



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K Hong

**Respondent:** Ecoodeals Services Ltd

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Midlands West Employment Tribunal (by CVP)

**On:** 12 & 13 April 2021

**Before:** Employment Judge Kelly (sitting alone)

### Appearances

For the claimant: Ms Wong, claimant's daughter

For the respondent: Mr Chan, respondent's accountant

## RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant's claim for deduction from wages is dismissed on withdrawal.
2. By consent, the respondent is ordered to pay the claimant the sum of £26.90 as holiday pay.
3. The claimant was unfairly dismissed. The respondent is ordered to pay the claimant the sum of £939.00.
4. The respondent breached the claimant's contract of employment. The respondent is ordered to pay the claimant £212.50.

## REASONS

1. This has been a remote hearing. The parties did not object to a remote hearing format. The form of remote hearing was V - Video. A face to face hearing was not held because it was not practicable and no-one requested it
2. By a claim presented on 27 March 2019 after a period of early conciliation, the claimant claimed automatic unfair dismissal, notice pay, holiday pay and deduction from wages.
3. Issues were clarified at a preliminary hearing on 19 August 2020 and we refer to the case summary in the order of that Tribunal (CMO).
4. At the start of the hearing, we clarified with the claimant that para 1.2 of the CMO was incorrect and it should read: Did the claimant assert a statutory right to holiday pay under the Working Time Regulations?
5. At the start of the hearing, the claimant confirmed that she was not bringing a claim for deduction from wages. Therefore, we have dismissed that claim.
6. During the course of the hearing, the respondent conceded that it would pay the claimant the sum sought by her of £25.90 as holiday pay and we have ordered the respondent to pay this sum to her.
7. At the start of the hearing, the respondent conceded that it did not give the claimant a written statement of employment particulars as required by s1 Employment Rights Act 1996 (ERA).
8. The respondent's case raised was that the claimant was not entitled to a notice payment because she committed mistakes at work and was given a verbal warning.
9. We were referred to a bundle of documents. This bundle contained documents generated during ACAS conciliation and we have not taken into account such documents.
10. We heard evidence from the claimant and from her former colleague at the respondent, Ms Chen, who no longer worked for the respondent. For the respondent, we heard evidence from Mr Ng, director of the respondent, and Mr Chan, the respondent's accountant.
11. All proceedings were interpreted by a Cantonese speaking interpreter. Further, Ms Chen required a Mandarin speaking interpreter.

### **What happened**

12. We make the following as the primary facts relevant to the issues in dispute.
13. The respondent is in business as a warehouse for goods arriving from Hong Kong which it packages and labels to supply to Amazon. The claimant was

employed by the respondent as a packaging and labelling staff from 22 Oct 2018 until her summary dismissal with effect on 6 Jan 2019.

14. The claimant began working 32.5 hours per week at the hourly rate of pay of £8.05. The respondent did not give the claimant (or any of its staff) a written contract of employment.
15. The claimant signed a staff handbook which was in Chinese. A written translation of it was not supplied to the Tribunal. The provisions on notice for termination in the Handbook were that, when an employee left the company, they had to give a month's notice, except during the probationary period, when two weeks' notice were required. There were no provisions for the notice period due from the employer to terminate the employment in the Handbook.
16. From time to time, the claimant would be late arriving at work and she would communicate this to the respondent which did not discipline her. Mr Ng's evidence was that he did not complain because she was a new staff member and her wages depended on the number of hours she worked. She also made two mistakes in her work in November and December respectively. The respondent spoke to her about this informally because it did not want to create a bad relationship between itself and a new member of staff. Mr Ng's evidence was that he could accept her mistakes because she was a new member of staff.
17. The claimant was paid for 133.50 hours in November 2018 which she worked 5 days a week, at the hourly rate of £8.05 gross.
18. In November 2018, Mr Ng had a meeting with the claimant, Ms Chen and another colleague saying that the workload was low. He said the respondent decrease their working hours to 15 hours per week from December without specifying how long this would last, but to increase the hourly rate to £8.50 gross. According to the claimant, Mr Ng said that the wages would increase to £10 per hour if working hours could not be restored to normal in January 2019 and holiday pay would not be affected. Mr Ng's evidence was that he said he would ask the company which controlled the respondent if he could increase the hourly rate to £10 but he could not guarantee anything. We accept Mr Ng's evidence on this point. Had the claimant believed that she was entitled to £10 an hour in January 2019, we consider she would certainly have raised this in her subsequent complaint emails referred to below, but she did not and, instead, she calculated her entitlements on the basis of a rate of £8.50 per hour.
19. The employees could accept the new hours or leave. A couple of days later, the claimant accepted to stay. Ms Chen and the claimant's other colleague resigned and left in December. That left the claimant and two full time employees who did the same job as the claimant plus some more manual warehouse work.
20. In December, the claimant asked Mr Ng what was going to happen in January, and he told her she would work 15 hours a week. She asked him if she would get £10 an hour and he did not agree. Instead, Mr Ng increased the claimant's

hours of work to 20 from 15 a week. This was notified to the claimant between Christmas and New Year. The hourly rate remained at £8.50 gross.

21. In December, there was a discussion between the claimant and Mr Ng about her holiday pay and Mr Ng agreed to pay the claimant a sum in lieu of holiday, which was paid. However, the claimant did not consider that it was the right sum.
22. On Friday 4 Jan 2019, the claimant emailed Mr Ng saying she worked 32.5 hours a week from starting in October 2018 and she and her colleagues had had their hours cut to 15 hours a week in December 2018, and that the respondent had agreed they would have the paid holiday they were entitled to 'as UK employer'. She would work 20 hours per week from January 2019 and that Mr Ng had told her she had no entitlement to bank holiday as part of her statutory leave entitlement. She stated that her holiday should be calculated as 'casual or irregular format' and she should have 31 paid hours, but he had only paid 20 hours for annual leave. She said at interview she was told she would have all her legally paid holiday and the company handbook contained an entitlement of 28 days leave for a 5 day week. She attached a link to the 'gov.uk' website on holiday entitlement. She asked for her correct holiday entitlement.
23. The respondent did not make any suggestion that this email was not written in good faith.
24. The next written communication the claimant received from Mr Ng was to dismiss her via WhatsApp on Sunday 6 Jan 2019. We were not shown a copy of the dismissal message.
25. Mr Ng's explanation of the dismissal was that the business declined so that the respondent did not need hourly rate employees and could manage with the two remaining full time employees. He said he was instructed by the respondent's controlling company to dismiss the part time employees. We were not referred to any document showing this instruction.
26. On 25 Jan 2019, the claimant emailed Mr Ng again. She described what he had put in the WhatsApp message of dismissal as 'You told me that I no longer needed to come into work immediately without any valid reason and or any misconduct, also you agreed to re calculate my paid holiday to 31 hours.' The respondent did not dispute that this is what the dismissal communication said and we accept that this is what it said.
27. Further, in the email, the claimant said she had received her final payslip and she complained that her holiday pay was calculated at the rate of £8.05 per hour not £8.50, and that she had not been paid notice pay and said she was due 2 weeks notice. She said this was an official complaint.
28. Mr Ng told the Tribunal that he understood that the claimant was raising a disagreement with him but he was unaware of the ACAS Code of Practice on grievances, which is why he did not follow it.

29. On 5 Feb 2019, the claimant emailed Mr Ng saying she should have been paid £417.45 for 20 hours work plus £5.85 holiday pay adjustment plus £340 notice pay, but she had only received £317.45 and had had no response from him.
30. Mr Ng responded on the same day that it was reasonable to use £8.05 as the holiday pay rate and she had been paid in full on the basis of her total time. He said the company director in China did not agree to her request for 2 weeks notice pay because she was still in her probationary period and two weeks notice was not required.
31. On the same day, the claimant replied that the notice period was 2 weeks when on probation, as per the staff handbook.
32. In October 2020, the respondent started taking on new employees again and had four at the date of the tribunal hearing.
33. The claimant made a claim for loss of earnings for 52 weeks after the end of her employment.
34. At the end of her employment, the claimant was earning £170 gross per week. The claimant's rate of tax deductions was very variable on her payslips from the respondent so that no accurate conclusion can be reached of what her marginal tax rate was from them. We shall therefore assume a tax rate of income tax of 20% and employee's national insurance contributions of 10%. Her net pay would therefore be £119 per week. The claimant had another part time employment when she started with the respondent which may have been causing the fluctuations.
35. In the 12 weeks ending with her employment, the claimant earned gross:
  - a. 1 week at £170 (£170)
  - b. 4 weeks in December at £128 (£512)
  - c. 6 weeks back to start of employment at £262 per week (£1572).
36. The claimant did not find replacement new employment for two weeks after the termination of her employment. She then found 7 weeks of temporary work earning £162 gross per week.
37. She then had 42 weeks of temporary work earning £180 gross per week.
38. The claimant did not receive state benefits.

## **The law**

### Notice pay claim

39. The employer will be in breach of contract if it dismissed the employee without notice where there has been no repudiatory conduct by the employee justifying summary dismissal (in the absence of a contractual entitlement to pay in lieu of notice and the making of such a payment.)

40. In *British Heart Foundation v Roy (Debarred)* EAT 0049/15 it was stated to be an objective test as to whether the employee had acted in serious breach of contract such as to entitle the employer to dismiss summarily.
41. Under Rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, 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 and Wales would under the 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 the termination of the employee’s employment.
42. Under s86(1) ERA, 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’s notice if his period of continuous employment is less than two years.
43. Under s86(6) ERA, this section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

Unfair dismissal claim

44. Under s94(1) ERA, an employee has the right not to be unfairly dismissed by his employer.
45. Under s108 ERA:
- a. section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
  - b. Subsection (a) above does not apply if subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies.
46. Under s104(1) ERA, an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee ... alleged that the employer had infringed a right of his which is a relevant statutory right.
47. Under s104(2) ERA, it is immaterial for the purposes of subsection (1)—
- (a) whether or not the employee has the right, or
  - (b) whether or not the right has been infringed;
- but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

48. Under s104(3) ERA, 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.
49. Under s104(3) ERA, the following are relevant statutory rights for the purposes of this section: the rights conferred by the Working Time Regulations 1998 (WTR).
50. Under regulation 13 of the WTR, a worker is entitled to four weeks' annual leave in each leave year and under regulation 13A of the WTR, a worker is entitled to a period of additional leave of 1.6 weeks in any leave year.
51. Under s1 ERA, where a worker begins employment with an employer, the employer shall give to the worker a written statement of employment particulars as set out in that section.
52. Where the claimant has less than two years' service, the burden of proof is on the claimant to show that the if the reason (or, if more than one, the principal reason) for the dismissal is that the employee alleged that the employer had infringed a right of his which is a relevant statutory right.

#### Remedy for unfair dismissal

##### *Basic award*

53. The principles on which the basic award for unfair dismissal should be calculated are set out in s119 to 122 ERA.

##### *Compensatory award*

54. Under s123 (1) ERA, subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
55. In *Devis v Atkins*, the House of Lords held that "it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed".
56. In *Polkey v AE Dayton Services Ltd 1988 ICR 142 HL*, the House of Lords held that where there was a proven procedural irregularity, but it could be shown that carrying out the proper procedure would have made no difference to the dismissal decision, this should be taken into account when assessing compensation.

##### *Contribution*

57. Under s123(6) ERA, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

### *Mitigation*

58. Under s123(4) ERA, a claimant has a duty to mitigate loss.
59. The burden of proof is on the respondent to show that the claimant failed to mitigate loss. It must show that the claimant has acted unreasonably.

### Statement of employment particulars

60. Under s38(3) Employment Act 2002, if, in the case of proceedings to which this section applies, (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty under section 1(1) or 4(1) of the ERA, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.
61. Under s38(4) Employment Act 2002, the above reference to the minimum amount is to an amount equal to two weeks' pay and the reference to the higher amount is to an amount equal to four weeks' pay.
62. Under s38(6) Employment Act 2002, a week's pay shall be calculated in accordance with Chapter 2 of Part 14 ERA. S224 applies to employments with no normal working hours and s228 to new employments in which case a week's pay shall be the sum which fairly represents a week's pay.

### Failure to comply with statutory code of practice

63. Under s207A Trade Union and Labour Relations (Consolidation) Act 1992, in claims listed in schedule A2 of that Act, if the claim concerns a matter to which a relevant Code of Practice applies and there was an unreasonable failure by the employer or employee to comply with the Code, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, respectively increase or reduce any award by no more than 25%. The claims listed in schedule A2 include claims for unfair dismissal and for breach of an employment contract but not for an award or increase to award for failure to supply a statement of employment particulars.
64. The ACAS Code on Disciplinary and Grievances is such a Code of Practice. It contains provisions on handling grievances in the workplace. This includes provisions for the employer arranging a meeting to discuss the grievance, notifying the employee of the outcome in writing and giving a right of appeal. The disciplinary provisions apply when there is misconduct or poor performance.

### **Conclusions**

#### Notice pay claim

65. The claimant did not commit a gross misconduct to disentitle her to a notice payment on termination of employment. Her time keeping was not bad enough for the respondent to complain about it. Mr Ng accepted the claimant's



mistakes. The dismissal notification did not refer to any misconduct and Mr Ng said the reason for dismissal was a reduced workload. Mr Ng's explanation of 5 Feb 2019 for the failure to pay notice was not that there had been a gross misconduct, but that she was still in the probationary period. Therefore, the claimant is entitled to a notice payment.

66. We do not accept the claimant's contention that the notice entitlement was two weeks. The Handbook provisions on which she relied were stated to apply to notice given by the employee, not the employer. We find that the claimant was entitled to the statutory minimum notice period of one week.
67. At the time notice of dismissal was given, the claimant was working 20 hours a week at £8.50 per hour. Therefore, the notice pay due to the claimant is 20 x £8.50 which is **£170**.
68. We increase this sum by 25% because of the respondent's failure to comply with the ACAS Code of Practice on grievances for no other reason than it was unaware of it. There is no much information available to employers on this subject on the internet that ignorance is no excuse.
69. This results in a total payment of **£212.50** for notice pay.

#### Unfair dismissal claim

70. The claimant did not have the two years' continuous service to bring a claim for ordinary unfair dismissal. Therefore, to succeed in her unfair dismissal claim, she must show that the reason or, if more than one, the principal reason for her dismissal was that she alleged that the respondent had infringed a relevant statutory right and she made the allegation in good faith.
71. In her email of 4 Jan 2019, the claimant complained that the respondent had told her she was not entitled to bank holiday as part of her statutory leave entitlement and asserted she was entitled to 31 paid holiday hours not 20 hours. We find that this amounts to an allegation that the respondent had infringed a relevant statutory right; relevant statutory rights include those conferred by the WTR. The WTR give a right to an additional 1.6 weeks holiday per leave year in addition to the basic four weeks leave. We consider that the claimant made it reasonably clear to the respondent that she was asserting this right when she referred to an entitlement to bank holidays.
72. We consider that the claimant asserted the infringement of her right in good faith. No suggestion was made by the respondent that this was not the case. This was part of an ongoing dialogue between the claimant and the respondent in relation to her holiday entitlement and which did result in an additional payment from the respondent to the claimant.
73. We consider that the reason for the dismissal, or if more than one, the principal one was that the claimant alleged that the respondent had infringed her rights under the WTR. Our reasons for this are as follows. The dismissal took place within one business day of the claimant's written assertion of the infringement of rights under the WTR. This suggests very strongly that it was due to that

assertion. The dismissal was in the next written communication which the respondent gave to the claimant after she made her written assertion.

74. We do not accept that respondent's explanation that the dismissal was effectively for redundancy. The respondent had increased the claimant's hours from 15 to 20 a week, between Christmas and New Year, only a few business days before the dismissal. There was no explanation in the dismissal notification that a reduced need for staff was the reason for the termination of the employment. The respondent's previous reaction to a reduced workload had been to consult staff about changing their hours and we consider that this is what Mr Ng would have done again in January if the real issue had been a reduction in work.

75. Therefore, the claimant was unfairly dismissed.

#### Remedy for unfair dismissal

##### *Basic award*

76. The claimant is not entitled to a basic award because she had less than one year's service with the respondent.

##### *Compensatory award*

77. We find that, had the claimant remained in the respondent's employment after 6 Jan 2019, she would have continued to earn no more than £170 per week until October 2020 when the respondent started to take on more staff and would have been likely to have increased the claimant's hours (and reduced her pay rate.) We cannot see that the respondent would have increased her hours prior to October 2020 if it did not have enough work to require more staff. Compensation for unfair dismissal is therefore calculated on the basis of a loss of £170 gross per week.

78. The claimant was out of work for two weeks. We consider that this was a reasonable period to be looking for new employment after a summary dismissal and the respondent did not present any evidence suggesting that the claimant unreasonably failed to mitigate her loss. In respect of the first of these weeks, we have awarded the claimant notice pay above and so will not give her double recovery by making a compensatory award for the same period. Her loss for the second week is 1 x weekly net pay as estimated above of **£119**.

79. We do not consider it equitable to award any sum for loss after this as the claimant then earned almost as much as she was earning with the respondent for 7 weeks, and then more than she was earning with the respondent thereafter, meaning that there was no net actual loss of earnings once she found new employment.

80. We do not consider that the claimant contributed to her dismissal by blameworthy conduct such as to justify a reduction in the award. Nor do we consider that it is appropriate to apply the principles in *Polkey* to reduce the award. We do not consider it at all likely that the respondent would have

dismissed the claimant for redundancy in January 2019, it having only reviewed her hours at the end of December.

81. We do not consider it appropriate to increase the award for a failure to comply with a statutory procedure because the ACAS Code of Practice in Disciplinary Procedures applies where there is a misconduct or poor performance issue, which was not the case in respect of the claimant's dismissal; the dismissal was for asserting a statutory right.
82. We will increase the compensatory award by four weeks pay because of the respondent's failure to issue the claimant with written particulars of employment. Four weeks rather than two weeks is appropriate because no written terms were issued at all and we found the respondent's default to be blatant; it stated that no employees were given written contracts.
83. How much is a week's pay for these purposes? We find that there were no normal working hours for the claimant, the respondent being able to change her hours during the employment. The claimant evidently thought the same because her email of 4 Jan 2019 referred to calculating holiday on the 'casual or irregular format'. Under the principles in s224 ERA a week's pay is the sum which fairly represents a week's pay. We find that the claimant earned an average of £205 per week during her employment and this fairly represents a week's pay, making 4 weeks' pay **£820**.
84. The total compensatory award is therefore **£939**.
85. We observe that the respondent appeared to have scant awareness of employment law and urge it to take advantage of the wealth of information available to it on the government website 'gov.uk' and on the ACAS website.

**Employment Judge Kelly**  
**13 April 2021**