



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111909/2018

Held in Edinburgh on 22 November 2018

Employment Judge: Michelle Sutherland (sitting alone)

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Nicola Dignon

**Claimant
In Person**

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Paul Crolla t/a The Gold Sea Take Away

**Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgement of the Tribunal is that the Claimant was unfairly dismissed and the Respondent is ordered to pay the claimant the sum of £375.84 by way of compensation.

REASONS

Introduction

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1. The Claimant presented a complaint of unfair dismissal.
2. The Claimant lodged a bundle of documents. The Respondent exhibited an electronic copy of a payslip.
3. The Claimant gave evidence on her own behalf and led evidence from John Scott, a friend. The Respondent gave evidence on his own behalf and led evidence from Stuart McArthur (Fryer/ Manager, Respondent) and Michelle Hooks (Counter Staff, Respondent).

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4. The following issues to be determined were identified –

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5. – Was the Claimant dismissed?

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- Did the Claimant have requisite continuous service?
 - What was the reason for dismissal?
 - Was that reason a potentially fair reason?
 - Did the Respondent adopt a fair and reasonable procedure?
 - 5 - If not was there a chance the Claimant would have been dismissed in any event?
 - Has the Claimant take reasonable steps to mitigate her losses?
 - Did either party fail to comply with an applicable Code of Practice?
 - Did the Claimant by her conduct contribute to her dismissal?
- 10 6. Neither party made closing submissions.

Findings in Fact

7. The Tribunal made the following findings in fact:–
8. The Respondent runs two chip shops in partnership with his brother Carlo Crolla, namely the Gold Sea, Ferry Road and the Corbie, Davidson Mains,
15 both in Edinburgh. The Claimant has worked ‘on the counter’ for the Respondent’s business intermittently for a number of years. The Claimant’s last period of employment with the Respondent’s business commenced on 24 April 2016 at the Corbie. In May 2017 the Claimant was transferred to work in the Gold Sea. The Claimant was not provided with a written statement of
20 terms and conditions. The Claimant worked 16 hours a week (usually on a Tuesday and a Thursday) and was paid £125.28 gross a week.
9. In April 2014, the Claimant had failed to attend work to perform a number of
25 additional weekend shifts which she had agreed to cover. Her failure to attend was not wholly explained but arose in part because of underlying domestic issues involving her sister. The Claimant had failed to call in and/or arrange temporary cover as was staff practice. Although he was sympathetic to her

circumstances, the Respondent was becoming increasingly frustrated by her poor attendance.

- 5 10. On Saturday 28 April 2018 the Claimant arrived at work late and upset because of domestic issues involving her sister and left work early stating “I can’t handle this, I’m leaving”. The Respondent suspected she was resigning but the Claimant attended work as normal on Tuesday 1 May 2018. The Claimant failed to attend work on Thursday 3 May 2018 because her daughter was unwell.
- 10 11. On Saturday 5 May 2018 the Claimant had a meeting with the Respondent to discuss work related issues including her holiday pay. The Respondent advised that Claimant that she couldn’t simply work when it suited her and that he’d had enough. The meeting became heated and the Claimant was
15 asked to leave the shop. The Respondent advised that he did not want her back in the shop but that he was not sacking her. The Claimant advised that she attend work on Tuesday to work her normal shift. On Monday 7 May 2018 the Respondent called the Claimant instructing her not to attend work
20 tomorrow, which was her normal Tuesday shift, but advising that he was not sacking her. On Wednesday 9 May the Claimant called the shop to ask if she was being allowed to work her normal Thursday shift. The Claimant spoke to the Fryer/Manager who deputised for the Respondent. The Claimant was again advised that she was not to work her shift. The Claimant phoned in
25 again on Sunday 13 May to ask if she was being allowed to work her normal Tuesday shift. The Claimant again spoke to the Fryer/ Manager who advised that she was not to work her shift and that she could discuss matters with the Respondent upon his return from holiday. The Respondent did not contact her to discuss matters.
- 30 12. Although the Claimant received a payslip for the week ending 13 May 2018 she did not receive pay for that week. She last received pay for the week ending 6 May 2018.

13. The Claimant sought advice from ACAS who advised her to put her concerns in writing. The Claimant wrote to the Respondent on 24 May 2018 seeking a meeting to discuss matters. The Respondent did not reply.

5 14. The Claimant contacted the job centre looking for work in mid-June 2018. She was in receipt of jobseeker's allowance from 18 June 2018. The Claimant no longer wanted to work in a chip shop. The Claimant secured work as a care assistance on 29 October 2019 working 24 hours a week at a rate of £7.83 an hour.

10 **Observations on the Evidence**

15. The standard of proof is on balance of probabilities, which means that if the tribunal considers that, on the evidence, the occurrence of the event was more likely than not, then the tribunal is satisfied that the event did occur.

15 16. The Claimant asserted that she commenced employment on 24 April 2016. The Respondent asserted that she commenced employment on 30 May 2016. The Claimant provided evidence that she ceased being in receipt of jobseeker's allowance on 26 April 2016. The Respondent exhibited her first pay slip which referred to her employment starting 30 May 2016. The Respondent gave evidence that he was responsible for the administrative affairs of the business and that not all staff receive payslips either immediately or at all. The Claimant gave evidence, which the Respondent accepted, that when she started back with the Respondent's business she was approached by the Claimant's brother and worked with him at the Corbie and only occasionally with the Respondent. The Claimant gave evidence that the Respondent did not immediately arrange for her to be provided with payslips. Accordingly it is considered likely that the Claimant started work on 24 April 2016.

30 17. The Fryer/Manager initially denied having a call with the Claimant on Wednesday 9 May 2018 but under cross examination he accepted that he couldn't recall whether or not there had been such a discussion and ultimately accepted that there may well have been.

Relevant Law

18. Where an employee has been continuously employed for more than one month, Section 86 of the Employment Rights Act 1996 ('ERA 1996') entitles an employee to 1 week's statutory notice for each whole year of continuous employment up to a maximum of 12 week's statutory notice.
19. Section 95 ERA 1996 provides that an employee is dismissed if the contract under which she is employed is terminated by the employer. "Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who *really* ended the contract of employment?'" **(CA, *Martin v Glynwed Distribution Ltd* [1983] IRLR 198)**. "...whether there has been a dismissal or a voluntary resignation was a question of causation which the tribunal had to answer by an analysis of the facts and, if there be any, of the relevant written material" **(CA, *Sandhu v Jan de Rijk Transport Ltd* [2007] IRLR 519)**. At this stage the burden of proof is upon the Claimant.
20. Section 96 ERA 1996 provides that the effective date of termination is extended to the date that statutory notice of termination would have expired.
21. Section 94 ERA 1996 provides the Claimant with the right not be unfairly dismissed by the Respondent provided that the Claimant has a period of not less than 2 years continuous employment ending with the effective date of termination (Section 108 ERA 1996).
22. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.
23. If the reason for her dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends

whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At this second stage of enquiry the onus of proof is neutral.

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24. If the reason for the Claimant's dismissal relates to the conduct of the employee, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).

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25. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT)*).

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26. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 2017, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that –

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a. *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

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b. *Employers and employees should act consistently*

c. *Employers should carry out any necessary investigations, to establish the facts of the case.*

- d. *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- e. *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- f. *Employers should allow an employee to appeal against any formal decision made*
27. Under Section 111 a complaint for unfair dismissal must be brought within 3 months of the effective date of termination subject to any extension for early conciliation.
28. Where an employee had been unfairly dismissed the tribunal shall make an award of compensation for unfair dismissal consisting of a basic award and a compensatory award. The basic award is calculated by reference to the employee's age and length of service and which may be reduced where the conduct of the employee was such that it would be just and equitable to reduce the amount of the basic award (Section 119 and 122 ERA 1996). The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances and shall be reduced where the Claimant caused or contributed to dismissal (section 123 ERA).
29. If the employee had not been dismissed in the manner and at the time that she was in fact dismissed, but nevertheless would or might have been fairly dismissed, at the same time or at some later date, the tribunal should reduce the amount of the compensatory award to reflect this possibility or probability **(Polkey v A E Dayton Services Ltd [1988] ICR 142).**
30. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 gives the Tribunal power to increase the compensatory award in an unfair dismissal case by up to 25% if it finds that the employer has unreasonably failed to comply with an applicable ACAS Code of Practice.

Discussion and Decision

31. The Respondent instructed the Claimant not to perform her shifts and did not pay her for those shifts. It was the Respondent by his conduct who caused the Claimant's contract to come to an end. It was the Respondent 'who really ended the contract'. Whilst he said he was not sacking her, by 13 May 2018 his actions had spoken louder than his words. Accordingly the Claimant was dismissed on 13 May 2018.
32. The Claimant had more than 2 years continuous service starting 24 April 2015 and ending 13 May 2018. The Claimant was therefore entitled to 2 weeks statutory notice making her effective date of termination 27 May 2018.
33. Since the Claimant had at least 2 years continuous service, she had the right not be unfairly dismissed by the Respondent.
34. The reason for her dismissal was her failure to perform shifts she had agreed to cover which pertains to her conduct and is a potentially fair reason for her dismissal.
35. The Respondent did not adopt any procedural safeguards before making the decision to dismiss. The Respondent did not make any proper enquiries as to the reason for the Claimant's failure to perform the shifts. The Respondent did not inform the Claimant that she was at risk of dismissal and then hold a meeting with her to provide her with an opportunity to put her case before the decision was taken, etc. No employer, including those of comparable size and resources, would have responded in this way. The approach adopted fell outside the band of reasonable responses and the dismissal was accordingly unfair.
36. The Claimant's employment was terminated without notice and she is therefore entitled to her notice pay in sum of £250.56 (2 weeks x £125.28).
37. The Claimant did not wish to be re-instated or re-engagement and sought compensation only.

38. The Claimant was unfairly dismissed and is therefore entitled to a basic award in sum of £250.56 (2 weeks x £125.28) subject any deduction. The Claimant had some control over the events which had contributed to her dismissal including her failure to call in and/or arrange temporary cover. It is therefore considered just and equitable to reduce her basic award by 50% to £125.28.
39. Had a fair procedure been adopted it is highly probable that the Claimant would have been dismissed in any event within the period of her statutory notice. Her periods of absence for unexplained reasons were both significant and frequent. The Claimant no longer wanted to work at a chip shop and was likely to have resigned had she not been dismissed. Accordingly, no compensatory award is made.
40. The Respondent did not comply with any of the provisions of the ACAS Code of Practice. Their failure to do so was unreasonable but it was not wholly unreasonable given their small size and administrative resources. Accordingly, an uplift would have been applied to any compensatory award.
41. The Claimant's conduct materially contributed to and was the cause of her dismissal and any compensatory award would have been reduced accordingly in any event.

Employment Judge: Sutherland

Date of Judgment: 12 December 2018

Entered into the Register: 13 December 2018

And Copied to Parties