



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111223/2021

5

Held via Cloud-Based Video Platform (CVP) on 9-10 March 2022

Employment Judge Tinnion

10 Ms. Luna Martin

Claimant
In Person

15 EE-USK & Piazza Ltd.

Respondent
Ms Taylor -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

- 20 1. The Claimant's claim of unfair dismissal against the Respondent under s.104(1)(b) of the Employment Rights Act 1996 is well-founded.
2. The Respondent shall pay the Claimant compensation in the sum of £6,195.

REASONS

Claim

- 25 1. By an ET1 presented on 2 September 2021 [2-13], Claimant Ms. Luna Martin (**Ms. Martin**) presented a claim that she had been unfairly dismissed by the Respondent on 28 August 2021 "*for asking to be paid*" [8]. She also asserted a claim for pay arrears. At a Preliminary Hearing (Case Management) on 3 December 2021, Ms. Martin confirmed she was not asserting a wages claim.
- 30 2. In its ET3 response, the Respondent's Mr. Callum MacLeod admitted dismissing Ms. Martin, but contended he had done so because Ms. Martin had badly upset his wife, Mrs. Andi MacLeod, during a phone call they had on 27 August 2021.

Evidence

3. On 9-10 March 2022, the final hearing was held via video/CVP. The following witnesses gave evidence: (i) Ms. Martin (ii) Ms. Nicola Ellis (Claimant's friend) (iii) Mr. MacLeod (Respondent's director) (iv) Mrs. MacLeod (Mr. MacLeod's wife) (v) Ms. Lisa Romney (Respondent employee). The Tribunal was satisfied all witnesses sought to assist the Tribunal by giving their honest best recollection of events. Documentary evidence consisted of a production of approximately 170 pages. References in square brackets are to the relevant page of that production.

10 Findings of fact

4. The Tribunal makes the following findings of fact, including any in its Discussion/ Conclusions section, on the balance of probabilities.

5. Respondent EEUSK and Piazza Limited (**EEUSK**) is a family-owned/operated business employing about 30-70 staff (depending on the season) which operates a small boutique hotel ("**The Scot**") and two restaurants in Argyll. Ms. Martin was an employee of EEUSK working at 'The Scot' from 26 July 2021 until 28 August 2021 when she was summarily dismissed by email [117].

6. Ms. Martin joined EEUSK following an interview with Mr. MacLeod. After her successful interview, Mrs. MacLeod messaged Ms. Martin welcoming her [87].

7. Ms. Martin is someone who is plain-spoken and not afraid to say things directly without necessarily intending to cause offence. She did not get a written contract before she was scheduled to start her first shift at The Scot at 11pm on 26 July 2021. At 21:07 that night, a couple of hours before she was due to start her first shift, she sent the following message to The Scot: "*Guys, hi. I'm supposed to be working at 11 tonight, and I still haven't received any paperwork, contracts or any employee handbook. I need these things to read over and sign before undertaking any kind of shift. I have asked and have been waiting for them for a few days.*" [88]. At 21:28, she chased a response: "*I need that paperwork. Please can you get it to me*" [88]. At 22:42, she sent

the following message: *“It’s 10.40 now, and I have been sat waiting for paperwork to read sign. I have asked several times and do appreciate you are very busy, however hope you can also appreciate that without a contract and without the time to read over the handbook and paperwork, I am unable to do a shift. If you can get these to me tomorrow I can come in on Wednesday night, but I must have them before I start.”* As it transpired, Mrs. MacLeod had attempted to send employee paperwork to Ms. Martin at 12:35 earlier that day [92], but mistyped the email address [91].

8. EEUSK staff are paid in arrears at the end of the month, and the payroll cut-off date is around the end of the first week of each month. So a staff member who starts employment on, eg, 31 January will be paid at the end of February wages for the period 31 January – 7 February, with the balance of the wages for the period 8 - 28 February (as well as 1 – 7 March) paid at the end of March.
9. Although she had an induction, EEUSK did not explain how its payroll system worked to Ms. Martin when she joined in July 2021, hence Ms. Martin was caught by surprise when on 27 August 2021 she received her first wages payment only to discover it did not cover the entirety of the period she had worked for up to then, only the period 26 July – 7 August 2021. Ms. Martin lived in rental property at the time and had a young child to look after, so getting her full wage entitlement each month was important to her.
10. On 31 July 2021, Ms. Martin asked work colleague Lisa Romney (who started at roughly the same time as her) when she would be paid (weekly, monthly, or four-weekly) [94]. Ms. Romney replied: *“Monthly near the 28th of the month for us both. Next month : (x)”* [94].
11. During her employment, Ms. Martin worked an average of 3 shifts a week (11pm – 6am) at a rate of £10/hour. Her duties included administrative work, bar work, housekeeping, cleaning, food preparation, cash handling, checking guests in and out, and keeping the building secure and safe. Although she worked alone during her nightshifts, Ms. Martin got on well with her work colleagues.

12. Other than a small accident with a hot water machine on 5 August, Ms. Martin's employment at The Scot in August 2021 was successful. Ms. Martin showed up at work on time for her shifts, and did the tasks assigned. She discussed shift arrangements with Mrs. MacLeod, and showed flexibility [101-5 104]. In her oral evidence, Ms. Martin stated the MacLeods were very kind to her during her employment. On the face of it, everything seemed to be going well.
13. In August 2021, EEUSK's payday was Friday 27 August. At lunchtime that day, Ms. Martin exchanged messages with Ms. Romney about their wages. 10 Ms. Martin expressed her hope that "*they have put all the days in I've done ... I started on the 26 so assume I'll just be paid from the[n] until now?*" [93]. Ms. Romney replied: "*U should be*" [93].
14. That afternoon, Ms. Romney messaged Ms. Martin confirming their wages had gone in, and asked whether her wages were right, stating: "*The cut off is 15 the 7th August. So we got just 2 weeks pay. Our full wage will [b]e next month :(*" [110].
15. Ms. Martin replied: "*No ... Not on .. £420 I got?! ... No. I have my daughter to feed and my rent to pay*" [111].
16. At 19:00 that evening (it is agreed the 20:00 WhatsApp time stamp is wrong), 20 Ms. Martin sent a message to 'The Scot' WhatsApp group chat (not, as might have been more advisable, a private message to Mr. or Mrs. MacLeod) stating: "*£1000 is missing from my pay slip. That needs to be rectified please ... Wasn't told about any cut off at all. Please rectify this*" [105]. In cross-examination, Ms. Martin denied the tone of this message was confrontational.
- 25 17. A minute later, Mrs. MacLeod replied on the same WhatsApp groupchat: "*@Luna Martin can you call me on [mobile number] to chat through please.*" [105]. Mr. MacLeod was also aware of this message. They both knew immediately what had happened because they understood how the payroll system worked.

18. Almost immediately after, there was a mobile telephone call between Ms. Martin and Mrs. MacLeod which lasted a few minutes at most. Mrs. MacLeod made the call. At the time of the call, Ms. MacLeod was at home with a friend, Ms. Ellis, getting ready for a social night out [106]; Mrs. MacLeod was at home with her husband and their young child. Ms. Martin put the call on speakerphone, so Ms. Ellis was also able to hear what was said – Mr. MacLeod did not hear directly anything which Ms. Martin said to his wife. The Tribunal finds that on the call the following was said:
- a. Ms. Martin said she'd only been paid £420, didn't know why, and asked why her wages were only £420;
 - b. Ms. Martin said Lisa Romney had also been paid incorrectly, and Ms. Romney had messaged her to tell her that;
 - c. by way of explanation, Mrs. MacLeod stated that there was a wages payroll cut-off period and she would be paid the following month;
 - d. Ms. Martin said she wasn't told about the cut-off, and Callum had told her she'd receive a full wage;
 - e. Mrs. MacLeod disputed that, and explained (again) that because of the payroll system there was a cut-off period and Ms. Martin wouldn't be able to get her full wage;
 - f. Ms. Martin said she had a little girl to feed and rent to pay, needed her wages for the shifts she had worked for the full month, and said she'd have to leave if she was not paid;
 - g. Mrs. MacLeod said it was ok, that she would get the wages sorted for Ms. Martin this month, and asked Ms. Martin to come into work half an hour tomorrow [28 August] to discuss how this would affect her next month's wages;
 - h. Ms. Martin agreed to that, said it was fine, thanked Mrs. MacLeod for her help, at which point Mrs. MacLeod ended the phone call.

19. At no point in time during the call did Ms. Martin or Mrs. MacLeod raise their voice or sound agitated.
20. Although the call itself was conducted politely, the participants' reactions to the call immediately afterwards were markedly different. Ms. Martin was happy with the way the call had gone (having received confirmation she would receive her full wages for the period worked), and after the call ended, carried on getting ready for her night out. At 19:20, she messaged Ms. Romney, stating: "*Sorted it. I'll get my full pay ... I wasn't told at any time about a cut off or working weeks in advance etc ... She's lovely but tried to argue the point and I said I'd simply have to leave*" [111].
21. At 19:21, Ms. Romney messaged Ms. Martin: "*[Callum] n Andi have called me. Missed calls. Am I in trouble? Lol xxx*" [112]. Ms. Martin replied: "*No no shouldn't think so! Only think I mentioned was that you'd said you hadn't been paid right either was upsetting (this was before you'd said about a cut off ... Here's the thing. Even if they'd paid me from the cut off it's massively wrong!!!*" [112]. Ms. Martin subsequently went out for the evening with Ms. Ellis, with her father babysitting her daughter.
22. Although Mrs. MacLeod showed no signs of agitation or upset on the call, the Tribunal accepts she was upset by Ms. Martin's very direct, blunt comments, picked up her daughter after the call, and began to cry. The Tribunal infers Mrs. MacLeod was not used to being spoken to by her staff the way Ms. Martin had spoken to her on the call. Rightly or wrongly, Mrs. MacLeod perceived Ms. Martin's statement that she would have to leave if she was not paid as a threat.
23. The Tribunal accepts Mr. and Mrs. MacLeod's evidence that about 5 minutes after the call was over Mr. MacLeod saw his wife visibly upset, and asked her what had happened. In response, Ms. MacLeod told Mr. MacLeod that Ms. Martin had said she needed the money for all the hours she had worked, Ms. Martin wouldn't listen to her explanation, and was determined to get paid.
24. The decision to dismiss Ms. Martin was made very shortly after the call, and it was made by Mr. MacLeod, although he did discuss it beforehand with Mrs.

MacLeod, who agreed with the decision. Mr. MacLeod's evidence explaining his reasoning – which the Tribunal accepts were his genuine reasons for choosing to dismiss Ms. Martin – was as follows:

5 *“My wife told me how the Claimant had spoken to her. We couldn't continue with someone with that particular attitude in the company. [After Tribunal request for clarification re: 'attitude'] It's extremely rare to have that level of confrontation within such a short period of employment. Her attitude was pay me my full wages or I'll leave. I did not know anything about the 'statute' malarkey. I did not know that it could be unlawful to dismiss ... I directed Lisa Romney to send the Claimant a letter of dismissal the following day.”*

10

25. In cross, Ms. Martin put to Mrs. MacLeod that the decision to dismiss was emotional, and could have been handled differently. Mrs. MacLeod agreed. Mrs. MacLeod stated that if her husband had not been home that evening, and had not seen her upset, events would probably have gone a different way.

15 Mrs. MacLeod said Ms. Martin was dismissed not for asking to be paid, but because of the way she was asking to be paid.

26. On 28 August 2021, Ms. Martin went to a hairdressing appointment. While there, she read an email Ms. Romney had sent her (at Mr. MacLeod's bequest) stating:

20 *“I am writing to notify you of the decision that has been made to end your employment with The Scot Hotel. Your employment started on 28th July 2021 and will be terminated on Saturday 21st August 2021. The reason for your failed probationary period is unreasonable behaviour and demands by the telephone. Monies owed to you, up to the fore mentioned date, will be paid in full on Tuesday 31st August 2021. You are required to return the Hotel keys after 11.30am on Tuesday 31st August 2021” [117].*

25

27. At 10:35am, Ms. Martin messaged Ms. Romney: *“Wow what a shame Lisa. I'd have appreciated a phone call. My request to be paid appropriately was not unreasonable. The manner in which I asked was firm but fair. Requesting my pay slip is not an unreasonable demand ... The only thing I said on the*

30

phone was that apparently you hadn't been paid correctly either which is upsetting. Which is what you told me?" [113].

28. At 13:04, Ms. Martin followed that up with a further message to Ms. Romney:
5 *"I'm assuming Andi was upset that I asked to be paid and expressed my concern that you were also not paid. I would like to know what my 'unreasonable behaviour demands' were however, I felt it was important you were also paid" [114].*

29. On 28 August 2021. Ms. Martin did not speak directly to Mr. or Mrs. MacLeod.

30. Various messages were exchanged after 28 August 2021. None of the post-
10 dismissal messages the Tribunal was referred to assisted the Tribunal in determining what the reason/principal reason for Ms. Martin's dismissal was.

Relevant law

31. Section 104 of the Employment Rights Act 1996 provides (in relevant part):

(1) An employee who is dismissed shall be regarded for the purposes of this Part
15 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee:

(a) brought proceedings against the employer to enforce a right of his
which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant
20 statutory right.

(2) It is immaterial for the purpose of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed,

25 but for that subsection to apply, the claim to the right and that the right has been infringed must be made in good faith.

(3) It is sufficient for subsection 1 to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purpose of this section—

5 (a) Any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.

32. The reason for dismissal is the set of facts known to, or the beliefs held by, the employer which cause the employer to dismiss the employee. Abernethy v Mott, Hay & Anderson [1974] IRLR 213, CA.

10 Issues

33. So far as liability is concerned, Ms. Martin’s claim gives rise to two key issues:

34. First, did Ms. Martin allege – in reasonably clear terms – that her employer had infringed her right under s.13 of the Employment Rights Act 1996 not to have unauthorised deductions made to her wages?

15 35. Second, if she did, was this the reason – or if he had more than one reason, the principal reason – why Mr. MacLeod decided to dismiss Ms. Martin on 27 August 2021, and subsequently did so the following day?

Discussion / Conclusions

20 36. First, it is not in dispute that on 27 August 2021 at 7pm, Ms. Martin sent a message to ‘The Scot’ WhatsApp group chat stating: “£ 1000 is missing from my pay slip. That needs to be rectified please ... Wasn’t told about any cut off at all. Please rectify this” [105]. Mr. and Mrs. MacLeod both read that message.

25 37. The Tribunal is satisfied that by this message, Ms. Martin did allege in sufficiently clear and unambiguous terms to her employer that her right not to have unauthorised deductions made to her wages – which is a qualifying “relevant statutory right” – had been infringed.

38. Second, the Tribunal is also satisfied that what Ms. Martin said to Mrs. MacLeod in their telephone conversation on 27 August 2021 following that WhatsApp message – for which, see findings at para. 18 above – also constituted an allegation in sufficiently clear and unambiguous terms that Ms. Martin’s right under s.13 of the Employment Rights Act 1996 not to have unauthorised deductions made to her wages had been infringed. In cross-examination, it was not contended otherwise.
39. Third, the Tribunal is satisfied that Mr. MacLeod read the WhatsApp message at [105], hence Mr. and Mrs. MacLeod both knew that Ms. Martin had made that allegation in that message, and was also informed of the gist of Mrs. MacLeod’s telephone conversation with Ms. Martin only a few minutes after that call ended.
40. Fourth, the Tribunal finds that Mr. MacLeod’s reasons for deciding to dismiss Ms. Martin on 27 August 2021, and subsequently doing so on 28 August 2021 via an email from Ms. Romney to Ms. Martin [117], were (in no particular order) as follows:
- a. Mrs. MacLeod’s visible emotional upset caused by the call;
 - b. Ms. Martin’s perceived “*attitude*” on the call;
 - c. Ms. Martin’s insistence, during the call, on being paid her full wage without deduction or delay.
41. Fifth, since there was more than one reason for dismissal, the Tribunal must determine which of these reasons was the principal reason for dismissal, ie, the most important. The Tribunal finds on the balance of probability that the most important reason in Mr. MacLeod’s mind for dismissing Ms. Martin was her insistence on the call of being paid her full wage without deduction or delay having not been paid in full. Mrs. MacLeod’s emotional upset, although not unimportant, was not the principal reason for dismissal: although she was upset, Mrs. MacLeod was able to tell Mr. MacLeod what Ms. Martin had said to her on the call, and it was the content of what Ms. Martin had said which caused Mr. Martin to decide to dismiss Ms. Martin. Mr. MacLeod himself

directly linked Ms. Martin's attitude to what she had said or implied to his wife: *"Her attitude was pay me my full wages or I'll leave.* Mr. MacLeod made the decision to dismiss Ms. Martin within literally minutes of the call, and made that decision without being aware of the fact that it might be unlawful for him to dismiss her for asserting that her right to be paid her wages in full had been breached.

- 5
42. Sixth, in light of the findings above, Ms. Martin's claim that she was unlawfully dismissed by the Respondent under s.104(1)(b) of the Employment Rights Act 1996 is well-founded, and she is entitled to a remedy for same.

10 Compensation

43. Ms. Martin is not entitled to a basic award for unfair dismissal, having worked for the Respondent for less than a year.

44. Ms. Martin was summarily dismissed on 28 August 2021. There is no extant claim for unpaid wages, hence the Tribunal infers and finds that Ms. Martin must have been paid in full (either before or after her dismissal) the wages she earned during her brief period of employment. Ms. Martin has not asserted a breach of contract claim (wrongful dismissal/notice of pay) either, and the Tribunal accepts the Respondent's contention that she was subsequently paid a week's notice, hence the Tribunal infers and finds that Ms. Martin has been paid wages equivalent to one week's notice (29 August – 4 September 2021) and therefore has not suffered a loss in income for that short period.

45. Ms. Martin limits her claim for compensation for unfair dismissal to the period ending 31 March 2022. She stated that from April 2022 she was hoping to open her own shop premises to sell her products which she currently markets (and sells from home) on the 'Etsy' website (which specialises in the sale of arts, jewellery, antiques and craft products by vendors of all sizes) [165]. Accordingly, the Tribunal finds that the appropriate period of compensation is approximately 29½ weeks (5 September 2021 – 31 March 2022). Ms. Martin worked (or at least was meant to work) a minimum of three 7-hour shifts a week at £10/hour for the Respondent, so the weekly loss in income arising

from her dismissal was £210 (10 x 3 x 7). Applying the above, Ms. Martin's compensation entitlement is £6,195 (210 x 29.5).

46. Having heard Ms. Martin's evidence under cross-examination, the Tribunal is satisfied that in light of her personal situation (a single mother dependent on her own father for unpaid childcare) she made reasonable efforts after her dismissal to mitigate her financial loss arising from her dismissal. Because Ms. Martin has a very young daughter who needs to be looked after during the day and who was not eligible to start nursery until 1 December 2021, Ms. Martin's personal circumstances prevented her from starting regular 'daytime' employment until after that date. Ms. Martin provided adequate particulars of the jobs she unsuccessfully applied for [134]. Ms. Martin was shown a job advert for Tesco [139] and confirmed she had applied for it. Ms. Martin was shown a job advert which she had not been aware of and not applied for [143] but pointed out it was a weekend position for October 2021, which would have caused her childcare difficulties. Ms. Martin was taken to the advert at [144], but pointed out that the rate - £8.91 – indicates it was a daytime position which she could not work at the time. Ms. Martin attended her jobcentre appointments [131-133].
47. Ms. Martin's unchallenged evidence, which the Tribunal accepts, was that she did not receive any additional state benefits following her dismissal, hence no credit or accounting for same needs to be given.

Employment Judge: Antoine Tinnion
Date of Judgment: 03 May 2022
Entered in register: 09 May 2022
and copied to parties

Note

Judgments are published online after they have been sent to the parties.