EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100522/2017

Held at Glasgow on 31 July 2017

Employment Judge: P Wallington QC (Sitting Alone)

Miss K Adair	**Claimant** **In Person**
(1) Concept Barbers Ltd	**First Respondent** **Not Present &** **Not Represented**
(2) Conway Men's Hairdressing Limited	**Second Respondent** **Debarred**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claim of unfair constructive dismissal is well founded.

2. The Claimant is awarded a basic award of **£2,560.00 (Two Thousand, Five Hundred and Sixty Pounds).**

3. The Claimant is awarded a compensatory award of **£300.00 (Three Hundred Pounds).** The Recoupment Regulations do not apply to this award.

4. The Claimant's complaint of breach of contract, namely the unilateral imposition of a reduction in her working week and consequentially in her pay, is well founded. The claimant is awarded the sum of **£1,254.00 (One Thousand, Two Hundred and Fifty Four Pounds)** in damages.

5. The Claimant's complaint of failure to make payment in lieu of untaken holidays is well founded. The claimant is awarded the gross sum of **£160.00 (One Hundred and Sixty Pounds).** Payment of this sum is subject to the deduction of any Income Tax and/or Employee National Insurance contributions that may be deductable in accordance with law.

REASONS

1. In this case the Claimant, Miss Karen Adair, made claims against two Respondents, as she was unsure which was her employer at the time of the matters giving rise to her claim. Both Respondents appear to be companies controlled by the same individual, a Mr Conway, and operate from the same premises, a hairdressing salon in Kilmarnock.

2. The First Respondent submitted a response within time to the claim, in which it asserted that it was the Claimant's employer, but also that it had subsequently closed the business. The Second Respondent failed to enter a response within the time limit, and when a response was eventually tendered some two weeks outside the time limit, no explanation was offered and no application for an extension of time was made. In consequence the response was not accepted, and the Second Respondent was informed that it would not be permitted to participate in the Hearing of the claim save to the extent expressly allowed by the Tribunal.

3. In the event, on the day of the Hearing, neither respondent attended or was represented. Attempts were made to contact Mr Conway to establish whether he intended to attend, as the principal of both Respondents, but it proved impossible to make contact with him.

4. At the commencement of the Hearing, in the absence of any attendance or representation of either Respondent, I asked the Claimant whether she wished to proceed with the Hearing. I explained that there was a possibility that if the First Respondent had a cogent explanation for non-attendance at this Hearing, there might be an application to set any Judgment aside and have the case re-heard. The Claimant however wished the claim to be

heard today, and I considered it appropriate to proceed with the Hearing in the absence of the First Respondent.

5. I heard evidence on oath from the Claimant, and was referred to a file of productions which she had brought to the Tribunal, to which I make reference as necessary within these Reasons. I found the Claimant to be a perfectly honest and straightforward witness, and accept her evidence in its entirety.

Findings in Fact

6. The Claimant was first employed by the First Respondent with effect from 10 February 2006 as a Gentleman's Hairdresser. Initially, she was employed for 16 hours per week, at £7.50 an hour, subsequently increased to £8.00 an hour. When engaged, she was not given a written contract, but when she raised the issue some 3½ years later, she was provided with a written contract, the employer being identified as "Concept Barbers" without the suffix "Ltd" (Production 1). (Nothing in my Judgment turns on the absence of the suffix.) The contract erroneously gave the Claimant's start date as being in February 2008. However, in its response the First Respondent accepted, and I find, that the Claimant's employment had indeed started in February 2006.

7. The Claimant was paid monthly, with wage slips which identified the employer as Concept Barbers (Production 2).

8. In December 2013 the Claimant asked Mr Conway, the principal of the First Respondent, if she could increase her hours from 16 hours per week to 24 hours per week. He accepted this request, and from then on the claimant routinely worked for three eight hour days each week, holidays apart.

9. In December 2015, the Claimant was asked by Mr Conway if she would move to working full time, following the departure of another member of staff from the hairdressing salon. She accepted this change in her hours.

Thereafter she worked 5 days per week, Tuesday to Saturday. I find that this was intended as a permanent change in the Claimant's hours.

10. Mr Conway continued to pay the Claimant monthly, with a wage slip showing conventional deductions of tax and National Insurance, but only on the basis of a 4 day week. He insisted that the Claimant must accept payment for working on Saturdays by cash in hand. The Claimant objected to this, recognising that it constituted illegal avoidance of tax otherwise payable by her and by the First Respondent. However, Mr Conway insisted, and the Claimant was paid in this manner until November 2016.

11. In March 2016 the premises were enlarged, following the acquisition of an adjoining building, and the business was re-branded, trading thereafter as "Conway Hairdressing" (the name of the Second Respondent). However, no steps were taken to notify the Claimant of a change of identity of her employer, and she continued to receive payslips in the name of the First Respondent.

12. In May 2016 the Claimant negotiated a reduction in her working hours to alternating 32 and 40 hours week, working alternate Saturdays. The illegal method of payment for Saturdays continued, but thereafter only for the alternate Saturdays worked. Shortly thereafter, Mr Conway re-employed a former member of staff, bringing the total number of staff to 6.

13. On 18 November 2016 Mr Conway told the claimant that her hours were reduced with immediate effect from 32/40 hours per week to 16 hours per week. These new working arrangements did not cover Saturdays, and therefore from that point no further illegal cash payments were made to the Claimant.

14. The Claimant had not asked for, did not want and did not accept this unilaterally imposed reduction in her working hours. Although it was asserted by Mr Conway then and in the First Respondent's response to the claim that the Claimant had childcare issues, and had sought a reduction in hours, I accept her evidence that she had not had any issues over childcare

other than a wish to not work every Saturday, so that her son (at that time aged 13 years) did not need to be looked after by his grandmother every Saturday.

15. The Claimant sought advice from ACAS about her position, and in light of that advice sent a letter (Production 7) dated 21 November 2016 to Mr Conway notifying him that she did not agree with the changes in the working hours and that she would work the new hours under protest, and requesting reasons why the reduction had been imposed and why she had been singled out in this matter (no other employee had had their hours changed).

16. A reply was requested within 5 working days. However none was received, and in contrast to past practice, Mr Conway ceased regular attendance at the hairdressing salon, so that the claimant had no opportunity to speak to him. She therefore sent a second letter (Production 8) to Mr Conway on 5 December 2016 chasing him for a response and raising a formal grievance about the change in her working hours.

17. Mr Conway replied in a letter dated 4 December 2016 (Production 9) but only received on 14 December 2016, in which amongst other points he asserted that the Claimant was only working a 4/5 day week on a temporary basis, and was contracted to work a 2 day week, that she had been asking to spend more time with her son, and offering to meet her to discuss her concerns. However, he made no offer to reinstate the additional days that had been removed from her.

18. At this point the Claimant consulted a solicitor, who wrote on her behalf on 16 December 2016 (Production 10). In this letter the solicitor made clear to Mr Conway that the reduction in the Claimant's hours was a breach of contract, and that she wished to return to the hours previously agreed, namely working Tuesdays to Fridays and every second Saturday. No reply to that letter was received, and a further letter was sent by the Claimant's solicitor on 9 January 2017, raising the suggestion that the claimant might in fact be redundant, and indicating that she would be willing to explore the

possibility of her employment ending by reason of redundancy subject to relevant payments being made on the basis of a 4 day week as previously worked.

19. Mr Conway, on behalf of the First Respondent, finally responded on 26 January 2017, giving illness as the reason for the delay in responding. He intimated that he wished, but was unable, to reinstate the Claimant's additional days, and that the company had no funds to offer redundancy on the terms suggested it. He offered the alternatives of employment continuing at 2 days per week, or an offer personally to pay an acceptable sum to terminate her employment. (Production 12).

20. The Claimant's solicitor wrote again to Mr Conway on 27 January 2017 (Production 13) acknowledging his letter and indicating a willingness to negotiate suitable terms for her departure. The letter indicated that the solicitor considered that the Claimant would be entitled on redundancy to £4,608; that appears to represent 10 weeks' gross pay as redundancy payment and 10 weeks' net pay as pay in lieu of notice, based on the four day week for which she had been paid through the payroll system. The letter went on to make an offer to accept £3,000 to terminate her employment by agreement, in addition to wages due for the month of January 2017.

21. Mr Conway on behalf of the First Respondent replied on 30 January 2017 (Production 14) stressing his wish to retain the Claimant's service for two days per week, and offering to pay her in the alternative a sum of £1,280, representing 10 weeks' redundancy pay based on a two day, 16 hour week, together with payment of wages due for January 2017 and any accrued holidays.

22. By this stage the Claimant had completely lost confidence in her employer, and she responded by tendering a letter of resignation dated 1 February 2017 but tendered on 3 February 2017, the resignation to be effective immediately. The letter (Production 15) stated "I have been forced to make

this decision due to the reduction in my hours of work whereby you have acted in breach of contract."

23. In fact by this stage the Claimant had obtained new employment, which she commenced on 4 February 2017, as a hairdresser, but working on a self-employed basis. Her average income before deductions since 4 February 2017 has been in the region of £250 per week, in effect the same as her wages of £256 for a four day, 32 hour week working for the First Respondent, disregarding the alternate Saturdays. The Claimant then presented her claim against the First and Second Respondents on 30 March 2017, following unsuccessful early conciliation.

24. The Claimant stated in the course of her evidence that she had checked the status of the First Respondent with Companies House, and it appeared that it was dissolved in early July 2017. However she also informed me that a hairdressing business was still operating at the premises at which she had worked, but now using the trading name of King Street Barbers.

The Law

25. The first issue arising on the facts of this case is whether the Tribunal has jurisdiction to entertain the Claimant's claims at all, in light of the admitted illegality of the manner of payment of the Claimant for her work on Saturdays during the period from December 2015 to November 2016. The relevant law has recently been clarified by the Supreme Court in **Patel v Mirza [2017] 1All ER 91,** which was not an employment case but lays down a new general approach that Courts and Tribunals should take to the enforcement of, or actions reliant on, illegal contracts. The proper approach is now a factorial one, the principal factors being the preservation of the integrity of the legal system, the public interest at stake, and whether denial of a claim in pursuit of the broader public interest would be a proportionate response. As the commentary on this case in **Harvey on Industrial Relations and Employment Law, Division AI, paragraph 76.05(4)** notes, proportionality is significant for claims where tax evasion is within the

knowledge of the employee but either the sums involved are minor or the involvement of the employee is relatively slight compared with the culpability of the employer.

26. If there is jurisdiction, the next issue of law is the right of an employee not to be unfairly dismissed. This right is conferred by Section 94 of the Employment Rights Act 1996 (ERA 1996). For these purposes, dismissal includes the resignation of the employee, with or without notice, in circumstances where the employee is entitled to resign without notice by reason of the employer's conduct (section 95(1)(c)). Such conduct encompasses a repudiatory breach of contract, or a breach of the implied duty, incorporated into every contract of employment, not without reasonable cause to act in such a way as is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

27. In order for a complaint of constructive dismissal to succeed, it is necessary, in addition to establishing a sufficiently serious breach of contract, or a sufficiently clear intimation of intent not to be bound by an essential term of the contract, that the employee did not affirm the contract prior to resigning, and that the resignation was at least in significant part in response to the employer's repudiatory conduct.

28. Further points of law are referred to as necessary in setting out my reasons for my decision in this case.

Conclusions

29. In this case the first issue is whether there is jurisdiction by reason of the admitted illegality of the payments of the claimant's wages for working on Saturdays. The Claimant was candid in her acceptance that this was an illegal arrangement, avoiding the Income Tax and Employee National Insurance contributions payable on her behalf on the sums paid.

30. However, I accept the Claimant's evidence which she did not wish for the financial advantage that this conferred and did not wish to be party to an illegal arrangement. It was insisted on by Mr Conway, the principal of the First Respondent. This was no doubt because of the advantage to him of not having to pay employer National Insurance contributions on these sums.

31. The fact that the amounts involved represented a relatively small proportion of the claimant's total pay – in the first instance 20%, reducing when her hours were changed to working alternate Saturdays to only 11% - does not make the illegality any the less an illegality. However in this case it is clear that the Claimant was a reluctant participant in the arrangement, and made such attempts as were reasonable in the circumstances both to distance herself from the arrangement and to persuade her employer not to continue with it.

32. In these circumstances, bearing in mind that she was the weaker party in the transaction, and in no sense its prime mover, this case would before the decision of the Supreme Court in **Patel v Mirza** be on the margin under the then authorities as to whether the illegality could be condoned. The introduction by the Supreme Court of a further consideration of proportionality leads me to the conclusion that I have jurisdiction in this case, since it would be disproportionate to bar the Claimant's access to her statutory and contractual rights entirely, given the relatively modest sums involved and the much more significant and driving role played in setting up the arrangement by the First Respondent, which would benefit from the claimant being denied jurisdiction.

33. The consideration that the First Respondent, which is plainly primarily to blame for the illegality, should be the beneficiary of the enforcement of the rule against a court giving redress under an illegal contract points clearly in my judgment to this being a case where the Claimant should not be denied a remedy, if she is otherwise entitled to it, by reason of the illegality.

34. The next question is which is the appropriate Respondent in these proceedings. All of the payslips produced in evidence by the Claimant, up to and including November 2016, are in the name of Concept Barbers, admittedly without the word "Ltd" but nevertheless clearly identifying the same employer as being the relevant employer throughout. I note also that the contract statement issued in November 2009 refers to the employer as "Concept Barbers" without the "Ltd" suffix.

35. The correspondence sent by Mr Conway was sent in the name of Concept Barbers Ltd, and Concept Barbers Ltd, the First Respondent, admitted and indeed asserted in its response form that it was the Claimant's employer. Conway Men's Hairdressing Limited, the Second Respondent, in its late response form which was not accepted, denied that it had ever employed the Claimant. The Claimant was not able to provide me with any document evidencing a transfer of her employment from the First to the Second Respondent, and nor could she identify any conversation indicating the change. The only point that she was able to refer to was that the First Respondent had taken over the adjoining shop premises and expanded the business from its existing premises into the joint premises, and had at that point put up new signage referring to Conway rather than Concept.

36. I consider that the change in signage, even taken with the rather surprising point that it appears from the correspondence from Mr Conway to the Claimant's solicitors that some of the employees working in the enlarged salon were not employees of the First Respondent, is nevertheless completely insufficient to establish that the Claimant's employer changed. I conclude that the evidence demonstrates overwhelmingly that the Claimant was and remained employed by the First Respondent.

37. I turn next to the question whether the Claimant was constructively dismissed. When she secured the First Respondent's agreement to increase her hours to three days per week, and when then the First Respondent secured her agreement to a further increase, initially to a 40 hour week then reducing to alternate 32 and 40 hour weeks, these

arrangements were intended to be permanent, or at least indefinite changes in her working hours. Nothing was said at the time to indicate that these changes were temporary.

38. The context of the second change, namely the departure of another member of staff, with the inference that that member of staff was not being replaced, thus necessitating the Claimant working additional hours, tends to confirm that the arrangements were intended to be permanent. The mere assertion by Mr Conway after he had imposed a reduction in hours that the increase had been temporary does not establish that as fact.

39. In these circumstances, it was in my Judgment a plain breach of contract unilaterally to reduce the number of weekly hours the Claimant was to work, with consequential reductions to her pay. That was a sufficiently serious breach of the contract, in the context of a contract to provide work of a specified quantity payable at a specified unit rate, to amount to a repudiatory breach of contract.

40. The Claimant properly intimated in her first communication with the First Respondent that she was working under protest. She continued to do so throughout the period from the first intimation of the change in November to the notification of her resignation at the beginning of February 2017. Further, she made it clear through direct correspondence and then correspondence from her solicitor that whilst she was willing to entertain negotiated redundancy terms she did not accept the change in her terms and conditions.

41. The change also undermined, in due course fatally, her trust and confidence in the First Respondent. A change of this magnitude, and then a false assertion that the Claimant had sought the reduction in her hours, are in my judgment matters calculated to destroy or seriously damage mutual trust and confidence, particularly so in the context of the Claimant as a single mother dependent for the family's income on the pay received from her employment with the First Respondent.

42. Nor did the Claimant wait too long to hand in her resignation. It was reasonable of her to seek responses first to her grievance and second to the solicitor's letters. The length of time that it took before she finally concluded that she should resign, was essentially attributable to the delays in responding to the correspondence on the part of Mr Conway. Further, the fact that she chose to time her resignation the day before she was able to commence her new employment is not a reason to reject her case that she resigned because of the treatment that she had received in repudiatory breach of her contract.

43. The respondent's acts or omissions in breach of its contractual obligations need not be the sole or principal reason for resignation: see **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**. Plainly the Claimant needed to find another job; she was fortunate to do so reasonably quickly; but these facts do not detract from the link between the First Respondent's conduct and her decision to leave and seek to earn her living elsewhere. I therefore find that the Claimant was constructively dismissed.

44. In the absence of the First Respondent there has been no attempt to establish a reason for this dismissal (and none was asserted in its response). Section 98(1) of the ERA 1996 requires that the respondent shows the reason for the dismissal. In the absence of a reason being shown, or of a reason that is potentially fair within Section 98, it follows that a dismissal, including a constructive dismissal, is unfair. I add that it would be difficult to establish that the First Respondent acted reasonably in circumstances where unilaterally and without notice it imposed a reduction of more than half in the Claimant's working week and wages.

45. Accordingly, the complaint of constructive unfair dismissal succeeds. The Claimant is entitled to a basic award. I consider that the rate of a week's pay upon which this award falls to be based must be the pay that would be payable for working the hours that she was contracted to work before the repudiatory enforcement of a reduction, not accepted by her and therefore not legally effective, in the working week.

46. The Claimant has wisely not sought to extend her claim to a basic award beyond payment for the 32 hour, four day week for which she was paid in the orthodox manner with appropriate tax and NIC deductions. She was paid at the rate of £8.00 an hour, giving a total weekly wage for 32 hours of £256.00. She was aged 38 years at the date of dismissal, and therefore all of her years of employment fell within the age bracket for which the rate for a basic award is one week's pay per year of service. Her employment terminated just short of 11 years' service and she is therefore entitled to a basic award based on 10 years' service, i.e. 10 weeks' pay. This amounts to £2,560.00. I award her this sum as the basic award.

47. As to the compensatory award, under Section 123 of the ERA 1996 the award should be of 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. In this case, the only loss that the Claimant has sustained as a consequence of her dismissal is the loss of the protection of her statutory rights that she had accrued over 10 years' service as an employee. In the circumstances of this case, I consider an appropriate award for that loss to be £300.00, which sum I award.

48. The claimant's next complaint is of breach of contract. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 gives jurisdiction to the Tribunal to determine claims of breach of contract outstanding on or arising from the termination of employment of an employee. The breach of contract complained of in this case is the First Respondent's unilateral imposition of reduced working hours resulting in reduced income. The claimant suffered the reduction in her income, as a result of not being permitted to work the additional two days per week that she relies on as part of her contractual entitlement to work and to pay. This situation continued for a total of 11 weeks.

49. From the payslips made available to me by the Claimant, I calculate that the additional net income she would have received after deductions, had she

been able to work an additional 16 hours, or two days, a week would have been approximately £114.00 a week. I therefore consider that she has sustained net damages, by reason of being denied the opportunity to work and earn additional wages, of 11 x £114.00, namely £1,254.00. I award her that sum as damages for breach of contract.

50. Finally, the Claimant did not take any of the holidays that she was entitled to take during the holiday year commencing on 1 January 2017. The First Respondent's premises were closed on 1 and 2 January 2017, but the claimant received no pay for those days. For the period of 34 days from 1 January to 3 February 2017 inclusive, the claimant accrued 2.5 days of annual leave entitlement under the Working Time Regulations 1998. She is therefore entitled to be paid under Regulation 15 of the 1998 Regulations a total of 20 hours' holiday pay, which at the rate of £8.00 an hour amounts to £160.00.

51. That is a gross sum, and is payable subject to the appropriate deductions for Income Tax and National Insurance that apply to it as wages. Accordingly, I award the claimant pay in lieu of holiday pay in the sum of £160.00 gross. The First Respondent is at liberty to deduct the appropriate amounts of Income Tax and Employee National Insurance contributions from this sum before payment of it, provided that it remits the sums to the Claimant's credit to HM Revenue and Customs, and provides appropriate evidence of having done so.

52. The awards to the Claimant are therefore in total a basic award of £2,560.00, a compensatory award of £300.00, £1,254.00 for breach of contract and £160.00, subject to deductions, as pay in lieu of holiday not taken.

53. The total award is therefore £4,274.00.

54. Whether the claimant will be in a position to enforce this award is not a matter within the jurisdiction or control of the Tribunal. This is a matter on which the claimant will need to consult again with her solicitor.

55. Finally I make no Order in respect of the fees paid by the Claimant for bringing this case. Following the decision of the Supreme Court on 26 July 2017 that the Employment Tribunal Fees Order 2013 is unlawful and the quashing of that Order, any fees paid by the Claimant will fall to be repaid to her by the Ministry of Justice, and therefore there is no point to be served in considering whether to make an Order for expenses against the First Respondent in respect of those fees.

Employment Judge: Peter Wallington QC
Date of Judgment: 17 August 2017
Entered in register: 21 August 2017
and sent to parties