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EMPLOYMENT TRIBUNALS

Claimant: Miss C Irvine

Respondent: Ghost Computer Services Ltd

Heard at: East London Hearing Centre **On:** 8 February 2017

Before: Employment Judge Brown (sitting alone)

Representation

Claimant: In Person

Respondent: Mr Matthew Southgate (Director)

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. The Respondent made unlawful deductions from the Claimant's wages when it failed to pay her £2,083.33 gross per month from May to September 2016.
2. The Respondent shall pay to the Claimant £1,394.84 gross on account of four months of unlawful deductions from wages at £333.33 per month gross.
3. The Respondent did not wrongfully dismiss the Claimant. It was entitled to dismiss the Claimant summarily on 6 September 2016 on account of the Claimant's behaviour in the office in front of a work experience student the previous week.
4. The Respondent shall pay the Claimant £390 in court fee costs.

REASONS

1. The Claimant brings complaints of unlawful deduction from wages and a failure to pay notice pay against the Respondent, her former employer. The Respondent employed the Claimant as a business development manager from 1 February 2016 to

6 September 2016. In her letter of appointment, the Respondent said, regarding the Claimant's pay, *"The salary for the position is £21,000 per annum. On completion of a successful 3month probationary period your salary will increase to £25'000 per annum. These KPI's/SLA's will be outlined during the first working week"*(sic).

2. The contract did not make the Claimant's increased salary conditional on her achieving KPIs (Key Performance Indicators) or SLAs (service Level Agreements). The contract did make the increased salary conditional on a successful completion of the Claimant's probationary period.

3. The parties agreed that the Claimant's contract provided that, following successful completion of her probationary period, the Claimant would be entitled to one month's notice to terminate her employment.

4. In early May 2016 the Claimant attended a probation review meeting with Matthew Southgate, director of the Respondent, and **Clare Aspell**. There were no minutes available for this meeting. The Claimant was told, in the meeting, that she had successfully passed her probationary period but that, because of financial constraints, she would not be paid an increased salary at that time. In further meetings on 3 August and 19 August, the Claimant raised the issue of her salary again and asked to be paid her increased salary. On 19 August 2016 Mr Southgate said *"I now know we shouldn't of passed your probation as sales were not where we wanted but we did due to the hard work you put in. I was led wrongly by CA [Clare Aspell] and I know you're entitled to the pay rise"*(sic). Mr Southgate signed minutes recording this. I do not accept his evidence that the minutes were inaccurate but that he signed them despite this.

5. There was an apprentice called **Charlie** working at the Respondent Company at the same time as the Claimant. The Claimant told him how to answer telephone calls and trained him. Charlie's tutor attended the workplace on about 16 August and the Claimant sent several emails about the tutor to Mr Southgate, complaining about the tutor's voice.

6. On 1 September 2016 the Respondent had a work experience student working in its office. The Claimant was engaged on a telephone call. Following the call, she said in the office, loudly, *"His tight Paki arse"*. There was a dispute between the parties about whether the Claimant was saying this herself, or was repeating someone else's unacceptable comment with disapproval. Next day, the work experience student's college tutor telephoned the Respondent, to say that inappropriate language was being used in the office and that the student did not feel welcome there. The Claimant was off work that day; her next working day was 6 September 2016. When she attended, Mr Southgate told the Claimant that he was dismissing her because of her unacceptable behaviour. He later sent a letter, setting out the reasons for the Claimant's dismissal. He said that he had dismissed her because of her conduct in front of junior members of staff and visitors. He said the conduct was:

- “• *The regular use of swear words in the office while we have visitors and a junior in the office.*
- *To repeat a racial comment out loud in the office following a talk with yourself and one of our suppliers on the phone about one of*

our clients, This is not suitable behaviour of a senior member of staff at any time in the work place, Even more so when we have a young person in our office completing work experience,

- *Your attitude to dealing with a Junior member of staff who is new to the company and still learning there role and place in the company was not acceptable and bullying,*
- *I interrupted before was not give a chance to bring up the miss use of the companies emails system to send unsuitable comments about another member of staff who was struggling to understand his job.”*

Relevant Law

7. By s13 *Employment Rights Act 1996* workers have the right not to suffer unlawful deductions from their wages.

8. Where an employee has committed a repudiatory breach of contract, the employer can accept the repudiation, resulting in summary dismissal. The degree of misconduct necessary in order for an employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. In *Briscoe v Lubrizol Ltd* [2002] IRLR 607 the Court of Appeal approved the test set out in *Neary v Dean of Westminster* [1999] IRLR 288 ECJ, where the special commissioner held that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

Discussion and Decision

9. On the facts, the Claimant successfully passed her period of probation. There was no variation in writing of her contract and, pursuant to its terms, she was entitled to be paid £25,000 gross after successful completion of the probationary period.

10. While the Respondent contended that the Claimant continued to work thereafter, for £21,000 gross per annum, it is clear that the Claimant continued to ask about her salary rise and did not accept that she should be paid £21,000 gross per annum on an ongoing basis as a variation of her contract. It is clear, also, that Mr Southgate told the Claimant that he knew that she was entitled to be paid £25,000 gross per annum in August 2016.

11. I find that the Claimant was entitled to be paid £25,000 per annum on successful completion of her probationary period and that there was no variation in the contract between the parties so that the Claimant could be paid any lower amount after her probationary period.

12. I find that the Respondent failed to pay the Claimant's salary of £25,000 gross per annum after her probationary period, in breach of her contract. The Respondent therefore made unlawful deductions from her wages; it did so for 4 months.

13. The Respondent shall pay to the Claimant 4 x £333.33 (the difference in the

gross monthly salary between annual salaries of £25,000 and £21,000); a total of £1,394.84.

14. I am satisfied that on 1 September 2016 the Claimant did, at least, repeat a racist comment, "*His tight Paki arse,*" in the office. She did so when a work experience student was present and heard it. This led to a complaint from the work experience student's college. The Claimant used racist language in front of a young trainee. I find that that was sufficiently unacceptable behaviour to fundamentally undermine the relationship of trust and confidence between employer and employee, so that the Respondent was entitled to dismiss the Claimant without notice. I find that the other matters relied on by the Respondent, the Claimant's emails complaining about a tutor and her behaviour towards an apprentice, were not such as to justify dismissal without notice.

15. The Claimant has succeeded in at least one of her claims and the Respondent should pay her court fees of £390. The Claimant had to pay those fees in order to bring her successful claim.

Employment Judge Brown

21 February 2017