed since her employment ended which is a sufficient period of time for her to have fully mitigated her losses.

47. The total of the claimant's financial loss attributable to the dismissal is therefore £4,825.16 (£4,321.80 + £503.36).

48. I accepted Mr Gresty's evidence that, if he had known that the claimant was employed by the respondent at the time, a redundancy process would have been highly likely. Given that no redundancy process of any sort was carried out, or even conceived of, there is no basis to assume that the claimant would inevitably have been dismissed as a consequence of such a process. However, it be equally unrealistic to expect that she would definitely not have been made redundant given that the respondent had swiftly formed the view after completion of the purchase that it no longer required the claimant's services. When making a *Polkey* reduction, the Tribunal must assess the chance that the actual employer, not a hypothetical reasonable employer, would have made the employee redundant.

49. It would therefore be just and equitable to make a *Polkey* reduction to the claimant's financial losses. I assessed the amount of that reduction to be 50% which is reflective of the uncertainty of knowing what the outcome of a putative redundancy exercise would have been.

50. The reduces the amount of her financial loss claim to £2,412.58.

51. In addition to this, the claimant is entitled to compensation for the loss of her statutory rights in the sum of £350.

52. This gives a total for the compensatory award of **£2,762.58**

Tabular summary of the awards made to the claimant

Heading	**Amount**
Statutory redundancy payment	£6,665.00
Unpaid wages	£720.00
Holiday pay	£1,080.00
Financial losses (after *Polkey* reduction)	£2,412.58
Loss of statutory rights	£350.00
Total	**£11,227.58**

Employment Judge Rhodes

28th June 2023

WRITTEN REASONS SENT TO THE PARTIES ON

6 July 2023

FOR EMPLOYMENT TRIBUNALS