



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Lyons

**Respondent:** HM Revenue & Customs

**HELD AT:** Leeds

**ON:** 17 and 18 April 2018

**BEFORE:** Employment Judge Cox

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Serr of Counsel

# JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.
2. The claim for damages for failure to give notice of termination fails and is dismissed.

# REASONS

1. Mr Lyons presented a claim to the Tribunal alleging that he had been unfairly dismissed from his job as an administrative officer with HM Revenue and Customs ("the Revenue"). He also claimed damages for the Revenue's failure to give him notice of the termination of his contract.
2. At the Hearing, the Tribunal heard oral evidence from Mr Lyons. For the Revenue, the Tribunal heard oral evidence from Mrs Gomersall, Operations Delivery Manager, who made the decision to dismiss Mr Lyons, and Mrs Wadsworth, Operations Manager, who heard and dismissed his appeal against dismissal. The Tribunal also read witness statements from: Mrs Lyons, Mr Lyons's wife; Mr Elliott of the Revenue's Internal Governance Civil Investigations department, who conducted the investigation into Mr Lyons's conduct; and Mrs Lewis, Human Resources Advisor. Because Mrs Lyons, Mr Elliott and Mrs Lewis

were not present to be cross-examined, the Tribunal gave their evidence less weight than that of the other witnesses.

3. On the basis of the oral evidence, the witness statements of those not present at the Hearing and the documents to which it was referred by the witness statements, the Tribunal made the following findings on Mr Lyons's claim.

**Unfair dismissal: reason for dismissal**

4. Where an employee alleges unfair dismissal, it is for the employer to show that the reason for the dismissal was one of the potentially fair reasons for dismissal set out in Section 98 of the Employment Rights Act 1996 (the ERA). These include a reason relating to the conduct of the employee (Section 98(2)(b)).
5. The parties agreed that Mr Lyons was dismissed on 3 March 2017 and the reason for his dismissal related to his conduct, namely, that he had claimed Working Tax Credit without reducing his childcare costs by the amount covered by a salary sacrifice scheme to which he belonged.
6. The Revenue operates a scheme whereby an employee can opt to sacrifice some of their salary in return for a voucher towards their childcare costs. The amount sacrificed is not treated as taxable earnings and so reduces the employee's income tax liability. The sum is transferred to an account administered by a third party, from which the employee can draw to pay their childcare provider. The rules on Working Tax Credit provide that it is not permissible to claim for childcare costs paid using childcare vouchers under a salary sacrifice scheme. Because Mr Lyons did not deduct the sum he received under the salary sacrifice scheme when claiming for his childcare costs, he and his wife were overpaid over £3,000 in relation to their joint claim for Tax Credit.
7. Mrs Gomersall concluded that Mr Lyons had acted dishonestly by not deducting the amount he was receiving under the salary sacrifice scheme, in breach of the Revenue's rules of conduct on honesty and impartiality. She also concluded that he had conducted his private financial activities in a way that reflected poorly on him as an employee of the Revenue, brought the Revenue into disrepute and/or had given grounds for suspecting dishonesty, in breach of the Revenue's rules setting out when an individual's private conduct will be viewed as a disciplinary matter.

**Unfair dismissal: reasonableness of the decision to dismiss**

8. As Mr Lyons's conduct was a potentially fair reason for his dismissal, the next issue for the Tribunal to decide was whether, in all the circumstances of the case, Mrs Gomersall acted reasonably or unreasonably in treating Mr Lyons's conduct as a sufficient reason for dismissing him. That question had to be determined in accordance with equity and the substantial merits of the case, and by reference in particular to the Revenue's substantial size and administrative resources (Section 98(4) ERA).
9. In relation to Mr Lyons's unfair dismissal claim, the issue for the Tribunal was not whether he was guilty of the misconduct upon which Mrs Gomersall based her decision to dismiss, but rather whether Mrs Gomersall had a genuine belief in Mr Lyons's guilt, based on reasonable grounds after a reasonable investigation (British Home Stores Ltd v Burchell [1978] IRLR 379). The Tribunal's role was not to decide whether it would have dismissed Mr Lyons had it been in Mrs Gomersall's shoes, but rather whether her decision fell within the range of

possible reasonable responses that a reasonable employer might have adopted (Post Office v Foley [2000] IRLR 827).

10. Having read the thorough report from Mr Elliott, the investigating officer, that Mrs Gomersall had before her and the transcript of what was said at the investigatory interview and the disciplinary hearing, the Tribunal was satisfied that Mrs Gomersall had reasonable grounds, based on a reasonable investigation, for reaching her conclusion.
11. Mr Lyons accepted during the course of the disciplinary process that he believed at the time that the amount of Tax Credits he was being paid was too high. He said that, because he was dyslexic and found it easier to process information if he received it orally rather than in writing, he had telephoned the Tax Credits helpline for Revenue employees for advice. He said that he had called on five different occasions to say that he thought he was being overpaid. Each time he had mentioned that he was involved in the salary sacrifice scheme and each time he was reassured that the sum he was being paid was correct.
12. Mrs Gomersall had before her a 2014 report by Dyslexia Solutions on Mr Lyons, which was prepared after a referral by the Revenue and formed part of Mr Elliott's investigation report. This confirmed that Mr Lyons had difficulties with reading comprehension. It therefore provided evidence to confirm the reason for Mr Lyons's decision to call the helpline rather than rely on the written guidance notes that the Revenue publishes to assist Tax Credit claimants. Mrs Gomersall also, however, had before her screenshots of the notes made by the three different call-handlers involved in the five calls Mr Lyons said he had made to the helpline, none of which made any mention of Mr Lyons raising either a possible overpayment or the salary sacrifice scheme. The notes recorded only that Mr Lyons had provided information on the income of himself and his wife. Mrs Gomersall knew that the normal procedure was for the call handler to record all parts of a conversation that would have an impact on the caller's tax affairs. If Mr Lyons had mentioned the salary sacrifice scheme, there was a specific process that the call handler would have followed to explain how it affected the claim. She therefore did not accept Mr Lyons's account of what had been said during those calls, and the Tribunal accepts that she had reasonable grounds not to do so.
13. Mr Lyons also accepted during the course of the disciplinary process that he knew at the time he was receiving the overpayments that the salary sacrifice scheme to which he belonged had to be taken into account in some way when calculating the Tax Credit that he was claiming. He also accepted that he had read some form of guidance before completing his Tax Credit claim form and that he had read something there about salary sacrifice, although he said he had not understood it.
14. The Tribunal was satisfied that all of this gave Mrs Gomersall reasonable grounds for concluding that Mr Lyons had conducted his private financial activities in a way that gave the Revenue grounds for suspecting dishonesty and that he had in fact been dishonest in his claim for Tax Credit.
15. The Tribunal also accepted that Mrs Gomersall's decision to dismiss Mr Lyons rather than to impose some lesser disciplinary sanction was within the band of possible reasonable responses in the circumstances. Mr Lyons's work involved

him in having access to taxpayers' financial and other sensitive personal information, so it was important for the Revenue to know that it could rely on him to act with honesty at all times. Although he had accepted that he had overclaimed Tax Credits, he had not admitted he had acted dishonestly but Mrs Gomersall had concluded that he had. Further, the Revenue is responsible for the administration of the Tax Credit system. It risked serious reputational damage if it became public knowledge that Mr Lyons had not properly declared his salary sacrifice but remained employed.

16. The Tribunal accepted that the need to act in accordance with equity implies that an employer acting reasonably will be consistent. Mr Lyons alleged that his dismissal was unfair because the Revenue had dismissed him when over the course of the past two years eight other employees whom the Revenue had identified as being guilty of tax fraud had not been dismissed. The Tribunal had ordered the Revenue to include in the Hearing file documents relating to those eight employees and witness evidence to set out in summary the circumstances of each case. In response to the Order, Mrs Lewis compiled a summary of the disciplinary action the Revenue had taken against employees considered to be guilty of tax fraud in the previous two years. This summary showed that 16 individuals had been dismissed and eight had been the subject of a final written warning.
17. Mrs Lewis's summary gave an outline of the facts and mitigating factors in those cases where the decision had been to issue a warning rather than dismiss. This showed that there was a wide variety of personal and other mitigating factors involved in these cases. The Tribunal was not satisfied that the circumstances of Mr Lyons's case were truly comparable with those of any of these other employees or that the Revenue had treated employees who were in the same material circumstances in different ways. The Tribunal also noted that neither Mrs Gomersall nor Mrs Wadsworth was involved in any of the cases referred to in Mrs Lewis's summary. Mrs Wadsworth had been involved in a case of tax fraud that had arisen in an earlier period and had decided to dismiss the employee.
18. For these reasons the Tribunal dismissed Mr Lyons's claim of unfair dismissal.

### **Breach of contract**

19. In relation to Mr Lyons's claim for damages for failure to give him notice of termination, the issue for the Tribunal was whether it was itself satisfied that he had committed a fundamental breach of his contract of employment. If he had, then the Revenue was released from its obligation to give him notice of his dismissal.
20. The Revenue said that Mr Lyons's failure to disclose his childcare voucher under the salary sacrifice scheme amounted to a breach of the implied term in his contract of employment that he would not, without reasonable and proper cause, act in a way that was, objectively assessed, likely to destroy or seriously damage the relationship of trust and confidence between himself and the Revenue (Malik v BCCI SA (1997) ICR 606). That implied term is included in every contract of employment and, because it underpins and is essential to the functioning of the employment relationship, breach of it amounts to a fundamental breach of the employment contract.

21. On the evidence that it heard, the Tribunal was itself satisfied that Mr Lyons's conduct was likely, objectively assessed, to destroy or seriously damage the trust and confidence that the Revenue had in him. Although in evidence before the Tribunal Mr Lyons accepted that his participation in the salary sacrifice had to be taken into account in some way in his claim for Tax Credit, he had not done so. Both he and his wife believed at the time they were receiving the Tax Credit that the amount they were being paid did not seem right. The Revenue publishes general guidance notes on claiming tax credits (reference TC600) and specific guidance notes on tax credits and childcare costs (reference WTC5). For the purpose of its findings, the Tribunal was prepared to assume (although without finding as fact) that Mr Lyons did not receive any guidance notes at all with his claim form. Nevertheless, the document accompanying the award of Tax Credits that he was sent states clearly that a claimant must tell the Revenue if they get help with childcare costs through a salary sacrifice scheme. Mr Lyons also had every opportunity to search online for guidance if he was concerned, as he said he was, that he was receiving the wrong amount. Had he done so, he would have seen the explanation in both sets of guidance notes which make clear that it is not permissible to claim for any childcare costs that have been paid for using childcare vouchers through a salary sacrifice scheme.
22. The Tribunal read and considered carefully the 2014 report by Dyslexia Solutions which formed part of Mr Elliott's investigation report. The assessment concluded in summary that Mr Lyons "has a profile consistent with a specific learning difficulty that is dyslexic in character. There are clear and specific weaknesses in aspects of his cognitive processing skills associated with working memory, phonological processing and rapid naming of phonological information. These weaknesses have implications for his reading efficiency, spelling and the structuring of his ideas and their transference into written form." The assessment also recorded that Mr Lyons's reading comprehension was in the below average range.
23. The Tribunal accepted that these weaknesses explained why in the first instance Mr Lyons wanted to obtain advice about his Tax Credit by telephoning the advice line rather than reading written guidance. His evidence was that, having made repeated calls to the advice line, he continued to be concerned about the amount of Tax Credits he was receiving. At that point, he should have taken steps to access the guidance notes that were readily available online. The Tribunal did not accept that the effects of Mr Lyons's learning disability are so severe that he could not have assimilated the clear statement in the guidance notes that childcare costs paid for by vouchers through a salary sacrifice scheme cannot be claimed. Even if he would have had difficulty in processing that information had he had to do so quickly, he was under no time pressure when making his claim. Further, his wife, the joint claimant with him for Tax Credit, was well able to assist him in understanding the guidance.
24. The Tribunal was satisfied that in all the circumstances, including the nature of Mr Lyons's work and the nature of his employer, his conduct in failing to take reasonable steps to check whether he was claiming Tax Credits on the correct basis was, objectively assessed, likely to destroy or seriously damage the Revenue's trust and confidence in him.

25. As the Tribunal was satisfied that the Revenue had terminated Mr Lyons's contract because of conduct that the Tribunal accepted had breached the implied term of mutual trust and confidence, he was not entitled to notice of termination of his employment. His claim for damages for breach of contract therefore failed and was dismissed.

Employment Judge Cox

Date 27 April 2018

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