



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs JM White

**Respondent:** Miss S Hall

## FINAL HEARING

**Heard at:** Birmingham **On:** 1 & 2 October 2018

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

### Appearances

For the claimant: Mr E Komeng, lay representative

For the respondent: Mr M Hall, lay representative

## JUDGMENT

- (1) All of the claimant's complaints fail and are dismissed.
- (2) This Judgment was made and took effect on 2 October 2018.

## REASONS

1. This is the written version of the Reasons given orally on 2 October 2018, written reasons having been requested by Mr Komeng, the claimant's representative, on the day.
2. This is a most unfortunate case. The respondent has multiple sclerosis. The claimant was her carer, working in the claimant's home, for over five years, six hours a day, five days per week. They were more than employer and employee to each other – they became quite good friends.
3. The employment relationship fell apart during the summer of 2017. This appears to have happened through no real fault of either of them. The 'villain of the piece' is Sandwell Metropolitan Borough Council, who I'll call the "Council". At the time of this hearing, the Council was not a party to the proceedings and no one from the Council was a witness before me. The only witnesses were the claimant and the respondent themselves. I'm sure any Council witnesses would have said things in the Council's defence, but, on the evidence I have, the situation arose

almost entirely due to the Council's inefficiency and/or incompetence.

4. The respondent employed the claimant directly using a so-called "personal budget", i.e. she received money from the Council which she was then to use to pay for her care. Whoever devised this system for employing carers no doubt had good intentions, but this is far from the first case I have seen where problems have arisen that would not have arisen had the claimant been employed by the Council or through an agency in what used to be the normal way.
5. In or around June 2017, someone in the Council seems to have noticed that the respondent's employment of the claimant hadn't been audited for a number of years. Without warning, the Council suspended payments to the respondent. This meant the respondent had no money to pay the claimant. The claimant was eventually paid directly by the Council, but not until November 2017. By then the parties were nearly two months into these Tribunal proceedings.
6. The claim form was issued on 21 September 2017. If the claimant's employment terminated at all before the claim form was issued, this happened around late July or the start of August 2017. Early conciliation was from the 7 August through the 5 September 2017.
7. On the face of the claim form, there were at least six types of claim. At the start of the hearing, Mr Komeng confirmed the claims still being pursued were: unfair dismissal, relying on conventional dismissal, alternatively constructive dismissal; wrongful dismissal, i.e. a claim for notice pay; a claim for a redundancy payment; and a holiday pay claim, that is, a claim for compensation for accrued by untaken annual leave.
8. After the end of the claimant's evidence, I raised the fact that there was nothing in her statement at all about the holiday pay claim. She was recalled to the witness table and I asked her some questions that claim.
9. The respondent's holiday year ran from the 1 March each year. Assuming the claimant's employment was terminated round the end of July 2017, that meant that she had accrued five months' worth of her holiday entitlement by then in the 2017/2018 holiday year. Five twelfths of her holiday entitlement under her contract would have been fifty-five hours, that is between nine or ten days. Under the Working Time Regulations (if we can put the contract to one side), it would have been between eleven and twelve days. But she told me she had, between March and the end of July 2017, taken at least three weeks – i.e. at least fifteen days – paid holiday. I therefore dismiss that claim.
10. In practice, this is a one issue case. The issue is this: did the claimant's contract terminate before she presented her claim form?
11. In theory there are a number of issues, but I really don't need to go into them in any detail. They are:
  - 11.1 if the claimant's contract terminated, was this through termination by the respondent in accordance with section 95(1)(a) of the Employment Rights Act 1996 ("ERA"), i.e. conventional dismissal?

- 11.2 if not, did the respondent fundamentally breach the claimant's contract of employment by non-payment of wages and/or by temporarily laying her off in circumstances where the contract of employment gave her no right to do so; and if so, did the claimant resign as a result?
- 11.3 if the answer to either of those questions is "yes", it seems to me this must have been an unfair dismissal under ERA section 98, through failure to adopt and follow a fair and reasonable procedure, even if for no other reason.
12. Another issue that might have arisen had my decision on the main issue been different, is: if the claimant was dismissed, was the principal reason for dismissal that the claimant was redundant in accordance with ERA section 139?
13. The reason I don't think any of these other issues is particularly important is that I see them as clear-cut. The respondent failed to pay the claimant her wages for two months in succession and could not tell the claimant when she would be paid. That must have been a fundamental breach of contract, to my mind: the 'wage/work bargain', as people refer to it, is at the heart of any contract of employment. See Cantor Fitzgerald International v Callaghan [1999] ICR 639 in relation to this. If the claimant did resign in the manner and at the time she is alleged to have done, which is something I will discuss in a moment, at least part of the reason for this clearly was the non-payment of wages and no one during this hearing suggested otherwise.
14. I also note that, in closing submissions, Mr Hall, the respondent's representative, confirmed that the main plank – and possibly the only plank – of the respondent's defence was an argument that the claimant had not been dismissed by the respondent and nor had she resigned.
15. So far as the redundancy pay claim is concerned, on no sensible view was the main reason for any dismissal redundancy. The respondent at all times needed and wanted someone to do the job the claimant was doing. If there had been a dismissal, it would have to have been an accidental one, in circumstances where all the respondent would have intended was for the claimant to take a temporary break from doing work for her while she sorted out money from the Council.
16. In terms of the case law relevant to the one real issue in this case, I refer to and incorporate into this decision the summary of the law set out in paragraphs 24 to 33 of the Employment Appeal Tribunal's decision in Sandle v Adecco UK Ltd [2016] UKEAT 0028\_16\_2706. That is a summary of the law relevant to whether the employer has said or done something that amounts to a conventional dismissal, but similar principles apply as to whether an employee has said or done something that amounts to a resignation. The essential point is this: for someone to have resigned or been dismissed, there has to be something communicated by words or actions that, in light of all the surrounding circumstances, the reasonable person on the receiving end of those words and actions would take as a resignation or as the dismissal.
17. Turning to the facts, there is very little that is relevant that is in dispute. The documentary evidence that is before me includes a printout of what are, I think, Facebook Messenger messages passing between the claimant and the

respondent from 1 June 2017 onwards. The messages between 30 June and 18 July 2017 confirm that the respondent was in communication with the Council, who kept giving her the impression that they would be paying shortly and that this is what she told the claimant. Unfortunately, payment never arrived. There was a potentially significant exchange between the claimant and the respondent on 30 June and 1 July 2017. This followed someone from the Council visiting the respondent in her home when the claimant had been there working. He had been wanting to conduct some kind of audit and/or to make some checks that the Council deemed necessary. The respondent had been too unwell and tired to engage with him and, so, he had not achieved what he had wanted to achieve.

18. In the messages there is some discussion of his visit. Then, the respondent wrote this: *"Sorry but I don't have care for next week. They will backdate it but won't pay next week, so you have a free week off"*. There is then the following exchange between the claimant and the respondent:

*C: So, I got a week off without pay and what about my wages?*

*R: No, it is with pay, they will backdate it so you will be paid as normal in July. Yes, you will get paid but not until Monday or Tuesday.*

*C: I will come in if you want.*

*R: No, you don't have to. I feel terrible that your pay is being delayed. They gave me no warning. I'm so sorry about this.*

*C: It's not your fault, it's theirs. He came out. I will tell them that in the letter if you want.*

*R: Thanks, they are coming on Thursday. I will pass on to them.*

*C: Ok just let me know if you want me in.*

*R: Ok. I'm going to be stuck in bed for a week, but write a letter and I will give it them. Again, I'm really sorry. Have a good weekend, week off....*

19. That's 30 June 2017. On 1 July, we have, from the respondent: *"Hi, you can come in on Monday? The on-duty Manager called me today to say that she had been told that your wages will go in Monday so sorry no week off."*
20. The reason I've highlighted this is that it shows that, at one point, the respondent was telling the claimant not to come into work for a week because the respondent would have no money for her, because she wouldn't be paid by the Council for a time. Then, when she understood from the Council that she would be paid sooner after all, the respondent effectively cancelled the week off she had given the claimant. At least once before the end of July 2017, then, the respondent told the claimant to take time off because of the money situation.
21. Matters came to a head around 20 to 21 July 2017. The parties disagree as to whether there was relevant conversations both on the 20th and the 21st. In her oral evidence, the claimant told me that, contrary to what is her witness statement, the most important conversation was actually on the 20th. But whether there were one or two conversations, it's common ground that there was at least one between them during which it was agreed that the claimant would be off work until she was paid, but she said she would return to work when she was paid. I will come back to that conversation, or those

conversations, in a moment. The claimant's primary case is that she was dismissed during those conversations.

22. The claimant confirmed in her oral evidence that she was hoping and expecting to be paid and to be returning to work sooner rather than later. The respondent had a similar expectation.
23. From the documents, the next potentially significant thing that happened was that, on 27 July 2017, the claimant messaged the respondent stating, "... *what's happening with the money? It's that time again today. How long am I out of work for, do you know? Let us know.*" The respondent did not reply by message, and although there may well have been one or more telephone conversations between the claimant and the respondent at this time, they take the matter no further because there is next to no evidence about what was said and discussed in those conversations before me.
24. The claimant sought advice from the CAB and spoke to ACAS as well. She told me that she was advised to write to the respondent to ask if she had been laid off permanently and/or if her job was redundant. The relevant part of what she wrote was this: "*I need to know the following as you are aware that I am currently being laid off. Does this mean that I'm fully laid off or has the position been made redundant? ... I need to know one way or the other*". The letter ends with this: "*So with deep regret, I'm sorry to say that you need to [respond] to this letter in the next five days or me to pursue this matter further.*"
25. The letter was hand delivered to the respondent's house on 31 July 2017. At the same time, the claimant dropped back the respondent's keys. In her oral evidence, the claimant emphasised that she was not returning the keys to signify the end of the relationship. She told me that she returned them at her husband's suggestion so she didn't get blamed if anything happened in relation to the respondent's property while she was off work. She said something like: "*I wasn't, like, chucking her the keys to hand in my job. I would get the keys back when I started again*".
26. On the evening of 6 August 2017, the respondent messaged the claimant as follows: "*The response to your letter will be with you sometime tomorrow*". The claimant replied, "*Sorry to say it's too late. The five days was yesterday for you to reply to my letter. ACAS has to step in now.*" That was the last communication between the parties I am aware of before proceedings were issued, apart from any without prejudice discussions there may have been during early conciliation (which, as I've already mentioned, began on 7 August 2017).
27. If I reject the claimant's primary case and decide she was not dismissed by what the respondent said to her on 20 and/or 21 July 2017, her secondary case, as explained by Mr Komeng in oral closing submissions, is that her letter of 31 July 2017 gave a deadline for the respondent to respond and that employment terminated when that deadline came and went without a response. In answer to a question from me, he confirmed that what he meant was that the final paragraph of the letter should be read as if it said something like, "If I don't hear from you in five days, you should take it that I have resigned."

28. I shall now go back to what the respondent allegedly said on 20 and/or 21 July 2017 and explain why I am not satisfied that she dismissed the claimant then.
29. In her witness statement, the claimant stated, "*The last day I worked for Sheron [that is, the respondent] was 21 July 2017 when she told me that I was being laid off as she had no money to pay me. I took that notice as my dismissal as Sheron did not say when she would have me back at work.*" I asked the claimant what the respondent had said. This was the point at which she told me that the most relevant conversation had taken place on the 20th and not the 21st. She told me that on the 20th the claimant had said something along these lines: "*As of tomorrow, there is going to be no more work. The Council are not going to pay so I'm going to have to let you go until they put the money back*". She went on to tell me that the following day, the two of them had the discussion I mentioned earlier during which the claimant had said she would come back when she was paid.
30. In her evidence, the respondent could recall no relevant conversation on 20 July 2017. Her version of what they said to each other on the 21st is not so very different from the version the claimant gave me in her oral evidence. The main difference between the two of them is that, according to the claimant, the conversation on the 21st followed one on the 20th; and the conversation on the 20th (or the alleged conversation on the 20th) puts the conversation on the 21st in a different context. According to the respondent, the claimant said, "*Let me know when it's sorted and I will come back. I'm not working for free. Keep me updated*". When I asked the claimant about this, she seemed to me to accept that she might well have said something like that on the 21st, apart, possibly, from the "*I'm not working for free*" comment.
31. I am now going to talk about layoffs and the allegation that the claimant was 'laid off' by the respondent. I should make clear that I am not talking about layoffs in a technical sense any more than the claimant was in her letter of the 31 July 2017. The layoff and short time provisions in the Employment Rights Act 1996 don't apply here and no one has suggested otherwise during this hearing.
32. I should also like to make clear, before I start analysing the claimant's evidence about what was allegedly said on the 20th, that I'm not suggesting for a moment that she was not telling me the truth as she genuinely believes it to be when she gave her evidence. The fact that someone honestly believes what they tell me in tribunal, though, doesn't make it true. Human memory is unreliable. People mishear, misunderstand and misremember things all the time. I don't know what was said; I wasn't there; there is no recording. But I have to decide what was said – or, at the very least, I have to decide whether I am satisfied on the balance of probabilities that something was said by the respondent to the claimant that amounted to "you are dismissed". When making a decision about this, I have to consider all of the evidence as well as what is inherently likely and unlikely given all the surrounding circumstances. The witness evidence of the claimant and of the respondent is only part of the evidence and probably not the most important part, not in relation to this issue anyway.
33. I think there may have been a certain amount of confusion on the claimant's side

about what has been labelled a 'layoff'. No one is suggesting that the respondent had a right under the claimant's contract of employment to lay the claimant off temporarily, i.e. to send her home without pay, albeit in the hope and expectation that pay would be forthcoming sooner or later. There is no doubt in my mind that if the respondent did this, it was a breach of the contract of employment and probably a fundamental one in its own right. But that's not the important issue in this case. An employer's fundamental breach of contract doesn't end the contract of employment by itself. It has to be accepted by the employee resigning in response to it.

34. The situation I am looking at is one where an employer tells her employee, in some way, shape or form, "Don't come in to work for an indefinite period because there's no work and/or I can't pay you. I expect that soon there will be work and I will be able to pay you and I'll tell you when you can come back". The employer could mean one of two things by this. She could mean, "You're dismissed, but I expect you will be reinstated before long". Or she could mean, "You're effectively on unpaid leave, but I expect this won't last long". In the first situation there is obviously a dismissal; but in the second situation there wouldn't be a dismissal unless and until the employee resigned in response.
35. I'm judging what the reasonable person in the claimant's position would have understood the respondent was saying to her. But she seems to be a reasonable woman, so I don't really need to speculate about what an imaginary reasonable person in her position would have thought – I can simply use the claimant herself. And what I ask myself is whether her words and actions at the time suggest she thought she had been dismissed, or had been suspended / sent on unpaid leave.
36. What comes through to me, from the claimant's letter of 31 July 2017 in particular, is that she didn't think she had been dismissed but that she wasn't sure one way or the other. Although the letter was written on advice, I see no good reason not to take it at face value. The obvious answer to the question, "why did she ask whether she had been fully laid off, i.e. dismissed", is she didn't know.
37. Mr Komeng has tried to persuade me that all the claimant was really after (apart, of course, from her money) was confirmation of her dismissal so that she could look for alternative work and in the meantime, potentially, claim social security benefits. However, if that were right, I don't think she would have asked whether she had been fully laid off, at least not in the way she did. Instead, I think she would have written something like, "My understanding is that I have been dismissed. Please confirm this". In addition, in the letter, the claimant invites a response, giving a deadline of five days; and she does so in a way that suggests to me she wasn't expecting any particular response; and that a response to the effect that, "no you haven't been dismissed" would not have come as a surprise to her.
38. Further, the comment the claimant agrees she made on the 21st, along the lines that she would return to work when she was paid, as if it would be her choice, and what she said about returning the respondent's keys on the 31st – how she wasn't handing them in to end her employment and would take them back when

she started again – those things are both, in my view, more consistent with some kind of temporary suspension or period of unpaid leave than with the claimant thinking she had been dismissed.

39. Even the message on 27 July 2017 - “*..what’s happening with the money? It’s that time again today. How long am I out of work for, do you know?*” – which I accept is not wholly inconsistent with dismissal, is an odd kind of message to send to your employer six or seven days after you think they’ve told you that you’re dismissed.
40. In short, the claimant was confused (and understandably so) as to what her situation was. She wasn’t sure whether or not she’d been dismissed, and if her thoughts were leaning in one direction or another, I think it was towards probably not having been dismissed. I therefore don’t accept the evidence in her witness statement that she took what had been said to her on 20 or 21 July 2017 as her dismissal. She may well by now have persuaded herself that that was how she took it, but what she said and wrote at the time suggests otherwise. I don’t think anything can have been said to her which clearly communicated the message “you are dismissed” and I therefore think it unlikely she was told “I’m going to have to let you go”, which is what in her oral evidence she said she was told.
41. It’s worth comparing and contrasting her oral evidence with the relevant part of her witness statement, which I have already quoted from. In the statement, she states that she took being told she was being laid off as her dismissal “as” – i.e. because – the respondent did not say when the respondent would have her back at work. Objectively, the respondent not giving her a back to work date does not point either way in terms of the claimant being dismissed versus her being temporarily laid off. As the claimant well knew, the respondent couldn’t give her a back to work date because of the uncertainty about when the Council would start paying again.
42. If the claimant had been told, “I’m going to have to let you go”, although the situation might still have been a bit unclear, the claimant would have thought she had probably been dismissed. She would have thought this because of that comment. She would not in her witness statement be referring to taking an ambiguous comment about being laid off as her dismissal because of a failure to tell her when she would be back in work.
43. Turning to the claimant’s suggestion in her oral evidence – and in her claim form as well – that the respondent told her on 20 or 21 July 2017 that there was no more work or that there was going to be no more work, whatever precisely was said by the respondent, it did not mean, and the claimant would have known it did not mean, that there was no work for her to do. The respondent’s need for care was no less than it had been over the previous five and a bit years. She hadn’t suddenly got better or got in an alternative carer. As everyone understood, what she and the claimant were discussing was simply the fact that the Council had turned off the ‘money tap’, that no one could say when it was going to be turned back on again, and that it wasn’t fair for the claimant to be expected to work without payment indefinitely.
44. I suspect that if the respondent said anything about there not being work, what she said was similar to what she wrote in one of her messages of 30 June 2017



that I mentioned earlier: "*I don't have care for next week*". It isn't a criticism of the respondent, but it is a rather odd way for her to have expressed herself. Odd or not, what she meant – and what the claimant understood she meant – was that she did not have the money to pay for her care the following week.

45. In conclusion on this point, I am not satisfied that the respondent said or did anything on 20 or 21 July 2017 that amounted to a dismissal. A reasonable person in the claimant's position would not have thought they had been dismissed. They would probably have been confused and not known what their position was; and that was exactly how the claimant herself was at that time.
46. If the claimant was not dismissed on the 20th or 21st, the only way her claims could succeed would be if she resigned after then. She never said or wrote anything like "I resign", so what I am looking for is an implied resignation. I have to look for it in what she wrote because there is no evidence before me of anything that was said at any relevant time that could conceivably be a resignation. She and the respondent agree that they parted on 21 July 2017 with the claimant saying she would come back to work when she was paid. And in her evidence before me, the respondent emphasised repeatedly that she always thought the claimant would return to work.
47. The text message of 27 July 2017 is plainly not a resignation and no one is suggesting it is. Equally plainly, to my mind, the claimant did not resign when she sent her letter of 31 July 2017. On my reading of it, it presupposes that the employment relationship may be continuing. As I discussed earlier, the claimant is effectively asking, "Have I been dismissed or not?" That would be a pointless question to be asking if what she meant to do was to resign.
48. Anyway, it isn't the claimant's case that she resigned when she sent the letter. Her case, as I have already explained, is that the letter contained a conditional resignation – a resignation that would take effect, but only take effect, if there was no response within five days.
49. I'm afraid that that part of her case is almost unarguable. Threatening to pursue this matter further if there is no response within five days is a million miles away from a clear resignation. There is so much ambiguity in what the claimant wrote. Much the same goes for the message of 6 August 2017 in which she said it's too late and that ACAS had to step in.
50. In deciding this case, I've found it useful to conduct a thought experiment and to imagine that the respondent was arguing that the employment had come to an end and that the claimant was arguing the other way. I think that in that situation, the claimant would have no difficulty at all in persuading me, or any other Judge, that everything was far too vague and woolly and ambiguous for there to have been either a dismissal by the respondent or a resignation.
51. It follows I am not satisfied that the claimant was dismissed by the respondent, nor that she resigned at any relevant time. If I'm not satisfied, and I am not, that her employment terminated before she presented her claim form, her claims necessarily fail.

52. I take no pleasure at all in making this decision and I would have taken no pleasure at all in deciding this case the other way. Either result would be deeply unsatisfactory and would leave good people out of pocket who don't deserve to be out of pocket. I wish there was something I could do to hold whoever was responsible at the Council to account, but I'm afraid there isn't. All I can do, and all I have done, is to make a decision by applying the law to the employment dispute that is before me.

Employment Judge Camp

10<sup>th</sup> October 2018