



EMPLOYMENT TRIBUNALS

Claimant: Ms E M da Costa

Respondent: Soho Restaurants Ltd

Heard at: London Central (remotely, by video) **On:** 09 September 2021

Before: Employment Judge Smailes (sitting alone)

Appearances

For the claimant: In person

For the respondent: No attendance

UPON a reconsideration of the judgment dated 09 September 2021 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing, the judgment is varied to the following extent: (1) in paragraph 1 the effective date of termination of the contract is changed from 11 April 2021 to 07 April 2021 and (2) the gross amount awarded to the claimant is changed from £1,479.78 to £1,274.68.

JUDGMENT UPON RECONSIDERATION

1. The respondent made unauthorised deductions from wages by failing to pay the claimant the full amount of wages due from 06 March 2021 to 07 April 2021 and is ordered to pay the claimant the sum of £1,274.68 being the total gross sum deducted.
2. The respondent was in breach of contract by dismissing the claimant without the period of notice to which she was entitled and the respondent is ordered to pay to the claimant damages of £350.

REASONS

1. Reasons were given at the hearing on 09 September 2021 and are repeated here as I have reconsidered the judgment on my own initiative and varied the original judgment. The reason for reconsidering the judgment is that I consider I made a mistake about the effective date of the end of the claimant's employment, which in turn affects the amount of the award.
2. I invited the parties to make written representations. The claimant confirmed that she had no objection to my proposed amendment. The respondent did not respond. I am satisfied that it is not necessary to hold a further hearing.

3. The claimant submitted a claim form on 22 July 2021, claiming arrears of pay and other payments following her dismissal.
4. The respondent did not reply to the claim or attend the hearing.
5. I considered whether to proceed in the respondent's absence. I am satisfied that the claim was served on the respondent at the correct address, which is the registered address for the company. This address was also the claimant's place of work. The claimant described the process for dealing with post, which would be to hand it to a member of administrative staff. The respondent's restaurant was in operation when the claim was served. The respondent was aware of the hearing. Joining instructions were sent to the director's email address on 08 September 2021. The director contacted the Tribunal to ask about it. He was sent another email on the morning of the hearing asking him to attend. I delayed the start of the hearing until 10:15 to allow the director further time to join the hearing. He did not join. I asked the clerk to make a final check for any further email from the respondent before starting the hearing. There were no further emails from the respondent. I decided that it was in the interest of justice to proceed with the hearing.
6. I heard evidence on oath from the claimant and considered the following documents: the ET1 and documents submitted at the beginning of the hearing, namely a witness statement, P45, payslips, screenshots of a text conversation with the respondent on 07 April 2021 and an email sent to all employees on furlough on 22 February 2021.
7. I dealt with one preliminary matter. On 26 August 2021 the claimant had asked for permission to amend her claim to include a claim for notice pay. The application had not been considered before the hearing. I decided that this amounted to putting a new label on the facts already pleaded in the claim, which was expressed as being for 'arrears of pay and other payments'. In section 8.2 of the ET1 form the claimant stated 'I did not have any dismissal communication or my P45, and my colleagues that had also been fired received a dismissal email and were kept on the furlough scheme.'. I gave the claimant permission to amend the claim.

Claim and issues

8. The background to this claim is that the claimant was employed by the respondent as a waitress from 04 August 2020 until her dismissal in 2021.
9. The issues for me to decide were: what were the dates of the claimant's employment, did the respondent make any unlawful deductions from wages during the time of the claimant's employment by failing to pay her wages, how did the claimant's employment end, was the claimant given notice, if the claimant was dismissed without notice, was she paid in lieu of notice?
10. I had no jurisdiction to consider a claim for compensation for loss of potential earnings after the claimant's employment ended.

Findings

11. The claimant was employed by the respondent as a waitress at the respondent's restaurant on Wardour street with effect from 04 August 2020. She worked 30 hours per week. Her gross pay was £350.00 per week.

12. The claimant was placed on furlough on 09 November 2020, having agreed to receive 80% of her usual pay while on furlough. While on furlough her pay was £280.00 pw gross, £260.56 net.
13. The director of respondent company sent an email to all furloughed staff on 22 February 2021 providing an update on plans for a phased return to work. Some staff would return when outdoor dining was permitted from 12 April 2021. Most other staff would return when indoor dining was permitted, which at the time was expected to be 17 May 2021. All staff would return from furlough as trade built up. There was no reference to any imminent dismissals. The email stated:

Any staff currently on the 'Job Retention/Furlough Scheme' will stay on this scheme until they are brought back to work.
14. The last payment made to the claimant was for the week up to and including 05 March 2021. The claimant received one further payment of £73.58 net on 16 April 2021, which she understood to be, and I find was, payment for accrued annual leave.
15. After payments stopped in March 2021 the claimant discussed the situation with colleagues via a whatsapp group chat. Some colleagues had received emails saying they had been dismissed and would be paid up to 11 April 2021. The claimant did not receive such an email. The claimant's line manager told her that he was expecting her to return to work on 12 April 2021 when the restaurant was scheduled to re-open.
16. The claimant tried to find out why she had not been paid but received no reply to her enquiries. The claimant had no response until she had an exchange of texts with the director on 07 April 2021. In that exchange the director said that he had dismissed the claimant weeks ago and he would forward the email to her. He did not say on what date he had dismissed the claimant. He said she had been one of the first people 'sent through' who wouldn't be returning and that this was maybe three or four weeks before the claimant's colleagues were dismissed.
17. The director did not forward the email he mentioned to the claimant. The claimant received nothing more until she received a P45 on 14 April 2021 stating that her employment ended on 11 April 2021. The respondent provided no explanation for stating this date, which is not consistent with the director's comment that he had dismissed the claimant 'weeks ago'.
18. When I gave judgment on 09 September 2020, I found that the claimant's employment ended on 11 April 2021, the date stated on the P45. I have reconsidered my judgment and in particular these extracts from the exchange of texts on 07 April 2021:

Respondent: I sent you an email a month or so ago telling you we would be taking you off furlough because you are no longer coming back to work at Ruby's...;

Respondent: [in response to the claimant's question about why she had not been paid] I can forward you the email if you like, did you expect to keep receiving furlough from a company that you were no longer working for, can you confirm your email...;

Claimant: I've been trying to contact you for more than 3 weeks to understand what is going on and during that time I did not have a reply back informing me I was fired... I'm very confused and surprised by what I've just been told and I'm simply trying to understand why I am the only one of the 'fired people' that isn't getting paid;

Respondent: ... there is no 'fired people' we have been letting go people from all over the company at all different times. ... You were one of the first sent through who wouldn't be returning, we stopped claiming furlough for you weeks ago so there is no way to make up the payments I'm afraid sorry for the miscommunication. I wish there was more I could do...;

Claimant: the people that worked at Ruby's Soho that got fired in the same time frame that you're claiming I did, have been paid and will be paid until the 11th of April;

Respondent: You got let go three weeks before they I think four maybe, different time frames;

Claimant: Anyways, if you don't want to explain me why, I will not fight for it, I think I've given pretty reasonable reasons for my concerns. I still need to see the email that you sent 1 month ago...

Respondent: Sorry, what do you mean? I think I've tried my best to explain it to you. I'm not your manager I oversee the whole group and try my best to please everyone. If you want to know why you are let down perhaps speak to [your line manager]... Your p45 should have been sent to you automatically I will chase it and see where it is. Again I'm so sorry? This has been an incredibly tough time for us as a business and I'm trying my best to please everyone.

Claimant: ...I'm no longer looking for an explanation, I simply want the forwarded email... if I was fired 4 weeks ago I need proof in writing that it happened (P45 or the email), otherwise it would mean I was fired just now and the company was still receiving my furlough and not sending it to me, which is obviously against the law.

19. The claimant did not receive an email dismissing her before 07 April 2021.
20. On reconsideration and closer analysis of the exchange of texts on 07 April 2021, I find that the exchange is a direct communication by the respondent that the claimant's employment had come to an end. This amounts to summary dismissal on 07 April 2021. The claimant was dismissed without notice. She was not paid in lieu of notice.
21. The claimant was on furlough when she was dismissed. The claimant was not paid her wages for the period 06 March 2021 to 07 April 2021.

ACAS

22. The claimant notified ACAS under the early conciliation process of a potential claim on 12 May 2021. The ACAS Early Conciliation Certificate was issued on 23 June 2021. The claim was presented on 22 July 2021.

The law

Unlawful deduction from wages

23. Section 13(1) ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA.

24. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.
25. Where the claim is about a series of deductions, the three-month time limit starts to run from the date of the last deduction or payment in the series, section 23(3) ERA. For a number of deductions to be a series there has to be 'sufficient frequency of repetition', **Bear Scotland v Fulton** [2015] IRLR 15.

Breach of contract (failure to give notice)

26. Section 86(1)(a) ERA provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more but less than two years is not less than one week's notice.

Conclusions

Unlawful deduction from wages

27. I found that the claimant's employment was terminated on 07 April 2021 when she received the message from the respondent.
28. I found that the claimant was not paid from 06 March 2021 up to and including 07 April 2021. The last payment was due on termination of her employment. The failure to pay her during that time amounts to an unbroken series of deductions from wages.
29. The claim was presented in time and as there is no break in the series of deductions. The claimant can claim for deductions from 06 March 2021 to 07 April 2021.
30. The claimant remained on furlough up to the date of her dismissal and had agreed to be paid at 80% of her normal pay while on furlough. The claimant is entitled to a payment of £280.00 gross per week from 06 March 2021 to 07 April 2021, a period of 4 weeks and 5 days. This amounts to £1,274.68 gross.
31. I have calculated the amount on a gross basis, but the respondent is to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

Breach of contract (failure to give notice)

32. The claimant was dismissed without notice and was not paid in lieu of notice. She is entitled to damages for that breach of contract. The intention of damages is to put the claimant in the position she would have been if the contract had been performed correctly, i.e. if she had been given notice.
33. The claimant was entitled to 1 week's notice. Although damages are calculated on a net basis, since the claimant will be liable for tax on the notice pay, I use the gross figure in the calculation. Notice pay should be paid at the claimant's normal rate, not the furlough rate. The claimant's gross weekly pay was £350.00. The damages for breach of contract are £350.00.

Julia Smailes

Employment Judge Smailes

14 January 2022

Date

JUDGMENT ON RECONSIDERATION SENT TO THE
PARTIES ON

...17th Jan 2022...

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