Case Number: 2502693/2019

THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs Alicia James**

Respondent: **Roundel Manufacturing Limited**

Heard at: **North Shields Hearing Centre** **On:** **Friday 17th January 2020**

Before: **Employment Judge Speker OBE DL sitting alone**

Members:

Representation:

Claimant: **Mr Gavin Holder (Lay Representative)**
Respondent: **Miss S Bowen of Counsel**

RESERVED JUDGMENT

1. The claimant was not constructively dismissed and accordingly the claim of unfair dismissal is unsuccessful and is dismissed.

2. The claimant did not suffer unauthorised deduction from wages and that claim is dismissed.

3. The claim of failure to follow a fair procedure is found to be invalid and is dismissed.

REASONS

1. The claimant Mrs Alicia James brought a claim for unfair constructive dismissal against her former employer Roundel Manufacturing Limited. She also made a claim of unauthorised deduction from wages and a claim described as failure to follow a fair procedure which was not categorised as any specific legal head of claim.

2. Evidence was given by the claimant herself. For the respondent evidence was given by two witnesses, Martyn Cole, Group Service Director and formerly Head of Information Service which included being Head of HR and Lee Nicholson, Sales

Order Processing Supervisor, who was the claimant's manager. A bundle of documents was provided running to 242 pages. There was also a chronology.

3. I found the following facts:

3.1 The claimant commenced employment with the respondent on 31st August 2010 as Sales Additions Co-ordinator, her duties being involved in selling kitchens or kitchen extras and receiving a salary and a bonus/commission, the latter being described by the respondent as "non-contractual". The respondent is in the business of manufacturing kitchens and kitchen extras operating from premises at Wear Industrial Estate, Washington, Tyne and Wear.

3.2 The claimant had a previous period of employment with the respondent starting as a seventeen-year-old apprentice in 2002 but had then left the respondent for career development in 2007 returning in 2010. There was a break in her continuity of employment and accordingly her service ran from 31st August 2010 until she resigned on 28th January 2019, her employment ending on 5th April 2019.

3.3 The claimant appears to have been a valued employee performing her duties in a satisfactory manner and earning regular commission, having reached her target figures. There was no history of any complaint or disciplinary action. Her attendance record was good. The relevant events for the purpose of this case, all occurred from November 2017 onwards.

3.4 In May 2018 the company discovered that an accidental overpayment commission had been made to the claimant in November 2017. The commission to which she was entitled was £529.67 but the payment which had been made to her was £3,529.57. That was very significantly above the level of commission which she had ever received. Calculating the average commission for the months May 2017 to October 2017 showed an average for those months of £510.33. The highest payment she had received of commission during those six months was £1,287.32. Accordingly on the basis of her average, the commission payment made to her in November 2017 was seven times the average amount of commission. The claimant did not report receipt of this figure, on the basis that she was not supplied with calculation of commission and therefore accepted the company's calculations without question. Having received the commission she treated it as legitimate and spent the money in the normal way.

3.5 Although there was an issue as to whether the company became aware of the overpayment in March 2018 rather than May 2018, the position appeared to be that it was following a review of the claimant's figures that enquiries began to be made in March 2018. It was in May 2018 that it became clear to the company that the overpayment had been made in November 2017.

3.6 The claimant's contract of employment contained express provision that if an accidental overpayment is made, the employee must act "in good faith"

and immediately notify the manager and that to fail to do so may lead to disciplinary action.

3.7 The claimant did not notify anyone about the overpayment as indicated above and there were discussions with the claimant about this. No disciplinary action was taken against her but she was informed that the company expected her to repay the overpayment. The claimant accepted what she was told about there having been an overpayment and negotiated with the company as to repayment terms. The claimant was informed that the company was prepared to agree repayment over what it considered to be a reasonable period and its initial position was that the repayment should be over a six-month period. The claimant felt that this was too short a period and was conscious of the fact that she would be going on maternity leave in July 2018.

3.8 There were meetings regarding the terms and there were exchanges of e-mail. On 29th May the claimant met with Ian Black, Head of Finance, to discuss the repayment plan. On 30th May it was confirmed to the claimant that the repayment plan which was effectively what she had proposed was acceptable to the company. The company was still looking to recover the money within approximately six months, although agreeing that this would not include any deductions during maternity leave and that further payments would be recouped following the claimant returning to work from maternity leave. The basic arrangement was that commissions earned by the claimant would not be paid to her but would be retained by the company as part of the repayment plan. At the end of the negotiations, the claimant had suggested that a fixed sum be deducted for May but as the payroll had already been organised, it was too late for the pay to be adjusted for that month.

3.9 The claimant conceded that the overpayment had been made by the company and that the company was entitled to recover the money. She did not allege that this amounted to a breach of her contract, either express or implied.

3.10 Following her meeting on 29th May the claimant left for lunch but did not return to work after lunch. She sent an e-mail to the company saying that she would not be returning, attributing this to her being upset at the meeting which she had attended and suggesting that she felt unwell. This was investigated by the company because her absence on the afternoon on 29th May was considered not to have been authorised. The matter was referred to Martyn Cole. As head of HR he met with Lee Nicholson and Sarah Coulthard about her having left the site and not returning for work. Martyn Cole notified the claimant on 7th June 2018 that her absence on the previous Tuesday afternoon was considered to be unauthorised absence and in contravention of the company's attendance and timekeeping policy. He stated that this would normally lead to disciplinary action, but that it had been decided not to take any further action but that the absence would be unpaid and would mean that the claimant could no longer achieve her one-hundred percent attendance for the calendar year. Whilst the claimant was

not happy about this, she did not raise a grievance about it or suggest that this was a breach of contract.

3.11 The claimant raised an issue with regard to what she felt were excessive duties she was having to perform in dealing with complaints about delivery. She said that there should be an increase in the administrative function of the department. This was considered and there were negotiations about it. The claimant maintained that she was being asked to take a reduction in wages in order to fund an increase in the facility of administration. The company denied that this was the case but did make arrangements for some of the duties to be taken over and for an increase in the administrative function. The claimant did not raise a formal grievance about this.

3.12 In order to provide for cover arrangements when the claimant was to go on maternity leave, Sarah Nicolson returned to work for the company. She underwent training with the claimant during the months of May and June. The company proposed that all commission earned by the department for those two months would accrue to the claimant herself, even if Sarah had done work on the contract. However for the part of July when the claimant would still be at work, the commission would all go to Sarah. The respondent felt this was the fairest way of dealing with commission as far as the claimant was concerned. The claimant alleged that the slightly different arrangement had been reached. She did not raise any grievance about this.

3.13 There was a further issue as to the claimant's commission target figure which had been £16,000 per annum prior to commission of five percent could be earned. The claimant was informed this target was being increased to £24,000 because of increase in the company's business. That was confirmed in writing to the claimant. However, the respondent's case was that the figure had been miscalculated partly because it took into account the commission overpayment and that the actual target figure was to be increased to £20,000 and not £24,000. The respondent conceded that in error that change to £20,000 was not confirmed to the claimant in writing and that there was no evidence of it. In any event this was not to commence until the claimant returned from maternity leave. Her maternity leave commenced on 9th July 2018 and accordingly the new arrangements would not commence until Spring 2019 or whatever date the claimant ultimately decided to return to work.

3.14 The claimant commenced her maternity leave on 9th July 2018. There appear to have been no relevant communications between the parties until on 28th January 2019 the claimant e-mailed Leigh Blythe tendering her resignation from the respondent and giving the date of termination as 5th April 2019, a period of nine weeks' notice. She referred to the fact her date due back from maternity leave would have been 8th April. The claimant gave nine weeks' notice in an erroneous misreading of her contract, the nine weeks' notice being that which would need to be given by the respondent based upon the claimant's length of service. The claimant was only required to give four weeks' notice.

3.15 On 30th January Martyn Cole acknowledged the resignation e-mail and stated that it was accepted. He referred to the fact that the claimant was only required to give contractual notice of four weeks but that the respondent accepted the notice given and that the last day of employment would be 5th April 2019. The letter also thanked the claimant for her hard work and efforts during her time with the company and stated that she had been a very valued employee over the last eight years and would be missed. The claimant had not given any reasons for her resignation and no explanation was requested.

3.16 On 6th February 2019 Martyn Cole wrote to the claimant with regard to the outstanding overpayment of commission and set out the payments made to date on the basis of commission retained, leaving a balance at that stage of £1,292.94. It was stated that it was intended to recover the outstanding amount by retaining the claimant's accrued annual leave payments and maternity pay making a total of £12,092.94. The claimant replied on 18th February stating that she did not agree to money being deducted from her maternity pay and that this would cause her financial hardship. Martyn Cole replied on 28th February stating that if the claimant did not agree then would she put forward an alternative repayment plan.

3.17 Martyn Cole wrote again to the claimant on 8th March with regard to the repayment arrangements and setting out the company's proposals, in the absence of any response having been received from the claimant. On 15th March the claimant sent an e-mail addressed to HR admin setting out a detailed grievance under the company's grievance procedure. The grievance referred to the way in which the overpayment had occurred, the treatment of her half-day absence by Martyn Cole, the allegation that Martyn Cole had asked the claimant to fund the admin department by taking a pay cut, the intention to deduct pay from SMP, the commission arrangements for May and June 2018, the increase in her commission threshold from £16,000 to £24,000 and what she described as a "punitive attitude" towards her by Martyn Cole by way of reference to disciplinary action and the whole issue of the overpayment.

3.18 Sarah Coulthard acknowledged the grievance and commenced investigations of it.

3.19 The claimant's effective date of termination was 5th April 2019.

3.20 Although Sarah Coulthard conducted various investigations in relation to the grievance, she then left the company and the grievance investigation was not concluded. The claimant did not receive any outcome of it.

Submissions

4. On behalf of the respondent Miss Bowen submitted that the claimant had not demonstrated that there was any significant breach of contract by the respondent. She referred to the well-known case of Western Excavating v Sharp, and the

contractual test. The claimant herself had conceded that she did not consider that there was a breach of contract in relation to the treatment which she had received. Miss Bowen said that legally the claim of constructive dismissal was not made out. The company had acted lawfully and appropriately with regard to the accidental overpayment and was entitled to require this to be repaid. The company had been reasonable in the way in which it had approached this and had been considerate towards the claimant. There was no breach of contract in relation to the setting of the repayment terms. The incident as to the claimant having been absent following a meeting was unauthorised absence in accordance with the company's policy. The fact that the company had not taken any disciplinary action showed a reasonable attitude and there was no evidence of any breach of contract. Detailed submissions were made with regard to the other aspects of the case and the issues raised by the claimant, stating that none of these showed any breach of contract whether express or implied in relation to the duty of trust and confidence between employer and employee. She also emphasised that the claimant had not raised any grievance at any time until after her resignation. To that extent the grievance was irrelevant as it was after the claimant had resigned. Any unfairness in dealing with the grievance, such not being admitted, could not be relevant to the decision made by the claimant to resign. The resignation in any event did not include any detail as to why it was that the claimant felt entitled to resign.

5. Furthermore there was significant delay by the claimant as to her resignation. Although the claimant maintained that she had felt stressed and was on maternity leave, the issues about which she raised concerns in relation to the treatment she received from the claimant ended in June 2018, but the resignation was not until 28th January 2019, more than six months later. As to the claimant's claim for unauthorised deduction of pay, Miss Bowen submitted that on the contrary the deduction of pay was authorised both because it was agreed by the claimant but also because such deductions are authorised under the relevant legislation. The deduction from statutory maternity pay was also permissible bearing in mind that SMP is within the statutory definition of pay. Deduction from pay generally in order to recover overpayments was an exception to the provisions in Section 13 of the Employment Rights Act 1998.

6. Finally the claim put forward by the claimant as a freestanding element of failure to follow procedure was not within the Tribunal's jurisdiction as it was not linked to any statutory head of claim which the Tribunal could determine. Miss Bowen produced two authorities with regard to deduction from pay with regard to overpayments. These were *SIP Industrial Products Limited v Swinn 1994 ICR473* and *Sunderland Polytechnic v Evans 1993 ICR392*.

7. On behalf of the claimant, Mr Holder challenged the date on which the overpayment had been discovered by the respondent. He submitted that it was the respondent's intention to build a claim against the claimant as part of a strategy to increase her bonus target by fifty percent. Although the respondent had alleged that the bonus scheme was extra contractual, it should be treated as a right of the claimant under her contract. He argued that the way in which her absence at work for one afternoon was treated was unreasonable and excessive and was an attack upon her integrity. There had been delays on the part of the company in following up e-mails. The evidence of the respondent with regard to the bonus target figure

of £24,000 was unreliable. There was no evidence to show that the figure was in fact to be £20,000. It should be borne in mind that the claimant at no stage refused to make repayment of the overpayment. The respondent had delayed in agreeing the plan which she had put forward. There had also been a failure with regard to correcting incorrect deductions which had been made in the claimant's payslips although this was not a claim formally put before the Tribunal.

The law

8. *Employment Rights Act 1996*

Section 95 (1) (c) there is a dismissal when the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Western Excavating (ECC) Limited v Sharp 1978 ICR221CA. The Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract.

As Lord Denning MR put it:

"*If the employer is guilty of conduct which is a significant breach going to root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*."

Section 13 - Right not to suffer unauthorised deductions

(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.

Section 14 - Excepted deductions

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or
(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

Section 27 - Meaning of "wages" etc

(1) Wages means any sum payable to the employee in connection with his employment, including—

(c) statutory maternity pay.

Findings

9. In order to succeed in a claim of constructive dismissal, the employee must establish that:-

1. There was a fundamental breach of contract on the part of the employer.

2. The employer's breach caused the employee to resign, and

3. The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

10. In the present case I have considered the issues raised by the complainant in support of her case in order to determine whether there is anything which amounts to a fundamental breach of the contract whether express or implied, whether any of these caused the claimant to resign and whether she delayed before doing so.

11. With regard to the overpayment of commission I find that this was accidental by the respondent and that they did not discover it until some months later. There is an issue as to whether the claimant was herself in breach of contract in failing to notify her employer of the payment. The evidence indicated that it should have been obvious to her that in November 2017 she received a commission payment which was seven times the amount of the average commission which she received. That does raise a strong suspicion that it should indeed have been obvious to her and that it was a matter which she should at least have queried and brought to the attention of the company. In her defence she maintained that she never received any breakdown of commission and always accepted the calculations of the respondent as being correct. In the event the company did not invoke any disciplinary action against the claimant for failing to notify them of the overpayment at the time or at all. On the contrary they appear to have given her the benefit of the doubt and concentrated upon seeking reasonable arrangements under which the money could be repaid by the claimant.

12. Mrs James expressly stated that she did not allege that the respondent was in breach of contract in seeking to recover the overpayment monies. Accordingly her constructive dismissal claim could not be founded upon any conduct by the respondent in requesting and requiring that the money should be repaid. As to the method by which the respondent sought to agree terms for the repayment, I find that there was nothing in these negotiations which could be categorised either as an express breach of contract or as conduct which amounted to a breach of the implied term of trust and confidence between employer and employee. This is because the negotiations went on for some time and ultimately the repayment terms were in line with what the claimant herself was advancing. She confirmed

the arrangements and allowed them to continue for very many months prior to the date when she resigned. She did not raise any grievance prior to her resignation as to this but only after she had resigned from the company. In her resignation e-mail she gave no reasons for her decision to leave the company.

13. As to the various other issues which the claimant raised, I find as follows. In relation to the change in the target figure for her commission from £16,000 per annum to £24,000 per annum, the claimant did not raise a grievance about this at the time. In any event it was not to come into effect until after her return from maternity leave. The respondent's position was that the stated figure was a miscalculation and that the actual new figure was to be £20,000 because the respondent had taken into account the overpayment of commission in working out what the new target figure should be. Those new arrangements were not to come into effect until after the claimant's return from maternity leave. If she felt this was erroneous then she could have raised a grievance prior to giving notice of resignation but she only did so after she had served her resignation notice.

14. The arrangements for attributing commission for May and June were devised by the respondent in a way which appeared to be advantageous to the claimant rather than to her colleague. There was nothing in this which amounted to a breach of an express or implied term and again gave no legal basis for constructive dismissal.

15. The way in which the claimant was treated with regard to unauthorised absence was in accordance with the company's policies. Although the claimant had sent an e-mail saying that she would not be returning to work on the afternoon in question, it cannot be denied that her absence was not "authorised" in that she had not obtained permission to be off; what she had done was inform her employer that she would not be returning. It was therefore correct to treat this as "unauthorised" and this did render the claimant at risk of a disciplinary investigation. That the respondent did not do that was reasonable. Again there is no breach of contract.

16. Finally the suggestion that Mr Cole adopted towards the claimant a punitive attitude suggested that the claimant was arguing that there was a breach of the implied duty of trust and confidence. The evidence produced by the claimant in this respect was not persuasive or compelling. In any event, the approach about which the claimant complained, was six months before resignation and this was too long a delay to enable the claimant to satisfy the statutory definition of constructive dismissal.

17. For all the above reasons I find that the claimant has not established constructive dismissal and accordingly her claim is dismissed.

18. With regard to the claims of unauthorised deduction of wages, Miss Bowen suggested that the Tribunal did not have jurisdiction to consider this at all. I find that the claim has been made but fails because it has not been demonstrated that there has in fact been any unauthorised deduction. The legislation provides that such deductions can be made on the basis that they are legally authorised. In Section13 of the Employment Rights Act, provision is made for recovery of payments statutorily and contractually authorised where, as here, the claimant has signed a contract which permits the employer to make the deductions. But added

to this the claimant herself had confirmed in writing throughout the e-mails that deductions could be made from her commission in order to make the necessary repayments. The claim for unauthorised deduction of pay is not made out and is dismissed.

19. Finally there is a suggestion in the claim form of a claim for failure to follow procedure. This was not adequately particularised. Some suggestions were made that this related to the way in which the grievance was investigated and the lack of an outcome. However this is not a legal freestanding head of claim and there is no legal basis upon which I can make a finding in favour of the claimant. Insofar as it does amount to a claim then I dismiss it.

EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 31 January 2020

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