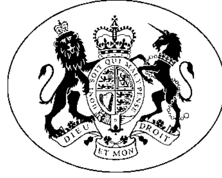
Case No: 2305173/2019



EMPLOYMENT TRIBUNALS

Claimant: Ms Jessica Coates

Respondent: South London Heating Limited

Heard at: Croydon **On:** 6 February 2020

Before: Employment Judge Fowell

Representation:

Claimant: Mr A Coates (lay representative)

Respondent: Ms K Chelhal, consultant for Peninsula Business Services Ltd

RESERVED JUDGMENT

ON LIABILITY

1. The claimant's dismissal was not in breach of contract.

2. The respondent made an unlawful deduction from the claimant's wages prior to her dismissal.

3. The claimant shall provide the respondent and the Tribunal, on or before 6 March 2020, with a Schedule of Loss, setting out what losses she claims to have suffered from the deductions in her wages prior to her dismissal. This should reflect the loss of net basic earnings, giving credit for any statutory sick pay received.

4. The company shall, on or before 20 March 2020, notify the Tribunal and the claimant in writing whether the claimant's Schedule is agreed, and if not file and serve a Counter Schedule setting out its response to those calculations and the extent to which they are disputed.

5. A decision on remedy will be made on the basis of the above calculations and any accompanying written representations only.

REASONS

Introduction

1. The respondent, **Error! Reference source not found.**Limited installs and repairs domestic heating boilers as well as providing other heating services. The claimant, Ms Coates, worked for them, initially as a subcontracted gas engineer, and then from 1 June 2019 as an employee. She was also a 49% shareholder a family business, JAC & Partners Limited, her father holding the rest of the shares. (He attended this hearing as her representative.)

2. The working relationship was a short one. It ended on 11 September 2019 following a series of disputes and a period of suspension. She did not therefore have sufficient service to bring a complaint of unfair dismissal but she has brought claims for unlawful deduction from wages and for her notice pay. The company did not pay her any notice on the grounds that she had been in fundamental breach of contract by committing gross misconduct. No one single incident is relied on as amounting to gross misconduct, but according to the Grounds of Resistance they say that there was:

   a. a string of complaints from customers about her work,

   b. that she was argumentative and defensive when invited to a meeting to discuss it,

   c. that on one occasion (12 July 2019) she failed to complete a repair for a customer properly, so that the electricity meter blew up and they were left with no electricity and a house full of smoke,

   d. that she was argumentative and defensive again when invited to a further meeting on 24 July 2019

   e. that following her suspension she failed to attend two investigation meetings without excuse,

   f. and that she failed to attend the disciplinary hearing, which went ahead in her absence.

3. The company also say that her pay was stopped on 9 August 2019 when she failed to attend the first investigation meeting, although it resumed on 16 August 2019, and that she was placed on statutory sick pay on 30 August 2019 when she informed them that she was sick. She says, on the other hand, that she should be paid in full throughout and paid her contractual notice pay on dismissal.

4. Somewhat surprisingly, the grounds of resistance which set out the company's

position make little mention of the detailed allegations for which Ms Coates was dismissed, apart from the customer complaints. The allegations in her dismissal letter included failing to work her contractual hours, using her company vehicle for private use, having a mobile phone provided by her father's company (JAC), using JAC tools, and disclosing information to her father. These points show that at the time of her dismissal there was also a lively concern that she was in fact working some of the time for her family firm.

5. The claim for notice pay is usually referred to as a claim for wrongful dismissal and on that issue I have to decide whether the company have satisfied me on the balance of probability that Ms Coates was in fact guilty of gross misconduct. As to the claim for unlawful deduction from wages, the question is whether those deductions were authorised in her contract of employment.

6. In addressing these issues I heard evidence from Ms Coates and her father; and on behalf of the company from their two directors Mr Gallagher and Ms Ioannou. Each side provided separate bundles totalling about 600 pages, clearly a very high amount for a complaint of this sort. Having considered that evidence, and arguments on each side, I make the following findings of fact.

Findings of Fact

7. Firstly I emphasise that this is not a claim of unfair dismissal so I am not concerned, for example, with the fairness of the process adopted, or whether the company acted fairly in dealing with the grievance raised by Ms Coates shortly after the heated meeting on 24 July 2019. My only concerns are whether, on the evidence presented, she was in fact guilty of gross misconduct, and secondly whether the company was entitled to withhold some of her wages before dismissing her.

8. By way of background JAC & Partners Ltd is a property management company and Ms Coates worked in her father's business carrying out gas installation work in their properties. It is not therefore a direct competitor of South London Heating Ltd. She was also carrying out work as a subcontractor for South London Heating Ltd whilst working as a director for JAC. Mr Coates was therefore known to Mr Gallagher and Ms Ioannou, and there seems to have been an ongoing tension between him and his daughter on one side and Mr Gallagher and Ms Ioannou on the other, which got worse towards the end of her employment.

9. The company was however keen to take Ms Coates on, on a permanent, employed basis. She is a domestic gas heating engineer of 12 years' experience and she joined with the job title of Senior Technician and Operations and Sales Manager.

10. Things did not get off to a very good start. Looking at the email exchanges around the time of her recruitment, I see that Mr Coates emailed the company on 27

February 2019 to say

> "I assume we are in plan to move Jess over to PAYE as of 1st March and if so I will terminate her as an employee of JAC as of Thursday. Jessica will remain a shareholder of JAC which is our family service company."

11. Ms Ioannou replied that day in friendly terms to say that that would be the start date. There were further exchanges in which she expressed that they were excited for Ms Coates to be joining them and looked forward to welcoming her on board, but were surprised that we would still be a shareholder of JAC.

12. He responded in forthright terms to say that he was "quite shocked" at the content of her email, and that it suggested that they did not trust her, "which is hardly a good sign for the future." In reply, Ms Ioannou suggested that it would be better to discuss things directly with Ms Coates. Hence, Mr Coates was taking the lead in negotiating the new contract with South London Heating and adopted from the outset a confrontational tone.

13. Nevertheless, Ms Coates joined them on a salary of over £46,000 and was provided with a company van. She was also given a £50 bonus for every new boiler which she sold to her customers. Her role was mainly as a senior technician. She would be sent a list of customers to visit by email each day and was given a time period for each visit and any travel time. In general, the working arrangements she had as a subcontractor continued unaltered, including her lunch break. Her preference would have been to skip her lunch hour altogether and leave work an hour early at 4 o'clock, but she was told that this was against the Working Time Regulations and that she had to have at least 30 minutes in the middle of the day. So, she took a half hour lunch break and another break at 4.00 pm, which meant that she was supposed to be working from 4.30 to 5.00 pm every day but in practice there was not time after 4.30 pm for any further home visit, so she usually left before 4.00 pm each day. The directors appear not to have been aware of this, as the day to day arrangements were largely left to the Office Administrator, Ms Green. This was a very favourable arrangement for Ms Coates as it meant that she could collect her child from nursery early.

14. From an early stage in her employment complaints were received from customers. Some said that she was only spending 10 minutes on a job and was not doing a very thorough job. Others said that she was always trying to persuade them to buy new boiler. These were serious concerns from the company's point of view and the two directors arranged to have a meeting with her at their home, rather than the office, to discuss it. She reacted badly when the subject was raised, particularly when she was taken to task for pressing the customers to replace their boilers unnecessarily.

15. After that meeting there was the incident on 11 July 2019 when a customer's fuse box blew up. Above the fuse board there was a stopcock. When Ms Coates left

the property the stopcock was leaking and dripped water onto the circuitry below, causing the explosion. They say that she should have checked to ensure that it was not leaking. They were also disappointed with her response, which was to deny any responsibility. That led to the meeting on 24 July 2019. Again it was at the directors' home and again it became heated when this incident was raised by Ms Ioannou.

16. Ms Ioannou's role involved handling customer complaints. She is not technically qualified, so for any technical details she relied on Mr Gallagher. Ms Coates took strong exception to been spoken to about these issues by her. She maintained that she was not in any way responsible for this incident, just as she did not at this hearing. Given the strength of her reaction she was suspended a few days later, on 4 August 2019.

17. The suspension letter said that there had been 20 customer complaints in all, costing the company over £3000, although in fact 11 of those related to her time as a subcontractor. Ms Coates felt this criticism was unfair, particularly about the electrical explosion, which had been caused by a leaking stopcock which she had not used. She felt that she had been bullied at that meeting. Presented with this long list of written complaints, she also felt that she was going to be dismissed, and so when she was invited to a further investigation meeting with the directors at their home she did not want to put herself back in that situation. She refused to attend without further information about the various complaints. As a result, her pay was stopped. Her van was then taken away from her without warning on 14 August 2019.

18. Behind the scenes, negotiations were underway over a settlement agreement, and given that the parties were negotiating, the company restored her pay on 16 August. Those negotiations broke down however and she was then invited to a disciplinary hearing. Given what had transpired, Ms Coates felt that there was only likely to be one outcome, so again she refused to attend. But this time she sent in her point of view in writing. In that email, of 30 August 2019, she also informed the company that she was self-certifying as sick, given the stress she was under, and in response they decided to reduce her pay to statutory sick pay only. A few days later, on 11 September, she was dismissed.

19. As already noted, the disciplinary letter raised a number of other points which were not referred to in the response form:

    a. falsifying her hours, i.e. leaving work early;

    b. not devoting the whole of her time and attention to her duties, i.e. not spending long enough at each client's premises;

    c. using JAC tools without management permission;

d. using a JAC phone;

e. disclosing confidential information to her father, i.e. the contents of the meeting on 24 July 2019;

f. doing business for JAC during working hours;

g. using her vehicle for personal use.

20. The allegations about hours of work, time spent at the customer's property and about using the vehicle for personal use all came from an examination of the vehicle tracking system. This is an anti-theft device, not usually monitored by the company, and Ms Coates was not aware that it was in use at all. It showed that almost every day she left work at least an hour early, sometimes as much as three hours early. She said that she would always call the office when she finished but there is a witness statement from Ms Green to say that she only phoned in on a few occasions. Given that nothing was done to address the situation, I find that Ms Green's evidence is more likely to be correct. Ms Coates also accepted at this hearing that in practice she often left early when she had finished, and went to collect her child, hence my finding that she usually left before 4pm each day. It is also clear that she left as soon as she could. On the other hand, she was never spoken to about this, or asked where she was.

21. The next allegation is related – not spending enough time on customer visits. The tracker information shows how long she spent and I accept that it is reliable. I do not accept, as Ms Coates suggested, that this was information which could have been made up by the company - it was not suggested to the company's witnesses that they had done so.

22. Looking at the detail of these complaints, there is a record of a complaint on 27 June 2019 about a call-out fee for a five-minute inspection of a fault that had already been reported to the company. The customer was just looking for a quote to fix the leak. Similarly on 13 July 2019 a customer complained that Ms Coates was only on site for a few minutes and paid no attention to the problem, just provided a quote.

23. Another type of complaint was about being pressured to install a new boiler. A customer complained on 16 July that they had booked a service but the boiler broke down a week after her visit. Ms Coates came back and suggested this time that they fit a new boiler as the repair was uneconomical, but she made no diagnosis of the fault, let alone provide a quote. The customer was unhappy with this approach and so went with another company. On 15 July a long-standing customer complained that when Ms Coates arrived to carry out a service she only opened the cover, glanced inside and checked the outlet, whereas the engineer the previous year had checked the boiler flow rates, taken readings and been there some time.

24. On 23 July 19 another customer complained that she had been pressured to install a new boiler. The same occurred with one customer she visited on three occasions, when she recommended that the customer replace the boiler at a cost of £1,200 but this did not solve the problem. She had not diagnosed any fault before recommending he buy this expensive item. There was also the significant issue on 11 July 2019 when the fuse box exploded at the property and it was felt that she should have spent more time checking the stopcock for leaks before leaving. She had had time to make sure everything was working properly but left early.

25. These were serious concerns. In most cases they resulted in a refund, sometimes of hundreds of pounds. Her time for the work was also unbillable. It affected the company's reputation. It led to an adverse review on the Checkatrade website. This was particularly unwelcome as they had won a national award for their services in 2015.

26. This was the company's main concern, combined with the negative and defensive attitude shown by Ms Coates when it was raised with her. The only real defence to these complaints, at the time and at this hearing, was that they could have been made up since the names of the customers were anonymised. Assessing matters on the balance of probability, I reject that idea. Not only would it involve a wholesale fabrication on the part of the company, itself a disproportionate effort in a dispute over notice pay, but if complaints were alleged which had no basis in fact Ms Coates could have said so. Notably, she accepts that there was an electrical explosion at one property following her visit on 11 July.

27. There is some support for these allegations also in the records about her movements from the vehicle tracking system. Customer complaints about her only being in the property for five or 10 minutes are borne out by the many examples shown of just such short periods. The pattern therefore of making short visits, not properly diagnosing faults or taking the time to do so, pressing customers instead to install a new boiler and leaving at the end of the day as soon as possible is well established. I therefore find on balance that this main allegation that her conduct led to a number of serious customer complaints is true.

28. There was no suggestion on her behalf that it was a training issue. On the contrary, she rejected the criticisms and was dismissive about the technical expertise of the company's directors, including Mr Gallagher. Given the number of these complaints within a short period of time, and the fact that she was spoken to about them in order to give her the opportunity to change her approach, I accept that they were fairly regarded as conduct issues by the company.

29. The other issues about her timekeeping and so forth are by comparison merely makeweights, and for that reason were sensibly dropped when the company set out its position in the response from. Dealing with each of them briefly, leaving

work early does not appear in itself to be a conduct issues since she was not paid to be in an office for a certain period and was entitled to go home when each job was completed. Similarly, the short period of time at each customer's premises would not be a disciplinary matter. There was no evidence that she had been conducting any work for JAC during work hours. She was using their phone and other equipment but only because no phone or equipment had been provided by the respondent. As for the personal use of the vehicle, the company's position is ambiguous. The contract of employment says that she would be provided with a vehicle and that she should meet the cost of personal use. That clearly indicates the personal use is permitted. A separate form, which she signed when she was issued with the van, contains a statement that it may not be used for personal use, but at the same time it retained the reference to meeting the cost of personal use. It is not clear which of these statements is incorrect, and even if personal use was prohibited there is nothing to suggest that it would be regarded as gross misconduct. I therefore discount those other allegations.

30. Having found that she was guilty of serious misconduct in relation to her work, the next question is whether that was sufficiently serious to amount to a fundamental breach of contract. As in cases of unfair dismissal, it is not for an employment tribunal to substitute its view of the seriousness of an offence for that of the respondent[1]. There is a range of reasonable responses. This "range of reasonable responses" test reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another.

31. Here, there is no reason for me to conclude that the decision to dismiss was outside the range of reasonable responses, given the frequency and cost of the complaints and the effect on the respondent's business. Accordingly, I am bound to conclude that the dismissal was not in breach of contract.

32. The same does not apply however to the complaint of unlawful deduction from wages. The contract of employment provided at section 20 that the company had the right to suspend her. It makes no mention of pay during suspension but that is the normal expectation and, for example, a key provision of the ACAS code of practice on disciplinary and grievance procedures. It is well established that a term may be implied into contracts of employment where no provision is made for a point. Hence, where there is no provision for notice periods, a period of "reasonable" notice is implied. I have no hesitation in reaching the conclusion here that suspension should be on full pay because the opposite result would involve a potentially serious unfairness to an employee; they might be suspended without pay even before any decision is made about their guilt. Such pay is not therefore discretionary, it is contractual, and although section 20 refers to the exercise of discretion, that only relates to whether or not to suspend the individual, not whether to pay them.

[1] For example, by the Court of Appeal in *London Ambulance Service NHS Trust v Small 2009 IRLR 563*

33. It follows that for the period between 9 and 16 August 2019, Ms Coates ought to have been paid in full. Similarly, her pay ought to have continued after 30 August 2019. There is nothing in section 20 or elsewhere in the contract of employment that makes her pay on suspension subject to her being well enough to carry out duties if so required. In short, there is nothing to show that sickness trumps suspension. If there were, there is further potential for serious unfairness. Suspension is a serious step and employees are often signed off sick with stress and anxiety as a result. To have their pay then taken away – which is the realistic effect of a reduction to SSP – before the outcome is known, can only add to that stress. In that case, if they were acquitted of any serious wrongdoing they would still end up paying a significant penalty in lost wages through no fault of their own. Accordingly, the complaint of unlawful deduction from wages succeeds.

34. Time did not allow for considerations of remedy but it was agreed that a further hearing was not necessary. Hence, directions have been given above for a schedule and counter schedule of loss, giving each side the chance to set out its calculation of the net loss of basic pay, after tax, suffered by Ms Coates prior to her dismissal.

Employment Judge Fowell

Date 10 February 2020