



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MARTIN
Members Ms Leverton
Dr Fernandez

BETWEEN: Miss K Canty Claimant
and
MrT F Moir t/a Merit Launderette
Respondent

ON: 4 September 2017

For the Claimant: Mr Hall - Solicitor

For the Respondent: Mr Moir - Owner

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claims are successful
2. The Respondent shall pay to the Claimant:
 - i. Injury to feelings £660.00
 - ii. Basic award for unfair dismissal of £384.00
 - iii. Compensatory award for unfair dismissal of £ 1,408.00
 - iv. Loss of statutory rights £300.00
 - v. Failure to provide a written statement of employment £256.00

- vi. The total payable by the Respondent to the Claimant is ££3,845.12

The Calculations are provided in the reasons below.

REASONS

1. Oral reasons were given at the end of the hearing. These written reasons were requested by the Respondent at the hearing.
2. By a claim presented to the Tribunal on 31 October 2016 the Claimant brought claims of unfair dismissal, sex discrimination, failure to provide written particulars of employment, failure to provide written reasons for dismissal, breach of contract and holiday pay. These claims were defended by the Respondent.
3. A rule 50 order was made which was automatically revoked at the conclusion of the proceedings.
4. The Tribunal heard from the Claimant and for the Respondent from Mr Moir. There was an agreed bundle of documents comprising 88 pages.

The issues

Unfair dismissal

5. Was the Claimant unfairly dismissed contrary to section 98 of the Employment Rights Act 1996:
6. Was the Claimant dismissed for a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996?
7. Was the dismissal fair in all the circumstances of the case within the meaning of section 98(4) of the Employment Rights Act 1996?
8. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct
9. Did the Respondent have reasonable grounds upon which to sustain that belief?
10. At the stage that the Respondent formed this belief had he carried out as much investigation into the matter as was reasonable in the circumstances?
11. Was the investigation carried out by the Respondent within the range of reasonable responses open to a reasonable employer?
12. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

Written statement of reasons for Dismissal

13. Did the Respondent unreasonably fail to provide a written statement giving particulars of the reasons for the employee's dismissal or were the particulars of reasons in purported compliance inadequate or untrue? The Claimant requested reasons on 17 August 2016.

Wrongful dismissal

14. Was the Respondent entitled to terminate the Claimant's employment contract without notice.

S1 Statement of Employment Particulars

15. Did the Respondent provide the Claimant with a statement of employment particulars as required under s1 ERA 1996?

Holiday pay

16. When did the holiday year begin?

17. What if any accrued untaken holiday was the Claimant owed on the termination of her employment?

Harassment/Discrimination

18. Did the Respondent in September 2015 engage in unwanted conduct of a sexual nature and/or related to the Claimant's sex which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

19. Because of the Claimant's rejection of the unwanted conduct, did the Respondent treat her less favourably than she would have treated her if she had not objected to the conduct?

20. Further or in the alternative did the Respondent treat the Claimant less favourably on the grounds of sex?

The law

21. It is for the Respondent to show that there was a potentially fair reason for dismissal. In this case the Respondent asserts that it was for a conduct reason. Once that reason is established I have to consider section 98(4) of the Employment Rights Act 1996 to consider whether in all the circumstances of the case the Respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the employee whilst considering the equity and the substantial merits of the case.

22. I remind myself that it is not for me to substitute my own view for that of the Respondent but only to consider whether or not the processes and the

decision to dismiss fell within a band of reasonable responses. In conduct cases I am to be guided by the case of ***British Home Stores v Burchell [1980] ICR 303***, and that I need to consider whether the Respondent held a genuine belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation.

Holiday pay

23. Regulation 13 Working Time Regulations 1998 which states:

- (1) subject to paragraph (5) a worker is entitled to four weeks' annual leave in each leave year.
- (2)
- (3) A worker's leave year, for the purposes of the regulation, begins-
 - (a) on such date during the calendar year as may be provided for in a relevant agreement; or
 - (b) where there are no provision of a relevant agreement which apply-
 - (i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or
 - (ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

The Tribunal's findings

5. The Tribunal has made the following findings and conclusions on the balance of probabilities. All evidence was heard and considered however these reasons are limited to matters which relate to the issue and are necessary to explain the decision reached. Not all evidence is recorded
6. The Claimant was employed by the Respondent from 28 November, 2013 until her employment was terminated on 3 July 2016. There was no written contract or because of employment provided to the Claimant. She was worked two days a week and normally worked on a Thursday and Friday. Her weekly pay £128 per week.
7. Respondent is a launderette and only one employee worked at a time. In September 2015, Mr Moir came onto the premises, having been to a shop and looked at birthday cards. Looking at humorous cards and one in particular, and very funny. On returning to the launderette Mr Moir proceeded to tell the Claimant about the card. It was a card with two figurines and words "I want to kiss your body all over" he said these words to the Claimant. The

- Claimant took offence and Mr Moir, realising that the comment may not have been appropriate apologised, saying it was what was written on the card. No more was said about this matter afterwards and the Claimant who is a single parent, explained that as he was the owner of the business she worried about losing her job which she needed if she made a formal complaint.
8. The Tribunal finds that the Claimant had some problems with the till and Mr Moir suggested a different way of working using hand written sheets he thought may help her which he says she also had problems with. He said she made many mistakes which the Claimant disputed. On 29 October 2015, he wrote her a letter alleging various things which he called a 'final written warning'. There was no prior meeting or investigation. Mr Moir told the Tribunal that he had been intending to dismiss the Claimant but was persuaded by Doreen (another employee) not to do this as the Claimant relied on her job and would also lose her benefits if he dismissed her. He therefore termed it a 'final written warning'.
 9. The staff would take their wages from the till at the end of their working week. If they were going on holiday they would take their wages for the next week in advance. This was standard practice. It was also standard practice (while Doreen was working there at least) that staff would swap shifts with one another without reference to Mr Moir if needed.
 10. The final matter leading to dismissal was the Claimant wanting to change her shifts the following week. She did not want to work on the Friday. Mr Moir tried to change things but was unable to do so to Claimant two days' work which she was contracted to work. He therefore unilaterally made other arrangements and told the Claimant she had one day's work that week. There was a series of texts which were reproduced in the bundle about this. The Tribunal notes that the last text sent regarding the change of days was that she would her normal days as she could not afford to lose a day's pay. This was not responded to.
 11. The Claimant worked one day and took payment for her contracted hours (2 days) leaving a note saying she recognised she owed the Respondent one days' work for the Friday which she did not do. Mr Moir considers this to be theft however there was an explanation which should have been explored. There was no attempt to do so. The Claimant had left a note to ask when she should make up the extra day.
 12. The Claimant's employment was terminated without any prior discussion or meeting summarily by text message.

The Tribunal's conclusion

S1 statement

13. There was no dispute about the lack of any written documentation setting out the Claimant's terms of employment. The Claimant did not receive anything in writing., S1 ERA requires that within 8 weeks written particulars of

employment with statutory terms must be sent to an employee. This is different to a formal contract which does not need to be in writing.

14. The Claimant's claim is successful.

Holiday pay

15. The Working Time Regulations 13(2) sets out how to calculate the holiday year. It provides that in the absence of a relevant agreement the holiday year shall start on the date the employee started employment. For the Claimant, it was on 28 November. The Claimant is entitled by the Working Time Regulations to 5.6 weeks leave per year. The Claimant took one week's holiday in the relevant period. Her employment terminated 3 July 2016. Therefore, the outstanding accrued holiday is 2.34 weeks at £128 per week.

Unfair dismissal

16. The Tribunal has no hesitation in finding the dismissal unfair. There was no meeting prior to terminating the Claimant's employment (which was terminated by text) or any attempt to establish from the Claimant what she says happened. The Tribunal takes into account that the Respondent is a very small employer, however Mr Moir says he runs or has run several other businesses and has employed many staff over the years. Even taking the size and administrative resources into account there was no attempt to conduct any procedure whether formal or informal, prior to termination of the Claimant's employment. The Tribunal does not accept that it would be pointless or unnecessary as suggested by Mr Moir as the undisputed evidence was that staff took their own wages from the till each week and if they are on holiday they take payment from till in advance without prior reference to Mr Moir. It was common ground that this was what happened.

17. In relation to the final matter prior to termination of the Claimant's employment, the Tribunal finds that the Claimant worked one day and took payment for her contracted hours (2 days) leaving a note saying she recognised she owed the Respondent one days' work for the Friday which she did not do. Mr Moir considers this to be theft however there was an explanation which should have been explored. There was no attempt to do so.

18. The Respondent completely failed to follow the ACAS code of practice and as such the Tribunal finds that an uplift to the compensatory award of 20% is appropriate.

19. The Tribunal considered whether the Claimant contributed to her own dismissal. Clearly, it would have been better if the Claimant had spoken to Mr Moir, she says she telephoned him but he did not pick up, however she could have sent a text or left a message explaining she was taking wages for that day. Additionally, the Tribunal finds that the running of the business was very informal, with staff taking their own wages from the till, and up to the time when Doreen left at least, swapping shifts between themselves. On the one

hand Mr Moir said that staff should go through him for everything but on the other maintains they should have some 'free will to do things'. On this basis, the Tribunal does not find any contributory fault.

Sex discrimination and harassment

20. It was common ground that on or about September 2015 Mr Moir made a comment which the Claimant objected to which is set out above. The Claimant's case is that he made a pass at her and what happened subsequently was because she rebuffed his advances. Mr Moir's case is that he had been to a greetings card shop and had been looking at the humorous cards as set out above.
21. The Tribunal finds that this incident does constitute harassment in that Mr Moir engaged in unwanted conduct related to the Claimant's sex which created a degrading, humiliating and offensive environment for her. That there may have been no intention to harass the Claimant but this is not relevant. Mr Moir accepts he may have acted inappropriately by apologising when the Claimant voiced her objection to the comment.
22. The next question for the Tribunal is whether this incident was a catalyst for the Claimant's dismissal and was the true reason for dismissal and not conduct as suggested by Respondent. Tribunal has considered the timeline. This incident happened sometime in September 2015. On 29 October 2015, Mr Moir sent a letter to the Claimant, raising concerns about various matters and categorising the letter as a "final written warning". If, as the Claimant suggests, Mr Moir wanted to terminate her employment because she had rebuffed his advances, the Tribunal finds that it is more likely that he would have done that shortly after the incident than some nine months later. He is also unlikely to have said "I must give the credit for your work and willingness to help when required".
23. The Tribunal does not find that the incident in September 2015 was the reason why the Claimant was dismissed.
24. The Claimant's claim is out of time for a one-off incident of harassment. The Tribunal considered whether it was just and equitable to extend time. The Tribunal, accepts that it would have been difficult for the Claimant to make a complaint, either directly to Mr Moir or to a Tribunal while she was still employed. She is a single parent and relied on her job and would be worried it would be in jeopardy. This is particularly because there was no one more senior than Mr Moir in the business for her to take her complaints to. The Claimant was in a vulnerable position. The Tribunal therefore exercises its discretion to extend time for presentation of her claim of harassment relating to the incident in September 2015 on the grounds that it is just and equitable to do so.
25. However, the Claimant has not produced evidence to justify her claim for £7,700 injury to feelings. For example, she does say she was worried about

going work or that the incident affected her in any way. There is no information about how she felt after the incident. It is for the Claimant to provide this information. Tribunal also takes account Mr Moir apologised immediately after the comment.

26. Taking all this into account, the Tribunal finds that the Claimant was harassed by Mr Moir and that he should pay an award to injury feelings of £660 (including a Simmonds uplift for inflation).

Compensation

27. Having come to these conclusions, the Tribunal awards the following compensation:

28. Unfair dismissal basic award: 3 weeks at £128 = £384

29. Compensatory award 11 weeks' loss of earnings at £128 per week - £1,408.00

30. Loss of statutory rights - £300

31. Failure to provide written reasons for dismissal – 2 weeks pay at £128 per week - £256.00

32. Wrongful dismissal – the Tribunal has awarded loss of earnings to the date of new employment. Therefore no award is made as this would be double recovery

33. Failure to provide written statement of employment – 2 weeks at £128 per week = £256

34. Discrimination - injury to feelings £660.

35. Holiday pay 2.34 weeks at £128 per week - £299.52

36. ACAS uplift 20% to the unfair dismissal compensatory award - £281.60.

37. The total payable by the Respondent to the Claimant is **£3,845.12.**

Employment Judge Martin

Date: 12 September 2017