EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107461/2017

Held at Inverness on 13 November 2018
Employment Judge: W A Meiklejohn

Mrs Hayley Young	**Claimant** **In person**
Alliance Hotels Consultants Limited	**Respondent** **Represented by** **Mr R Niemeyer,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that –

(1) The Respondent is ordered to pay to the Claimant a redundancy payment of FIVE HUNDRED AND TWENTY POUNDS (£520.00);

(2) The Claimant was unfairly dismissed by the Respondent but no award of compensation is made;

(3) The Respondent is ordered to pay to the Claimant holiday pay in the sum of TWO HUNDRED AND EIGHTY FOUR POUNDS AND FIFTY FIVE PENCE (£284.55); and

(4) The Respondent is ordered to pay to the Claimant the sum of FIVE HUNDRED AND TWENTY POUNDS (£520.00) in terms of section 38 of the Employment Act 2002.

REASONS

1. This case came before me in Inverness on 13 November 2018. It had been listed for a two day Final Hearing on both liability and remedy. The Claimant appeared in person. The Respondent was represented by Mr Niemeyer, Director.

2. The Claimant was pursuing claims of unfair dismissal and entitlement to a redundancy payment and unpaid holiday pay. These claims were resisted by the Respondent.

3. It was apparent from the case papers that, while the Respondent was resisting the Claimant's claims, there was substantial agreement between the parties as to what had happened.

4. The overriding objective contained in Rule 2 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 – to deal with cases fairly and justly – includes the following –

   - dealing with cases in ways which are proportionate to the complexity and importance of the issues

   - avoiding unnecessary formality and seeking flexibility in the proceedings

   - avoiding delay, so far as compatible with proper consideration of the issues

   - saving expense

5. I decided that it was appropriate to engage with the parties at the start of the Hearing with a view to determining whether all material facts could be agreed. The result of that exercise was that the matters recorded below

under Findings in Fact were agreed between the parties without the need for evidence to be led.

Findings in Fact

6. The Respondents operate Glencoe House Hotel. The Claimant entered their employment as a receptionist on 6 August 2013. In 2015 the Claimant relocated to Inverness where the Claimant's husband had secured employment. She remained in the employment of the Respondent but her job changed to database data input with effect from 15 June 2015. From that date the Claimant worked from her home in Inverness. There was no break in her period of continuous employment. The Respondent did not issue the Claimant with a written statement of particulars of employment nor a statement of changes to those particulars as required under Part 1 of the Employment Rights Act 1996 ("ERA").

7. In her database data input role the Claimant was paid £563.53 per month which equated to £130.00 per week. This was also the amount of her weekly net pay.

8. On 19 July 2017 the Claimant received a telephone call from the Respondent in the course of which she was given notice of termination of employment as at 30 September 2017. This was confirmed in an email sent by the Respondent to the Claimant on 20 July 2017 which referred to "changes to the operational structure of the business given the hotel's recent expansion".

9. The Respondent sent a further email to the Claimant on 28 July 2017 which provided a more detailed explanation, referencing the need for "a new and more extensive database" and explaining that "data-entry can no longer be done from an off-site location".

10. The Claimant's employment ended, upon the expiry of the period of notice she was given, on 30 September 2017. She continued to work for the Respondent until this date.

11. After an interval of around four weeks the Claimant secured employment undertaking nursery duties with her new employer. She was already undertaking playground duties for the same employer and had done so since January 2017.

12. When the Claimant entered the Respondent's employment she was advised that the holiday year was the calendar year. She took the holidays to which she was entitled in the holiday years up to 31 December 2016. In the holiday year commencing 1 January 2017 she calculated her holiday entitlement up to 30 September 2017 as 67 hours of which she had, as at that date (30 September 2017), taken 32 hours leaving an accrued but untaken entitlement of 35 hours.

13. The Respondent acknowledged that there had been no prior consultation with the Claimant prior to her being given notice of termination of employment. The Claimant acknowledged that it would not have been feasible for her to fulfil another role which entailed working at the Respondent's premises and accordingly the outcome would have been the same if there had been prior consultation.

Applicable Law

14. The fairness (or otherwise) of a dismissal is dealt with in section 98 ERA which, so far as relevant, provides as follows –

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

….(c) is that the employee was redundant….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

15. The definition of redundancy is found in section 139 ERA which, so far as relevant, provides as follows –

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

….(b) the fact that the requirements of that business –

….(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

16. Entitlement to annual leave and payment therefor is dealt with in paragraphs 13 to 16 of the Working Time Regulations 1998. In summary, the annual entitlement is 5.6 weeks and an employee is entitled to payment for leave accrued but not taken on termination of employment.

17. Section 38 of the Employment Act 2002 applies where an employee is successful in his/her claim under any of the relevant jurisdictions (which include unfair dismissal, redundancy payment and holiday pay) and where the employer was, when the proceedings were begun, in breach of his duty to the employee to give a written statement of initial employment particulars or of particulars of change. The amount to be awarded is either the

minimum amount of two weeks' pay or, if the Tribunal considers it just and equitable in all the circumstances, the higher amount of four weeks' pay.

Discussion and Disposal

18. I was satisfied that the reason shown by the Respondent for the Claimant's dismissal was redundancy. The Respondent's requirement for the Claimant to undertake database data input working from her home was, when notice of termination was given, to cease as from 30 September 2017. This was a potentially fair reason for dismissal.

19. An employer contemplating the dismissal of an employee by reason of redundancy should consult with the employee before doing so. The Respondent failed to do this and I decided that this rendered the dismissal procedurally unfair.

20. However, I took account of the decision in the case of **Polkey v A E Dayton Services Ltd [1987] UKHL 8** and decided that the taking by the Respondent of the appropriate procedural steps, that is consulting with the Claimant before giving notice of termination of employment, would not have avoided the Claimant's dismissal by reason of redundancy as at 30 September 2017. Expressed as a percentage likelihood that the Claimant would have been dismissed even if the appropriate procedural steps had been taken, that percentage was 100%.

21. Accordingly I decided that it would not be just and equitable to make a compensatory award for unfair dismissal in favour of the Claimant. It was also not appropriate for the Claimant to receive a basic award as she was entitled to a redundancy payment.

22. The Claimant had been employed by the Respondent for four complete years at the date of her dismissal. All of that service was between the ages of 22 and 41 and so the appropriate multiplier was 1. The calculation of the Claimant's redundancy payment was therefore £130 (her weekly gross pay) multiplied by 4 (her years of service) multiplied by 1 producing a total of £520 and I decided that the Respondent should be ordered to pay this amount to the Claimant.

23. The Claimant was entitled to payment for 35 hours of accrued but untaken holidays at the date of termination of her employment. She was paid £130

per week for working 16 hours which equated to an hourly rate of £8.13. Multiplying £8.13 by 35 produced a total of £284.55 and I decided that the Respondent should be ordered to pay this amount to the Claimant in respect of holiday pay.

24. The Claimant was entitled to an award in terms of section 38 of the Employment Act 2002 as her claims succeeded and the Respondent had failed to comply with the obligation to provide (i) a written statement of initial employment particulars and (ii) particulars of change. If there had been at least partial compliance by the Respondent with their obligations under Part 1 ERA I might have been persuaded to order payment of the minimum amount but as there was no element of compliance I decided that it was just and equitable to order the Respondent to pay to the Claimant the higher amount of four weeks' pay. Based on the Claimant's weekly pay of £130, this equated to £520.

Employment Judge: **Alexander Meiklejohn**
Date of Judgment: **15 November 2018**
Entered in Register: **20 November 2018**
And copied to parties