



EMPLOYMENT TRIBUNALS

Claimant

Miss A Drew

v

Respondent

**Mr D West t/a Blue Moon
Recruitment**

Heard at: Hull

On: 7 August 2018

Before: Employment Judge Knowles

Appearances:

For the Claimant: In person

For the Respondent: In person

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:

1. The Claimant's complaint of unfair dismissal under section 104 of the Employment Rights Act is well founded and the Respondent is ordered to pay to the Claimant compensation for unfair dismissal in the sum of £2,263.00.
2. The Claimant's complaint of breach of contract, wrongful dismissal, is well founded and the Respondent is ordered to pay to the Claimant damages for breach of contract in the sum of £708.
3. The Claimant's complaint of breach of contract, bonus pay, is well founded and the Respondent is ordered to pay to the Claimant the sum of £540.
4. The Respondent is ordered to pay an additional uplift of 20% to the above sums under the provisions of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The sum that the Respondent is ordered to pay to the Claimant is £702.20.
5. The grand total that the Respondent is ordered to pay to Claimant as set out above is £4,213.20.
6. The Recoupment Regulations do not apply.

RESERVED REASONS

1. Evidence

I heard evidence from the Claimant. The Claimant called two witnesses in support, Mr Daniel Paul Barrett, a friend and former client and Miss Charlotte Walters, a previous employee of the Respondent. I heard evidence from the Respondent. The Respondent produced a bundle of documents (R1) consisting of 13 sections. References in this judgment to page numbers are to those in the bundle denoted in brackets (section:page number). The Claimant added at tribunal a supplementary statement, C2, and a copy of Facebook messages which preceded her appointment, C3.

2. Issues

2.1 The Claimant claims that she was dismissed for asserting a statutory right to payslips but the Respondent claims she was dismissed for conduct. The issue in this respect is what was the reason for dismissal? It is for the Claimant to show on the balance of probabilities that she was dismissed for the reason she claims. If she does, the dismissal would be automatically unfair. If she does not, she has no right to claim unfair dismissal because she has insufficient service.

2.2 The Claimant further claims that she was due a payment of notice pay on termination of employment but the Respondent claims that she is not because she was dismissed for gross misconduct. It is for the Respondent to show that the Claimant's employment was terminated in circumstances amounting to gross misconduct and that he was not therefore under any obligation to make a payment of notice pay.

2.3 The Claimant claims that she is entitled to bonus payments for candidates placed by her during her employment but the Respondent claims that bonus payments are not payable to a leaver. The issue is what were the terms of the Claimant's contract and were those terms breached.

3. Findings of fact.

3.1 I made the following findings of fact on the balance of probabilities having heard from the witnesses and considered the documents which they submitted and their representations.

3.2 The Claimant commenced employment 26 June 2017 as a Resource Consultant and her terms of employment included a 3 month probationary period (1:1). The contract provides for a weeks' notice after one month's employment, and 1 months' notice on successful completion of probationary period.

3.3 Her basic earnings were £1,333.33 gross per month at commencement, £1,180 net. Pay was due monthly on the 15th of the month in arrears.

3.4 The Respondent operates and runs a recruitment business, placing candidates into the employment of clients and charging those clients for successfully sourcing a new employee for them.

3.5 The Claimant's earnings were supplemented by bonus payment which she states averaged £300 per month gross. The Respondent claimed £150 to £200 per month was more realistic however the Claimant utilised past payments to calculate her average whereas the Respondent was speculating as to future bonus.

3.6 The Respondent has no formal bonus scheme rules. It simply operates a table which shows how much bonus will be paid according to the amount that the Claimant billed to clients when a candidate was placed by them (4.1). The Respondent does not dispute that he agreed this scheme of bonus payments with the Claimant verbally and that it was in operation when her employment terminated. The Respondent claims that the Claimant is not entitled to bonus payment after she leaves because that is normal in the recruitment industry. He accepted in evidence that other employers in that industry may state that that is the case in their contract or bonus scheme rules. He accepts that his documentation concerning the Claimant's terms of employment are silent on the issue.

3.7 On 6 October 2017, after the 3 month period of probation, the Claimant's request for flexible working was agreed by the Respondent (6:1). Her new working week was 3 days whereas previously it had been 5 days per week. Wages were pro-rated. The arrangement was agreed in writing but expressed to be on a "month-to-month" basis, a "rolling-contract". The Respondent claims that the letter is an extension of her period of probation, but that is not what it states. The Respondent states that he told her that her probationary period was being extended but the Claimant disputes this. On the balance of probabilities I find that the flexible working request outcome dated 6 October 2017 is nothing to do with the probationary period nor were discussions concerning the request.

3.8 I note that the letter concerning the flexible working application was sent after the probationary period had expired and that the Claimant is within that letter described as a "great asset" to the Respondent and that they "hope to be able to offer [her] a rewarding working environment". There is no documentary evidence that there were any performance concerns raised by the Respondent with the Claimant during the probationary period.

3.9 The Respondent claims that the Claimant was not hitting her target billing or KPI's but both the Claimant and her line manager Miss Walters state that these did not in any event apply during their probationary periods. The Respondent did not challenge their evidence. Miss Walters stated that the Claimant billed more than she had during her probationary period and no performance concerns had been raised with her during her probationary period or thereafter. Miss Walters gave evidence that in the industry you have good and bad months but were not performance managed for not meeting target, it simply affected your entitlement to bonus. The Respondent did not challenge this evidence.

3.10 On the balance of probabilities I find that the Respondent never raised performance concerns with the Claimant until their final meeting on 10 November 2017 which I will cover further below. Indeed I find that there is no evidence that the Respondent had any performance concerns about the Claimant before November 2017.

3.11 I find on the balance of probabilities that the Claimant had, as she claims, successfully completed her probationary period without any concerns having been raised. I find that the Respondent held no such concerns at the end of the probationary period. I find that the Respondent conversely agreed to a variation of

contract to part-time working because he wanted to retain the Claimant and allow her time to complete her part-time degree course in addition to working for him.

3.12 During her employment the Claimant became concerned that she was not receiving payslips and developed worries that statutory deductions were not being raised. She asked the Respondent for payslips but initially none were provided. The Respondent accepts that this was raised with him after the first month of employment, i.e. in July 2017. The Claimant began raising the issue with HMRC in September 2017 (11:1) and has produced her call records from HMRC. The Claimant states that on 28 September 2017 the Respondent finally gave her a payslip for September and August, both backdated. The Respondent does not recall when he gave these to her. I find on the balance of probabilities that they were delivered only on 28 September 2017 after the Claimant had highlighted her concerns to the Respondent that she had been told by HMRC that her employment with the Respondent had not been registered with them.

3.13 On Friday 13 October 2017 the Appellant was not paid, pay day falling on the Sunday that week, and was messaged by the Respondent to say that in the worst case scenario she would be paid on Monday 16 October 2017. There was an exchange of messages between Miss Walters, the Respondent and the Claimant in which the Claimant stated she was entitled by law to be paid on the Friday. The Respondent has not disputed the other witnesses evidence that he did not take kindly to this and messaged Miss Walters via WhatsApp “that he would not be told by [the Claimant] how to run his company, that [the Claimant is] disrespectful by the way she talks to him and frustrating him”.

3.14 The Respondent asserts that he did transfer money to the Claimant on Sunday 15 October however the Claimant’s bank statements show it credited the following working day 16 October. The Respondent did not produce evidence of the transfer on 15 October 2017. It is not material to the claim to determine when the Claimant was paid, rather to note that she was paid only after the Respondent reacted in a hostile manner to the Claimant asserting her right to be paid earlier, which the Respondent does not challenge.

3.15 The Respondent was absent from the office between 12 October 2017 and 23 October 2017 according to the Claimant, and the Respondent does not challenge this. He then went on holiday to Thailand for 2 weeks.

3.16 Before 10am on 10 November 2017 the Claimant provided feedback to a rejected candidate, Mr Barrett, that he had been unsuccessful in obtaining a job for which he had been interviewed because he was sleeping with a member of the client’s HR team and was asking for too much money. The Claimant had been given those reasons by Miss Walters who had been given them by the Respondent following a conversation he had with the client. Both Miss Walters and Mr Barrett support the Claimant’s account and I find it on balance of probabilities to be true. The Respondent claims that the conversation happened later than this but accepted when questioned that this was speculation on his part.

3.17 The Respondent met the Claimant at 10am on 10 November 2017 and he states he was considering the Claimant’s future due to her poor performance. The Claimant became concerned about the meeting and with the Respondent’s consent began recording it part way through. The transcript is at 3:1 in the bundle. Part is missing but it is implicit from the content of the transcript that the Respondent stated he was undertaking a performance review. He refers to her billing, and to their being nothing lined up for the following month. The Claimant refers to not having any targets

to meet during her probationary period, the Respondent does not challenge this but replies "But I don't see you a future with the Company". The Claimant asks why and he replies "because I see it as a stepping stone, I've noticed that you've got more time for your degree". She presses him further noting that he has not been present since her flexible working request was agreed and she began working part-time. He replies "... I haven't seen that you have gone the extra mile, I don't see the passion, you seem unhappy, you seem frustrated". The Claimant states "I'm fine, absolutely fine in the job all I was frustrated about was payslips". The Respondent replies "I know and you got payslips". The Respondent then offers to the Claimant notice pay and accrued bonus provided she agrees. The Claimant asks for confirmation in writing. The Claimant was not dismissed during the meeting, however she was made an offer that if she agreed she would leave with notice and bonus. The Respondent does not address during the meeting what would happen if she did not agree.

3.18 After the meeting the Respondent emails the Claimant (3.1.2) that day. The letter is an express dismissal stating the reason is poor performance during the probationary period. The effective date of termination is 10 November 2017. The letter suggests that if the Claimant signs the letter accepting her dismissal, she will be paid her notice pay and be paid accrued bonus.

3.19 The Respondent does not appear to realise he dismissed the Claimant through that letter. He writes to the Claimant again on 13 November 2017 to dismiss the Claimant summarily during her notice period for breach of confidentiality, referring to the conversation with Mr Barrett on 10 November 2017. He states that the Claimant will be paid to 9 November 2017 and that the offer to pay her notice and bonus is rescinded. The Claimant is not offered a right to appeal.

3.20 In evidence the Respondent stated that he dismissed the Claimant for her attitude, for prioritising her degree, for not hitting her financial target and for not hitting her other KPI's. He listed the reasons in that order, but when asked stated that the financial target was the main reason for her dismissal.

3.21 The Claimant wrote to the Respondent complaining about her dismissal immediately but he does not respond in writing to the Claimant. The Claimant lodges a complaint she describes as a grievance on 16 November 2017 but the Respondent does not respond. The matter proceeds through ACAS and into these tribunal proceedings.

3.22 Following her dismissal the Claimant immediately began searching for work and and began employment after 10 weeks unemployment. She is now employed on a greater basic salary (£16,250 per annum), however does not receive a bonus. She does however receive £75 per month in pension contributions from her new employer. She did not receive any pension contributions from the Respondent. She is happy in her new employment and does not intend to leave. The Claimant's new employment is full-time, meaning that she now earns more than she did working 3 days per week for the Respondent.

3.23 The Respondent accepts that if accrued bonus is payable to the Claimant then the sum due on sales before the termination of her employment is £600.

4. Submissions

4.1 The Respondent submitted that he had given the Claimant full support and training, and was available to her 24/7. He wanted to give her flexible working a go

but was not 100% sure it would work out so agreed to it on a month to month basis. This was an extension to her probationary period. He then saw a sense of frustration from the Claimant and her degree took the front seat and her attitude deteriorate. The Claimant was not hitting her financial targets so he arranged the performance review 10 November 2017. During the meeting he did not see that her heart was in the job. In the end there is only 19 days not covered by payslips. It is convenient that Mr Barrett suggests that he received his feedback before their meeting, Mr Barrett is her friend. The client in question was concerned over the feedback given and the Claimant breached confidentiality. The client ceased to use his recruitment services as a result.

4.2 The Claimant submitted that she has told the truth and could have stayed and been happy working there. She was denied her statutory rights. She asked repeatedly. She has lost earnings. Her dismissal was not handled appropriately.

5. The Law

5.1 The Employment Rights Act 1996 provides that employees have a right to an itemised pay statement under Section 8 which specifically provides:

- (1) *An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.*
- (2) *The statement shall contain particulars of—*
 - (a) *the gross amount of the wages or salary,*
 - (b) *the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,*
 - (c) *the net amount of wages or salary payable, and*
 - (d) *where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.*

5.2 Part II of the 1996 Act sets out the provisions concerning the protection of wages. Section 13 states:

- (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.

- (3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

5.3 Section 94 of the 1996 Act contains the right not to be unfairly dismissed by an employer.

5.4 Section 108 contains the qualify period of employment for the application of the right not to be unfairly dismissed which is two years by reason of sub-section (1). However sub-section (1) does not apply if *subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies*. This means that a person unfairly dismissed for asserting a relevant statutory right may claim unfair dismissal even where they do not have the qualify period of continuous employment with their employer on the effective date of termination.

5.5 Section 104 provides:

(1) *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*

- (a) *brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
- (b) *alleged that the employer had infringed a right of his which is a relevant statutory right.*

...

(4) *The following are relevant statutory rights for the purposes of this section—*

- (a) *any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal, ...*

5.6 A reason for dismissal is a set of facts known to the employer or belief held by him which caused him to dismiss the employee (***Abernethy v Mott Hey & Anderson [1974] IRLR 213 CA***).

5.7 Where an employee does not have 2 years continuous service to claim ordinary unfair dismissal she has the burden of proving that the reason for dismissal was an automatically unfair reason. The standard of proof is on the balance of probabilities (***Smith v Hayle Town Council 1978 ICR 996, CA, and Ross v Eddie Stobart Ltd EAT 0068/13***).

5.8 In the absence of an express contractual term, a term may be implied into a contract where it is the customary practice adopted in a particular industry. However the custom in question must be reasonable, notorious and certain (***Devonald v Rosser and Sons 1906 2 KB 728 CA and Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA***).

5.9 A dismissal ordinarily engages notice provisions contained in a contract of employment or the statutory minimum notice periods contained in the 1996 Act. However, where the employee is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment this entitles the employer to

summarily terminate the contract (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*).

5.10 Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that

(2) *If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

(a) *the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

(b) *the employer has failed to comply with that Code in relation to that matter, and*

(c) *that failure was unreasonable,*

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

5.11 The ACAS Code of Practice on Disciplinary and Grievance matters is a relevant Code of Practice and this contains provisions for informing employees of the problem before they attend a meeting to discuss poor performance, allowing employees to be accompanied at and formal disciplinary or grievance meeting, and allowing an employee to appeal against and formal decision made.

6. Conclusions

6.1 I find that the Claimant has satisfied the burden of proof upon her and has established on the balance of probabilities that the reason for her dismissal was principally due to her complaints over payslips. The Respondent was clearly aggrieved by her complaints and his explanation for wanting her to agree to leave on 10 November 2017 included her seeming unhappy and frustrated. In the meeting he agrees the Claimant's statement that she was only frustrated about payslips. The Respondent's reasons for dismissal therefore expressly included, during the meeting, her complaints over payslips. The purported performance review meeting did not coincide with the probationary period. The meeting was some 6 weeks thereafter. In the meantime there had been an agreement to her flexible working request and she had been described as a great asset. On the balance of probabilities I find that the Respondent was exasperated by her insistence on receiving payslips and the dispute over pay day in October tipped matters over the edge for the Respondent, a further instance of her telling him how to run his business, to which he reacted with hostility.

6.2 When he returned from holiday he organised a performance review but this was, I find, a pretence to cover his real reasons for dismissing the Claimant, which were because of her assertions of statutory rights relating to payslips and pay, but principally because of the measures she took in relation to payslips and the action he had to take as a result of her complaints. The Respondent's evidence concerning the Claimant's poor performance is evidentially unsound. His complaints concerning her financial performance during her probationary period contradict undisputed evidence from the Claimant and Miss Walters that targets were not applied during the probationary period. He also refers to other KPI's but these were not mentioned in his meeting with the Claimant and appear to have been added as reasons by the Respondent in hindsight after the event. The reference to her prioritising her degree as a reason for dismissal is at odds with the 3 day week arrangement he agreed with

her only a month earlier to allow her to concentrate on her degree. On the balance of probabilities I find the Claimant's case compelling and that her evidence should be preferred to the Respondent's concerning her performance and the reasons for her dismissal. The Claimant was dismissed principally for asserting her statutory right to a payslip. The Claimant was unfairly dismissed.

6.3 The Claimant's employment was dismissed without notice on 10 November 2017. The later dismissal allegedly for gross misconduct had no legal effect. The dismissal was for poor performance and the Respondent did not at the point of dismissal know of any reasons to terminate her employment for gross misconduct.

6.4 In any event the Respondent has not established that the Claimant had committed a repudiatory breach of the contract of employment which entitled him to summarily terminate the contract. Firstly, the conduct he has brought into question was the repetition of feedback provided by him, to Miss Walters, who provided it to the Claimant. The Claimant was not advised that any part of the feedback was confidential or that any part should not be shared with the candidate by the Claimant. In this respect the Claimant was provided with the feedback from the Respondent and relayed the information she was told. If the information was confidential and not to be shared with the candidate the Respondent and Miss Walters may have advised the Claimant of that fact but did not. Secondly, the Respondent assumed that the feedback was given to the candidate by the Claimant to deliberately cause the client to cease working with the Respondent, after the Respondent met with the Claimant on 10 November 2017. However, I heard from the Claimant and from Mr Barrett and their evidence is that the feedback was delivered before 10am on 10 November 2017. I have taken into account the Respondent's submission that this appears convenient however on the balance of probabilities this evidence is to be preferred over his speculation as to when the feedback was delivered to Mr Barrett. The Respondent produces no evidence to suggest that the feedback was delivered after his meeting with the Claimant.

6.5 The Claimant was wrongfully dismissed and is entitled to damages for breach of her contract relating to notice provisions.

6.6 In my conclusion on the facts of this case the Claimant had on the balance of probabilities completed her probationary period to the Respondent's satisfaction and the later suggestions of poor performance were a pretence for dismissing her for other reasons. The Claimant's contract provided for a month's notice after successfully completing her probationary period and her contractual entitlement was not met by the Respondent. The Claimant is entitled, in my conclusion, to damages for breach of contract in the sum of a month's pay.

6.7 I find on the evidence that had the Claimant not been unfairly and wrongfully dismissed her employment would have continued 3 days per week.

6.8 The Claimant's schedule of loss is contained in the bundle of documents at 2:3.

6.9 Statutory deductions relating to the Claimant's pay whilst in employment ran broadly at 10% of her total earnings. I adopt this using a broad brush approach in the absence of detailed calculations from either party.

6.10 I calculate damages for wrongful dismissal using her monthly full time net rate of pay £1,180, reducing this to 3/5th to pro-rate to her revised working week. The amount of damages is therefore £708.

6.11 The Respondent agreed to pay the Claimant bonus on her sales but has not done so. He accepts he has nothing in his contractual or bonus scheme documentation setting out a right to withhold bonus to leavers. He states that this is the industry norm however he produces no evidence in support of that contention. I cannot find on the evidence presented that there is any term to be applied by customary practice. In my conclusion the Claimant's express contractual entitlement to her bonus payment has been breached and she is entitled to damages for breach of contract in the sum agreed between the parties, £600 gross. I calculated that this would broadly equate to £540 net of statutory deductions.

6.12 The Claimant is not entitled to a basic award as she has insufficient service.

6.13 I calculate the Claimant's losses limited to 10 weeks at which point her losses are fully mitigated through her beginning full time employment and earning, in total, more than she would have earned had she not been unfairly dismissed and continued to work 3 days per week for the Respondent.

6.14 10 weeks net losses in basic pay to beginning her new employment amount to £1,633.

6.15 10 weeks loss in bonus pay would have been approximately £700 gross and approximately £630 net of tax and national insurance.

6.16 The Claimant claims in her schedule of loss an amount for loss of statutory rights however the Claimant had insufficient service to have accrued statutory rights therefore I make no award.

6.17 The awards that I make are therefore:

- a. Wrongful dismissal - £708.
- b. Breach of contract relating to bonus - £540 (agreed sum calculated net).
- c. Compensatory award for unfair dismissal - £2,263

6.18 I find that the Respondent failed to follow the ACAS Code of Practice on Handling Disciplinary and Grievance matters. Specifically the Respondent did not inform the Claimant of the problem prior to their meeting, she was not offered a right to be accompanied or any right of appeal against her dismissal. When she complained, no steps were taken to reconsider her dismissal under any process. In relation to notice pay and bonus, her complaints were not answered, no grievance processes were considered. In all the circumstances I consider that the failures were, notwithstanding the Respondent being a sole trader employing few people, unreasonable. I increase the above awards to the Claimant by 20% because I consider that level of increase to be just and equitable having regard to the number of breaches of the Code. The award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 is therefore (£2,263 + £540 + £708 X 20%) £702.20.

6.19 The total amount payable by the Respondent to the Claimant is £4,213.20.

Employment Judge Knowles

Sent to the parties on:

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For the Tribunal:

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Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.