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EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000489/2024

Held by CVP 6 September 2024

Employment Judge E Mannion

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Ms S Warren

**Claimant
In person**

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Structured House Ltd

**Respondent
Not in attendance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that

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- I. The claimant was constructively and unfairly dismissed and the respondent is ordered to pay to the claimant a basic award of £5,384.61 and a compensatory award of £3,017.28;
- II. The respondent was in breach of contract to the claimant by not making payment of all wages owing to her in October 2023 and January 2024 and is ordered to pay the claimant the sum of £4,570.20 subject to tax and NI deductions; and
- III. The claim for holiday pay due at date of termination of employment is dismissed.

REASONS

Introduction

1. The claimant lodged a claim for constructive unfair dismissal, unpaid wages and holiday pay. The respondent completed the ET3 form but confirmed at Part
5 6 that they did not contest the claim. The respondent was not in attendance at the Final Hearing but had received a Notice of Hearing.
2. The claimant provided further details of her claim by email on 28 May and 3 June 2024 as well as supporting documentation.

Issues

- 10 3. The issues were as follows:
 - (i) Did the respondent commit a repudiatory breach of contract?
 - (ii) Did the claimant accept the breach?
 - (iii) Was the resignation in response to the breach?
 - (iv) Did the claimant delay in accepting the breach?
 - 15 (v) Is the claimant owed payment for wages in breach of her contract?
 - (vi) Is the claimant owed payment for untaken annual leave?

Findings in fact

4. The Tribunal makes the following findings in fact:
 - 10.1 The claimant was employed as an Executive Assistant to the Chief
20 Executive Officer of the respondent organization, Craig Inglis from 2015 to 16 January 2024.
 - 10.2 This employment was under a contract of employment whereby employees were paid on the first of each month.
 - 10.3 One of the claimant's duties was to process the wages and send
25 these to the employees from the office bank account in time for the first of each month. If the first fell on a weekend or bank holiday, the claimant normally organised payment on the preceding working day.

If the monies were not in the office bank account in advance of the first of the month, she would log in from home and make the payments on the first.

5 10.4 From May 2024 onwards, there were insufficient funds in the office bank account to process wages for payment on the first of the month requiring the claimant to chase up Mr Inglis for the monies on behalf of all staff. The claimant was paid late in the following months – May, June, July, August, September 2023 (when the claimant was paid in two part payments) and January 2024.

10 10.5 No payment was made to the claimant on 1 October 2023 as contracted.

10.6 Given the claimant's role in processing wages, she was regularly asked by other employees if they would be paid on time. She found this very stressful.

15 10.6 Coming up to the 1 January 2024, there was insufficient money in the office account for staff wages. The claimant sent a text message to Mr Inglis about this and was informed the wages would be in the account the following day for her to process. Money was not in the account the following morning and it was not until 3 January 2024
20 that the claimant was paid.

10.7 Over the course of the 1 and 2 January 2024, the claimant and Mr Inglis exchanged text messages about the lack of money in the account for payment of wages, the business as a whole and the impact on both Mr Inglis and the claimant. Both sides expressed the
25 stress that was placed upon them by the state of the business. The text messages were a departure from their normal interactions and employment relationship.

10.8 On 2 January 2024, the claimant sent a text to Mr Inglies stating as follows "Hi, I can't drag this out I'm scunnered. I don't want things to
30 end bad between us and fall out and can sense it could turn that

way. I'm owed £4,665.32 that's two months salary for November and December and that's it I'll go".

5 10.9 Further text messages were exchanged between the claimant and Mr Inglis on the 3, 10 and 15 January 2024 dealing with wages and outstanding payments.

10 10.10 The claimant continued to undertake tasks including engaging with the accountant and organising payment of invoices and wages after 2 January 2024. On 15 January 2024 Mr Inglis sent her a text asking her to organise banking authority for Mr Craig Gardener of the respondent organisation.

10.11 The claimant did not attend work after 16 January 2024. She did not submit a formal letter or email of resignation. This was her last day of work with the respondent.

15 10.12 Noone from the respondent organisation contacted the claimant after 16 January 2024 to see where she was and why she was not at work.

10.13 The claimant did not receive a final salary payment covering the work done from 1 – 16 January 2024 or any untaken annual leave.

10.14 The claimant started a new role on 19 February 2024.

20 **Observations on the evidence**

5. The claimant gave her evidence in a clear way and I considered she was giving an honest account of events as she remembered them.

Decision and Relevant Law

6. Section 94 of the Employment Rights Act 1996 provides that

25 *an employee has the right not to be unfairly dismissed by his employer.*

7. Section 95 of the same act outlines that an employee shall be regarded as dismissed if -

the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Did the respondent commit a repudiatory breach of contract?

8. The obligation to pay employees their salary is one that is fundamental to the employment contract. Any breaches of this clause are likely to be treated as repudiatory breaches. In this instance, the contract provided that the claimant would be paid on the 1 of each month. The claimant's salary was paid for the most part, but there was a delay in doing so.

9. The Court of Appeal considered a delay in salary payment in **Cantor Fitzgerald International v Callaghan and ors 1999 ICR 639, CA**, noting that the circumstances of a delay in paying salary will be relevant in determining if the delay constitutes a repudiatory breach of contract. A delay can occur due to a fault in the employer's technology, an accounting error, an illness or unexpected events. In those circumstances, the breach would not normally be viewed as a repudiatory breach. However where a failure or delay in payment is "repeated and persistent" it is open to the court to find that such a breach goes to the root of the contract and is repudiatory.

10. Taking into account the circumstances before me, I note that the primary reason for the late and non-payment of salary was cash-flow in the company. This was consistent over a period of approximately eight months, although noting no difficulty with salary payments in November and December 2023. I find that the persistent nature of the late payments amount to a repudiatory breach of contract.

11. An implied term in every employment contract is the term of trust and confidence as articulated in the case of **Malik v BCCI SA (in liquidation) [1998] AC 20** as follows: "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or*

seriously damage the relationship of confidence and trust between employer and employee.”

12. In **Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75**, the Court of Appeal held that a final straw could result in a breach of the implied term of trust and confidence even where that final straw event is not by itself a breach of contract. Rather, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence. It had to contribute something to that breach, although what it added might be relatively insignificant.
13. Further guidance in so-called ‘last straw’ cases was provided by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** who found that the breach while relatively insignificant, “*must not be utterly trivial*”. In considering the impact of the last straw event, the Court of Appeal found as follows at paragraph 20: “*The only question is whether the final straw is the last in a series of acts and incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.*”
14. I note that the late payment of wages, if not a repudiatory breach of contract it and of itself, can amount to a breach of the implied term of trust and confidence. I accept the claimant’s evidence that the text message exchange on the 1 January 2024 was a departure from the normal relationship that existed between the claimant and Mr Inglis. The messages from Mr Inglis were terse and aggressive. The exchange itself came about because the claimant asked when money would be in the office account to pay wages. This was part of her role as well as something she had her own interest in, as wages were owed to her also. It came after a period where wages were paid late, in two payments or not at all and against a background where the employer was seeking further investment in the company due to cash-flow issues. It was not usual for the claimant to ask when monies would be in the account to allow her to pay wages and this occurred in previous months.

15. I find that this exchange was an event likely to destroy or seriously damage the relationship of trust and confidence as between the claimant and the respondent and so was a breach of the implied term of trust and confidence.

Did the claimant accept the breach?

5 16. For a successful constructive unfair dismissal claim, a claimant must show that they accepted the repudiation by resigning in response to the breach, either with or without notice. In this case, the resignation is ambiguous as the claimant did not formally write or inform the employer that she is giving notice and resigning. Instead there is the text message chain between 1 and 15
10 January 2024.

17. The test to establish if ambiguous words amount to a resignation is an objective one, taking into account all the surrounding circumstances, and asking how a reasonable employer would have understood them in the circumstances.

15 18. In this case the claimant and Mr Inglis have a terse interaction on the 1 Jan 2024 about the late payment of wages. The following day, the claimant texts Mr Inglis to inform him that she is “scunnered” by the events, outlining that she is owed money and once that is received “I’ll go”. Mr Inglis replies explaining that monies will be in the account the following morning and then
20 in a fresh paragraph states “that’s fine”.

19. The following day, 3 Jan, Mr Inglis texts to say money is in the account and then that further money will follow “in the next few days to get it back to square”. The claimant asks what this money is for and Mr Inglis says it’s for her and two other employees. He notes that further money will follow in the
25 coming days to get payments “up to date.” The claimant took it that the money in the account on 3 Jan was the salary payments due to her and her colleagues on 1 Jan.

20. There is no further interaction between the two until 10 Jan when the claimant asks about the further monies Mr Inglis said would be in the account to bring
30 pay up to date. He replies to say that it should be in by Monday and asks that

the two don't "fall out about it" and that he has not let her down before. The claimant responds explaining that she needs to be off the payroll by Monday otherwise it will be too late and another months' salary will be owed to her. When he replies "Huh" and "Ok" she states that he let her down at the worst possible time and that he knew that.

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21. I find that while the text message of the 2 Jan may have been ambiguous, it is during the exchange on 10 Jan that Mr Inglis for the respondent understood that the claimant was resigning from her post. I find that a reasonable employer may have viewed the 2 Jan text message as a heat of the moment exchange, but viewed the texts on 10 Jan, reminding him that she needs to be removed from the payroll and that he had let her down, as confirmation that she was in fact resigning. This is reinforced by the texts on 15 Jan asking the claimant to give Mr Gardner access to banking and that neither he nor anyone else from the respondent questioned where she was after 16 Jan.

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15 *Was the resignation in response to the breach?*

22. In order to make a claim for constructive dismissal, a claimant must show a causal link between the employer's breach of contract and their resignation. In short, the reason for the resignation must be the employer's breach and not some other reason such as the employee finding alternative employment. Determining the real reason for the resignation is a question of fact for the tribunal.

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23. **Meikle v Nottinghamshire County Council 2005 ICR 1 CA** looked at where there are multiple reasons for the resignation, some which may be repudiatory breaches and some not. The Court of Appeal confirmed that it is enough for an employee to resign in response, at least in part, to the repudiatory breach of contract.

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24. The claimant in evidence confirmed that the issue with the wages and the manner in which Mr Inglis spoke to her were the primary factors in her resignation. I accepted her evidence that the wages issue had been creating difficulty for her for some time, but the catalyst was the text exchange on 1

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January. She confirmed in evidence that she could not believe what he sent, that she expected an apology and reassurance but instead got an angry response. She acknowledged that she was frustrated but stated that she was put in a position where she had to ask when wages would be paid and given
5 how important that is, to her and her colleagues, she should not be made to feel as if she is asking too much. She felt that they could not come back from that. I find that her resignation was in response to the breaches by the respondent.

Did the claimant delay in accepting the breach?

10 25. The lead case in this area is **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA** where Lord Denning confirmed that an employee “must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.”

15 26. The claimant’s resignation was on 2 Jan, when she informed Mr Ingles that she “was off”. It was sent the following day in direct response to the exchange on 1 Jan. I find that there was no delay in the claimant accepting the breach but note that the respondent did not immediately recognise that the claimant was resigning, given the ambiguous wording.

20 27. I therefore find that the claimant was constructively unfairly dismissed under Section 94 of the Employment Rights Act 1996.

Unfair dismissal Remedy

28. The claimant is entitled to a basic award and a compensatory award as per Section 118 of the Employment Rights Act 1996.

25 *Basic award*

29. The formula for calculating the basic award is set out in Section 119 of the Employment Rights Act and provides that a claimant is entitled to one week’s pay for each complete year of continuous service where the claimant was

below the age of 41 but not younger than 22. A week's pay is capped at £700 under statute.

5 30. As per *Secretary of State for Employment v John Woodrow and Sons (Builders) Ltd 1983 ICR 582, EAT*, a week's pay is calculated based on gross pay.

31. The claimant's continuous service dated from April 2015 to January 2024. This amounts to 8 complete years of service. The claimant was 35 at the date of termination. She worked normal working hours and her pay did not vary depending on the amount of work done. Her annual gross salary was 10 £35,000. Her weekly gross salary was therefore £673.07.

The calculation: weekly pay x completed years of service = basic award

$£673.07 \times 8 = £5,384.61$

Compensatory award

15 32. The compensatory award is provided for in Section 123 of the Employment Rights Act 1996 and is such amount "as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained" by the claimant in consequence of the dismissal. The loss must be attributable to the actions taken by the respondent employer. As per **Norton Tool Ltd v Tewson 1972 ICR 501 NIRC**, the compensatory award should include items 20 such as loss of earnings loss between the date of dismissal and the hearing; estimated loss after the hearing; expenses incurred as a consequence of dismissal; and loss of statutory protection rights

33. The onus is on the claimant to provide evidence of their losses. Calculations are based on net figures.

25 34. The claimant began a new role on 19 February 2024. She was unsure of her gross annual salary but confirmed that her net monthly salary is £2,273.64. She confirmed by email on 25 September 2024 after the hearing that her gross salary in her new role is £33,000.

35. The claimant has a four week and two day period from 17 January to 16 February 2024 where she did not have any income. The claimant was paid £35,000 per annum by the respondent. Her monthly her monthly net salary was £2,312.87. This gives her a net annual salary was £27,754.44. Her net
5 daily salary was £109.26 and her net weekly salary was £533.73
36. She is therefore entitled to £2,353.44 immediate loss of earnings for the four weeks and two days where she was unemployed.
37. Her annual gross salary in her new role is £33,000 and her monthly gross salary is £2,750. Her monthly net salary in her new role is £2,273.64. Her net
10 monthly salary with the respondent was £2,312.87. There is an ongoing loss of £39.23 per month. I award her £313.84 for immediate loss of earnings for the 8 month period from the start of her new employment to date of the hearing.
38. In terms of future loss, there is an ongoing loss given the lower salary in her
15 new role. I note that the claimant was working for the respondent for almost nine years and mostly enjoyed her role, although a change was noted with Mr Inglis' move abroad. The company was facing cash-flow problems at the time of, and in the months preceding, her resignation. In October 2023, the claimant spoke to Mr Inglis about these issues and informed him that if the
20 respondent could no longer afford her salary, she would start to look for alternative work. She was assured that this would not be necessary but in any event the respondent continued to have cash-flow problems and was seeking alternative investment. Taking into account the claimant's evidence and the circumstances of the case, I find that as at the date of the hearing, being
25 almost nine months from the termination date, it is likely that the claimant would no longer be working with the respondent given the cash-flow problems the respondent faced. I therefore find that there is no future loss of earnings.
39. I also find that the claimant is entitled to £350 for loss of statutory rights.
40. The claimant is therefore entitled to £3,017.28 as a total compensatory award.
- 30 *Is the claimant due notice pay or wages from 1 to 16 January 2024?*

41. The employment contract sets out the rates and hours of pay as well as the frequency of pay. It is a fundamental term that an employee will be paid in exchange for work done.
42. Section 86 of the Employment Rights Act 1996 outlines the minimum notice requirement. In a constructive dismissal claim, an employee can resign with or without notice.
43. In the case before me I accept the claimant's evidence that she was not paid for work undertaken in October 2023 or January 2024. I accept that in January 2024 she continued to work for a little over a fortnight following her resignation and that this was a notice period. She continued to attend work and undertake tasks, such as liaising with the accountant. As the wording of her resignation is ambiguous, I find that her resignation was effective from 10 January 2024.
44. The claimant did not receive a further salary payment from the respondent after 3 January 2024.
45. She is therefore entitled to wages from 1 to 9 January and notice pay from 10 to 16 January 2024. She is also entitled to payment of wages from October 2023. In failing to pay these sums to the claimant, the respondent was in breach of contract.
46. The claimant was paid £35,000 per annum. Her monthly gross salary was £2,916.66 and her monthly net salary was £2,312.87. Taking these figures, her net annual salary was £27,754.44. Her net daily salary was £109.26 and her gross daily salary was £137.79.
47. She is owed £1,653.54 gross for the 12 working days from the 1 to 16 January 2024. She is owed £2,916.66 gross for work undertaken in October 2023. Both figures are subject to tax and NI.

Is the claimant owed payment for untaken annual leave?

48. An employee is entitled to a minimum of 28 days annual leave per leave year under Regulation 13 of the Working Time Regulations 1998 SI 1998/1833. An employer can make a payment in lieu of taking annual leave, on

termination of the employment relationship. An employer can also set out contractual arrangements regarding annual leave, in particular how public holidays will be organised.

49. In this case, the claimant was entitled to 28 days inclusive of “the usual public
5 holidays in Scotland” as per her contract. The 1 and 2 January 2024 are public holidays in Scotland. The claimant did not take any other holiday during January 2024, save for these public holidays. Her entitlement to annual leave on the 16 January 2024, the date of termination, was 1.3 days’ holiday. No further holidays are due and owing to the claimant.

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Employment Judge: E Mannion
Date of Judgment: 25 September 2024
Entered in register: 27 September 2024
and copied to parties

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