



EMPLOYMENT TRIBUNALS

Claimant: Miss Stokes
Respondent: Lucy Gray Limited
Heard at: East London Hearing Centre (by CVP)
On: 12 June 2024
Before: Employment Judge Iman

Representation

Claimant: Miss Stokes – self representing
Respondent: Did not attend not represented

WRITTEN REASONS

1. The claimant's claims were for unauthorised deduction of wages and breach of contract in relation to notice pay.
2. An oral judgment was issued in respect of this claim on 12 June 2024 and judgment was sent to the parties on 19 June 2024. These reasons are provided having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013.

Application to re-instate unfair dismissal proceedings

3. Miss Stokes indicated that she was not seeking to pursue her application to re-instate proceedings once the 2-year limit was explained to her.

Application to postpone proceedings

4. Miss Lucy did not attend on behalf of the respondent. She had submitted an application to the Tribunal on the 11 June 2024 requesting an urgent postponement of the proceedings.
5. The email that was sent to the Tribunal attached a note from Miss Lucy's General Practitioner. The covering email indicated that Miss Lucy wished to defend the claim but that she was not fit to attend or take part in tribunal proceedings at present and attached a General Practitioner note in support of this.

6. The note from Miss Lucy's General Practitioner, Dr Beddoe, dated 10 June 2024 states that Miss Lucy had been seen at the clinic and she was "*really struggling with stress manifesting in symptoms of both anxiety and depression. She is not sleeping due to her anxiety which is making things a lot harder. She describes restlessness and palpitations alongside low mood and poor concentration. She is normally an extremely organised person but has been struggling with this of late due to her anxiety. For this reason I do not feel she is fit to attend and take part in tribunal proceedings and give evidence.*"
7. The note from the Dr Beddoe goes on to say that, "*She is currently not keen on any medication and it is hard for her to take time off which would certainly be beneficial. I have for now advised on some talking therapy to help with the anxiety and stress but to see us again if her mood is not improving.*"
8. Miss Stokes was neutral on the application to postpone proceedings. She explained that though her preference was for the matter to proceed today that she understood if the Tribunal determined that the matter should be postponed and therefore left the matter to the Tribunal's discretion.
9. The Tribunal considered the Presidential Guidance on seeking a postponement of a hearing which states the following;

When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.
10. Though the letter from the GP note concluded that she was not fit to attend the hearing, the GP letter did not provide any details of the prognosis of the condition and an indication of when Miss Lucy would likely be fit to attend a hearing. The letter also did not explain what the causes/ triggers of the stress were and no follow-up had been definitively scheduled. Miss Lucy was advised to return to her General Practitioner if her mood did not improve.
11. The Tribunal acknowledges that proceedings can be stressful for all parties involved and at times resolution of the issues may also assist with the resolving symptoms.
12. Mr Smith, Miss Lucy's partner did attend and renewed the application to postpone proceedings on Miss Lucy's behalf. He explained that Miss Lucy was under a lot of pressure at the moment and that she had a difficult time at the weekend. He explained that she had been working very hard recently and the Tribunal should postpone proceedings in order to allow Miss Lucy to attend and that that it would be travesty of justice if the proceedings went ahead in her absence.

13. Mr Smith was permitted to make the application to postpone the hearing. Mr Smith was asked if he had permission act on Miss Lucy's behalf should the matter proceed and he explained that he did not. He explained that he was not familiar with the papers and that his attendance was only to make the application to postpone proceedings and he was not representing Miss Lucy. He further explained that he did not have an awareness of the case.
14. In considering whether to proceed in Miss Lucy's absence, the Tribunal has to consider the overriding objective, which includes fairness to both parties and the interests of justice.
15. Miss Lucy was continuing with her working responsibilities and the Tribunal was not provided with a period of time when it was anticipated that she would be better and the matter could be re-listed. It was not made clear in the General Practitioner's note why Miss Lucy was able to still carry out working responsibilities and how that was differentiated and distinguished from her ability to attend a Tribunal hearing. Further, the Tribunal acknowledge that a hearing can be stressful for all parties involved and sometimes resolution of the hearing may assist any stress associated with the hearing. Further, the Tribunal is able to make reasonable adjustments to assist a party to participate in a hearing but the General Practitioner's note also did not provide any explanation as to why reasonable adjustments would not be suitable for Miss Lucy.
16. The Tribunal noted that Miss Lucy had provided a detailed response in her ET3 form. Miss Stokes had submitted her documents to the Tribunal and Miss Lucy on the 30 May 2024 and despite directions being issued to both parties on the 02 February 2024 that by 05 June 2024 the Tribunal must receive one physical and one electronic copy of the bundle and witness statements, Miss Lucy had not submitted anything to the Tribunal.
17. The Tribunal noted an email dated the 29 May 2024 from Miss Lucy in which she wrote to the Tribunal explaining that she had not heard from the claimant and had not had a response to her emails. However, despite this Miss Lucy did not submit any documents once she received the documents on the 30 May 2024 and nor did she choose to submit any further documents to the Tribunal.
18. The Tribunal must be proportionate in any decision around postponement. This claim relates to statutory and/or contractual entitlement to notice pay and holiday pay. Any delay was likely to mean the listing would be some months away and there was no indication when Miss Lucy would be ready to participate in proceedings.
19. The Tribunal was satisfied that the Notice of Hearing had been served properly. The Tribunal considered it was in the interests of justice to proceed in Miss Lucy's absence.
20. The Tribunal took a short adjournment in order to allow Mr Smith an opportunity to contact Miss Lucy and also for the Tribunal to notify Miss Lucy that the Tribunal had determined that the hearing would be proceeding. Mr Smith was unable to make contact, but the Tribunal did

make contact. Miss Lucy informed the clerk that she would be joining the hearing but did not attend.

21. The Tribunal did wait for a reasonable length of time for Miss Lucy to attend. She did not attend and did not provide any further explanation as to her non-attendance.
22. The Tribunal explained to Mr Smith that he was welcome to stay and observe the proceedings but as he had explained that he was not able to act on behalf of Miss Lucy, he would be able to make submissions to the Tribunal.
23. Mr Smith did stay for the hearing as an observer. However, despite explaining that he was not aware of the case and that he had not been asked to act on Miss Lucy's behalf he laughed whilst the witness gave her evidence and also at one stage sought to provide comment on the witness's evidence. Mr Smith was directly addressed about his conduct in respect of laughing at the witness whilst she was giving evidence and was asked to refrain from commenting on the evidence. The Tribunal disregarded any comments made by Mr Smith about the witness and her evidence.
24. Miss Stokes asked if Mr Smith had to be present and whether he could be asked to leave. It was explained that this was a public hearing and that Mr Smith was welcome to observe the proceedings but that he would be asked to leave if his behaviour disrupted proceedings further. There were no further disruptions from Mr Smith.

Issues

25. The issues for the Tribunal to determine were;
 - a) Was there an employment contract in existence between the parties?
 - b) What was there a contractual probationary period? If so, what was the duration of it?
 - c) Was the claimant in her probationary period at the time of dismissal?
 - d) Was the claimant entitled to any notice pay?
 - e) Had the respondent carried out any unlawful deduction of wages?
26. The Tribunal heard from Miss Stokes. This was the only live evidence that the Tribunal heard. Miss Stokes in her evidence adopted what was contained in her ET1.
27. The Tribunal found her to be a reliable and credible witness. The Tribunal that she was a straightforward and fair witness who sought to assist the Tribunal and made concessions when she considered it appropriate to do so.
28. It was accepted by both parties in the ET1 and ET3 that Miss Stokes worked from 27 March 2023 to 05 October 2023 There was a dispute as to hours worked by Miss Stokes and she accepted the 36 hours as articulated by Miss

Lucy in her ET3. It was accepted by both parties that the earnings were £2333 per month gross salary.

29. Miss Stokes told the Tribunal that she was dismissed without notice. She explained that she attended work on the 05 October 2023, and that she was expecting this to be a normal working day and that she had *no inkling* that she would be asked to leave that day.
30. She stated that Miss Lucy advised her that *this isn't working and you can go now*. She explained that she wasn't told anything that help her understand why she was being asked to leave. She explained that she sent an email and sought clarification and explained that she was prepared to work her 12 month notice period. However, that Miss Lucy maintained her position and she was not expected to work her notice period of 12 weeks.
31. In respect of her probationary period, Miss Stokes explained that she was not in her probationary period and that she had been told verbally that she had passed the probationary period. This conversation occurred 3- 4 months prior to her finishing her employment. She explained that she was never given any verbal or written notification that her probationary period had been extended.
32. The statements that were submitted as part of ET3 in respect of her poor conduct and performance were put to Miss Stokes. She explained that as far as she aware Miss Lucy was happy with her performance. She explained that she had met certain milestones and that she considered that she was asked to leave so that they could recruit someone at a lower salary.
33. She explained that 121's were done informally and there were never any issues raised regarding this with her and that as they were given insufficient time to complete them she would write them up when she was able.
34. She explained that no complaints had been raised with her. She explained that she was considered reliable as she was given more and more responsibilities and disputed what was stated in the ET3 response stating that there was nothing raised with her either verbally or orally in respect of her performance and conduct at work.
35. Miss Stokes referred the Tribunal to text messages in her bundle of documents which demonstrated that she was receiving praise for the work carried out. She also explained that she was given Nanny duties for Miss Lucy, and she maintained that those are not tasks that you would give to someone to look after your family if you considered them unreliable.
36. She explained that a few weeks prior to her being asked to leave she was asked to write up her job description, but she was not given indication as to why that was needed.

Contract of employment

37. The Tribunal is satisfied that a written contract of employment existed between the parties. The Tribunal noted that the terms of the contract in the contractual document before it aligned with the respondents submissions

and the references to the probationary clauses in their ET3. Further, the salary and start date were as agreed by both parties.

38. Therefore though the document was unsigned the Tribunal was satisfied that this document did capture the employment contract that was in place at relevant time and the terms had been accepted by both the respondent and the claimant.

Probationary period

39. Having carefully considered the terms of the contractual clause which is cited in the ET3 response and also contained within the documents submitted by Miss Stokes and reads as follows:

The first three months of your employment will be a probationary period during which time your performance and conduct will be monitored and appraised. The probationary period may be extended at the Company's discretion by up to three months and this is without prejudice to the Company's right to terminate your employment before or on the expiry of your probationary period if you are found for any reason whatsoever to be incapable of carrying out, or otherwise unsuitable for, your job. At the end of your probationary period, your employment will be reviewed within a reasonable time of its expiry and your probationary period will not be deemed to have been completed until the Company has carried out its review and formally confirmed the position in writing to you. During the probationary period the full disciplinary and grievance procedure will not apply.

40. Therefore, the contractual clause clearly states that the first 3 months are a probationary period and that it can be extended *by up to three months* at the company's discretion and therefore the contractual amount that is permissible is a total of 6 months. Therefore, the date of the 05 October 2023 falls outside the 6 month period permissible under the contract which therefore engages the 12 month notice period which is required from either party after the probationary period. This is also set out in the contract.
41. Although, given the construction of the contractual clause the Tribunal is not obliged to provide any further detail, for completeness, I will state that there was no evidence before the Tribunal that the probationary period had been extended beyond the initial 3 months. On the contrary there were WhatsApp messages within the bundle which demonstrated a good working relationship between the parties and showing them working together on initiatives. Examples include messages that were exchanged on 25 April 2023, 09 June 2023, on the 01 September 2023 that showed positive responses to Miss Stokes work. Her tasks included amending price lists, dealing with marketing and creating birthday party invites for Miss Lucy.
42. In the 01 September 2023 Miss Stokes explains that the rebooking rate has increased by 19 percent and is responded to by with praise and a comment that *all was going in the right direction*.

43. The WhatsApp messages in the documentary evidence do not align with the statements in the ET3 that social media upkeep was only carried out upon persistent requests, failing to proactively engage in this important marketing aspect and neglected to upload photos, hindering marketing efforts and camera functionality.
44. There were a few issues in respect of rubbish being taken out and a query about why a report was late but they were resolved professionally and courteously by the parties. The Tribunal did not consider that the allegations of poor performance and conduct were made out.
45. Therefore, the Tribunal is satisfied that Miss Stokes was not within her probationary period on the 05 October 2023 and therefore is entitled to 12 weeks notice pay. It is clear from the email that she sent to the respondent on the 07 October that this was her understanding also .

On Thursday 5th October during our weekly meeting, you told me that you had been considering my employment with Lucy Gray Ltd and that you wanted to terminate my employment with immediate effect stating “you can go now”, therefore dismissing me without notice.

46. I note that there was a response from the Respondent on 13 October 2024:

In response to your email and to provide further clarification, it is unfortunate that you were unable to successfully complete your probationary period within the company. Please refer to the probationary period clause outlined in your employment contract. As previously discussed, throughout your employment, you consistently demonstrated an inability to perform your duties effectively and proved unsuitable for your role. At the end of the extended probational period, your employment was reviewed, and it was decided that you did not successfully complete the probation period therefore resulting in your dismissal. The following points serve to elucidate the reasons for this decision:

47. The Tribunal noted that this response was sent on 13 October 2023, several days after the dismissal. Miss Stokes rejected that any of the points of concern listed in that email and in the ET3 had been raised with her. The Tribunal did not consider the email 13 October 2023 persuasive evidence as this email was sent several days following the date of dismissal and captured alleged conduct and poor behavior in a document that would be expected to be captured much earlier on resulting in a dismissal. The Tribunal found the evidence of Miss Stokes persuasive and did not consider there was any justification for the dismissal in the manner that it had occurred.

Remedy

48. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996*). Wages must be ‘properly payable’ to count as a deduction (*section 13(3)*).
49. Determining whether wages claimed are ‘properly payable’ requires the tribunal to consider the circumstances of the case and what the contract of

employment means for those circumstances (*Agarwal v Cardiff University and anor* [2019] ICR 433 CA; *Delaney v Staples (t/a De Montfort Recruitment)* [1991] ICR 331 CA).

50. It is well established law that salary pay meets the definition of wages as set out in section 27 of the Employment Rights Act 1996 and as such are payable in connection with an individual's employment.
51. In respect of salary Ms Stokes explained that she was owed 3 days salary as she was asked to leave on the Thursday 05 October 2023 and therefore was claiming for the 3 days that she worked and had not been paid. As payment was made at the end of the month. She explained that she was no longer able to access wage slips as she was no longer able to log on to the employer's portal where her wage slips were. The Tribunal accepted the evidence of Miss Stokes in this regard. There was no evidence to suggest that Miss Stokes had been remunerated for the days worked.
52. The Tribunal concluded that there had been an unlawful deduction of wages and the claim was well founded. In respect of breach of contract and notice pay the claim was also well founded as the claimant was outside the probationary period. The respondent is ordered to pay the claimant the amount of **£6690.74**, which is the gross sum deducted (12 week's notice pay £6460.62 plus 3 days salary £230.12). The respondent is responsible for deducting and paying any tax or national insurance at source.

Employment Judge Iman
Dated: 23 July 2024