



EMPLOYMENT TRIBUNALS

Claimant: Mrs Jade Parry
Respondent: The Crispy Cod Ketley Ltd
Heard at: 10:00 am
On: 29 June 2023
Before: Employment Judge Wright

Representation

Claimant: Mrs J Hayward (the Claimant's mother)
Respondent: Did not attend

JUDGMENT having been sent to the parties following the hearing on 29 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 (“ET Rules”), the following reasons are provided:

REASONS

Summary of the claim

1. The Claimant brought a claim dated 26 January 2023 in the Midlands West Employment Tribunal for unfair dismissal, wrongful dismissal, failure to provide itemised pay statements, unlawful deduction of wages including holiday pay, and failure to provide a statement of employment particulars.
2. The Respondent did not submit a response, did not participate in the preparation of the case for hearing, and did not attend the hearing.
3. The Claimant attended the hearing, which was in person at Midlands West Employment Tribunal, and was represented by her mother.
4. Claimant had prepared a paper bundle (‘the Bundle’) which she had sent to the Respondent and which she attended the tribunal with on the morning of the hearing.

5. The Claimant had prepared a written witness statement as had Mr Singh-Heer, who also attended in person to give evidence on behalf of the Claimant.

List of Issues

6. The issues to be determined by the Tribunal were as follows:

Unfair dismissal

7. Was the Claimant dismissed?
8. If the Claimant was dismissed what was the reason or principal reason for dismissal?
9. Was it a potentially fair reason?
10. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

Remedy for unfair dismissal

11. Does the Claimant wish to be reinstated to their previous employment?
12. Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?
13. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
14. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
15. What should the terms of the re-engagement order be?
16. If there is a compensatory award, how much should it be? The Tribunal will decide:
17. What financial losses has the dismissal caused the Claimant?
18. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
19. If not, for what period of loss should the Claimant be compensated?
20. 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?
21. If so, should the Claimant's compensation be reduced? By how much?
22. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
23. Did the Respondent or the Claimant unreasonably fail to comply with it?
24. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

25. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
26. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
27. What basic award is payable to the Claimant, if any?
28. 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 extent?

Wrongful dismissal / Notice pay

29. What was the Claimant's notice period?
30. Was the Claimant paid for that notice period?
31. If not, was the Claimant guilty of gross misconduct? / did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Holiday Pay (Working Time Regulations 1998)

32. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?
33. How much holiday had the Claimant accrued during the period of her employment?
34. How many days remain unpaid?
35. What is the relevant daily rate of pay?

Unpaid Wages

36. How much pay (if any) is outstanding to be paid to the Claimant?

Itemised payslips

37. Did the Claimant receive itemised pay statements?
38. If not, should any award be made under section 12 (4) of the ERA in respect of any unnotified deductions?

Written statement of terms and conditions.

39. Did the Respondent provide the Claimant with a written statement of terms and conditions?
40. If not, what is the appropriate award for the tribunal to make (either 2 or 4 weeks' gross pay).

Relevant Law:

Unfair dismissal

41. The relevant sections of the ERA the Tribunal considered were as follows:
42. Section 95 of the ERA 96 confirm the circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice).

43. Pursuant to section 94 Employment Rights Act 1996 ('ERA') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with section 98 ERA: (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.

44. Section 98 ERA:

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment...

(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.

Notice pay

45. Section 86 of the ERA 96 sets out the rights of employer and employee to minimum notice.

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously

employed for one month or more—

- (a) is not less than one week's notice if his period of continuous employment is less than two years,
- (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
- (c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

Unpaid Wages Claim – Part II ERA 96 section 13.

46. Section 13 ERA provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

47. "13. Right not to suffer unauthorised deductions.

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

48. Section 23 ERA provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to section 13.

Holiday pay

49. Article 7 of the Working Time Directive (WTD) provides that each member state must ensure that every worker is entitled to paid annual leave of at least four weeks.

50. In England and Wales, workers have a right to a minimum of 5.6 weeks' paid annual leave under the Working Time Regulations 1998 (SI 1998/1833) (WTR) 33.

51. WTR 1998 also give a worker the right to bring a claim:

- (a) That the employer has prevented them exercising the right to take annual leave under regulation 13 or 13A (regulation 30(1)(a), WTR 1998).
- (b) That the employer has failed to pay them for annual leave taken accordance with regulation 16 (regulation 30(1)(b)).
- (c) That the employer has failed to pay them in lieu of untaken leave following termination of employment in accordance with regulation 14(2) (regulation 30(1)(b)).

Failure to provide a pay statement.

52. Section 11 of the ERA 96 states that where the employer fails to give a pay statement or gives one that does not provide the required information, an aggrieved worker can refer the question to an employment tribunal to determine what the statement should have contained.

53. Section 12 (3) ERA states:

Firstly if the employer has failed to provide a pay statement or if the pay statement or standing statement does not contain the required information, then the tribunal must make a declaration to that effect.

54. Section 12 (4) of the ERA 96 states:

Secondly, the tribunal may (but is not obliged to) make a financial award to the employee if any un-notified deductions have been made from the worker's wages in the 13 weeks immediately preceding presentation of the claim, albeit any financial award cannot exceed the aggregate of the un-notified deductions.

55. An employee is entitled to bring a complaint to an ET about a breach of both ERA 1996 s 13 (unauthorised deductions) and ERA 1996 s 8 (itemised pay statements).

56. However, whilst a worker can complain to the tribunal about both these matters, double recovery is not possible. Under ERA 1996 s 26 the aggregate of any amounts ordered to be paid under s 12(4) and under s 24 may not exceed the amount of the actual deduction.

Failure to give statement of employment particulars

Section 38 Employment Act 2002

57. (1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

58. (2) If in the case of proceedings to which this section applies—

- (a) the employment tribunal finds in favour of the worker]... and

- (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars...

59. the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

60. (4) In subsections (2) and (3)—

- (a) references to the minimum amount are to an amount equal to two weeks' pay, and
- (b) references to the higher amount are to an amount equal to four weeks' pay.

Summary of the evidence and finding of facts

61. The Claimant attended to give evidence as did Mr Singh-Heer. Both witnesses' evidence was uncontested, and the Respondent did not attend the hearing. I considered the evidence given both in written statements and sworn oral evidence. I considered the ET1 together with relevant documents pointed out to me in the hearing bundle. I made the following findings of fact:

Relevant finding of fact

Claimant's evidence

62. The Claimant was employed by the Respondent (a family-run business) from 23 September 2020 to 21 October 2021 and worked regular shifts of 23 hours per week over 5 days a week – Monday, Wednesday, Friday, Saturday and Sunday.

63. During the Claimant's shift on 19 October 2022, she raised issues regarding some chicken not being completely cooked and this led to a dispute with Miss Georgia Heer (Miss Heer), who argued that it was.

64. The Claimant carried on working her shift but stayed out of the way and then arranged for a colleague to cover her shift the following day.

65. The Claimant had not originally been due to work a shift the following day, but had agreed to cover for another colleague because it was that colleague's daughter's birthday. Owing to the disagreement the day before, the Claimant was concerned about working this shift as no other employees outside of the family members were going to be present.

66. The Claimant was contacted by Miss Heer on 21 October at 11.25 am asking her to ring ASAP. The Claimant was working her day job at the time, which she did not finish until 3 pm.

67. At 11.48 am on 21 October 2022, the Claimant received a text message (included in the Bundle) suggesting that Miss Heer didn't like the way this was going and did not want a big fall out, so it was best that the Claimant did not return to work.

68. The Claimant received very abusive messages after the above texts from Miss Heer, in which Miss Heer used extremely aggressive language, including expletives. As a result, the Claimant did not feel able to return to the shop to return her uniform and collect her wages.
69. The Claimant blocked Miss Heer following these messages and Mr Singh-Heer dealt with the return of the Claimant's uniform and the obtaining of her wages.
70. Owing to the abusive messages received following her dismissal, the Claimant felt unsafe raising anything further with the Respondent regarding her dismissal.

Failure to provide itemised pay statements

71. The Claimant was not provided with a breakdown of her wages and deductions made from these, which made it difficult to understand how her wages had been calculated and what deductions had been made.

Unauthorised deductions of wages

72. From February 2022 the Claimant's wages were changed from being paid fortnightly to being paid monthly.
73. She received part payment in cash and part-payment by bank transfer.
74. She was paid £9.50 gross an hour and had been informed by the Respondent that there was a 50p deducted that had been made for NI and tax from the part of her wages that were paid in cash, so she received £9 per hour net pay.
75. The Claimant confirmed a shortfall of £126.00 in her wages (after deductions for tax and NI) in her October pay and also of 14 hours pay in November, which equates to £133 gross based on £9.50 per hour.
76. The Claimant's evidence as set out above was accepted.

Holiday Pay

77. The Claimant was able to mark days off as holiday, but she was not paid for these. She had been informed by Mr Karl Singh-Heer (of the Respondent) that he did not pay holidays.
78. When questioned by me, the Claimant confirmed that there were no discussions to indicate that her wage included an element of holiday pay and, in any event, I noted that her wages were at national minimum wage, so it would not be possible that these were intended to include any element of holiday pay.

Statement of employment particulars

79. The Claimant was not provided with a statement of employment particulars.

Remedy for unfair dismissal

80. The Claimant is a single parent with a mortgage to pay and she relied on her second job to meet this.
81. She has been looking online every 2 days for work including on the "Indeed" website and in the local papers.
82. She has looked at a cleaning job with the company she is employed with in the day, but she needs the hours to fit around when she has childcare and the hours available were on different days to those that she worked for the Respondent, so she was unable to do these. Other roles have clashed with hours that she already works.
83. The Claimant has tried picking up cleaning hours and also enquired about work in her local chip shop, but the hours that she is available have not been compatible; these have not been the same days as she worked for the Respondent.
84. The Claimant relies on family members for childcare and the hours need to therefore be compatible with when this can be provided.
85. The above evidence was accepted.

Mr Singh-Heer's witness evidence

86. Mr Singh-Heer is the son of the Respondent, a family-owned business. He worked in the shop when he was not at university and is also the Claimant's partner. Mr Singh-Heer had been sent text messages and left voicemails by Miss Heer concerning the Claimant and the events on 19 October 2022 leading to the Claimant's dismissal on 21 October 2023.
87. He had received abusive voicemail messages regarding the Claimant from his sister, Miss Heer, on 21 October 2022 and at other dates. He had informed Miss Heer that enough was enough and had stepped in to return the Claimant's uniform and collect her wages so that she did not have to return to the shop.
88. Mr Singh-Heer's evidence supported the Claimant's account of events.
89. Mr Singh-Heer confirmed holiday pay was not paid by the Respondent.
90. Mr Singh-Heer's evidence was consistent with the Claimant's, and the documentary evidence provided in the Bundle and the above evidence was accepted.

Conclusion

Unfairly dismissal

91. Based on the above findings of fact, I find that the Claimant was dismissed, and that the Respondent had failed to discharge its burden to show a fair reason for the Claimant's dismissal that falls within section 94 of the ERA. As such I found that the Claimant had been unfairly dismissed.

92. Based on the above findings of fact, I find that the Claimant was dismissed, and that the Respondent had failed to discharge its burden to show a fair reason for the Claimant's dismissal that falls within section 94 of the ERA. As such I found that the Claimant had been unfairly dismissed.

93. The Respondent failed to provide a fair reason for the Claimant's dismissal at the time of the dismissal, and did not follow a fair procedure in dismissing her by doing so via text message. Further, the Respondent behaved in such a way following the dismissal text message, that the Claimant was unable to raise with them the fairness of her dismissal.

Remedy

94. In the circumstances, the Claimant was claiming compensation only and I found it was not appropriate to order either re-instatement or re-engagement.

95. I found that the Respondent had failed to follow the ACAS code of conduct and considered that in the circumstances, it was appropriate to award a 25% uplift to the compensation element of the award.

96. I found that the Claimant had taken sufficient steps to try and mitigate her losses. I therefore made an award up to the date of the hearing (9 June 2023), but no future award of losses.

Wrongful Dismissal

97. I found that the Claimant had been dismissed without being provided with any notice and accordingly found that she had been wrongfully dismissed.

98. Based on the Claimant's length of employment with the Respondent, she was entitled to 2 weeks' notice and, an award of 2 weeks' wages was made. This has been set off against the sums awarded to the Claimant under her claim for unfair dismissal to avoid a double recovery over the same period of loss.

99. In addition, the Claimant would have accrued holiday pay over her notice period, had she been given notice. An additional 15.2 hrs = £144.40 of holiday that would have accrued over this period has been added to the sum awarded for holiday pay.

Unpaid Wages Claim – Part II ERA Section 13

100. I found that the Claimant had suffered unlawful deductions to her wages of £133 gross pay in her October pay and 14 hours pay in November, which again equates to £133 gross pay (based on £9.50 per hour).

Holiday Pay

101. I found that that the Claimant was not able to take paid holiday over the course of her employment. Her statutory entitlement, based on 23 hours at £9.50 per hour over 5 shifts a week was 5.6 weeks leave per annum under the WTR 98. As she had been prevented from taking this leave for 2 years, her entitlement was to 5.6 weeks leave x 2 years = £2,447.20 as set out in the Judgment sent to the parties following the hearing on 29 June 2023.

102. The addition of holiday that would have accrued over the Claimant's notice period, had she been provided with this (from 23 September to 4 November)

which equated to an additional 15.2 hours = £144.40 was added and a total sum of £2,591.60 awarded.

Statement of employment particulars

103. I found no written particulars of employment had been provided and that it was just and equitable in all the circumstances to award the higher amount of 4 weeks' wages.

Declaration statement of pay

104. The Claimants were not provided with itemised pay statements in accordance with their rights under section 8 of the Employment Rights Act 1996. Such pay slips should have included details regarding their hours worked, hourly rate of pay and total gross and net pay for the relevant periods. The tribunal makes no award.

105. I declined to make an award under section 12 (4) because it is clear under section 26 that if a complaint is made under both section 12 and 24 in respect of the same deduction that double recovery is not possible. It is correct that a declaration should be made but the deduction here has been covered under the unlawful deduction of wages claim above and there is no discretion to make a further award.

106. The amounts awarded are as set out in the judgment sent to the parties following the hearing on 29 June 2023.

Employment Judge Wright

Dated 29 August 2023