



EMPLOYMENT TRIBUNALS

Claimant: Rashila Kayastha

Respondent: Crystal beauty Centre Limited

Heard at: London Central

On: 19 November 2021

Before: Tribunal Judge J E Plowright acting as an Employment Judge

Appearances

For the Claimant: In person

For the Respondent: Mr Ali Badreddine

RESERVED JUDGMENT

1. The claim for unfair dismissal is dismissed.
2. The claim for a redundancy payment is dismissed.
3. The respondent made an unauthorized deduction from wages by failing to pay the claimant wages due to her for the period 1st December 2020 to the 18th February 2021 and is ordered to pay the claimant the sum of £1853.26 being the gross sum due.
4. The respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken annual leave on termination of employment and is ordered to pay to the claimant the sum of £410.85 being the gross sum due.
5. The respondent was in breach of contract by dismissing the claimant without notice and the respondent is ordered to pay the claimant the sum of £165 being the total gross sum due for that breach.

6. The respondent is ordered to pay to the claimant additional compensation of £330 being the gross sum due pursuant to section 38 Employment Act 2002 for failure to provide the claimant with a written statement of employment particulars.
7. The total award that the respondent must pay to the claimant is £2759.11 gross.

REASONS

Claims and Issues

1. The claimant worked as a beautician for the respondent, Crystal Beauty Centre Limited, which is a small business. The claimant has brought claims for unfair dismissal, failure to give her a redundancy payment, unlawful deduction of wages in that she was not paid all the wages she was entitled to, breach of contract in that she was not paid notice pay and failure to pay her holiday pay.
2. The issues in the case are as follows:
 - 2.1 What was the period of time that the claimant worked for the respondent?
 - (a) What was the claimant's start date?
 - (b) What was the claimant's end date?
 - 2.2 Was the claimant unfairly dismissed?
 - 2.3. Was the claimant entitled to a redundancy payment?
 - 2.4 Did the respondent fail to pay the claimant wages that were lawfully owed to her?
 - 2.5 Was the claimant entitled to notice pay?
 - (a) When was the claimant given notice if at all?
 - 2.6 Was the claimant entitled to be paid for holiday accrued during her employment?
 - 2.7 Is the claimant entitled to an award under section 38 of the Employment Act 2002?

Procedure/Procedure, documents and evidence heard

3. The Tribunal heard evidence from the claimant and from Ms Kalloute (the director of the company) and Ms Badreddine (Ms Kalloute's husband) on behalf of the respondent.
4. In terms of documentation, I had before me the ET1, an accompanying document prepared by the claimant setting out her case and the ET3. During the hearing, I

was also emailed a copy of the claimant's P45 and two pay slips dated 31/10/20 and 30/11/20.

The Facts

Start Date of the Claimant's Employment

5. There is no dispute that the claimant was an employee of the respondent. However, there is a dispute regarding the dates she worked for the respondent.
6. The claimant's case is that she started working for the respondent on the 9th September 2020. The respondent's case is that the claimant joined the company initially as a freelance self-employed contractor on the 9th September 2020 and that she became an employee in October 2020 on a six month probationary basis.
7. There is no written contract of employment and no written statement of particulars of employment.
8. I find that the claimant's start date of employment was the 9th September 2020 for the following reasons.
9. The evidence of the respondent in respect of the start date of the claimant's employment was unreliable in the following respects.
 - 7.1 Firstly, in oral evidence, Mr Badreddine stated that the claimant started working for the company on the 9th September 2020 as a self-employed contractor. However, he then said that he paid the claimant wages on the spot and that she was paid £715.04 for September 2020. The payment of £715.04 is consistent with the monthly wage that appears on the two payslips for October 2020 and November 2020. When this inconsistency was pointed out to Mr Badreddine, he then changed his evidence and said that the claimant rented a chair, that they would collect money on her behalf and that she was paid cash in September. He said that he was not sure how much but that it was good money.
 - 7.2 Secondly, in the ET3, the respondent suggests two start dates for the claimant's employment, the 1st October 2020 and the 5th October 2020.
10. The claimant has consistently stated that she started working for the respondent as an employee on the 9th September 2021 and I found her evidence on this issue to be reliable.

The Claimant's Salary

11. The claimant's case is that she was employed to work 8 hour shifts four days a week (32 hours per week in total). The respondent disagrees to the extent it says that the claimant was to be paid £10 per hour to work 2 – 3 days per week between 11am – 6pm on a flexible basis but with a fixed pay of £715.04 per month.
12. Based on the payslips that have been provided, I find that the claimant was paid £715.04 per month which is the equivalent of £165 per week (£715.04 x 12/52).

The Termination Date

13. The respondent's case is that the last date of the claimant's employment was the 1st December 2021 and the claimant's case is that she was employed until the 26th February 2021 when she received her P45 via WhatsApp.
14. For the reasons I give below, I find that the claimant's employment was terminated on the 18th February 2021.
15. The respondent's case is that following the introduction of lockdown measures on the 5th November 2020 which forced the business to close temporarily as a hair and beauty salon, the claimant was notified on the 15th November 2020, that her employment would come to an end on the 1st December 2020 and also that she was provided with her P45 on the 1st December 2020.
16. However, the evidence of the respondent's witnesses was inconsistent regarding the last time the claimant had worked. In oral evidence, Mr Badreddine said that the claimant had not been at the hair and beauty salon since October 2020. However, both Mr Badreddine and Ms Kalloute later said that they had not seen the claimant since the 4th November 2020. Mr Badreddine also said that the claimant did not work between the 5th November 2020 and the 19th November 2020.
17. Ms Kalloute said that the claimant was told in December 2020 that she would have to go but nothing was put into writing. This is inconsistent with the respondent's case that the claimant was notified on the 15th November 2020 that her employment would end on the 1st December 2020.
18. The respondent's case is that the claimant had been given her P45 on the 1st December 2020. However, this is not consistent with the evidence of Mr Badreddine and Ms Kalloute that they had not seen the claimant since the 4th November 2020. Furthermore, in oral evidence, both Mr Badreddine and Ms Kalloute conceded that the claimant was not provided with her P45 until the 26th February 2021, when it was sent to her via WhatsApp, even though the P45 is dated the 1st December 2020.
19. The claimant claims the last day she attended the salon to work was on the 18th December 2020, prior to the lockdown on the 19th December 2020. It is a matter of public record that London did enter Tier 4 restrictions on the 19th December 2020.
20. Ms Kalloute left the UK in November 2020, her husband left the UK in December 2020 and they did not return to the UK until February 2021 which means they were not in the UK to monitor the claimant's work activities. I found that the claimant was clear in her evidence about working at the salon until the 18th December 2020 and I find that she gave reliable evidence about the date of her last physical attendance at the salon. I therefore find that the last day she attended the salon to work was the 18th December 2020.
21. I find that the claimant thereafter attempted to obtain wages owed to her from the respondent and was told that her employer was processing the payments. Mr Badreddine accepted that he received numerous calls from the claimant to such an extent that she was annoying him.

22. The respondent gave the claimant a one off payment of £300 in January 2021. The respondent's case was that this was a one off payment because the claimant was desperate for money. Although this payment of £300 could support the respondent's case that her employment had already been terminated, Mr Badreddine stated that after that payment was made he called the furlough department to see if she was eligible for a furlough payment. He was told that she was not eligible for a furlough payment. The contact by Mr Badreddine with the furlough department after the one off payment of £300 in January 2021 is not consistent with the respondent's case that the claimant's employment was terminated on the 1st December 2020.
23. Although I have found that the respondent was told by HMRC that the claimant was not eligible for a furlough payment in January 2021, the claimant's evidence was that up until the 18th February 2021, Mr Badreddine indicated to her that she was entitled to furlough and that he was going to help her. I find that Mr Badreddine was annoyed with the claimant and that it is therefore entirely plausible that he did not make it clear to the claimant until the 18th February 2021 that there was nothing more he could do for her and that her employment was terminated.
24. However, I find that by the 18th February 2021, it must have been clear to the claimant that the respondent was not prepared to do anything further to assist her and that she was no longer employed by the respondent.
25. The claimant contacted ACAS on the 25th February 2021 and I find that the reason she did contact ACAS on the 25th February 2021 was because she knew that her employment had now been terminated.
26. The claimant was sent her P45 via WhatsApp along with three payslips for October 2020, November 2020 and December 2020 on the 26th February 2021, which is the day after she contacted ACAS. The respondent's case is that the December 2020 payslip was sent in error and a mistake by the accountant. I do not find this explanation plausible and I find that the December 2020 payslip that was sent to the claimant is a further indication that the claimant was employed by the respondent throughout December.
27. I do however find that the fact that the P45 and the payslips were sent on the 26th February 2021 is further evidence that the claimant's employment had been terminated on the 18th February 2021.

Holiday Pay

28. I find that the claimant did not take any paid holiday. This was confirmed by Ms Kalloute in oral evidence when she stated that holiday pay depended on how many months an employee had worked and that they usually did not pay sick pay or holiday pay. Ms Kalloute agreed that the claimant was not given any paid holiday whilst employed by the respondent.

Notice Pay

29. The claimant maintains that she was never given any notice. I have found that the claimant was not given notice of termination of employment on the 15th November 2020 as claimed by the respondent. I have also found that it was not made clear to the claimant that her employment was terminated until the 18th February 2021.

Whilst it must have been clear to the claimant that her job was at risk, I find that she was not given notice of termination of employment but instead simply told by the respondent on the 18th February 2021 that there was nothing more that could be done for her and that her employment was at an end.

30. Therefore, I find that the claimant was employed by the respondent between the 9th September 2020 and the 18th February 2021. I find that the claimant was paid between the 9th September 2020 and the 30th November 2021 but was not paid wages that were owed to her between the 1st December 2020 and the 18th February 2021.

The Law

31. The claimant has brought claims for unfair dismissal and failure to give her a redundancy payment. To succeed in an unfair dismissal claim she would have had to have been continuously employed by her employer for not less than two years under section 108(1) of the Employment Rights Act 1996. Similarly, to be entitled to claim a redundancy payment, the claimant would have had to have been employed for a period of not less than two years under section 155 of the Employment Rights Act 1996.
32. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by them unless 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 the worker has previously signified in writing her agreement or consent to the making of the deduction.
33. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.
34. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must be not less than the statutory minimum period of notice set out in section 86 of the Employment Rights Act 1996.
35. Section 86(1)(a) of the Employment Rights Act 1996 provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week if her period of continuous employment is less than 2 years.
36. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.
37. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment

Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose. Since the payment for leave in this case was due after the 6th April 2020 (when there was a change to the relevant provisions) an average of pay over the previous 52 weeks is taken.

38. Under Section 38 of the Employment Act 2002, where a Tribunal finds in favour of an employee in a complaint of breach of contract or unlawful deductions from wages and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

Unfair Dismissal and Failure to Make a Redundancy Payment

39. The claimant was employed between the 9th September 2020 and the 18th February 2021. In order to succeed in her claim for unfair dismissal or her claim for a redundancy payment, she would have to show that that she was employed by the respondent for a period of not less than 2 years. However, the claimant was employed by the respondent for a period less than two years and therefore neither of these claims can succeed.

Unauthorised Deductions

40. The claimant was employed by the respondent between the 9th September 2020 and the 28th February 2021. The claimant was paid between the 9th September 2020 and the 30th November 2021 but was not paid wages that were owed to her between the 1st December 2020 and the 18th February 2021. The claimant's monthly wage was £715.04 which is the equivalent of £165 per week. She was therefore owed two months wages for December 2020 and January 2021 and wages from the 1st February 2021 to the 18th February 2021. For February 2021, the claimant is entitled to 18 days' wages which at £23.51 per day amounts to £423.18 (£23.51 x 18). The total amount is therefore £715.04 x 2 + £423.18 = £1853.26.

Notice Pay

41. The claimant was never given notice of the termination of her employment which is not less than one week under section 86(1) of the Employment Rights Act 1996. She was entitled to one week's notice pay and is therefore owed £165.

Holiday Pay

42. There was no written contractual agreement. The claim relies on the claimant's right to annual leave under the Working Time Regulations 1998. Under these regulations, the claimant was entitled to 5.6 weeks' holiday per holiday year. Since there was no relevant agreement giving a different holiday year, the claimant's holiday year began on the start date of her employment which I found to be the 9th September 2020. The claimant was employed until the 18th February 2021. The

claimant was entitled to be paid, on termination of her employment, in lieu of leave which she had accrued but not taken in the period 9th September 2020 to the 18th February 2021. The claimant had not taken any paid holiday in this period. I conclude that the respondent made an unauthorised deduction from wages by not paying the claimant in lieu of accrued leave.

43. The claimant worked between the 9th September 2020 and the 18th February 2021 (a total of 162 days or 23.1 weeks). She had accrued $23.1/52 \times 5.6$ week's leave which is 2.49 week's leave.

44. The claimant's entitlement to pay in lieu of accrued but untaken holiday, based on basic pay is $2.49 \times \text{£}165 = \text{£}410.85$.

Ex Gratia Payment

45. In January 2021, the claimant was paid £300 as a one off gift. However, this does not extinguish the claimant's right to be paid her wages in full, notice pay or pay in lieu of accrued but untaken holiday.

Section 38

46. The claimant has succeeded in her claim for unauthorised deduction of wages. An award of additional pay under section 38 Employment Act 2002 for failure to provide a written statement of employment particulars is, therefore, possible.

47. The claimant was an employee of the respondent. She was, therefore, entitled under section 1 ERA to be provided with a written statement of employment particulars. However, the claimant was never given a written statement of employment particulars. The respondent has not put forward any evidence of any exceptional circumstances which would make it unjust or inequitable to order them to pay the claimant an additional amount for this failure, in accordance with section 38 Employment Act 2002. I must, therefore, order the respondent to pay an additional two weeks' pay and may, if I consider it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay. Whilst there was a complete failure to provide any written particulars of employment, the respondent had not been in default of its obligation for long by the time the claimant's employment came to an end and it is clear that the pandemic complicated the situation. In these circumstances, I do not consider it would be just and equitable to order the respondent to pay an additional 4 weeks' pay. Therefore, I order the respondent to pay an additional two weeks' pay i.e. $2 \times \text{£}165 = \text{£}330$.

48. The total award I make is therefore $\text{£}1853.26$ (wage arrears) + $\text{£}165$ (one week's notice) + $\text{£}410.85$ (holiday pay) + $\text{£}330$ (failure to provide a written statement of employment particulars) = $\text{£}2759.11$.

Case Number: 2201077/21

Date: 01/12/21

Tribunal Judge J E Plowright acting as an Employment Judge

Sent to the parties on:

02/12/2021

For the Tribunal: