



EMPLOYMENT TRIBUNALS

Claimant: Mylene Sofia de Ceita Santiago do Nascimento

Respondent: SM Sparkling Services Limited

Heard at: East London Hearing Centre (By CVP)

On: 16 March 2023

Before: Employment Judge Anderson

Appearances

For the Claimant: J Rabinowitz (Counsel)

For the Respondent: Did not attend

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is upheld.
2. The Claimant's claim of unlawful deduction from wages is upheld.
3. The Claimant's claim for holiday pay is upheld.
4. The Claimant's claim of breach of contract by the failure of the Respondent to pay notice pay is upheld.
5. The Claimant's claim of breach of contract by the failure of the Respondent to pay pension contributions is dismissed.
6. The Claimant's claim that the Respondent is in breach of its duty to provide pay statements in accordance with s8 Employment Rights Act 1996 is upheld.
7. The Respondent is ordered to pay to the Claimant the sum of **£7222.14**, (comprising £2390 in compensation for unfair dismissal, £2997.20 in compensation for unpaid holiday and £1834.94 in unauthorised deductions from wages). Payment must be made within 28 days of the date this order is sent to the parties.

REASONS

Background

1. The Claimant issued a claim of unpaid wages and unfair dismissal on 20 October 2022. The Respondent failed to respond. On 7 February 2023 the Tribunal wrote to the Respondent warning it that a judgment may be made under rule 21 Employment Tribunals Rules of Procedure 2013 and confirming that the case had been listed for a full merits hearing on 16 March 2023. The Respondent did not attend the hearing.

The Hearing

2. The Claimant filed a bundle which included pleadings, a witness statement, and a skeleton argument. She was represented at the hearing by Mr Rabinowitz. Mr Rabinowitz's skeleton argument was very detailed, as is the Claimant's witness statement, drafted with the possibility in mind that the Tribunal may decide the case without a hearing. For that reason, I did not invite further submissions from Mr Rabinowitz, other than on the matter of amendments to the claim, though I asked some questions about the arguments made in his skeleton argument. The Claimant gave brief evidence on oath in order that I could clarify with her some points in her statement, but I was mindful of the fact that it is not the job of the tribunal to cross examine the Claimant and take on the role of an adversary in this situation.
3. I reserved judgment.

The claim

4. The Claimant states that she was employed by the Respondent to work in human resources from 30 September 2019 until 25 July 2022 and that she was underpaid wages, holiday and pension during that time. On 25 July 2022 she discovered that she had been taken off the payroll by the Respondent. She ceased working from that point. The Respondent said it would address the matter but did not.
5. Other relevant matters include that the Claimant was furloughed under the government furlough scheme from March 2020 to August 2021 and she raised a grievance on 8 August 2022.
6. The Claimant relies on her discovery that she had been removed from the payroll on 25 July 2022 as a fundamental breach of contract for the purposes of a constructive unfair dismissal claim.
7. The Respondent took no part in early conciliation and has not responded to the claim or to any communications from the Tribunal or the Claimant about the claim.
8. In relation to underpayments or non-payment of wages, pension and holidays the Claimant claims as follows (all figures are gross):

- a. Notice Pay
 - i. The Claimant states that her weekly wage was £190 and claims a three week contractual notice payment of £570. This amount is claimed under the compensatory award for unfair dismissal set out below at 9b.
 - b. Holiday Pay
 - i. The Claimant claims that she was refused leave for the duration of her employment. She claims £2997.20 in unpaid holiday pay.
 - c. Unpaid wages
 - i. The Claimant claims that she was not paid her contractual wage on a number of occasions and claims £2521.60 in unpaid wages. A detailed schedule setting out payments received by the Claimant formed part of the documentary evidence.
 - d. Pension
 - i. The Claimant claims that she requested to be enrolled in the workplace pension scheme, but this never happened. She claims that had she been so enrolled the Respondent would have contributed 3% of her earnings including holiday pay from 1 February 2020 until 25 July 2022 which amounts to £708.18.
9. In relation to unfair dismissal the Claimant claims:
- a. A basic award of £380.00 based on a weekly wage of £190.00.
 - b. Loss of earnings for 9 weeks from 25 July 2022 until she obtained alternative employment, in the sum of £1710.00.
 - c. A payment for loss of statutory rights of £300.
10. The Claimant also claims an uplift on the damages claimed of 25% due to a failure to comply with the ACAS code of Practice on Disciplinary and Grievance Procedures. This is in the sum of £2154.25.

Applications

11. Mr Rabinowitz said that the claim for pension loss may require an amendment as it is not listed as a loss on the ET1, but on clarifying instructions with his solicitor said that pension loss was included in the schedule of loss filed with the ET1 though the amount of the loss was not specified. I noted that if the Respondent had required particularisation of the pension loss claim, or any other part of the claim, it could have sought it and it did not. It is my decision that the claim for pension loss as clarified in the witness statement and skeleton argument, which is essentially a claim of breach of contract, is simply a clarification of the claim brought and an amendment is not required.

12. The second issue raised as possibly requiring an amendment is the pleaded effective date of termination. This is put as 31 July 2022 in the ET1. Mr Rabinowitz said that as preparation for the hearing progressed and instructions were taken from the Claimant by new representatives, instructed in February 2023, it became apparent that the date of termination was 25 July 2022, which is the date on which the Claimant became aware that she had been removed from payroll, and the date on which she ceased to work. This is simply an amendment to a date, albeit results in a slightly higher claim for damages, and not a new cause of action or new fact which would constitute an amendment.

Findings of fact

13. The Respondent has not contested the claim. The Claimant provided a signed witness statement, documentary evidence of pay received, and gave evidence on oath. On the basis of her uncontested evidence, I make the following findings.
14. The Claimant has provided a signed and dated employment contract as well as pay slips and bank statements evidencing payments to her from the Respondent during the period September 2019 to July 2022. I find that the Claimant was employed by the Respondent continuously from 30 September 2019 until 25 July 2022.
15. Under the terms of her contract the Claimant was employed as a human resources manager for 20 hours per week, at a rate of £9.10 per hour and had a contractual holiday entitlement of four weeks per annum. The holiday year commenced 1 April. There is no term or reference in the contract to the carrying over of untaken leave from one leave year to the next.
16. The National Minimum Wage for those over the age of 22 increased from £8.91 to £9.50 on 1 April 2022 and the Claimant was therefore entitled to an hourly rate of £9.50 from 1 April 2022 until the termination of her employment on 25 July 2022.
17. Under the terms of the Claimant's contract she was entitled to opt into a workplace pension scheme. I find that the Claimant told the Respondent in January 2020 that she wished to join the pension scheme and the Respondent did not then or at any other time during the Claimant's employment register the Claimant in a workplace pension scheme.
18. The Claimant requested leave on occasions throughout the duration of her employment. She was told by the Respondent that she did not need to take leave as she worked from home and could work anywhere. The Claimant confirmed in oral evidence that she continued to carry out work for the Respondent if asked to do so even when she was out of the country. I find that the Respondent refused to allow the Claimant to take annual leave during her employment.

19. The Claimant was on furlough from 1 March 2020 until 30 September 2021. The Claimant said in oral evidence that during this time she did not ask to take any holiday. I find that it follows from the refusal noted in paragraph 18 that the Claimant would not then consider that the position was any different while she was furloughed.
20. I find that the Claimant received a payslip for the month of November 2019. She then received payslips for the months that she was furloughed, March 2020 to September 2021. She received a payslip for the month of December 2021. She did not receive any other payslips.
21. The Claimant contacted HMRC on 25 July 2022 to obtain proof of earnings because she had been unsuccessful in obtaining payslips from the Respondent. She was advised that she was no longer on the Respondent's payroll. The Claimant ceased to make herself available for work from this time.
22. On 8 August 2022 the Claimant raised a grievance with the Respondent. The grievance remains unanswered.

Decision and Reasons

23. The Respondent did not attend the hearing today. I am satisfied that the Respondent was aware of the claim and of the hearing. Rule 21 Employment Tribunals Rules of Procedure 2013 applies and my decision on the claim is as follows:

Unfair dismissal

24. S94 of the Employment Rights Act 1996 [ERA] confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under s95, and in this case relies on s95(1)(c), that she was entitled to terminate that contract by reason of the employer's conduct.
25. In removing the Claimant from its payroll, as discovered by the Claimant on 25 July 2022, the Respondent committed a repudiatory breach of contract, effectively dismissing the Claimant from that date. I find that the Claimant was entitled to terminate the contract for this reason. No explanation or reason has been provided by the Respondent which would show that there was a potentially fair reason for dismissal under s98 ERA. I uphold the Claimant's claim of unfair dismissal.

Breach of contract

26. The employment tribunal has jurisdiction to consider a claim for breach of contract under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994.

27. The Claimant was entitled under the terms of her contract to opt into a workplace pension scheme. She told the Respondent that she wished to do so in January 2020. She was not entered into such a scheme. However, the Claimant will have been aware from the payslips she did receive that she was not in a pension scheme and she did not give evidence that the matter had been raised other than in January 2020. Where she has continued to work for the Respondent from January 2020 to July 2022 without further protest or resignation over this issue, I find that she has affirmed the contract in this respect.
28. Under the terms of her contract the Claimant was entitled to notice of three weeks. She was given no notice and is entitled to payment in lieu of notice.

Payslips

29. Under s8(1)(a) ERA the Claimant had a right to be given itemised payslips. The Claimant was employed by the Respondent from 30 September 2019 to 25 July 2022 and the Respondent unlawfully failed to provide payslips for the months of October and December 2019, January and February 2020, October 2021 to July 2022 (with the exception of December 2021).

Unpaid wages

30. Under s13 of the ERA:

(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.

31. Under s23(4A) a claim for unpaid wages can be backdated no further than two years from the date of issue of the claim.
32. Although Mr Rabinowitz has submitted that unauthorised deductions prior to 20 October 2020 constitute a breach of contract I do not award those deductions as a breach of contract (deductions in October 2019 to February 2020) where the Claimant continued to work (or was on furlough) without protest until October 2021, effectively affirming the contract.
33. I find that the Claimant was underpaid wages in every month from October 2021 to July 2022 and that those deductions were unauthorised.

Holiday Pay

34. The Claimant had a contractual annual leave entitlement of four weeks which is said to include bank holidays. There is no term in the contract providing for the carry over of unpaid leave from one year to the next and although Mr Rabinowitz said that there was nothing in the contract which says that the

right to annual leave in any given leave year is extinguished at the end of that year, I find that there is no contractual right to carry over leave.

35. Under Regulation 13A of the Working Time Regulations 1998 (the Regulations) a worker is entitled to 5.6 weeks per annum, pro-rated where the worker is part time.
36. Under Regulation 14 a worker is entitled to claim pro rata for holiday untaken in a holiday year at the date of termination.
37. Under Regulation 13(9)(a) untaken leave cannot be carried over to the following year except under the exception for untaken leave arising because of the effects of coronavirus as set out in Regulation 13(10).
38. In *Smith v Pimlico Plumbers Ltd* [2022] EWCA Civ 70, [2022] IRLR 347 the Court of Appeal confirmed the finding of the ECJ in *King v Sash Window Workshop and anor* 2018 ICR 693, ECJ, that a worker can carry over leave from one leave year to the next where the worker has been prevented from taking annual leave. While acknowledging that it had no power to draft regulations it suggested that such an interpretation could be read into Regulation 13, and suggested wording as follows:

Reg 13 (16) Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.

39. I have found above that on the uncontested evidence of the Claimant she was refused leave by the Respondent when she requested it and I find that it follows from that refusal that the Claimant would not then consider that the position was any different while she was furloughed. I find that the Claimant is entitled to payment for untaken holiday, calculated on a pro rata basis of the statutory minimum of 5.6 weeks per annum for the duration of her employment with the Respondent.

Remedy

Unfair Dismissal

40. I accept the calculation of the Claimant as set out in the schedule of loss filed on 16 March 2023. The basic award is £380. The compensatory award is 9 weeks at £190, which includes the notice period, and amounts to £1710. I agree that there should be an award of £300 for loss of statutory rights. The total award for unfair dismissal is **£2390**.

Unpaid wages

41. The Claimant's weekly wage was £182.00 until 31 March 2022 and £190 thereafter until 25 July 2022. The corresponding monthly wages were than as follows:
- a. Until 31 March 2022 – $(£182 \times 52) / 12 = £788.67$
 - b. From 1 April 2022 – $(£190 \times 52) / 12 = £823.33$
42. From October 2021 to 31 March 2022 the Claimant should have been paid $£788.67 \times 6 = £4732.02$. She was paid £3600.40. The shortfall is £1131.62.
43. From 1 April 2022 to 25 July 2022 the Claimant should have been paid $£823.33 \times 4$ (less £190) = £3103.32. She was paid £2400. The shortfall is £703.32.
44. The total amount awarded for unpaid wages is **£1834.94**.

Holiday Pay

45. I accept the figure for hours and rates of holiday pay as set out by the Claimant in her schedule of loss filed on 16 March 2023. The Claimant is awarded **£2997.20** for unpaid holiday throughout her employment with the Respondent.

Pay Slips

46. In accordance with s12(3)(a) ERA I declare that the Respondent has failed to provide pay statements as required under s8 (1) ERA for the months of October and December 2019, January and February 2021, October 2021 to July 2022 (with the exception of December 2021).

ACAS Uplift

47. The Claimant claims an uplift of 25% on the sums awarded above on the grounds that the Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. A grievance was not raised until two weeks after the Claimant's effective date of termination and I was not presented with evidence that indicated a grievance could be raised after employment had ended. I refuse the application for an uplift.

Employment Judge Anderson
Date: 17 March 2023