



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Bell

Respondent: Woodrow Retirement Home Ltd (1)
Mr P Edwards (2)

Heard at: Exeter **On:** 9 &10 August 2018

Before: Employment Judge Goraj
Members Ms S M Christison
Mrs M Corrick

Representation

Claimant: in person (supported by her husband)
Respondent: Mr J Churchill, Counsel

JUDGMENT having been sent to the parties on 24 August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form presented on 13 February 2018 the claimant pursued complaints of unfair dismissal, sex discrimination, failure to provide written reasons for dismissal, breach of contract for notice and a claim for holiday pay. The claimant's claim form was treated as a claim against both Woodrow Retirement Home Ltd and Mr Peter Edwards.
2. The claimant's early conciliation certificate records that ACAS received the EC notification on 11 January 2018 and that the EC certificate was issued by email on 18 January 2018.
3. In their response form the respondents denied the allegations including in summary, that the claimant had been dismissed by the first respondent. The respondents contended that the claimant had walked out on her

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employment with the first respondent on 19 December 2017 and that she had, in any event, confirmed her resignation by failing to respond to the first respondent's letter dated 4 January 2018 inviting her to a meeting.

4. The respondents also contended that if the claimant had been dismissed (which was denied), the reason for her dismissal was conduct and further that the claimant had, in any event, contributed to such dismissal and any compensation should accordingly be reduced by 100%.

The case management hearing on 1 May 2018

5. At a case management preliminary hearing ("CMPH") on 1 May 2018, the claimant confirmed that her claims were complaints of (a) unfair (express) dismissal (including that she did not contend that she had been constructively dismissed) (b) harassment on the grounds of sex/direct sex discrimination in respect of the alleged conduct of the second respondent on 19 December 2017. The claimant relied on an actual comparator Mr Alan Fawcett and/or a hypothetical comparator. The claimant confirmed that she did not however also contend that she was dismissed because of her sex (c) an alleged failure to pay accrued annual leave of five days and (d) breach of contract for notice.
6. The respondents confirmed in summary at the CMPH that (a) they contended the claimant had walked out on 19 December 2017 following a discussion with the second respondent regarding annual leave and that she was not dismissed (b) If the claimant was dismissed (which was denied) the reason for her dismissal was some other substantial reason namely a disagreement regarding her shifts and (c) they denied that the second respondent had engaged in the alleged conduct on 19 December 2017 and, in any event, that any such conduct related to or was by reason of the claimant's sex.

Clarification of the issues at the Hearing.

7. The issues were further clarified at the commencement of the hearing. The claimant confirmed, once the position had been explained to her by the Tribunal, that she wished to proceed only against the first respondent in the light of the confirmation by the first respondent that it did not rely on the statutory defence in defence of the sex discrimination claims. The second respondent was therefore dismissed from the proceedings.
8. The claimant subsequently, in any event, withdrew her complaints of sex discrimination on 10 August 2018 which were dismissed in the light of such withdrawal. The respondent is therefore henceforth referred to as, "the respondent".
9. During the course of the hearing the respondent confirmed that it accepted that the claimant was entitled to the alleged outstanding holiday pay in the sum of £232.78 which it agreed to pay to the claimant by consent in settlement of such claim.

Bundle of documents

10. The Tribunal was provided with an agreed bundle of documents to which the following documents were added during the course of the hearing: -
 - (1) An exchange of text messages between the claimant and Mrs Fawcett on 19 December 2017.
 - (2) A copy of the claimant's P45 together with a covering letter from the respondent's payroll providers to Mr Edwards dated 12 February 2018 enclosing a copy of the P45 for forwarding to the claimant.

Witness statements

11. The Tribunal received witness statements and heard oral evidence from the following witnesses:
 - (1) The claimant.
 - (2) Mr Peter Edwards, Registered manager and Provider at the respondent.
 - (3) Mrs S Fawcett, Head of Care at the respondent

Further clarification of the issues

12. Following the conclusion of the oral evidence, the respondent requested the Tribunal to determine first as a preliminary issue whether the claimant was dismissed by the respondent.
13. The Tribunal agreed (after discussion with the parties) to this request on the basis that it would also determine the associated issues of (a) if the claimant was dismissed when did any such dismissal occur (b) whether any such dismissal was fair for the purposes of Section 98(1) – 98(4) of the Employment Rights Act 1996 ("the Act") and if not (c) whether the claimant had contributed to her dismissal for the purposes of any reduction to any basic or compensatory awards.

Submissions

14. The oral submissions of the parties were therefore confirmed to such issues.
15. The respondent submitted a detailed and helpful written skeleton argument at the beginning of the hearing and provided the Tribunal with a large number of authorities, some of which have been extremely helpful to the Tribunal in reaching our decision including **Onassis v Vergottis [1968] 2 Lloyd's Rep 403** and **Sandle v Adecco UK Limited 2016 IRLR 941** .

THE LAW

16. The Tribunal has had regard in particular to the following statutory provisions Sections 95, 97, 98, 122 (2) and 123 (6) of the Employment Rights Act 1996 ("the Act").

FINDINGS OF FACT

The claimant

17. The claimant was employed by the respondent from 18 August 2015. The claimant was primarily employed by the respondent as a Chef. The claimant's contract of employment is at pages 45 – 52 of the bundle. With effect from February 2017 the claimant worked 37 hours per week spread across five days and also undertook some care related duties.

The respondent

18. The respondent is a small family owned and managed retirement home. At the time of the events in question the respondent employed approximately fourteen employees. The registered manager is Mr Peter Edwards who is also a manager/ owner of the business. The respondent has no HR function and Mr Edwards had no disciplinary experience at the time of the events in question.

The previous relationship between the claimant and Mr Edwards

19. The claimant and Mr Edwards had a good working relationship prior to the events in question and the claimant was overall regarded as a hardworking and reliable employee.
20. Prior to the events in question, the claimant had considered reducing her working hours in the New Year. The claimant had discussed the matter informally with her work colleagues and with Mrs Fawcett, the Head of Care at the respondent. Mrs Fawcett spoke to Mr Edwards about it and subsequently told the claimant that the claimant would have to speak to Mr Edwards directly regarding any changes. The claimant had not at this time made any final decision regarding any changes to her working hours.

Christmas holidays

21. In 2017 the claimant was not due to work on Christmas Eve, Christmas Day, New Year's Eve or on New Year's Day in accordance with her rostered hours. The claimant had requested in accordance with the respondent's holiday procedures leave from 26 December – 30 December with a return to work on the Tuesday after New Year. The claimant's request for leave had been formally granted by the respondent in November 2017.
22. In addition, the claimant had requested not to work on 22 December 2017 as it was the day after the staff Christmas party. Mr Edwards had agreed to cover the claimant that day.

The events of 19 December 2017

23. There is a significant dispute between the parties regarding the events of 19 December 2017.
24. In brief summary, the respondent contended in particular that there was a discussion between the parties relating to the claimant's proposed holidays, the non -working day on 22 December 2017 and proposed changes to the claimant's working hours. The respondent further contended that the discussions culminated in the claimant alleging that the respondent had sacked her and leaving the premises before Mr Edwards was able to explain his intentions. Mr Edwards denied that he told the claimant that he was sacking her.
25. In summary, the claimant contended in particular that Mr Edwards (a) shouted and was abusive towards her on 19 December 2017 primarily regarding her holiday (b) expressed his intention to dismiss her and further (c) when asked directly by the claimant whether he was sacking her said yes.
26. There were no witnesses to this conversation and there is no contemporaneous documentation.
27. Having given careful consideration to the conflicting accounts and the limited associated documentary evidence the Tribunal is satisfied on the balance of probabilities that: -
 - (1) Mr Edwards was annoyed with the claimant on the morning of 19 December 2017 because he had been told by another employee that she had heard that the claimant had said that Mr Edwards would be doing the cooking on 22 December 2017 because the claimant would be too pissed to come into work (following the staff Christmas party the previous evening). Mr Edwards was annoyed by this as he felt that the claimant had taken advantage of him when he had agreed to cover her duties on 22 December 2017.
 - (2) Mr Edwards was also concerned as he had heard from other employees that (a) the claimant intended to take holiday during January 2018 which was a busy period for the respondent and (b) the claimant intended to reduce her hours in the New Year, which would have caused difficulties for the respondent, and that the claimant had placed pressure on other staff to take on her hours.
 - (3) During the early stage of the conversation on 19 December 2017, the claimant asked Mr Edwards whether he wished her to do the ordering of supplies for the period during her absence on leave to which Mr Edwards responded that it was not necessary as the required orders had already been received and that he would deal with such matters during her absence. The claimant perceived this to constitute a removal of part of her role.
 - (4) There was no significant discussion between the parties on 19 December 2017 regarding any changes to the claimant's working

hours. When reaching this conclusion, the Tribunal has taken into account that the claimant had not made any final decision regarding any changes to her hours.

- (5) Following the discussion regarding the ordering of supplies the discussion between the parties focused largely on the claimant's leave, including the non-working day on 22 December 2017, and Mr Edwards' concerns that he had heard that the claimant also proposed to take holiday in January 2018 for which she had not sought approval.
- (6) It was against the above background that the discussions between Mr Edwards and the claimant deteriorated with each of them speaking over the other and believing that the other was acting unreasonably.
- (7) This conversation culminated in the claimant becoming very upset and saying to Mr Edwards that she understood that the respondent was sacking her. The claimant said to Mr Edwards "you are sacking me" to which she understood that he had said yes and walked out. When reaching this conclusion, the Tribunal has taken into account in particular that the claimant's understanding that she had been dismissed by the respondent is confirmed in the subsequent exchange of texts with Mrs Fawcett later that day referred to below.
- (8) The Tribunal is not however satisfied that when the claimant said to Mr Edwards "you are sacking me" that he said "yes" in response to the claimant. When reaching this conclusion, we have taken into account in particular that (a) this is denied by Mr Edwards and (b) the discussion had become heated by this time with the claimant and Mr Edwards talking over each other.
- (9) The claimant then put down her cooking utensils, telephoned her husband and left the respondent's premises, without Mr Edwards having an opportunity to say anything further, because she believed that she had been dismissed by Mr Edwards.
- (10) Mrs Fawcett the respondent's Head of Care was not at work that day and was unaware of what had taken place between the claimant and Mr Edwards. There was an exchange of texts between Mrs Fawcett and the claimant between 13.34 and 16.30 that day which was initiated by Mrs Fawcett regarding an unrelated work matter. The claimant informed Mrs Fawcett that she was not at work because she had been sacked by Mr Edwards that morning.

Subsequent events

28. The claimant subsequently texted Mr Edwards just before 10.00pm on the night of 19 December 2017 with the question "why?". We accept the claimant's evidence that she was asking Mr Edwards why she had been dismissed. We are further satisfied that Mr Edwards understood that this was what was being asked of him by the claimant including that he was aware that it was the claimant's understanding that she had been dismissed by him that morning.

29. Mr Edwards did not respond to the claimant's text. In evidence Mr Edwards told the Tribunal that he did not respond to the claimant's text as he believed that the claimant had committed gross misconduct by leaving her post and abandoning vulnerable people resulting in his own words "in immediate dismissal by myself".
30. The claimant did not attend for work on 20 December 2017. The respondent did not reply to the claimant's text on 20 December 2017 or otherwise contact her at that time to invite the claimant to discuss the matter or to inform the claimant that she had not been dismissed notwithstanding that Mr Edwards was aware that this was the claimant's understanding of the position.

The payment of the claimant's salary

31. The respondent subsequently paid the claimant for the period up until 15 December 2017. The claimant was not paid for 19 December 2017 or for any period thereafter. The claimant's final payslip, which is dated 22 December (at page 66 of the bundle), was for a period of work paid in arrears.
32. The claimant's P45 was not issued until mid-February 2018. It was however prepared on the basis that the claimant had left the employment of the respondent on 19 December 2017. This is recorded in both the P45 and the covering letter which was sent to Mr Edwards by his payroll providers for him to issue to the claimant.

The subsequent correspondence

33. The claimant wrote to the respondent by letter dated 28 December 2017 raising a grievance and asking for reasons for her dismissal on 19 December 2017 (and threatening legal action). This letter is at page 67 of the bundle.
34. Mr Edwards responded by letter on 4 January 2017 (page 68 of the bundle). Mr Edwards denied that the claimant had been dismissed by him on 19 December 2017 and contended that the claimant had walked out during their discussion regarding leave and other matters. There was no suggestion in his letter that the respondent considered that the claimant continued to be employed by the respondent. The claimant denied receiving the respondent's letter. We are satisfied on the balance of probabilities that this letter was sent by Mr Edwards. We are not however satisfied that it was received by the claimant. When reaching this conclusion we have noted there is no reference to it in the claimant's claim form or by her in any other documentation.

OUR CONCLUSIONS

Was the claimant dismissed by the respondent and if so when.

35. The respondent denies that the claimant was dismissed by the respondent including on the grounds that in order for a dismissal to be effective it has to

be communicated by words or conduct (relying in particular on the Judgment in **Adecco** referred to above).

36. The tribunal is satisfied in the light of our findings of fact and having regard to the legal principles referred to above, that the claimant was, viewed objectively, dismissed by the respondent.
37. When reaching this conclusion we have taken into account in particular the following :-
 - (1) That the claimant was not dismissed by Mr Edwards during their discussions on the respondent's premises on 19 December 2017. The claimant's contract of employment was therefore still in existence when she left the respondent's premises.
 - (2) The claimant however understood, when she left the respondent's premises on 19 December 2017, that she had been dismissed and Mr Edwards was fully aware that this was the claimant's understanding.
 - (3) When Mr Edwards received the claimant's text at 10pm on 19 December 2017 he understood that the claimant was asking him why she had been dismissed. Mr Edwards did not however respond to that text on 19 December 2017 (or on the subsequent day) but decided at that time that the claimant was guilty of gross misconduct for leaving her post resulting in "immediate dismissal by myself".
38. We accept having regard to the submissions made by Mr Churchill, and having regard in particular to the Judgment in **Adecco** that in order for a dismissal to be effective a dismissal has to be communicated either by words or by conduct. We are satisfied that, viewed objectively on the facts, the claimant's dismissal by the respondent was communicated to the claimant on (or by) 20 December 2017 by way of the respondents' conduct. When reaching this conclusion, we have taken into account in particular that: -
 - (1) Mr Edwards made no attempt to respond to the claimant's text on the night of 19 December 2017 or on the morning of 20 December 2017 to dispel the claimant's belief that she had been dismissed or to otherwise continue the employment. Further the respondent did not seek to make any further contact with the claimant until its letter dated 4 January 2017.
 - (2) Our findings at 37 (3) above.
 - (3) The claimant was not paid for any period after 15 December 2017.
 - (4) Further, when the respondent wrote to the claimant by letter dated 4 January 2017 there was no suggestion in that letter that the claimant's employment was still subsisting.
39. The Tribunal is therefore satisfied that the claimant was dismissed by the respondent on (or by) 20 December 2017 and that this the effective date of dismissal for the purposes of the Act.

Was the claimant's dismissal fair for the purposes on section 98 of the Act.

40. We have then gone on to ask ourselves whether the claimant was fairly dismissed for the purposes of section 98 of the Act. The first question we have asked ourselves is whether the respondent has established the reason for dismissal for the purposes of Section 98(1)/ (2) of the Act?
41. We are satisfied, on the facts, that the reason for the claimant's dismissal was conduct namely, that Mr Edwards dismissed the claimant because he had a genuine belief that she was guilty of gross misconduct for leaving the premises on 19 December 2017 as referred to previously above.
42. We have then gone onto consider whether or not such dismissal was fair or unfair in all the circumstances having regard to the provisions of Section 98(4) of the Act. When reaching our conclusions we have taken into account the small size of the respondent and the respondent's lack of experience of dealing with HR matters.
43. Notwithstanding such matters, the tribunal is not however satisfied that this was a fair dismissal in all the circumstances for the purposes of Section 98(4) of the Act taking into account in particular that (a) it was accepted by the respondent that it did not contact/ follow any procedures at this time in respect of the claimant's alleged gross misconduct and (b) having regard to the circumstances in which this dismissal came about including that there was a dispute between the parties on 19 December 2017 (including that we are satisfied in such circumstances a reasonable employer would have taken steps to clarify the position and that thereafter any dismissal for gross misconduct would have been preceded by a formal procedure at which the claimant would have had an opportunity to state her case including the reasons why she left the respondent's premises on 19 December 2017) and (c) that a reasonable employer acting in the band of reasonable responses would not have dismissed the claimant in such circumstances.

Contribution

44. We have then gone onto consider the question of whether or not there has been any contributory fault on the part of the claimant for the purposes of Section 122 (2) or 123 (6) of the Act including whether there should be any reduction in any basic and/or compensatory awards.
45. Having given the matter careful thought, we are satisfied that it is appropriate to make a reduction for contribution in respect of the events on 19 December 2017 which led to the claimant's departure from the respondent's premises and the decision by Mr Edwards to terminate the claimant's employment for such action.
46. When reaching this conclusion, we have taken into account that the discussion on 19 December 2017 became heated with both parties talking over the other and that the claimant left the respondent's premises before Mr Edwards had an opportunity to say anything further.

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47. In all the circumstances we are satisfied that there has been culpable and blameworthy conduct on the part of the claimant and further that any basic and compensatory awards should be reduced by 30%. When reaching this figure we have taken into account that although there was culpable conduct on the part of the claimant as explained above, the claimant however understood when she left the claimant's premises on 19 December 2017 that she had been dismissed by Mr Edwards (who was fully aware of such understanding) and that the primary responsibility to resolve the matter therefore rested with the respondent.

Employment Judge Goraj

Date: 24 October 2018