



EMPLOYMENT TRIBUNALS

Claimant: Ms. E. L. Croucher

Respondent: The Spread Food LTD

HEARD AT: London Central

On: 9 September 2022

BEFORE: Employment Judge J Galbraith-Marten

REPRESENTATION:

CLAIMANT: In person

RESPONDENT: Mr. M. Norledge, Director

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The breach of contract claim in respect of notice pay succeeds and the Claimant is awarded **£2,050.00 net**.
2. The unlawful deduction of wages claim in respect of holiday pay is well founded and the Claimant is awarded **£230.88 gross** subject to the necessary deductions for tax and national insurance.

REASONS

Introduction

1. The original claim was unfair dismissal, wrongful dismissal and holiday pay but the unfair dismissal claim was struck out as the claimant did not have 2 years' continuous service with the respondent at the date of her dismissal.

2. The remaining claims are wrongful dismissal i.e., the respondent dismissed the claimant without giving her contractual notice and arrears of holiday pay.
3. A wrongful dismissal claim is a common law action based on breach of contract. It is different to a complaint of unfair dismissal. The reasonableness of the employer's actions or beliefs is not relevant. The Tribunal must decide the issue based on its own findings of the evidence available.
4. The claimant having submitted her resignation with notice on 11 January 2022, was subsequently dismissed for gross misconduct by the respondent on the same date based on six charges of misconduct. The respondent's position is the claimant was guilty of gross misconduct and therefore summary dismissal was justified.
5. The claimant asserted she would have accrued an additional 2.5 days holiday had she been provided with the relevant notice. She also took 3 days holiday prior to her termination that were not paid by the Respondent. The respondent maintained the claimant had taken more than her accrued annual leave entitlement at the date of her dismissal.
6. The parties each prepared a witness statement and their own supporting bundle of documents. The Tribunal heard sworn evidence from both the claimant and Mr. Norledge.

The Issues

7. The issues for the Tribunal to decide were:
 - a) What was the claimant's notice period?
 - b) Was the claimant paid for that notice period?
 - c) If not, was she guilty of gross misconduct entitling the respondent to dismiss her summarily?
 - d) Did the respondent fail to pay the claimant for annual leave she had accrued but not taken when her employment ended?
 - e) If so, what is the outstanding amount?

Findings of Fact

8. The respondent licenses land from various London boroughs upon which it operates a market trading business specialising in food and beverage stalls. The claimant commenced employment as a sales and event manager on 14 November 2021. She was contracted to work Sunday to Thursday, 40 hours a week and her salary was £30,000.00 gross per annum.
9. The claimant's contract of employment was included in her bundle of documents at pages 5 – 8. Her holiday entitlement as set out in the contract was 28 days per annum and in the event of termination any holidays accrued but not taken would be paid for. In the event the claimant had taken more holiday than had been accrued at the date of termination, the appropriate payment would be deducted from any final payment by the respondent.

10. Again, as set out in the claimant's contract of employment, both the claimant and respondent were required to provide one month's notice.
11. In December 2021, the claimant's job title was changed to general manager but that did not result in any increase in salary.
12. The claimant resigned by email on 11 January 2022 at 9.30am and that was included in her bundle at page 3. She states she was not given autonomy to make decisions, any decisions she did make were second guessed and there was no KPI monitoring system in place. During her evidence the claimant stated she didn't believe she had any opportunity to grow or succeed in her role and therefore, she resigned.
13. The respondent did not reply to the claimant's email but the next day, she received a letter dated 11 January 2022 sent to her personal email address from Mr. Norledge. That letter was included in the claimant's bundle at pages 25 – 33. Mr. Norledge wrote; *"it has become apparent that you are continually unable to meet deadlines and have become unresponsive in many respects. This flagrant disobedience and poor conduct constitutes gross misconduct and your position has been terminated with immediate effect."*
14. Mr. Norledge referred to six grounds that led to his decision in the letter. However, in evidence, he confirmed it was only ground three that he believed amounted to gross misconduct given it was a health & safety breach and that justified summary dismissal. Mr. Norledge further elaborated that he included the additional information in the letter as he believed it would have been insufficient to send the claimant feedback confined to one issue.
15. The first allegation related to clarifying the accuracy of assigned contacts. The respondent alleged the claimant had delegated this task erroneously to two other employees. No evidence was supplied by either party in respect of this allegation. Although the respondent accepts this allegation did not amount to gross misconduct, for the sake of clarity, the Tribunal agrees this was not an act of gross misconduct such as to justify the claimant's summary dismissal.
16. The second allegation relates to a missed deadline. The respondent sent the claimant a series of emails on 8 December 2021 asking that she investigate the viability of providing its own market food stalls. The deadline to submit a response was midday 6 January 2022. No response was submitted by the claimant. Although the respondent accepts this allegation did not amount to gross misconduct, for the sake of clarity, the Tribunal agrees this was not an act of gross misconduct such as to justify the claimant's summary dismissal.
17. The third allegation was a serious breach of health & safety protocol, and the respondent maintains it was serious enough to justify the claimant's summary dismissal. This event relates to the respondent's storage unit located in Victoria Park, Finchley. On Monday 20 December 2021 the claimant tried to enter the storage unit and she discovered it was unlocked. She reported this to Mr. Norledge by phone.

18. At 3.48pm on 20 December 2021, Mr. Norledge sent the claimant an email regarding the incident with further instructions to avoid a reoccurrence. He stated the storage unit contained items hazardous to health and safety as well as equipment and stock worth more than ten thousand pounds. He asked the claimant to provide further details of how she found the unit unlocked. Mr. Norledge also asked the claimant to add a task to the respondent's operating schedule to tick that the unit had been locked and for the claimant to submit a short video clip and email it to him every week to ensure he had evidence going forward that the unit was locked. The claimant responded to the email at 4.03pm on 20 December 2021 and she agreed to those instructions.
19. The claimant believes the storage unit contained a first aid kit, fences, high vis jackets, some signage, and other boxes. The claimant accepted there was an electricity socket in the unit, but she refuted there was any equipment of high value. The respondent produced an invoice from portabar dated May 2019 for £10,558.80. Mr. Norledge stated that portable bar equipment was in the storage unit. He also stated the unit contained knives, alcohol and cleaning materials.
20. After the Christmas holiday period, the claimant next worked at Victoria Park on Sunday 9 January 2022. The respondent provided an extract from its operating system, albeit undated, which Mr. Norledge asserts demonstrates the claimant ticked the system that day to confirm the unit was locked and she had informed Mr. Norledge. However, he asserts that instruction was not followed by the claimant as she did not provide him with the necessary video clip.
21. Mr. Norledge's position was that a failure to adhere to the instruction given to the claimant on 20 December 2021 and not completed on 9 January 2022, amounted to a serious health & safety breach given the contents of the unit. As the video clip was not provided, he had to assume the unit was unlocked again and if unlocked, it could have had serious consequences for the respondent and the claimant if accessed by a member of the public who could have injured themselves. The claimant stated the risk was no higher than any of the other public risks within the park i.e., a busy main road and open toilet blocks.
22. The Tribunal accepts the unit contained the equipment and hazardous materials as stated by Mr. Norledge as that is corroborated by the information in his email to the claimant dated 20 December 2021. Therefore, the Tribunal agrees the instructions provided to the claimant to tick the operating schedule and provide the video clip were reasonable bearing in mind the potential risk to the public if the unit was unlocked.
23. The evidence provided by the Respondent of the operating schedule confirms the claimant had ticked to say she had acted on those instructions, but she had not done so. In her witness statement at paragraph 3 the claimant accepts she did not send the video on Sunday 9 January 2022.

24. To describe this as a serious breach of protocol, when no protocol was in place, is overstating matters. It was a failure to comply with a reasonable management instruction, but it was not so serious as to justify summary dismissal. Mr. Norledge referred to the dismissal of a former employee, Mr. Roberto Santini, who had failed to mark out pitch stalls which resulted in one of the traders falling and injuring themselves. Mr. Santini was also summarily dismissed. The Tribunal distinguishes the claimant's dismissal on the basis Mr. Santini's actions resulted in actual harm whereas the claimant's actions did not. In the circumstances, the claimant's failure to send Mr. Norledge the video of the locked unit was not an act of gross misconduct, but it was a failure to follow a reasonable management instruction. At most, the claimant should have been issued with a final written warning.
25. Allegation four was another outstanding task. On 4 January 2022 the claimant was asked to record the serial numbers of the card readers being used by traders on Sunday 9 January 2022 on the respondent's operating schedule. The claimant was on holiday on Monday 10 January 2022 and her employment was terminated the following day. Although the respondent accepts this allegation did not amount to gross misconduct, for the sake of clarity, the Tribunal agrees that a failure to complete this task was not an act of gross misconduct such as to justify the claimant's summary dismissal.
26. The fifth allegation related to the claimant contacting one of the respondent's customers using her personal mobile on Sunday 9 January 2022 and not via the respondent's Hubspot app. The claimant's evidence was the app was not working and therefore, her only means of communicating with that client was via her personal mobile. The Tribunal accepts the claimant's evidence, and the respondent provided no policy or other evidence to establish this was a breach of any existing policy. Although the respondent accepts this allegation did not amount to gross misconduct, for the sake of clarity, the Tribunal agrees this was not an act of gross misconduct such as to justify the claimant's summary dismissal.
27. The final allegation was outstanding tasks allocated to the claimant on the respondent's customer relations management programme. The respondent alleges that 34 tasks allocated to the claimant were outstanding. The claimant stated that every employee had outstanding tasks on the customer relations management programme and that tasks could be moved on and the deadlines extended as necessary. The screenshot of the customer relations management programme at page 32 of the claimant's bundle is undated but shows the outstanding tasks allocated to the claimant were overdue at most by 6 days at the date of her dismissal. The Tribunal does not consider a 6 day delay to be excessive or otherwise unreasonable. Although the respondent accepts this allegation did not amount to gross misconduct, for the sake of clarity, the Tribunal agrees this was not an act of gross misconduct such as to justify the claimant's summary dismissal.
28. The claimant was employed by the respondent for 58 days and she was entitled to 28 days holiday per annum. At the date of her dismissal, the claimant had taken annual leave on 24, 27, 28, 29, 30 & 31 December 2021 and 3 & 10

January 2022 a total of 8 days. This was set out in a screenshot of the respondent's annual leave planner included at page 5 of the respondent's bundle.

29. The claimant was not paid for 3 or 10 January 2022 as set out at page 33 of the claimant's bundle as the respondent maintained she had taken more holiday than she had accrued. The Respondent also deducted a day's pay on 4 January 2022 for the same reason. Therefore, the claimant was paid for a total of 6 days annual leave in 2021, not paid for 2 days annual leave in 2022 and the respondent recouped 1 day's salary on 4 January 2022. The claimant stated she was also entitled to an additional 2.5 days annual leave that she would have accrued during her one month notice period if it had been provided.

Submissions

30. Mr. Norledge submitted the complaints are not well founded. If an accident had occurred because of the storage unit being unlocked, the respondent would have been held liable in negligence and the incident that led to the claimant's dismissal was not the first occasion this problem had arisen. If he had continued to employ the claimant, he would not have been assured it would not happen again. It was a significant threat to his business, and it was unsafe to continue to employ the claimant. Health & safety is a black and white issue for him, and he believes in prevention. In relation to the claimant's holiday pay, the claim has been exaggerated.
31. The claimant submitted all the allegations against her have been fabricated by the respondent who failed to present any evidence to substantiate them. The respondent has not taken her case seriously throughout and that was demonstrated by its failure to comply with the Tribunal's disclosure order or act on her subject access request. Her case is that the gross misconduct alleged was fabricated to avoid paying her the relevant notice. In terms of holiday pay, she is seeking what is outstanding as she would have continued to accrue holiday during her notice period but for her wrongful dismissal.

The Law

32. A claim for wrongful dismissal is a breach of contract claim under the jurisdiction of the Tribunal by virtue of **section 3 of the Employment Tribunal's Extension of Jurisdiction (England & Wales) Order 1994**.

3. Extension of jurisdiction

Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages or for a sum due, in respect of personal injuries) if –

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England Wales would under law for the time being in force have jurisdiction to hear and determine;*
(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on termination of the employee's employment.

33. In accordance with section **13(1) of the Employment Rights Act 1996**, a worker has the right not to suffer unauthorised deductions. A deduction is defined as: -

s.13(3) where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

34. In relation to holiday pay, compensation related to leave is set out in **regulation 14(2) Working Time Regulations 1998**.

s.14(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu in accordance with paragraph (3).

Conclusions

35. As set out above, the Tribunal is not satisfied the claimant was guilty of conduct so serious as to amount to a repudiatory breach of contract entitling the respondent to terminate without notice. The wrongful dismissal claim therefore succeeds.
36. For the purposes of compensation, a wrongful dismissal claim is to put the claimant in the position they would have been had the contract been performed properly. A proper performance of the contract would have been to dismiss the claimant with contractual notice. The claimant was entitled to one month's notice. Her gross pay was £2,500.00 per month and her net pay she believes £2,050.00 per month. The tribunal therefore awards the claimant £2,050.00.
37. Regarding the holiday pay claim, and based on a five day working week, the Claimant's annual leave entitlement for the duration of her employment was 4.6 days and as above, although she took 8 days holiday she was paid for 6 days and 1 day was recouped from her final salary providing a total of 5 days. However, had she been provided with the relevant notice period, she would have accrued an additional 2.33 days plus the 4.6 days providing a total of 7 days. As the Claimant was paid for 5 days, she is entitled to 2 days accrued but unpaid holiday.
38. The unlawful deduction from wages and holiday pay claim succeeds. Based on an hourly rate of £14.43 per hour x 8 hours per day x 2 days = £230.88 gross pay subject to the necessary deductions for tax and national insurance.

Case No:2200356/2022

Employment Judge J Galbraith-Marten

12 September 2022

Sent to the parties on:

12/09/2022

For the Tribunal Office: