



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Thresh

**Respondent:** TENN Construction Limited

**HELD AT:** Hull

**ON:** 9 April 2018

**BEFORE:** Employment Judge T R Smith

## REPRESENTATION:

**Claimant:** No attendance

**Respondent:** Mr P Tennison

## JUDGMENT

1. The Claimant's complaint of breach of contract is not well founded and is dismissed.
2. The Claimant's complaint of unlawful deduction from wages is not well founded and is dismissed.

## REASONS

### Background

1. When this case was called on at 10am the Claimant was not present although Mr Tennison was.
2. The Tribunal made enquiries with the clerk at Hull to see whether a message had been received from the Claimant to indicate she was having difficulties attending. The Claimant had not contacted the Tribunal at all.

3. The Tribunal also directed the clerk to make enquiries at the regional office of the Tribunal at Leeds, again to see if any message had been received from the Claimant. None had been received.
4. The Respondent provided to the Tribunal the Claimant's last known telephone number. The Tribunal clerk attempted to contact the Claimant on the number given but the number was temporarily unavailable.
5. The Tribunal noted that the Claimant had not responded to a letter of 21 March 2018.
6. The Tribunal had to decide whether to proceed in the absence of the Claimant.
7. The Tribunal reached the view that it was appropriate to proceed in the Claimant's absence. The Tribunal's reasons were as follows. Firstly, the Respondent was present and wished to proceed. Secondly, no explanation had been given for the Claimant's non attendance. Thirdly, there was no evidence that if the case was adjourned the Claimant would attend at an adjourned hearing.
8. The Tribunal then decided whether or not to dismiss the Claimant's claim under Rule 47 of the Employment Tribunal's (Constitutional and Rules of Procedure) Regulations 2013.
9. The Tribunal considered that having regard to evidence on the Tribunal file and in particular the ET1 that it was appropriate that evidence was heard and the matter determined on its merits.

#### **Evidence**

10. The Tribunal heard from Mr Paul Tennison, director and principal shareholder of the Respondent.
11. The Tribunal also had a copy of the Claimant's written particulars dated 14 November 2017 to hand.

#### **Findings of Fact**

12. The Claimant was offered employment by the Respondent as a contract supervisor.
13. The position was full time, 39 hours per week.
14. The rate of pay was £23,500 per annum.
15. The contract was subject to a probationary period of three months.
16. Either party had the right to terminate the contract during the probationary period on one weeks' notice given in writing.
17. The Claimant's first working day was Wednesday 15 November 2017. The Claimant worked for four hours in the office in the afternoon.
18. The Claimant then worked on the afternoon of Thursday 16 November. She worked for four hours.
19. The Claimant therefore worked for a total of eight hours. The Tribunal accepts the evidence of Mr Tennison that she was paid for that work, approximately a week late, in early to the middle of December 2017.

20. A telephone conversation took place between Mr Tennison and the Claimant on 16 November.
21. The Respondent had discovered a major financial irregularity within the business. The Respondent was in financial difficulties and it needed to restructure.
22. The Respondent therefore decided to dismiss the Claimant and another member of staff, the senior contract supervisor. The latter was employed on a higher salary than the Claimant. The content of that telephone conversation is crucial to my findings. I only had oral evidence from Mr Tennison and I found him a reliable witness.
23. He explained to the Claimant that her employment had to terminate and explained the reasons why. He apologised for the circumstances. He did not say anything about paying the Claimant. No discussion took place by either party as regards notice.
24. Mr Tennison subsequently sent a text to the Claimant asking the Claimant to be discreet as regards the Respondent's financial position and that a number of jobs depended on the success of the business.
25. The Claimant did not report to work after 16 November.

### **Conclusion**

26. Under section 13 of the Employment Rights Act 1996 an employer shall not make a deduction from wages of a worker unless the conditions set out in section 13(a) or (b) are satisfied.
27. Non payment may amount to a deduction.
28. The Claimant's complaint under section 23 of the Employment Rights Act 1996 related to the unlawful deduction of eight hours pay. I am satisfied on the evidence before me that sums due to the Claimant have been paid. They were paid, albeit somewhat late in December. The Claimant did not present her ET1 until 6 February 2018.
29. Given it is for the Claimant to prove her case on the balance of probabilities, and the Claimant has failed to do so, her complaint must be dismissed.
30. The next issue relates to the question of notice. Under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 non payment of notice is potentially a contract claim. I am satisfied having regard to the written particulars of employment that the contractual period during the probationary period was one week.
31. The mere fact the Claimant was entitled to notice does not mean she is entitled to be paid if she fails to work her notice.
32. I find the Claimant's employment was terminated during the phone call on 16 November. No discussion took place as regards notice. Unless the Respondent had agreed to pay money in lieu of notice the Claimant was not entitled to be paid unless she was ready willing and able to work. The Claimant failed to attend work. Therefore, the Respondent is not in breach of contract in failing to pay notice. If the Respondent had made it clear on 16 November that the Claimant would not be paid for her notice if she worked it, that would have been a different consideration but the oral evidence I have from Mr Tennison was that no such discussion took place. Given, again, it is

for the Claimant to prove her case on the balance of probabilities and she has failed to do so her complaint of breach of contract is dismissed.

Employment Judge T R Smith

Date: 17 May 2018

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.

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