EMPLOYMENT TRIBUNALS

Claimant: Fatemeh Zaremohazabiyeh

Respondent: Luna Jack Ltd

Heard at: Watford Employment Tribunal (via CVP) **On:** 24 June 2025

Before: Employment Judge Taft

Representation
Claimant: In person
Respondent: Mr Fuller (Director)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of breach of contract in relation to notice pay is well-founded.

2. The Respondent shall pay the Claimant **£89.25** as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay. The Claimant is responsible for the payment of any tax or National Insurance.

3. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended.

4. The respondent shall pay the claimant **£58.80**. The claimant is responsible for paying any tax or National Insurance.

REASONS

Introduction

1. The Claimant, Fatemeh Zaremohazabiyeh, was employed by the Respondent, Luna Jack Ltd, from 29 November 2022 until 20 March 2024. She complains that she was dismissed in breach of contract because she was not given any notice and that she was not paid in respect of accrued but untaken holiday.

2. The Tribunal refused the Claimant's application to amend her claim to add claims of unfair dismissal under Sections 98 and 104 Employment Rights Act 1996 and victimisation under Section 27 Equality Act 2010. Oral reasons were given at the hearing. Either party can request written reasons by request within 14 days of the sending of this written decision.

Issues before the Tribunal

3. The issues were as identified by Employment Judge Robertson at a Preliminary Hearing on 6 May 2025. These were:

Wrongful dismissal / Notice pay

(a) What was the claimant's notice period?
(b) Was the claimant guilty of gross misconduct? The respondent relies upon the following alleged matters:
    (i) On 5 January 2024, the claimant did not do e-learning;
    (ii) On 6 January 2024, the claimant swapped her shift without following the relevant procedure;
    (iii) In March 2024, the claimant avoided the tasks she had been asked to carry out; and
    (iv) On 19 March 2024, she failed to comply with relevant procedure for swapping her shift.
(c) If not, how much should the claimant be awarded as damages?

Holiday Pay (Working Time Regulations 1998)

Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

4. It was agreed that the Claimant had not taken any holiday in 2024 and that her contractual notice period was 4 weeks.

Evidence and Submissions

5. The Respondent had not produced a bundle as ordered by Judge Robertson. I was conscious that this was the second attempt to hold a final hearing of this matter, the first having been ineffective due to time taken with an application to amend from the Claimant and because the Tribunal had not been able to open documents sent by the Respondent by email.

6. I considered the issues before the Tribunal and the likely value of the claims. I concluded that it did not further the overriding objective to have a third attempt at a hearing if it were possible to hold a fair hearing that afternoon. I therefore canvassed with the parties what documents they relied upon. The Claimant confirmed that she had copies of all of these documents and undertook to send these and the Claimant's and Respondent's statements to the Tribunal and Respondent over the lunch break. These were not new documents to the Respondent – the purpose of copying in the Respondent was to ensure that there was full clarity as to the documents before the Tribunal.

7. After the lunch break, I clarified with the parties that they were the only documents each party intended to rely upon. They both so confirmed. I therefore considered that it was safe to proceed and that a fair hearing was possible.

8. During cross examination, Mr Fuller referred to WhatsApp group messages that were not before the Tribunal. I did not allow the Respondent to adduce these messages given that the Respondent had had ample opportunity to disclose them pursuant to the Case Management Order of 6 January 2025 and to include them in the file ordered by Judge Robertson on 6 May 2025. It was neither fair to the Claimant nor proportionate for there to be further delay to allow the Respondent to adduce those messages.

9. I heard evidence from the Claimant and from Mr Fuller for the Respondent. Both were given opportunity to cross-examine the other. However, given that the morning of the hearing was entirely taken up with the amendment application and clarifying the documents the parties relied upon, I strictly case managed the afternoon by restricting questions to the issues identified. I asked questions on each topic before inviting the parties to ask any further questions. If questions or answers strayed from those topics, I asked the questioner or witness to move on.

10. Documents relied upon by the Respondent included statements taken from employees and customers by email. None of the statements contained a statement of truth or a signature. None of the witnesses attended the Tribunal. As a result, I gave little (but not no) weight to the evidence presented.

11. Given the pressures of time, I took the same approach to submissions as to evidence. I reminded the parties of the issues and invited submissions in respect of those issues alone. The Claimant was invited to make submissions first. At the end of her submissions, I asked if there was anything further she wanted to say about the identified issues. She said not. Mr Fuller then made submissions. After this, the Claimant asked to speak again. I explained to the Claimant that allowing responses to submissions was neither appropriate nor proportionate given that we were already past the end of the Tribunal day and that I would then need to offer the same opportunity to the Respondent, which might prompt her to make a further request. I am satisfied that the Claimant was given opportunity to and did make relevant submissions in respect of the issues before me.

The law

12. An employer is entitled to dismiss an employee without notice if the employee commits a repudiatory breach. In most cases, as is identified in the issues above, that repudiatory breach is said to be an act of gross misconduct. Whether an employee has committed gross misconduct is a question of fact for the court, or in this case Tribunal, to determine - *Adesokan v Sainsbury's Supermarkets Ltd* [2017] ICR 590.

13. An employee dismissed in breach of contract has a duty to mitigate their loss by looking for alternative work. If they successfully obtain alternative work, compensation is limited to their actual loss during the notice period.

14. Regulation 14 Working Time Regulations 1998 confirms that

> (1) Paragraphs (1) to (4) of this regulation apply where—
> (a) a worker's employment is terminated during the course of his leave year, and
> (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulations 13(1) and 13A(1) differs from the proportion of the leave year which has expired.
> (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
> (3) The payment due under paragraph (2) shall be—
> (a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
> (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—
>
> $$(A \times B) - C$$
>
> where—
> A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;
> B is the proportion of the worker's leave year which expired before the termination date, and
> C is the period of leave taken by the worker between the start of the leave year and the termination date.
> (4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Findings of Fact

15. The Claimant was employed by the Respondent as a Bar Associate. Her employment commenced on 29 December 2022. She was entitled to be paid £10.50 per hour.

16. Clause 5 of the Claimant's contract of employment provided that the Claimant was required to work 12-20 hours per week *"as necessary to keep the Premises open during licensed hours"*. It went on to say that the Respondent could require the Claimant to work different hours according to business need, either on a temporary or permanent basis. It was explicitly

stated that *"It is a condition of your employment that you may agree to work different hours if requested to do so by the Company"*.

17. As might be expected in the hospitality industry, more hours were required of staff in the busy festive period and fewer hours were required at the start of a calendar year.

18. The Respondent operated a rota. There was no written procedure to cover swapping shifts, though it was a reasonably common occurrence. The Respondent used a WhatsApp group chat to communicate with staff. Staff used the WhatsApp group chat to ask if others could cover or swap shifts. Mr Fuller gave evidence that his expectation was that all requests to swap shifts were authorised by him. I accept that evidence. Although staff used the WhatsApp group to find shifts to swap, the shift swap needed to be approved by Mr Fuller.

19. The Respondent employed supervisors. Staff wishing to swap or cancel shifts would occasionally speak to supervisors to request this if they were not able to speak to Mr Fuller. Supervisors would then speak with Mr Fuller for authorisation.

20. Clause 7 of the contract confirms that the Respondent's holiday year ran from 1 March to 28/29 February. It further confirms that *"Annual leave entitlement not used by the end of the holiday year will usually be lost and under no circumstances will payment be made for annual leave that is lost through not being exercised by the correct date."* Later, the clause records *"on termination of employment you will be entitled to payment for any accrued but untaken holiday entitlement".*

21. Clause 9 of the contract confirms that *"after successful completion of your probationary period, the prior written notice required from you or the Company to terminate your employment will be 4 weeks until you have been continuously employed for four complete years"*. That clause goes on to say that *"the company reserves the right to dismiss you at any time without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, if you cease to hold a personal license to sell liquor in respect of the Premises or other premises, or if you cease to be entitled to work in the United Kingdom."*

22. Staff were asked to complete e-learning on various topics within 3 months of joining the Respondent. A number of staff did not do this, including the Claimant.

23. On 9 January 2024, Mr Fuller posted a message in the WhatsApp group chat regarding e-learning. A number of staff were chased to complete various modules of e-learning, including staff who had been with the Respondent longer than the Claimant. The message thanks the Claimant for having completed her e-Learning.

24. It is clear that not all of the Claimant's colleagues were happy with her work. There were complaints that she avoided work – for example working with her back to customers so she could not see when they needed to be served

and “disappearing” during a shift. Supervisors complained that the Claimant refused to carry out tasks they had allocated to her.

25. Mr Fuller met with the Claimant to discuss the problems identified by supervisors. This was an informal discussion rather than a disciplinary meeting. The Claimant was asked to improve.

26. On 19 March 2024, the Claimant attempted to speak to Mr Fuller to request the following Sunday off. Mr Fuller was busy so could not speak with the Claimant. The Claimant then spoke with her supervisor, Niamh, who said that she would try to sort this out for her. This was the second week in a row that the Claimant had requested to cancel a shift after not being able to find cover. It would be the third Sunday in a row that she had not worked.

27. The Claimant was dismissed by Mr Fuller on 20 March 2024 by WhatsApp message. The reason given was *“gross misconduct and serious insubordination”*.

28. The Claimant was paid 4-weekly. Her final 6 payslips record that she was paid for 97.5 hours on 4 November 2023, 88.5 hours on 2 December 2023, 91.75 hours on 30 December 2023, 72.25 hours on 27 January 2024, 66 hours on 24 February 2024 and 30 hours on 23 March 2024. Given that more hours were generally available in the run up to the festive season, the hours worked in 2024 better reflect the hours that would likely have been worked during the Claimant’s notice period.

29. The Claimant began new employment on 25 March 2024 earning more than she had with the Respondent. Although the Claimant asserted that this was a typo on the ET1 and that she had intended to indicate that she began work on 25 April 2024, I find as a fact that she began her alternative work on 25 March. I take account of the fact that the record of the Preliminary Hearing on 6 May 2025 identifies that the Claimant obtained employment during her notice period and that Judge Robertson explained to her that this would reduce the amount of compensation that would otherwise have been potentially awarded to her. I find that this discussion would be unlikely to have taken place if the Claimant had not informed Judge Robertson that she had obtained alternative employment during her notice period. It appears therefore that the Claimant has changed her position once she discovered that having obtained employment during her notice period would affect the compensation potentially available to her. It is for this reason that I do not accept her evidence that alternative work began on 25 April.

Conclusions

30. The Claimant did not commit gross misconduct.

31. The Claimant did not complete her e-learning within the 3 months requested by the Respondent but this was not gross misconduct. It is clear that she was not the only employee who had not done so, and in fact other employees with longer service still had e-learning outstanding once the Claimant had completed her modules. This was a request of the Respondent but it was not gross insubordination for the Claimant not to

have completed this training, nor was it treated as such either in respect of the Claimant or of her colleagues.

32. There was no evidence before the Tribunal that the Claimant swapped a shift without following procedure on 6 January 2024.

33. There was limited evidence of the Claimant avoiding tasks she had been asked to carry out by supervisors. This was not gross misconduct. Supervisors may not have been happy with the quality of the Claimant's work but this was not gross insubordination.

34. On 19 March 2024, the Claimant asked her supervisor to cancel a shift the following Sunday. She did so because she could not speak to Mr Fuller, who was busy. Mr Fuller was not happy that this was the third Sunday in a row that the Claimant had said she could not work. This is not, however, gross misconduct. It may have been gross misconduct had Mr Fuller informed the Claimant that she was required to work but the Claimant refused. But this did not happen – she had simply requested the day off. Mr Fuller dismissed the Claimant rather than instruct her to work the day.

35. It follows therefore that the Respondent was not entitled to dismiss the Claimant summarily.

36. The Respondent terminated the Claimant's employment in breach of the contractual obligation to provide 4 weeks' notice. However, the Claimant mitigated her loss by obtaining alternative work commencing 25 March 2024. She was out of work for 4 days.

37. Between 30 December 2023 and 19 March 2024 (80 calendar days), the Claimant worked a total of 168.25 hours. That is an average of 2.1 hours per calendar day. This equates to 8.4 hours over the 4 days of her notice period. Given that the Respondent pays in quarter and half hours, this would likely have been shifts totalling 8.5 hours

38. She is therefore entitled to damages of £89.25 (gross) for her notice period, representing £10.50 multiplied by 8.5.

39. The holiday year ran 1 March – 28/29 February. The Claimant was not entitled to carry over any holiday not taken in the holiday years 2022/23 or 2023/24. By the date of the Claimant's dismissal on 20 March 2024, just less than 3 weeks of the 2024/25 holiday year had elapsed. She was entitled to 5.6 weeks' holiday per year. Applying the formula detailed in Regulation 14 Working Time Regulations 1998, I calculate that 0.3 weeks had accrued.

40. The Claimant was entitled to be paid according to an average of the past 52 weeks. We do not have 52 weeks' worth of payslips but do have 24 weeks. Over those 24 weeks, the Claimant worked 446 hours - an average of 18.6 hours per week. Applying that to the 0.3 weeks accrued, she was entitled to 5.6 hours. She had not taken or been paid for any hours. She is therefore entitled to damages of £58.80 (5.6 multiplied by £10.50).

Approved By

Employment Judge Taft

10 July 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11/07/2025

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