Case Number: 2301968/2021

THE EMPLOYMENT TRIBUNAL

Claimant: **Miss Z. Carty**

Respondent: **Razors and Blades Limited**

Heard at: London South Employment Tribunal (by CVP)

On: 13 October 2023

Before: Employment Judge A. Beale

Representation
Claimant: In Person
Respondent: Mr M. Kaye, Development Operations Manager

JUDGMENT

The judgment of the Tribunal is that:

1. **The Tribunal has jurisdiction to consider the Claimant's complaints of unfair dismissal, wrongful dismissal, unauthorised deductions from wages (including failure to pay holiday pay) and those complaints are well founded.**

2. **The claim for a redundancy payment fails and is dismissed.**

3. **In respect of the claim for unfair dismissal, the Respondent shall pay to the Claimant the gross sums of:**
(a) a basic award of £104.64;
(b) an award in respect of loss of statutory rights of £52.32
(c) a compensatory award of £1,255.78 in respect of the period from 5 August 2020 to 15 January 2021,
from which any tax payable will fall to be deducted.

4. **In respect of the claim for wrongful dismissal, the Respondent shall pay to the Claimant the gross sum (from which any tax payable will fall to be deducted) of £104.64, equating to two weeks' pay, which is already included in the compensatory award set out at 3(c) above and therefore need not be paid separately.**

5. **The Respondent failed to pay the Claimant her wages for the period of**

23 March to 4 August 2020, and shall pay the gross sum of £1005.09 in respect of that period, from which any tax payable will fall to be deducted.

6. **In respect of the claim for holiday pay, the Respondent shall pay the Claimant the gross sum of £331.81, from which any tax payable will fall to be deducted.**

7. **The total amount payable to the Claimant under this judgment is therefore the gross sum of £2,719.64, from which any tax payable will fall to be deducted.**

8. **The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the award made under section 123 ERA 1996. The total monetary award made to the Claimant is £2,719.64 (gross). The prescribed element is £1,225.78 (gross). The dates of the period to which the prescribed element is attributable are 5 August 2020 to 15 January 2021. The monetary award exceeds the prescribed element by £1,493.86.**

REASONS

1. Reasons for the judgment were given orally on the date of the trial, but the parties having requested written reasons in accordance with rule 62(3) of the Employment Tribunal Rules, these are duly provided below.

Introduction

2. The Claimant brings claims for unfair dismissal, redundancy pay, wrongful dismissal, arrears of pay and arrears of holiday pay. Her claim was submitted on 2 June 2021.

The Respondent's position: Rule 21

3. The Respondent has not submitted an ET3. The Respondent did attend the hearing on 13 October 2023; however even at that stage, no ET3 had been submitted, and no application for an extension of time to do so had been made.

4. The Respondent was informed of the claim against it at the latest at the Preliminary Hearing held on 20 July 2022, following which the ET1 was served on the Respondent's correct address on 18 August 2022.

5. Although Mr Kaye who represented the Respondent, initially told me that he had not received this email, on viewing the file it was apparent that he had, because he wrote to the Claimant later that day, incorporating the email from the ET, to ask her to provide him with any information she had about the claim. The Claimant promptly provided him with her documents at 20:40 on the same day, but neither Mr Kaye nor anyone else from the Respondent corresponded further with the Claimant or the ET.

6. Mr Kaye could not explain this, save to say that he thought that everything would be dealt with at the ET hearing. I do not accept this is a reasonable explanation. The correspondence from the ET was very clear that the Respondent needed to file a response and this was also canvassed at the Preliminary Hearing in July 2022. Despite further correspondence from the ET, the Respondent has not done so at any stage.

7. Under rule 21(3) of the 2013 Employment Tribunal Rules, where no response has been entered, a Respondent shall only be entitled to participate in any hearing to the extent permitted by the Judge.

8. I considered the above circumstances carefully and concluded that, where no response had been entered and there had been no application for an extension, although the Respondent was clearly aware of the claim and the requirement for a response, and where the claim had been on foot for over two years, the Claimant would be significantly prejudiced by the introduction of a defence at this stage. I did not consider it appropriate to delay the hearing yet further. I therefore decided under rule 21(3) that the Respondent should not be permitted to participate in the hearing.

9. For completeness, I should add that Mr Kaye provided, on the morning of the hearing, a small number of documents and a "witness statement". I did read these documents during the course of the hearing. I noted from the "witness statement" that Mr Kaye himself had no involvement in the Claimant's employment or the termination thereof. I further noted that Mr Kaye had been unable to contact the Claimant's manager who effected the termination of her employment, and that his (necessarily hearsay) account of what had happened was contradicted in important respects by the clear documentary evidence produced by the Claimant.

10. Since providing my oral judgment, my attention has been drawn to the case of *Office Systems Equipment Ltd v Hughes* [2019] ICR 201. Based on my review of that case, I would be open to an application from the Respondent to reconsider my decision not to allow its participation in the hearing <u>insofar as remedy is concerned only.</u>

<u>The Issues</u>

11. The issues I had to determine were:

    (a) Whether the Claimant's claims had been submitted within the time limit and if not, whether time should be extended.

    (b) If I determined that the ET had jurisdiction to hear the claims, whether:
        i. the Claimant was unfairly dismissed;
        ii. the Claimant was entitled to a redundancy payment;
        iii. the Claimant was wrongfully dismissed;
        iv. the Claimant was owed arrears of pay;
        v. the Claimant was owed holiday pay (and if so, how far back that claim could extend).

    (c) What remedy (if any) the Claimant is entitled to.

Evidence and Documents

12. I heard evidence from the Claimant and had regard to the documents she had sent to the ET, which were held on the ET file.

Findings of Fact

13. The Claimant was employed by the Respondent, which is a hairdressing business, from 26 September 2017. She worked as a cleaner in the evenings, for 2 hours per day for 3 days per week (6 hours per week). Whilst I understand there had been some suggestion that the Claimant was not an employee from her line manager at around the time she ceased to work, it appears clear from her contract that she was an employee of the Respondent. She was paid the minimum wage, rising each year, for her hours of work.

14. On 23 March 2020, the Claimant's manager texted her to say that the shop was closed until further notice due to the Covid 19 pandemic. She was told she did not need to clean unless otherwise instructed.

15. Shortly thereafter, the Claimant was told that she could not be paid until 1 April 2020 owing to the financial impact on the business of Covid-19. The Claimant was paid up to 23 March 2020 on 1 April 2020.

16. On or around 3 April 2020, the Claimant asked whether the Respondent would be using the CJRS for subsequent payments. The Respondent informed her that they were looking into government support but recommended that the Claimant apply to her local council. The Claimant made further contact with the Respondent attempting to clarify the situation. On 9 April, the Claimant asked whether she could have a letter outlining her employment situation. On 23 April she asked if she was on the furlough scheme but had no response.

17. On 11 July 2020, the Claimant's manager asked if she could return to work from Tuesday, and sent subsequent messages trying to get in touch with the Claimant. The Claimant's evidence was that she continued to request furlough (as a further lockdown was possible).

18. On 2 August 2020, the Claimant's manager emailed her to say that the business had been sold to a new owner. It is not clear from the information I have whether this was in fact the case, or whether it was simply that new management was installed. On 4 August 2020, the Claimant's manager emailed the Claimant to say that her contract "is being terminated...This will be sent shortly". The Claimant responded to this email the same day saying she had not been aware of the change in management, and asking why she had not been on furlough. She said she would await her "being fired" letter.

19. It does not appear that any further letter was ever sent to the Claimant. The Claimant said, and I accept, that she was not sure whether she had been

dismissed or remained in employment. She still retained the keys to the shop, which had not been requested back from her.

20. The Claimant began to claim JSA from 28 September 2020 and sought alternative daytime employment (although her employment with the Respondent was in the evenings so she could have continued with it), attending the job centre on a fortnightly basis and signing up to nanny websites. She obtained employment at a rate of £360 per week on or around 15 January 2021.

21. The Claimant's evidence, which I accept, was that she was unaware of the right to claim unfair dismissal or go to an employment tribunal. The Respondent's business closed again in the early part of 2021. In May 2021 when businesses were again reopening and she still had not heard whether or not she remained in employment with the Respondent, the Claimant attended the Citizens' Advice Bureau where she learned of the possibility of bringing a claim in the employment tribunal. She contacted ACAS and sent documents relating to her employment and was told that she had been dismissed on 4 August 2020.

22. On 4 May 2021 the Claimant contacted RXB Barbers (the trading name of her place of work) to raise her complaints about her employment. In an email response dated 25 May 2021, the Claimant was told by a Mr Hernani D'Abreu that the business had been taken over by a newly registered business (it is not clear whether this was correct) from September 2020, with a new Director, and that the Claimant's employment had been terminated the previous year formally in writing. She was told her role was not available with the new company.

23. The Claimant submitted her early conciliation notification and received her early conciliation certificate on 2 June 2021 and submitted her claim on the same day.

Relevant Law

Time Limits

24. Under section 111(2) and (2A) Employment Rights Act 1996, a claim for unfair dismissal must be brought before the end of three months commencing with the effective date of termination, allowing for any extension of time for early conciliation. Time may be extended for such period as the Tribunal considers reasonable where it was not reasonably practicable to present the claim form within the time limit.

25. Where a claimant is ignorant of his/her right to claim unfair dismissal, the reasonable practicability of submitting a claim within time will depend on the reasonableness of that ignorance. In *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, the Court of Appeal held that the tribunal must in such circumstances ask further questions: "What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?".

26. A claim for breach of contract/wrongful dismissal must be brought within three months of the effective date of termination, with the same extension provisions (see article 7 of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994.

27. A claim for unauthorised deductions from wages must be brought before the end of the period of 3 months from the date on which the deduction, or the last in the series of deductions, was made (s. 23(2) and (3) ERA 1996), subject to the same not reasonably practicable extension provisions (s. 123(4). No claim may be brought in respect of a complaint relating to a deduction where the date of payment of wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint (s. 123(4A), subject to exceptions which do not apply in this case).

28. In *Chief Constable of the Police Service of Northern Ireland v Agnew* [2023] UKSC 33, the Supreme Court held, at paragraph 124:

> 124. An important purpose of the "series" extension in section 23 ERA 1996 (and article 55 ERO), just as it is in section 48(3) ERA (and article 74 ERO), is to allow workers or employees, in an appropriate case, to complain about acts or failures which occur outside the three-month period preceding the complaint. In the case of article 55 ERO, there must be a relevant act or failure to act which has occurred within that three month period, but the complaint is not necessarily confined to that act or failure. If, for example, it is shown to be the latest in a series of deductions, all of which are relevantly connected with each other, the worker or employee may complain about them all, for they are all comprised in one series which for this purpose is "in time". In this way, the purpose of the scheme is given proper effect.

and further, at paragraph 127

> 127. Secondly, we agree with the Court of Appeal that the word "series" is an ordinary English word and that, broadly speaking, it means a number of things of a kind, and in this context, a number of things of a kind which follow each other in time. Hence, whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact, and in answering that question all relevant circumstances must be taken into account, including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances.

Substantive law

29. I have had regard to section 98 ERA 1996 in relation to the unfair dismissal claim, sections 13 and 23 ERA 1996 in relation to the claims for unauthorised deductions from wages, and regulations 13 and 14 of the Working Time Regulations 1998 in relation to the claim for holiday pay. Where appropriate I refer to applicable law further below.

Conclusions

Jurisdiction

30. I first have to decide whether the Claimant's claims have been brought within time.

31. I have concluded on review of the documents that the Claimant's effective date of termination was 4 August 2020, when she was told "your contract is being terminated". Although she was also told "this will be sent shortly" I take the view that this was a sufficiently clear indication of termination, taken with the lack of response to the Claimant's subsequent email on the same date, for a reasonable employee to have understood that the contract was being terminated. The Claimant's last payment of wages was therefore due on that date, or (based on previous payments) within around a week thereafter.

32. However, I accept that the Claimant did not understand that her employment had been terminated at this time, as she clearly stated in response that she would await her being fired letter, which was never received. I accept that the Claimant was to some extent misled by her employer, who indicated that termination would be effected in writing, which never came. I also accept that there was subsequent uncertainty for the Claimant arising from the ongoing pandemic and thus the difficulty in knowing whether the business was continuing or not.

33. Furthermore, I accept the Claimant's evidence that she was unaware of her right to claim unfair dismissal or make claims for arrears of wages or holiday pay (or the other claims she has now made). The Claimant was employed by the Respondent as a cleaner, and had no particular reason to be aware of her rights. Given the availability of information on the internet, there is a question as to whether that ignorance was reasonable, but taking into account the confusion the Claimant was in as a result of the unclear way in which the Respondent had terminated her employment, and the further uncertainty engendered by the Covid-19 pandemic, meaning the operation of businesses such as the Respondent was limited, I have concluded that on balance it was not reasonably practicable for the Claimant to have brought a claim within 3 months of the termination of her employment.

34. I accept that the Claimant sought advice at the point when businesses were beginning to reopen in May 2021, and acted promptly once she became aware of her right to make a claim to the ET, contacting the Respondent on 4 May 2021, and having received a response on 25 May 2021, submitting her ACAS notification and her claim on 2 June 2021.

35. Thus I find that the Claimant's claims for unfair dismissal, wrongful dismissal and unauthorised deductions of wages/holiday pay have been brought out of time, in that they were raised more than three months after her effective date of termination/the last in any series of deductions from wages/holiday pay which occurred at the latest on 4 August 2020 or shortly thereafter. However, I am satisfied in the circumstances set out above, and in particular given that (i) it was not clear to the Claimant that she had been dismissed; (ii) she was unaware of her rights to proceed to an employment tribunal, and (iii) the Covid 19 pandemic made it difficult for her to ascertain the situation from the Respondent and limited her opportunities to obtain advice, it was not reasonably practicable for the Claimant to bring her claim in time. I also find that she brought her claim within a reasonable period of time once she became aware of her dismissal and her rights.

Substantive claims

36. Turning to the Claimant's claims, I have reached the following conclusions.

37. I find the Claimant was unfairly dismissed. Her employment was terminated by the Respondent and no fair reason for dismissal has been proven by the Respondent. It is not clear whether the company was taken over or whether there was simply new management, but it is not apparent why a cleaner was not still required either by the original or new owners and owing to the Respondent's failure to submit a response, I have no information on this point. I further find that the Claimant reasonably mitigated her loss in finding new employment from 15 January 2021.

38. For the reasons given above, I am not able to find on the balance of probabilities that the Claimant's employment was terminated by reason of redundancy and thus I cannot find that she is entitled to a redundancy payment. Any redundancy payment would in any event have been co-extensive with the basic award for unfair dismissal.

39. I find that the Claimant was wrongfully dismissed as she was entitled to either contractual or statutory notice. Her contractual notice period past the initial probationary period is not given, so I can make no award on this basis. She was entitled to 2 weeks' statutory notice.

40. I find that the Claimant was not paid by the Respondent between 23 March 2020 and 4 August 2020, and that she was entitled to be paid over that period at a rate of initially £8.21 per hour then, from 1 April 2020 at £8.72 per hour for 6 hours per week.

41. I find that the Claimant was not paid any holiday pay throughout her employment. I find that there was a series of deductions in respect of holiday pay throughout her employment, on the basis that the Respondent had a policy of not paying the Claimant the holiday pay to which she was entitled, based on the recent guidance of the Supreme Court in *Agnew,* as set out above. However, the Claimant may only claim holiday pay for a period going back two years owing to the effect of s. 123(4A) ERA 1996.

42. In view of the above findings I award the following compensation.

43. For unfair dismissal, a basic award of £104.64, a compensatory award (in respect of the period from 5 August 2020 to 15 January 2021) of £1,225.78, which also includes the Claimant's notice pay of £104.64, and an award for loss of statutory rights of £52.32, based on one week's pay.

44. I award arrears of pay in respect of the period from 23 March to 4 August 2020 of £1005.09.

45. I award holiday pay for a period of two years prior to the submission of the claim form totalling £331.81.

46. The above figures are all gross. It appears that the Claimant's earnings at the relevant time may have fallen below the tax threshold; however, I have

no clear information on this point and therefore have set out the gross sums from which any tax payable will fall to be deducted.

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Employment Judge A. Beale
Date: 31 October 2023