



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Ms K Annesley**

**v Brampton Manor Salon & Tea Rooms  
Ltd**

**Heard: Papers only**

**On: 12 January 2023**

**Before:**

**Employment Judge JM Wade**

This has been a papers only hearing, by Consent, the respondent's Mr Lynch being unwell on the day of the intended CVP hearing.

## JUDGMENT

1. The claimant's complaint of entitlement to a statutory redundancy payment succeeds and the respondent shall pay to her the sum of £1120.
2. The claimant's complaint of entitlement to notice pay succeeds and the respondent shall pay to her the sum of £23.38.
3. The claimant's complaint of unfair dismissal is not well founded.
4. The claimant's complaint of underpaid holiday pay on the termination of her employment succeeds as a WTR/unlawful deductions from wages complaint (but not as a breach of contract complaint). The respondent shall pay to her the sum of £89.20.

## REASONS

### Introduction

1. The parties consented to a decision on the papers only in this case. The claimant has been very well advised and the respondent is represented by its director Mr Lynch. I had helpful written statements from six people, the claimant and a former colleague, the respondent's Mr Lynch, his daughter, the manager of the pub run by an associated company, and the former finance manager. I also had a short bundle of relevant papers and some additional disclosure from the claimant's witness. Both parties had the opportunity to present written submissions. All the bundle papers were relevant. The issues to be decided appear in the decision making and conclusions below.

### Findings of Fact

2. The claimant's date of birth is 6 October 1992. She lives a few miles east of Chesterfield. She is a beauty therapist. She began maternity leave in December 2021 and had planned to return to work after 39 weeks when her maternity pay expired, in September 2022.

### The respondent

3. The respondent company operated beauty therapy and related services from listed premises known as Brampton Manor, in Chesterfield. The respondent is one of a number of companies of which Mr Lynch is, or has been, an owner and director. Several companies have been dissolved and/or subject to voluntary liquidation; and one has been struck off the register compulsorily. The respondent remains recorded as active at companies' house. One other business operates the "Fox & Goose Inn" at Wigley, a few miles west of Chesterfield. Ms Parsons was finance manager of the group of companies and had done that role for ten years or so, when her employment ended on or around late May/early June of 2022.

When did the claimant's continuous employment begin?

4. The claimant's employment began on 6 March 2015. A contract signed in 2016 by her and Mr Lynch is silent as to her start date but I accept her evidence at paragraph 1, although Mr Lynch recalls 2016 as the start date, relying on the date the first written contract was signed. I consider he is mistaken. The claimant's evidence is corroborated by Mr Lynch's daughter, who says she worked alongside the claimant for seven years. It is therefore more likely that employment started in 2015. The respondent/claimant HMRC/PAYE/bank records are not available to me, but if there was significant documentary evidence to suggest this finding is wrong, no doubt it will be challenged by a reconsideration application explaining why that evidence was not put before me. Neither party has ever suggested 2018 is the correct start date, which is the date recorded in a contract signed by Ms Parsons and the claimant in late May, early June 2021. More likely, 22 May 2018 was the date on which the claimant was appointed, "Head Therapist", which was the reason to issue a new written contract.

What were the terms of her contract of employment as to hours in 2021/2022?

5. The claimant's written contract, which I find she did sign in early June 2021, contrary to her recollection, provided for a salary of £10 per hour, paid weekly, and basic hours of work of 16 per week. It also provided that "overtime is not payable, other than in exceptional circumstances". This contract also specified the place of work as Brampton Manor, although clause 19 provided for reasonable changes to terms and conditions to be made on not less than one month's notice. The holiday year was provided to be 1 April to 31 March with no carry over permitted, and holiday entitlement of 28 working days including bank holidays per year.
6. Unsurprisingly the pandemic had affected the respondent's business, including the need to close and furlough staff. By later in 2021 it employed only four people: the claimant, the owner's daughter, one other therapist colleague, and one other, possibly Mr Lynch or Ms Parsons. One therapist colleague had been dismissed because the respondent no longer required as many therapists.
7. On 18 December 2021 a letter was sent by Ms Parsons to the claimant's mortgage company confirming the start of her maternity leave (18 December 2021), return on 21 September 2022 "on the same employment terms and conditions as before ....These terms include £8320.00 basic pay per annum plus £5200.00 overtime per annum". That letter is somewhat at odds with the written contract terms, which specified that overtime was not payable other than in exceptional circumstances. The claimant's evidence is that she generally worked 26 hours a week. I find that the written terms had been varied by the parties by their conduct, at the latest by December 2021; rather than overtime being

exceptionally paid for, the claimant was entitled to be paid for overtime and regularly was paid, such that she could earn a further £5200 per annum.

8. The claimant did work varying extra hours and was paid for them before taking maternity leave. Sometimes this was more than 26 hours, sometimes much less. In making this finding I have pay slips before me but also weigh in the mix that the respondent calculated the claimant's maternity pay to be £156.66, the statutory rate, per week. It was entitled to do so because SMP is 90% of average earnings or £156.66, whichever is the **lower**. Her **average** hours were certainly not 16 or 17 hours per week, but "average" is not the same as "normal" for weekly pay calculation purposes.
9. The question on the claimant's case is whether her "normal working hours" for Section 221 Employment Rights Act 1996 purposes, were 26. For that to be the case the variation must have been such that the claimant was entitled to work 10 hours' extra, and was obliged to do so and the respondent was obliged to provide her with that work. That stretches the position too far; the normal working hours pursuant to her contract were 16 hours, with payment for any further hours worked, if available. The context is such that a mutual obligation for 10 further hours was very unlikely in this setting, notwithstanding that a colleague had left.
10. Has the claimant's employment ended, and if so, when?
11. The context for the communications between the parties is this. The respondent had been notified the Brampton Manor premises must close for works by the end of April 2022. Mr Lynch's daughter, Ms Rivers-Lynch looked at taking on new premises with the claimant and the other therapist colleague. She and the claimant exchanged warm and friendly exchanges about this, but by February the claimant knew of Ms Rivers-Lynch plans and that she would be welcome to work with her, but that it was to be wholly separate from the respondent business. The claimant's clients had included those whose treatments used a particular machine, and if she were to continue with Ms Rivers-Lynch that equipment would be needed at the new premises. Ultimately Ms Rivers Lynch decided wholly new premises was too much responsibility, and her mother offered a "garden studio" arrangement 5 minutes from Brampton Manor. The respondent gifted, transferred or sold the relevant equipment, such that Ms Rivers-Lynch new premises were open in June 2022.
12. Knowing Ms Rivers-Lynch plans, in April 2022 the claimant asked the respondent (both Ms Parsons and Mr Lynch) about her maternity pay and potential redundancy payment as she was concerned. Mr Lynch reassured her as to her employer (the respondent), wished her well and said, "if the business no longer trades from Brampton Manor this does not mean that the business has stopped trading and you will continue to be paid your SMP unless otherwise notified". He went on, "If you are concerned about losing clientele if the business no longer trades from the premises then you are welcome to contact your clients to inform them you are

trading from another premises either as an employee or as a self-employed therapist. However we would expect you to inform us of this and clarify your employment status with us prior to making this decision. I hope this clarifies the position.

13. That invited clarification from the claimant, effectively, if she wished to resign and work with his daughter she needed to make that clear. She did not do so, nor did she pursue working at Ms Rivers-Lynch new premises.

14. On 31 May 2022 Ms Parsons emailed the claimant a letter as follows:

“Dear Kelly

Due to the circumstances of the closure of the Salon at Brampton Manor and the wishes of the other employees to pursue self-employment we have been advised to cease trading and wind up the company.

We remain liable for your full maternity pay entitlement. We calculate this as being 16 weeks @ £156.66 gross, making a net total due of £2119.42 including accrued holiday entitlement. If you are in agreement with this figure we propose paying this in a lump sum to you tomorrow, 1<sup>st</sup> June.

Thank you for your hard work and loyalty to the Salon over the years and I’m sure your clients will look forward to seeing you back at work as soon as you are able.

Best Regards

Craig Lynch

Director”

15. The claimant then emailed Mr Lynch with information about closure and redundancy, indicating she had sought ACAS advice and considered she was entitled to a redundancy payment.

16. Before the claimant had indicated any agreement, or dissent, in relation to the letter above, the respondent transferred to her the payment indicated above. On 1 June Mr Lynch said this:

This is not the advice we have had. The company is liable for your maternity pay and you should have received this today. I injected funds into the company in order to meet this liability as the company has no premises to trade from to earn the money you are due over the coming months. I do not expect to recover this money. As the company has insufficient funds to pay redundancy payments you should apply to the National Insurance Fund for any money owed and we will fully co-operate with them to ensure that you receive this. I do not know if you can apply now or have to wait until the end of your maternity period but doubtless you can take advice on this. The company has nothing to do with any new entity or your future employment or self-employment. Leona is no longer an employee of the company so please direct all enquiries to me.

17. This reply, read objectively and taken with the letter of 31 May 2022 and the contemporaneous payment of maternity pay and holiday pay, amounted objectively to a dismissal of the claimant, the reason being redundancy.

18. It coincided in time with the opening of a new business by Ms Rivers-Lynch, and it was clear at that time the respondent had no intention to continue trading and the email reply accepts in terms that a redundancy payment was due, but that the respondent could not pay it.

19. It is also clear that thereafter Mr Lynch changed his mind, as his submissions for this paper hearing make clear. No P45 or further communication clarifying the termination of the contract of employment was issued, as it was with the previously redundant colleague, but Ms Parsons of course was no longer employed to deal with such matters.

20. In pursuit of his change of mind, there was contact from Mr Lynch to the claimant in August seeking a discussion about a return to work, and formal notice of a change of location and intention to operate from the Fox & Goose, with the claimant delivering services there.

21. I consider that generally, the parties' correspondence to each other after 1 June subsequently does not help me, polluted as it is, by the fact that they were in dispute and in communication with ACAS.

22. The next admissible communication on the record was this from the claimant:

Hi Craig

My maternity leave ends next month on the 21st of September and then I'm due back to work. As said previously in another email Brampton manor salon has closed and ceased trading. So I have lost my job? Therefor should have been made redundant. I can not apply for redundancy from national insurance funds as you stated before as I've not had a letter of being made redundant from yourself, and you've not actually said I've been made redundant, But my job no longer exists, so I'm not sure why? Also the company is still active and not "insolvent", so the government won't pay it. I don't want this to be difficult and awkward.

I've worked for you for 7 years and been very loyal to you and the company. I'm only asking for what I'm entitled too and should be getting. I've finished my maternity and no longer have a job, as you can imagine this is going to be a difficult situation for me now. Looking for work ect, with a baby. And my redundancy will help me and my family, now I'm jobless. I'm hoping you'll show me the same respect I shown the company, work & my job for the past 7 years.

If this can not be resolved via us, then I'll pass it on.

23. The claimant's email simply reflects that the communications from Mr Lynch on 31 May and 1 June had not said, in terms, that the respondent terminates your contract by reason of redundancy. That no doubt affected her ability to seek payment from the national insurance fund. It is understandable that in the context of seeking to resolve a dispute she would write in those terms, and that, in seeking to resolve the dispute Mr Lynch would change his position and create a job for her in a new location. Neither of those matters affect the conclusion that the objective reader, in context, would form having read the communications of 31 May and 1 June.

24. There were no clients treated by the respondent after the new business was set up; and indeed the bank account for October 2022 contains very little activity –

the only material activity being loan repayment and spotify, being funded by director's loan from Mr Lynch. There was subsequent communication in September 2022 between the claimant and Mr Lynch and the claimant was offered a meeting to discuss a return to work, but the claim was presented on 13 September 2022 within the relevant time limits and communication ceased shortly thereafter.

## 25. The Law

26. There is a significant body law in this dispute. Sections 220 to 226 of the Employment Rights Act 1996 address a week's pay. Sections 135 to 137 deal with entitlement to a redundancy payment. Section 94 gives the right not to be unfairly dismissed and Section 98 sets out how the Tribunal is to determine such complaints. Sections 86 to 88 address notice requirements on termination. There is case law addressing a week's pay is also be found in Tarmac Roadstone Holdings Ltd v Peacock [1973] ICR 273 and Bass Leisure Ltd V Thomas [1994] IRLR 104 EAT addresses what is meant by "the place where the employee was so employed" in Section 139. It is the actual place of work, in short, rather than a place where an employee could be required to work.

27. The Working Time Regulations 1998 ("WTR") give the right to paid holiday pay, and Regulation 14 addresses payment of untaken leave on termination of employment. A body of case law has established that unlike redundancy payments and notice payments, which are domestic law, the European based part of holiday pay should include voluntary overtime. See Dudley Metropolitan Borough Council v Willetts & Ors UKEAT/0334/16, Flowers & Ors v East of England Ambulance Trust UKEAT/0235/17/JOJ and East of England Ambulance Service NHS Trust v Flowers and others [2019] EWCA Civ 947).

## 28. Conclusions

29. The claimant was dismissed by the communications of 31 May and 1 June 2022 and she was dismissed without payment of notice, but with payment of maternity pay and holiday pay. The reason for dismissal was that the respondent had ceased to carry on the business for the purposes of which the claimant was employed in the place where she was so employed.

30. Was that reason a substantial enough reason in all the circumstances of this case justifying dismissal of the claimant taking into account equity and the substantial merits of the case? In all but extraordinary circumstances a redundancy dismissal would require as much warning as possible, consultation and the seeking of views to avoid hardship.

31. These were extraordinary circumstances. The claimant knew, in reality before her maternity leave commenced that there likely would not be a salon at the

premises by September 2022, her return. It is clear Ms Rivers-Lynch treated the claimant as a confidant and very close ally about her plans, and particularly that she no longer wished to work in a business of her father's. The claimant had a great deal of warning that a salon at Brampton Manor would no longer exist and indeed had closed at the end of April 2022. She also knew that the particular machine she used to treat clients would move, and that was an opportunity for the new business to "lose" in effect, the treatment work which was not as attractive or remunerative and which the therapists did not so enjoy doing.

32. I did not have before me the group chat messages between the three therapists, but I was told that the relationships broke down, and that is why the claimant did not then go on to take part in that new business.
33. That relationship breakdown was not known when Mr Lynch terminated the claimant's employment and his communication reflects that he fully expected the new venture to succeed in whatever form, and that relationships remained warm. In all the circumstances of this case then, which are exceptional, I do not consider that the lack of notice and lack of formal consultation makes the closure not a substantial enough reason to dismiss the claimant.
34. I do note that no offer of suitable alternative employment was made before the claimant's employment ended or in the two months which followed. She is entitled to a redundancy payment calculated by reference to her normal working hours, her age and her length of service. That sum is £1120.
35. As to notice pay, the claimant was entitled to seven weeks' notice at £160 per week; she received £3.34 less than that (in statutory maternity pay, which was paid). She is therefore entitled to £23.38.
36. As to holiday pay on the termination of employment, the claimant's schedule for today also seeks holiday untaken in the previous holiday year because of maternity leave. The other difference between the parties is whether holiday pay should be calculated on the basis of 26 hours per week or 16, or some other amount.
37. In pursuing holiday she must rely on European case law addressing WTR being primarily a health and safety provision. The principles in those cases apply only to twenty days of the twenty eight days provided for in the WTR, because eight of the twenty eight days are domestic legislation only. Her contract provides that she cannot carry forward holiday, nor was there a handbook or other provision before me which addressed the position contractually, on the termination of employment with unused holiday.
38. Applying the European principles then, I have to decide which holiday is left untaken, the European twenty days or the domestic only eight days. This is very

difficult for small employers and parties to address. Applying a broad brush approach and the Flowers judgment above, that voluntary overtime counts in the assessment of a “week’s pay”, or should do for European based leave. It therefore seems to me that the claimant is entitled to £89.20 on the basis that it was a new holiday year and the European four weeks’ minimum would expect to be taken first. In relation to the previous holiday year, the amount outstanding at the end of the holiday year appears to be less than the domestic 1.6 weeks (or eight days) on the claimant’s calculation (assuming again that she used up the European four weeks first). I therefore dismiss that part of the claim.

39. To assist the parties, if I am considered to have erred in my judgment in the claimant’s unfair dismissal case, it is perhaps helpful if I indicate that I would not have made any compensatory award. This a “Polkey” situation. Even if a discussion had taken place, with formal invite and possible discussions about doing the less desirable work from the pub, this would not have born fruit. The claimant did not want to do that work in that place, indeed when the offer was made she considered it not to be genuine. The employment would have ended in any event before the end of her maternity leave, and the claimant would have lost the statutory rights associated with seven years of stable employment, and sustained no financial loss as she intended to take all her maternity leave.
40. The premises closed in or around April 2022. Two of the three therapists wished to leave employment and set up independently. The equipment the claimant was qualified to use, and with which her clients were mostly treated, was transferred to that new business along with other equipment. It is clear the claimant had the option to join in with that new venture when she wished to come back to work, but did not do so. Had a letter been sent in the terms sent to the colleague in 2021, such that the respondent could not deny dismissal, I consider this case would not have needed to have been presented.
41. I also draw that conclusion because no Transfer of Undertakings case has been advanced by the claimant, and she has been very well advised. I take it that she did not seek a declaration, or even the risk of a declaration, that her employment had transferred and she was not dismissed. Perhaps she did not wish to put her former close friends in that position in their new business. The preparation of this case and focus on the issues is a credit to those that have advised the claimant and to the respondent and I hope that these reasons explain this papers decision sufficient that it can be accepted by all.

Employment Judge JM Wade

Date: 13 January 2023

Note: Judgments and reasons are published on the Tribunal’s website shortly after sending to the parties.