



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4120806/2018**

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**Held in Glasgow on 12 December 2018**

**Employment Judge: P O'Donnell**

10 **Mrs C Murray**

**Claimant  
In Person**

**Sainsburys Supermarkets Ltd**

**Respondents  
Represented by:  
Ms L Armstrong -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Employment Tribunal is that the claimant's complaint of breach of contract in respect of the respondent's failure to provide her with the correct notice of her dismissal is well founded. The claimant is entitled to compensation equal to 10 weeks' pay less any wages earned in alternative employment during the 10 weeks following 7 July 2018.

**REASONS**

25 **Introduction**

1. The claimant has brought a complaint of breach of contract in respect of a failure by the respondent to provide her with the correct notice of her dismissal by reason of redundancy. The claim is resisted by the respondent.

30 **Preliminary issues**

2. During the course of the hearing, the Tribunal was taken to minutes of a grievance appeal meeting at which the claimant was represented by an officer

**E.T. Z4 (WR)**

of the trade union, Unite. The Employment Judge asked the claimant if she was a member of Unite and she confirmed that she was.

3. The Employment Judge explained to parties and their agents that his firm provided legal services to Unite and its members. However, he went on to explain that he had carried out a check when he had been allocated this case and that there was no record of his firm acting for the claimant in relation to this or any other matter.
4. Mr Hay on behalf of the respondent and Ms Murray on behalf of the claimant confirmed they had no objection to the Employment Judge continuing to hear the case.

### Evidence

5. The Tribunal heard evidence from the following witnesses:-
- a. The Claimant
  - b. Jonathan Mason, Store Manager
6. There was a bundle of documents produced by the respondent and additional documents produced by the claimant.
7. The Tribunal found the claimant to be a credible and reliable witness who had a good recall of events. Similarly, Mr Mason gave evidence in a honest and reliable way but the difficulty with his evidence was that he was not present at the meeting on 25 June 2018 which came to form the crux of the case and so he could not give direct evidence as to what was said at that meeting; the claimant was the only person who was present at the relevant meeting giving evidence at the Tribunal.
8. There was a note of the meeting but this was in the format of a template or "script" which was to be followed by the manager holding the meeting with any additional comments added as handwritten. It was not a verbatim transcript of what was said.

9. In these circumstances, to the extent that there was any dispute of fact between the claimant and the respondent as to what happened at the meeting on 25 June 2018, the Tribunal preferred the evidence given by the claimant.

5 **Findings in Fact**

10. The Tribunal makes the following relevant findings in fact:-

- a. The claimant commenced employment with the respondent on 9 July 2002.
- b. The claimant had been employed in the role of store supervisor.
- 10 c. In January 2018, the respondent began a consultation process about a restructuring programme that involved the removal of the claimant's post of store supervisor.
- d. New posts were being created including one called "Customer and Trading Manager" also referred to as a "3S" role.
- 15 e. The claimant expressed an interest in taking up the 3S role and was successful in being matched to this role.
- f. The claimant took up this role with effect from 10 June 2018. This was on a four week trial basis.
- g. If the trial was unsuccessful (which included an employee concluding that the job was not one they wished to continue in) then the employee would be treated as being dismissed on grounds of redundancy.
- 20 h. The respondent's initial intention in such circumstances was to dismiss the employee at this stage and make a payment in lieu of notice as part of the severance package being paid. This was set out in a series of Frequently Asked Questions document (FAQ) available on the respondent's intranet.
- 25 i. The respondent's position in relation to this changed due to the fact that they had not had enough people to fill the new roles and they needed those carrying the roles out on a trial basis to work in that role for their notice period in order to be able to function. The FAQ was updated to reflect this but the claimant had not read the updated
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version and the issue with notice pay was not drawn to her attention until she was being dismissed.

- 5 j. By 18 June 2018, the claimant had decided that she did not wish to continue in the 3S role and spoke to her store manager, James Jordan, on this date to informally advise him of this.
- k. As part of the respondent's redundancy process, a meeting was to be held to formally discuss the situation when an employee was not continuing in an alternative role beyond the trial period and to issue notice of redundancy.
- 10 l. This meeting in respect of the claimant took place on 25 June 2018 between her and James Jordan. A copy of the note of this meeting was found at pp85-87 of the respondent's bundle; the document takes the form of a template to be used in every case with a list of points for the manager to cover in the right-hand column of the document. Any  
15 information specific to the individual employee was pre-populated in the document from the respondent's database. The left-hand column was left blank to allow for hand-written notes to be added.
- m. In the box headed "Redundancy", the document states that the claimant's employment was to be terminated by reason of redundancy  
20 on 8 July 2018. The corresponding box in the left-hand column records that the claimant wished to leave on 7 July 2018.
- n. In the event, the Tribunal prefers the claimant's evidence that Mr Jordan gave her the date of 7 July 2018 as the date on which her employment would end.
- 25 o. The claimant had been concerned that she not work beyond the end of the trial period as she had received advice from ACAS that if she worked beyond the end of the trial period then she could lose her right to redundancy pay.
- p. The claimant was issued with a letter dated 25 June 2018 confirming  
30 that her employment would come to an end on 7 July 2018. The letter went on to state that she would not receive any pay in lieu of notice for the remainder of her notice period.
- q. The claimant's employment came to an end on 7 July 2018.

- r. The claimant raised a Fair Treatment complaint about the failure to pay her in lieu of notice. This was heard by another store manager, Mark Taggart, and a subsequent appeal was heard by Jonathan Mason. This complaint was unsuccessful at each stage with both Mr Taggart and Mr Mason relying on the change to the respondent's approach to notice and pay in lieu of notice narrated above as the reason for not providing the claimant with notice or pay in lieu of notice.
- s. The claimant had been looking for alternative employment and on or around 2 July 2018 she received offers of 2 jobs, one to start on 9 July and the other on 29 July 2018. On 3 or 4 July 2018, the claimant accepted the job which started on 9 July.

**Relevant Law**

- 11. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996.
- 12. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.

**Claimant's submissions**

- 13. On behalf of the claimant, Ms Murray submitted that the claimant was entitled to 12 weeks' notice of dismissal but only received 2 weeks' notice.
- 14. She submitted that the claimant had not asked to receive only 2 weeks' notice and that this was the notice given James Jordan at the meeting on 25 June 2018. This was consistent with the claimant's understanding that she could not work past the end of the 4 week trial period or she would lose her entitlement to statutory redundancy pay.
- 15. Ms Murray submitted that the claimant was entitled to an award equivalent to the salary that would have been payable for the remaining 10 weeks of the claimant's notice period. She accepted that the claimant would need to give

credit for any earnings she received in her new job for the 10 week period following the end of the claimant's employment.

16. Ms Murray also drew the following factors to the Tribunal's attention:-

- 5 a. The claimant had been a loyal employee of the respondent for nearly 16 years.
- b. Her previous contract for the store supervisor position contained a provision for 12 weeks' notice.
- c. The claimant had sought advice from ACAS about working beyond the trial period and was concerned to protect her right to redundancy pay.
- 10 d. The change to the FAQ document occurred after the re-structuring when the claimant had already taken up the trial role.

#### **Respondent's submissions**

17. The respondent's agent submitted that the focus of the case was whether there had been an agreement between the parties for early release of the claimant.

18. Mr Hay submitted that there was an agreed termination on shorter notice for the following reasons:-

- 20 a. The conversation was begun by the claimant when she approached James Jordan on 18 June 2018.
- b. The date of 7 July 2018 was proposed by the claimant against the original date of 8 July 2018.
- 25 c. The rationale for why the claimant suggested the date of 7 July is only relevant if the respondent could have known that this reason was incorrect.

19. On the facts of the case, it was submitted that there had been a mutually agreed termination.

30 20. If he was wrong on this then Mr Hay submitted that any award would be one of damages for breach of contract and not a payment due under the contract.

He submitted that 12 weeks' notice was due and 2 weeks' notice had been given. Any earnings obtained during the remainder of any notice period fell to be deducted from any award.

### Decision

5 21. The Tribunal considered that the first question to be determined was when the claimant was given notice of her dismissal. Notice of dismissal is only given when there is an ascertainable date of termination; an intention to dismiss at some unspecified future date or in the some form of speculative scenario is not proper notice of dismissal.

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22. In particular, the Tribunal did not consider that the "Provisional Severance Calculation" given to the claimant in the earlier stages of the consultation process was capable of amounting to proper notice of dismissal as it was no more than an indication of what payments the claimant would receive if her employment was terminated on a particular date. The Tribunal did not consider that this document expressed any intention by the respondent to dismiss the claimant on any date set out in it.

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23. In the Tribunal's view, the claimant was given notice of her dismissal at the meeting with James Jordan on 25 June 2018. The facts of the case can lead to no other conclusion than notice being given on this date.

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24. The second question is how much notice the claimant was due? It was not in dispute between the parties that either under her contract or by statute, the claimant was entitled to 12 weeks' notice. The Tribunal agrees.

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25. The next question is how much notice was the claimant given? In the Tribunal's view, the facts of the case and the evidence presented clearly show that the claimant was given no more than 2 weeks' notice.

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26. There was certainly no evidence put before the Tribunal to suggest that the claimant was ever given 12 weeks' notice and asked to work that notice. The claimant's evidence was that she was given 2 weeks' notice with a termination

date of 7 July 2018 whilst the only direct evidence from the respondent (that is, the note of the meeting of 25 June 2018) also confirmed that the claimant was given 2 week's notice with a termination date of 8 July 2018.

5 27. In these circumstances, to the extent that the respondent sought to argue that the claimant had been given 12 weeks' notice and asked to be released early rather than working that notice period, there was no evidential basis for such an argument.

10 28. Taking the respondent's case at its highest, the most that could be said, in light of the evidence presented to the Tribunal, is that the claimant was given notice that her employment would terminate on 8 July 2018 and she asked to be released one day earlier to which the respondent agreed.

15 29. However, that is academic given the Tribunal's finding that the claimant was given the date of 7 July 2018 as the date of termination by Mr Jordan at the meeting on 25 June 2018. There was no request by the claimant for early release.

20 30. Even if the Tribunal had been persuaded that the claimant had originally been given the date of 8 July as the date of termination then the Tribunal would not have been prepared to find that a request to be released one day early waived the breach of contract arising from the failure to give proper notice.

25 31. The most that could be said in such circumstances is that the claimant was asking to be released early from the notice period actually given to her (2 weeks) and not the period which she should have been given. Such a request would not have absolved the respondent of the initial breach of contract.

30 32. In these circumstances, the Tribunal finds that the claimant was dismissed in breach of contract because the respondent failed to give her the correct notice of her dismissal. The claimant is entitled to damages for breach of contract equivalent to 10 weeks' pay less any earnings she received in her new job during what would have been her notice period.



33. Due to a question as to whether the salary figures available to the Tribunal were gross or net figures, it was not possible for the Tribunal to determine the amount of any damages to be paid by the respondent. Parties are invited to try to agree the figure in light of the Tribunal's findings but if such agreement cannot be reached then they are at liberty to seek a remedies hearing for the Tribunal to determine an issue.

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**Employment Judge: P O'Donnell**  
**Date of Judgment: 10 January 2019**  
**Entered in register: 16 January 2019**  
**and copied to parties**

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