EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 6/7/2021

Claimant: Ms V Vecchini

Respondent: Mr A Jakobs

Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Ms B Lester (Solicitor)

JUDGMENT

The claims are dismissed

REASONS

1. The claims were for notice pay and unfair dismissal. I heard evidence from the Claimant and the Respondent. There was a bundle of documents. I received oral submissions. The hearing was by CVP. There were a few technical problems at first but all concerned were able to join satisfactorily before we started.

Findings of fact

2. The Respondent was the employer of the Claimant, who worked for him as a housekeeper. The Claimant entered into a written contract on 4 February 2016 in which, amongst other clauses, she agreed to be paid £440 per week, *'payable in equal weekly instalments in arrears'*. It was mutually understood this amount was net of tax and national insurance contributions and in practice the Respondent agreed to pay all the tax due on the salary.

3. While the contract does not state that the £440 per week was net, it is clear that it was. The Claimant always received £440 and no deductions were made from that sum and HMRC treated the Claimant as having received the £440 on a net basis.

4. The Respondent engaged a payroll company to calculate the tax and national insurance contributions (NIC) such that he could make the net payment of £440 per week to the Claimant and the necessary tax and NIC payments to HMRC in accordance with the Respondent's statutory obligations as an employer. As HMRC works on a gross basis only, the payroll company grossed up the net weekly amount in accordance with the tax code provided to them by HMRC and submitted such calculations to HMRC on a weekly basis. Later this was changed to pay on a monthly basis but ion the same principle.

5. In or around February 2018 the Claimant was contacted by HMRC and told that she had been paying tax on an incorrect tax code. A new tax code was therefore issued. Neither the Respondent, nor the payroll company had been alerted by HMRC to this new tax code and therefore the payroll company had continued to calculate the gross salary based on the previous tax code and the Respondent had consequently continued to pay tax and NI based on this erroneous calculation for the tax year 2017/2018. During this period, the Claimant had continued to receive her contractual pay at the rate of £440 net per week.

6. In September 2018, the Claimant received a letter from HMRC regarding a tax refund of £6703.60 due to overpayment of tax over the period 6 April 2017 to 5 April 2018, during which period she had been employed by the Respondent. The money was paid to the Claimant by HMRC through her own tax account.

7. On the basis that the Respondent had paid this money to HMRC and in accordance with the pay terms in the Claimant's contract, the Respondent requested that the money be repaid to him. The Claimant refused to return it.

8. Negotiations ensued. The parties discussed the matter repeatedly, with the Claimant refusing to hand over the rebate money to the Respondent. The Respondent explained to the Claimant that her contractual entitlement was to £440 per week only and that she had received that amount. Therefore, any money returned by HMRC belonged to the Respondent.

9. The Respondent further offered to allow the Claimant to pay the money to him in instalments and offered to set it off against untaken holidays. This too was rejected by the Claimant.

10. On 28 March 2019 the Respondent suggested that in order to avoid any future confusion over payments, the parties should vary the current contract to include;

> *6.1 The Employee's gross salary (inclusive of Income Tax and the Employee's National Insurance Contributions) will be £30,640.44 per annum payable in arrears in equal monthly instalments. The salary shall be reviewed once a year on the anniversary of the Commencement Date but any increase in salary shall be at the absolute discretion of the Employer and there is no contractual entitlement*
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> *6.2 The Employer shall be responsible for accounting to HM Revenue & Customs for Income Tax, the Employer's and the Employee's National Insurance Contributions, as well as to the relevant qualifying pension scheme, if the Employee is eligible, the Employer, the Employee's pension contributions and/or any other deductions as required by applicable legislation from time to time, relating to her Employment.*

11. The Claimant refused to agree to amend the contract.

12. An offer was made again on 21 June 2019 to update her previous contract to clarify the salary was to be paid on a gross basis rather than a net one. The Claimant refused.

13. In December 2019, the Respondent made changes to the draft contract and provided it to the Claimant with the aim of entering into the new contract on 1 January 2020. In January 2020, the Claimant refused to sign the contract as it included a clause in requiring her to pay back money to the Respondent if she owed them money as follows: *The Employee agrees that the Employer shall be entitled to deduct from any amount payable to the Employee under this Agreement: (i) any deductions required by law (including PAYE income tax, auto-enrolment pension contributions and National Insurance Contributions); and (ii) any monies owed by the Employee to the Employer at any time.*

14. It was explained to the Claimant that no attempt to reclaim the money from the tax refund would be made. The Claimant refused to agree and the contract therefore remained unchanged.

15. The Claimant offered by way of compromise simply to pay back half only of the overpayment but this was not accepted.

16. As the Claimant refused to sign anything including a reference to deduction from her salary, a further offer to vary the terms of the contract was made again on 29 January 2020 in

writing offering "*So also for the 25 hour contract I still want to change the contract from net to gross, with no impact on your salary. This is to prevent issues in the future*". An amendment letter was prepared in February 2020, changing only the hours and the salary to a gross figure.

17. The Claimant replied to this in writing on 9 March 2020 setting out the reasons why she would not agree to it, saying "*it seems clear to me that this new contract has been drawn up to recoup the tax refund…*" She also said the "*clause in the contract that obligates me to return to you 'monies owed' seems too vague and needs to be addressed".* The letter also indicated that she did not want to be contacted directly on the issue of the tax refund and this should be addressed to the North Kensington Law Centre.

18. By this stage the parties had been discussing the tax rebate for about 18 months.

19. On 12 March 2020, the parties met and discussed their respective positions with regard to updating the Claimant's contract. The Claimant indicated that she was not willing to accept a change to her contract despite the explanation given by the Respondent. He said, "*Because we cannot find an agreement for this issue, then I will have to fire you, but not for your job because your good at your job I will give you one month's notice".*

20. The Respondent felt that the employment relationship would be untenable once discussions about possible dismissal started and hence had not given notice of his intentions.

21. The termination of the Claimant's contract was confirmed in writing the following day, where she was given the reason for her dismissal as her lack of willingness to co-operate with a change in contract. She was also told of her termination payment and her right to appeal the decision.

22. The Claimant's written response dated 16/3/2020 and subsequent appeal did not contain any offer to agree to the contractual amendment but repeated her view that the proposed change was unacceptable.

23. I therefore reject her claim in final submissions that had she been told before 12/3/2020 that the Respondent was planning to dismiss her, that she would have then agreed to amend.

24. Her appeal was heard on the phone by a business colleague of the Respondent namely Ms N Morees, but she dismissed the appeal. It was stated that the reason for the dismissal was unrelated to the tax rebate or to performance or conduct but was solely due to the Claimant's unwillingness to sign a new contract giving a gross salary.

25. The Claimant was dismissed with notice but the Respondent set off the notice pay against part of the £6700 which he asserted he was due by the Claimant, invoking clause 22.1 of the written agreement dated which reads "*If on termination of Employees employment, Employee owe the Employer money as a result of any loan, overpayment, default on Employee's part or any other reason whatsoever, the Employer shall be entitled as a result of the Employee agreement to the terms of this contract to deduct the amount of the Employees indebtedness to it from any final payment of salary which it may be due to Employee."*

26. The Respondent asserts that the reason for dismissal was not misconduct or capacity some other substantial reason namely the inability to agree reasonable amended contractual terms to regulate the relationship going forward.

The law

27. Section 98(1)(b) of the Employment Rights Act 1996 provides that (any) substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held can be shown by an employer.

28. Willow Oaks Developments Ltd v Silverwood and Others EWCA Civ 660 2006 IRLR 607 – dismissal for refusing to sign new restrictive covenants could be SOSR for dismissal.

29. To be recognised as SOSR the employer must submit evidence showing what those reasons were and that they were genuine and substantial and not frivolous trivial or capricious. Harper v National Coal Board 1980 IRLR 260.

30. Where business reasons are put forward as SOSR then the reasons must be sound and. Where there is a sound reason for a re-organisation and the only sensible way to deal with it is to terminate the existing contracts offering the employees reasonable new ones, and the employee refuses to accept the new agreement, that is a substantial reason such as to justify the dismissal within section 98(1)(b) Hollister v National Farmers Union 1979 ICR 542

31. It does not follow from the fact that it may be reasonable for an employee for personal reasons to refuse to agree to such changes that it is unreasonable for the employer to dismiss him for such a refusal. Nor is it the case that less favourable terms can only be imposed in cases where the very survival of the business depends on it. The employer does not have to show that the re-organisation was essential but that it was for sound business reasons. Chubb Fire Security v Harper 1983 IRLR 312

32. If SOSR reason is established then as with any other potentially fair reason the Tribunal must then consider section 98(4). This provides as follows "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.'*

33. Part of this reasonableness inquiry is to balance the benefit to the employer against the detriment to the employee. Catamaran Cruisers Ltd v Williams 1994 IRLR 386

34. The ACAS Code and Guide regarding disciplinary and grievance procedures do not apply to SOSR dismissals.

Conclusion

35. The cause of the problem was the unsatisfactory contract which the Respondent produced for the Claimant to sign in 2016. It was not reasonable and sensible to state the salary net of tax. Tax varies according to the changing circumstances of the tax payer. All proper employment contracts should state the pay gross. The Respondent should not have used this unsatisfactory contract which has caused the problems. Also, the Respondent's payroll company should not have applied the wrong tax code.

36. The Claimant was not responsible for these problems. She does not speak English as her first language and she was unfamiliar with the UK tax system and how employment contracts work. It is very unfortunate that the Claimant should have been bothered by these mistakes.

37. Claimant asserts that she was told by HMRC that the refund "was her money". If she was told that, she was misinformed. She would have been entitled to any tax refund if she had an agreed gross salary and for some reason excessive tax had been deducted from the gross salary. However, that was not her agreement. Her agreement was that she would receive only £440 net per week, and she was not entitled to receive more, directly or indirectly from the Respondent.

38. As the Respondent had in error paid an excessive amount to HMRC, the excess was plainly an over-payment by him, and not by the Claimant, and the money should have been paid back to him. When the money was repaid to the Claimant, she held it on a constructive trust for the Respondent, and she had been enriched unjustly at his expense. It would have been better if those advising the Claimant had explained this to her and encouraged her to do the right thing namely repay it to the Respondent and agree to a proper contractual amendment.

39. In fact, in her evidence the Claimant revealed that she knew really that the rebate was due to the Respondent because she said she would have been happy for the money to be sent back to HMRC and for the Respondent to claim it from HMRC. However, she did not send it back to HMRC.

40. The existing contract dated 4/2/2016 was unsatisfactory and unworkable because it did not state the employee's gross salary. It was a direct result of this that the long-standing dispute between the parties over the tax refund arose. The Respondent had been left out of pocket in a substantial amount and the existing terms caused confusion and ongoing problems as regards the payments due to the Claimant and the amount of tax and NI properly payable by the Respondent to HMRC.

41. Amending the contract to show the gross pay and the working hours properly would have been a minor amendment in the interest of both parties and it is unfortunate that the Claimant adopted an intransigent attitude not only towards paying the tax rebate over to the Respondent, but also in refusing to agree any amendment.

42. Without an amendment it was not reasonable to expect the Respondent to continue employing the employee as it was likely that further problems would follow.

43. Having seen and heard the Claimant giving evidence I find she is unwilling to compromise once she has got the idea in her head that she is in the right.

44. The Respondent attempted over a protracted period to negotiate a solution, and did so patiently and reasonably. After 18 months of unsuccessfully attempting to put the employment relationship on a proper and workable footing, there was no reasonable solution in sight.

45. By March 2020 the parties had lost all trust and confidence in each other and were in entrenched positions, with the Claimant refusing to communicate about the central issue save through lawyers. This situation was incompatible with the personal and domestic nature of the housekeeper role which the Claimant was performing in the Respondent's own household. I find that these matters were SOSR for the dismissal.

46. The meeting on 12 March 2020 should have been heralded by a notice warning the Claimant that her employment was at risk. However, leading up to this there was a considerable history of discussions and negotiations and I find that the Claimant was fully aware by then of the situation, and what was at stake.

47. It is notable that after being dismissed the Claimant did not say that she would agree to the amendment. In her email of 16/3/20 and in her appeal she repeated that it was unacceptable to amend.

48. She was also given a full appeal hearing at which the matter was fully reconsidered.

49. Taken as a whole I find that the dismissal was within a range of reasonable responses and was substantively and procedurally fair.

50. If I should have found that the lack of notice of the meeting on 12/3/20 made the dismissal procedurally unfair, then in any event under the Polkey doctrine I find that such a notice would not have made any difference to the outcome.

51. The set off by deduction of part of the rebate due against the notice pay was covered by the terms of the contract, so that claim also fails.

J S Burns Employment Judge
London Central
6/7/2021
For Secretary of the Tribunals
Date sent to parties : 06/07/2021