EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4110821/2018

Held in Glasgow on 9,10 and 11 January 2019

5 **Employment Judge: Michelle Sutherland (sitting alone)**

Alison Campbell	**Claimant** **Represented by:** **Mr J O'Donnell, Solicitor**
10 **Café Balfe Limited**	**Respondent** **Represented by:** **Mr D Hay, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

15 The judgement of the Tribunal is that:

1. The Claimant was constructively and unfairly dismissed and the Respondent is ordered to pay to the Claimant a monetary award of £1,700 by way of compensation. The clamant was in receipt of Universal Credit. This is a recoupable benefit and the Recoupment Regulations accordingly apply. The 20 prescribed period is from 14 May 2018 until 11 January 2019. The prescribed element comprises financial loss in that period which amounts to £600. The total monetary award of £1,700 exceeds the prescribed element by £1,100.

2. The Respondent failed to provide the Claimant a written statement of terms and conditions and the Respondent is ordered to pay the Claimant £240.

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REASONS

Introduction

1. The Claimant presented complaints of constructive unfair dismissal and failure to provide a written statement of her employment particulars.

2. The Claimant gave evidence on her own behalf. For the Respondent, evidence was led from: Collette Balfe (Co-owner), Lauren Struthers (Co-owner), Jill Hunter (Supervisor), and Kellyanne Williams (Waitress).

3. The parties lodged a joint set of documents and closing submissions were made on behalf of both parties.

4. The issues to be determined were identified at an earlier Preliminary Hearing to be as follows -

   a. Was the Claimant an employee of the Respondent?
   b. Did the Respondent provide the Claimant with written particulars of employment in accordance with Section 1 of the Employment Rights Act 1996?
   c. Was there an express term in the Claimant's contract that she would work fixed shifts on Wednesday and Friday?
   d. If so, did the respondent breach that term?
   e. If so, was that a fundamental breach?
   f. Was the respondent's response to complaints made by the Claimant a breach of the implied term of trust and confidence?
   g. Did the Claimant resign in response to a fundamental breach of contract?
   h. Did the Claimant resign without delay so as not to constitute affirmation of the contract?
   i. If the claim succeeds how much should be awarded by way of compensation?
   j. Should an award or uplift be made under Section 38 of the Employment Act 2002 and if so, how much?

5. A constructive dismissal may still be fair and accordingly it is also necessary to determine the following issues -

a. Did the Respondent have a potentially fair reason for the breach?
b. Was the dismissal fair in the circumstances?

Findings in Fact

6. The Tribunal made the following findings in fact:–

5 7. The Claimant was employed by the Respondent as a waitress from late April 2013 until her resignation without notice on 14 May 2013. The Respondent has a café, bar and takeaway service which have been running for around 13 years. The Respondent is co-owned by Collette Balfe and Lauren Struthers (nee Balfe) who are sisters. Collette Balfe is largely responsible for the 10 finances and Lauren Struthers is largely responsible for staff. The co-owners also work regularly in the café itself including front of house duties and both receive salaries.

8. The Respondent has around 16 staff. Café Balfe was regarded by the staff as a friendly place to work. The staff and co-owners got on very well and regularly 15 socialised together referring to themselves as the 'Café Balfe Family'. The Claimant very much enjoyed working at Café Balfe but this changed after the meeting on 12 October 2017.

9. With the exception of the Claimant, all waiting staff had floating shifts. Staff had originally about 4 - 5 shifts a week but this was reduced to about 3 shifts 20 because of the financial difficulties experienced by the Respondent during the last few years. The staff rota was prepared weekly by either of the Co-owners and Staff were advised of the rota on a Sunday evening via a WhatsApp group chat. With the exception of the Claimant, who rarely participated, staff regularly engaged in shift swapping once the rota was issued. Whilst staff 25 were required to ask managers to have time off it was never refused. Staff received paid holidays but could elect to have unpaid time off if they had exhausted their holiday entitlement or wished to preserve it.

10. When the business started the Co-owners had little if any experience or knowledge of employing staff or workers. They received some start-up advice 30 and were provided with a template document headed "Written Statement of

Employment" which referred both to employee status and casual worker status. This statement was not issued to any staff until after the termination of the Claimant's employment. The Claimant was not given any written contract or statement regarding the terms of her employment.

5 11. The Claimant was paid an hourly rate equivalent to the National Living Wage. This was paid 1 week in arrears on the following Thursday after deduction of Income Tax and National Insurance. The Claimant was supervised by Jill Hunter. Jill Hunter reported to the Co-owners. The Claimant was told her duties by management (the Co-Owners and Jill Hunter (Supervisor)) and
10 acted under their direction as required. The Claimant was regarded as a very good worker with a very warm personality.

12. In December 2014 the Claimant and the Respondent agreed that the Claimant would work set shifts on a Tuesday and Thursday and two floating shifts on Saturday or Sunday. The Respondent was aware that the Claimant required
15 set shifts to co-coincide with her childcare arrangements and was unable to be flexible and work floating shifts on weekdays.

13. On 29 May 2016 the Claimant's attended a work baby shower arranged by her colleagues. The Claimant was then absent from work on maternity leave from May 2016 to April 2017

20 14. On 27 February 2017 the Claimant texted Lauren Struthers (Co-owner) to advise that she was coming back to work in April and in view of after school care was looking to work set shifts on a Wednesday and Thursday and one floating shift at the weekend. Lauren replied: "those days are good for me the wed fri and a day at weekend". The Respondent did not expressly state
25 whether that arrangement was intended to be temporary or permanent. The Respondent was aware that the Claimant required set shifts to co-coincide with her childcare arrangements and was unable to be flexible and work floating shifts on weekdays. The Claimant worked set shifts on a Wednesday and Friday following her return to work until the termination of her employment
30 unless she had agreed time off.

15. In the period between 9 April 2017 and the termination of her employment, the Rota notes the Claimant as working the following shifts: Tuesday 12 noon to 5pm; Wednesday 12 noon to 5 pm and a shift at the weekend. The only exceptions to this pattern pertained to an earlier start of 11am rather than 12 noon, agreed time off and sickness absence.

16. The Claimant felt that things were not as friendly at work after her return from maternity leave but the Co-owners and other staff who worked with the Claimant did not observe any issue, and were not advised of any issue until the meeting of 16 October 2017. The Claimant and Jill Hunter (Supervisor) remained friends during that period and saw each other socially.

17. In February 2017 Colette Balfe (Co-owner) was complimented on her make up. In response Colette Balfe observed that she needed to make more of an effort now that the Claimant was back (whom she regarded as well presented).

18. On 3 May 2017 the Claimant had a conversation with Jill Hunter (Supervisor) about cosmetic dentistry. Jill Hunter thought the Claimant was suggesting that her teeth needed fixing and was offended. The Claimant apologised immediately. The Claimant also texted Jill Hunter later that day to apologise again, to explain that she didn't mean anything by it, and that she was upset that she had offended her. Jill Hunter replied saying she felt bad she had upset her, that she was fine and that there was no 'bad blood' between them. The issue appeared to have been resolved.

19. On 28 May 2018 the Claimant answered a telephone call from a customer looking for a booking. A fellow waitress Kellyanne Williams took issue with the timing of the booking and expressed this to the Claimant. Jill Hunter (Supervisor) advised Kellyanne that her manner was inappropriate and Kellyanne apologised to the Claimant. The issue appeared to have been resolved.

20. On 6 October 2017 the Claimant answered a telephone call from a customer looking for a booking. Kellyanne Williams (Waitress) took issue with her failure to take a telephone number. The Claimant raised her voice to Kellyanne in

view and hearing of customers in the restaurant instructing her not to speak to her in that manner, noting that she was nearly twice her age and that she found her attitude very disrespectful. Kellyanne was upset by their exchange.

21. On 8 October 2017 the Claimant raised the issue with Jill Hunter (Supervisor) who advised that she couldn't discuss matters because they hadn't yet decided what action they were going to take. On 11 October 2017 a meeting was arranged to discuss matters the next day. The Claimant sought for Lauren Struthers (Co-owner) to attend the meeting but she was absent on maternity leave.

22. On 12 October 2017 a meeting took place between Collette Balfe (Co-owner), Jill Hunter (Supervisor), Kellyanne Williams (Waitress) and the Claimant. The meeting took place at a quiet spot at the back of the café (there being no meeting rooms). The Claimant was advised that it was not appropriate for her to raise her voice to a member of staff and particularly in front of customers. The Claimant apologised and in response Kellyanne also apologised. The issue between them was regarded by them as resolved. The Claimant asked if Kellyanne could leave so that she could raise another issue with Collette Balfe (Co-owner) and Jill Hunter (Supervisor).

23. The Claimant described to Collette Balfe (Co-owner) and Jill Hunter (Supervisor) a couple of incidents involving Colette Balfe which the Claimant said had upset her (e.g. the incident regarding her make-up, above). Colette Balfe apologised for making her feel this way. Colette Balfe was visibly upset by the accusations and retired briefly to the toilet to compose herself. The Claimant also described a couple of incidents involving Jill Hunter which she said had upset and intimidated her (e.g. the incident regarding her braces, above, and when she handed her a bill she might say "watch you don't trip on the way to the table"). Jill explained that she had not intended to make her feel this way and apologised for how she might feel. She explained that this was only intended as humour and social banter. (Jill was regarded as a very professional person with a warm personality. She sometimes engaged in light sarcasm with staff. She did this to gently poke fun at herself for being slow or to staff for being impatient.) Jill said if she didn't like her banter then she

wouldn't engage it in and they would speak only about work-related issues. She asked the Claimant if that was her preference and the Claimant agreed. It was felt by management that the Claimant was being overly sensitive to minor issues which had been taken out of context. It appeared that the Claimant was raising these in response to relative formality of the meeting to discuss her having raised her voice to Kellyanne Williams (Waitress).

24. Following that meeting on 12 October 2017 the Claimant and Jill Hunter (Supervisor) were no longer friends (Jill Hunter deleted the Claimant as a 'friend' on Facebook) and staff and management were aware of this. Following that meeting the Claimant and Jill Hunter (Supervisor) had only a professional relationship and did not engage in any social banter at work. In the period between 12 October 2017 and 16 March 2018 (5 months), 'management' (the Co-owners and Jill Hunter (Supervisor)) did not follow up with the Claimant regarding the issues raised on 12 October 2017 which they understood had been resolved. In that period staff who worked with the Claimant, including management, did not observe any material issues involving or affecting the Claimant at work albeit there were signs that there was some deterioration in their professional relationship. In this period the Claimant did not raise any issues with management regarding their working relationship or otherwise. No issues were raised in writing at any time.

25. Both the Claimant and Jill Hunter attended the Respondent's Christmas night out in December 2017 and participated in Secret Santa together. During the Christmas night out the Claimant approached Jill Hunter with a view to rekindling their friendship but this approach was unsuccessful.

26. On 12 January 2018 Jill Hunter (Supervisor) advised the Claimant via the What's App Team Rota, that her sister, the Claimant's close friend, was in hospital. This was the only other significant social contact between them.

27. On 28 February 2018 the Claimant had difficulty attending work because of prolonged snowy conditions. She was 10-15 minutes late and tried to tell the story of a near miss whilst driving to work which was ignored by Colette Balfe (Co-owner) during a shift handover.

28. The Respondent has been making a loss for the last few years because their footfall has decreased and their fixed costs including rates and utilities have increased. The Respondent has had to reduce staff costs by reducing the numbers of paid shifts worked by staff. In March 2018 the Co-owners met to discuss matters. They agreed that all waiting staff bar the Claimant worked flexibility, that they needed all staff to work flexibly, that the Claimant worked set shifts, that she had recently refused a request from another staff member to work set shifts, and they resolved that the Claimant would require to work flexibility.

29. On 13 March 2018 another waitress Christie advised management that she did not want to work on the same shift alone with Jill Hunter (Supervisor) and the Claimant because the atmosphere between them on the last shift was terrible and that Alison had spent a lot of time in the kitchen. Lauren Struthers (Co-owner) resolved to speak to both the Claimant and Jill Hunter separately and then together to resolve matters now that the deterioration in their relationship was affecting staff and potentially customers.

30. On 16 March 2018 towards the end of the Claimant's shift she was asked to meet with Lauren Struthers (Co-owner) at the rear of the restaurant. Lauren Struthers raised a number of issues with the Claimant. Lauren Struthers instructed the Claimant to telephone in rather than use Whatsapp if she was unable to attend work. The Claimant explained that she was never sick and didn't know. Lauren Struthers criticised the Claimant for being late for a shift but was unable to advise which shift when asked. Lauren Struthers criticised the Claimant for spending too much time in the kitchen. Lauren Struthers criticised the Claimant for not treating Colette Balfe with respect. Lauren Struthers noted that another waitress Christie had advised that she did not want to work on the same shift as Jill Hunter and the Claimant because the atmosphere between them on the last shift was terrible. The Claimant insisted that this atmosphere was not coming from her. Lauren Struthers advised her that she needed to get them both together to resolve this issue. Lauren Struthers then advised the Claimant that the business was no longer able to accommodate her set shifts, which did not suit the needs of the business, and

that everyone needed to be flexible. The Claimant explained that if she didn't have set shifts she couldn't work there anymore. Lauren Struthers raised a number of alternative options which the Claimant declined citing her childcare arrangements. Lauren Struthers then offered to consider the issue of her set shifts further in discussion with her sister (Co-owner) and get back to her as soon as possible. The Claimant was upset by the meeting and was crying. The Claimant was asked if she was ok and if there were any issues she wished to raise. Lauren Struthers did not subsequently discuss the issue of the set shifts with her sister.

31. The Claimant was absent from work from until 17 March 2018 until the termination of her employment. The Claimant did not receive wages during her absence and did not qualify for statutory sick pay. The Claimant secured Fit Notes in respect of her period of absence which stated that because of an acute reaction to stress she was not fit for work. On 22 March 2018 the Claimant removed herself from the Whatsapp Shift Rota.

32. On 12 April 2018 Colette Balfe (Co-owner) texted the Claimant to advise that her current sick line had expired and to ask whether she had another sick line or was going back on the rota. The Claimant replied asking what was happening about her set shifts. Colette Balfe advised that Lauren Struthers (Co-owner) was going to speak to the Claimant next time she was in work.

33. On 19 April 2018 Lauren Struthers (Co-owner) contacted the Claimant asking why she wasn't in work yesterday because her sick line had expired. The Claimant asked if she was still getting her set shifts and Lauren Struthers advised her that she was not discussing matters over the phone. There was no other contact between the Claimant and the Co-owners, and no other attempt to contact her, during her period of stress related absence regarding either set shifts or the reason for her absence or otherwise.

34. In April 2017 the Claimant applied for work with Clarks which was ultimately unsuccessful.

35. On 30 April 2018 the Claimant's solicitor wrote to the Respondent advising that Jill Hunter resolved "not to speak to her at all" on 12 October 2017 and

that this has been implemented, that she raised grievances which were not resolved and that there was a unilateral proposal to breach her entitlement to set shifts. (Its without prejudice status was waived.)

36. On 9 May 2018 the Respondent replied to the Claimant's solicitor stating: that it was agreed between the Claimant and Jill Hunter (Supervisor) that they would not speak other than on work related matters; that the Claimant was given set shifts on a temporary basis; that at the meeting they were considering changing her shifts and that they had agreed to look at it again and revert to her; and that her shift pattern has not been changed.

37. On 14 May 2018 the Claimant intimated her resignation with immediate effect. The Her stated reasons were that her supervisor, Jill Hunter, had refused to talk to her since 12 October 2017 and her being told on 16 March 2018 that she was no longer allowed to work set shifts.

38. The Claimant was age 38 at the termination date. The Claimant has been in receipt of Universal Credit since the termination of her employment.

39. Towards the end of May 2017 the Claimant applied for work as a Sales Advisor at New Look, as a Supervisor at Shoezone, as a Waitress at Tail O' the Bank and as a No 7 Advisor at Boots. Her weekly earnings with New Look are in excess of her weekly earnings with the Respondent.

Observations on the evidence

40. The Claimant asserted that at the meeting on 12 October 2017 Jill Hunter had said that if you don't like how I'm speaking to you then I just won't speak to you and that the Claimant had understood this as an intention not to speak to her at all. Collette Balfe and Jill Hunter both asserted that she was offering not to engage in social banter, and they would speak only about work-related issues, if that was the Claimant's preference. The Claimant and Jill Hunter required to work closely together and it was not reasonably practicable for them not to speak at all whilst serving customers, etc. It is considered unlikely that Jill Hunter would have offered or insisted upon not speaking to her at all. It is also considered unlikely that the Claimant would have understood what

was said as an insistence that she would not speak to her at all. It is considered more likely that Jill Hunter offered not to engage in social banter and to speak only about work-related issues.

41. The Respondent asserted that the working relationship between the Claimant and Jill Hunter (Supervisor) remained professional until the shift on 13 March 2018. The Claimant asserted that their professional relationship had broken down following the meeting of 12 October 2017. In the period between 12 October 2017 and 13 March 2018 the Claimant did not raise any issues with management regarding their working relationship or otherwise. It is considered unlikely that another waitress Christie would have insisted upon not working with them only on the basis of one poor shift. It is considered unlikely that the Co-owners would have taken that request seriously only on the basis of one poor shift. It is therefore considered likely that there were earlier signs that there was some deterioration in their professional relationship.

The Claimant's submissions

42. The Claimant provided detailed written submissions which in summary were as follows –

a. The Claimant was an employee of the Respondent – the test is multifactorial and the relationship met the irreducible minimum of control, mutuality of obligation and personal performance. The Respondent supervised and controlled her waitressing. There was an obligation on the Respondent to offer work and on the Claimant to accept and personally perform that work.
b. The Respondent did not provide the Claimant with a written statement of particulars.
c. The exchange of texts amounted to an express agreement to provide set shifts on a Wednesday and Friday. The Claimant worked every Wednesday and Friday unless she was absent on holiday.
d. The conversation between the Claimant and Lauren Strutthers (Co-owner) amounted to a repudiatory breach by way of a clear indication

that the Claimant would no longer be permitted to work set shifts and that breach was not removed or rectified prior to resignation.

e. Removal of the right to set shifts amounted to a fundamental breach

f. The Respondent's response to the Claimant's complaints by way of their failure to take seriously, investigate and address these complaints amounted to a breach of the implied term of trust and confidence

g. The breaches were an effective cause of the Claimant's resignation having played a part in her reasons for her leaving.

h. The Claimant resigned without delay following the breaches.

The Respondent's submissions

43. The Respondent provided detailed written submissions which in summary were as follows –

a. The Claimant was not an employee of the Respondent – whilst the relationship met the irreducible minimum of control and personal performance it did not meet the irreducible minimum of mutuality of obligation. There was no obligation on the Respondent to offer work and on the Claimant to accept and perform that work. The Claimant was merely a 'regular casual' given preference in the rota over other casuals. That this was for an extended period was not determinative of employment status. The onus is upon the Claimant to establish employment status. The flexibility to swap shifts and to take unpaid and paid leave which was never refused was inconsistent with mutuality of obligation.

b. The language in the texts were not apt to construe a contractual obligation

c. The conversation between the Claimant and Lauren Struthers (Co-owner) did not amount to a repudiatory breach but rather a consultation and a negotiation regarding her shifts.

d. Whether there is a breach requires to be construed objectively rather than subjectively and without application of the band of reasonable responses.

e. It was accepted that a unilateral removal of any right to set shifts would amount to a fundamental breach
f. A breakdown in a friendship with a work supervisor falls to be distinguished from the breakdown in their working relationship which had not arisen.
g. The reason for the Claimant's resignation was the breakdown in her friendship.

Decision and discussion

44. The Claimant had more than two years' continuous employment and accordingly had the right not to be unfairly dismissed by the Respondent, by virtue of section 94 of the Employment Rights Act 1996 ('ERA 1996').

45. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).

46. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***).

47. The breach must be "a significant breach going to the root of the contract" (***Western Excavating***). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term of trust and confidence.

Was the Claimant an employee of the Respondent?

48. S.230(1) ERA defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. S.230(2) provides that a contract of employment means 'a

contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

49. Determination of employment status is multi-factorial and no single test is determinative of the issue. However the irreducible minimum for a contract of employment must be met namely personal service, control and mutuality of obligation. Furthermore, the other relevant factors must be consistent with a contract of employment (***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Carmichael v National Power plc [2000] IRLR 43, HL***). The tribunal must paint a picture from the accumulation of detail and then stand back to evaluate the overall effect (***Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA***).

50. It was accepted that, notwithstanding the very limited power of substitution (namely the power to swap shifts with other waitresses on the rota), the Claimant was providing personal service, namely her own work and skill as a waitress. It was also accepted that the Respondent had sufficient control over the way in which the waitressing duties were performed by the Claimant (the Claimant was told her duties by management and acted under their direction, she reported to a supervisor and was reprimanded by management if she did not perform those duties in the manner expected).

51. Beyond the brief exchange of texts there were no written contractual terms. Parties did not intend all the terms of their contract to be contained within those texts. Accordingly "the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct" (***Carmichael***).

52. From December 2014 until March 2018 the Claimant's pattern of work on a weekday was on specific days. From December 2014 until May 2016 she worked Tuesdays and Thursdays. Towards the end of her maternity leave the parties agreed via text that the Claimant would work three shifts a week, one fixed shift on a Wednesday and Thursday and one floating shift at the weekend. From April 2017 until March 2018 the Claimant worked Wednesdays and Fridays. The limited exceptions to the Claimant's pattern of

work pertained to agreed time off or sick leave. The Claimant was expected to seek permission for that leave and did so albeit that permission was never refused. The Respondent regarded the arrangement with the Claimant as 'not flexible' – that was the issue they had and what they resolved to change. The Claimant was expected to provide sick lines when she was unfit for work. The Claimant was expected to work that pattern of work when her sick line expired even though the rota had not been intimated to her (it was known to the Respondent that she had removed herself from the Whatsapp Rota). Prior to the alleged anticipatory breach there was no evidence that the Respondent declined to offer that pattern of work or that the Claimant refused to perform it. The Respondent was obliged to offer that pattern of work and the Claimant was obliged to accept it. That was the true intention of the parties determined objectively. There was accordingly sufficient mutuality of obligation between the parties.

53. As regards other relevant factors beyond personal service, control, and mutuality the following facts are considered relevant –

a. The Claimant worked 4 days a week for prior to maternity leave and 3 days a week after maternity leave. The only exception pertained to agreed time off or sick leave. Unlike the other waitresses, the Claimant rarely exercised the power to swap shifts with other waitresses on the rota.
b. It was expressly agreed by text that the Claimant would work "Wednesday and Friday and a day at weekend" after her maternity leave and this reflected her pattern of work.
c. The Claimant was paid an agreed hourly rate. The Claimant did not bear any financial risk and her wage was not determined by that day's takings and/or tips.
d. The Claimant was required to attend meetings to discuss her conduct at work and the manner in which she undertook her duties and she was invited to staff nights out. There was a degree of integration into the Respondent's business.
e. The Claimant was paid statutory holidays but not sick pay.

f. The Claimant was paid under deduction of tax and NI.

54. These other relevant factors are consistent with their being a contract of service.

55. Considering the details of the relationship between the Claimant and Respondent and then taking a step back and looking at the overall picture a contract of service i.e. employment emerges between the Respondent and the Claimant.

Did the Respondent provide the Claimant with written particulars of employment in accordance with Section 1 of the Employment Rights Act 1996?

56. The Respondent did not provide the Claimant with any written particulars of employment bar the exchange of texts and therefore did not provide any in accordance with Section 1 of the Employment Rights Act 1996.

Was there an express term in the Claimant's contract that she would work fixed shifts on Wednesday and Friday?

57. Beyond the brief exchange of texts there were no written contractual terms. Parties did not intend all the terms of their contract to be contained within those texts. Accordingly "the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct" (***Carmichael***).

58. From December 2014 until March 2018 the Claimant's pattern of work on a weekday was on specific days. From December 2014 until May 2016 she worked Tuesdays and Thursdays. Towards the end of her maternity leave it was expressly agreed by text that the Claimant would work "Wednesday and Friday and a day at weekend" after her maternity leave and this reflected her pattern of work. From April 2017 until March 2018 the Claimant worked Wednesdays and Fridays and one floating shift at the weekend. The limited exceptions to this pertained to agreed time off or sick leave. The Claimant was expected to seek permission for that leave and did so albeit that permission was never refused. The Respondent regarded the arrangement

with the Claimant as 'not flexible' (that was the issue they had and what they resolved to change). The Claimant was expected to provide sick lines when she was unfit for work. The Claimant was expected to work that pattern of work when her sick line expired even though the rota had not been intimated to her (it was known to the Respondent that she had removed herself from the Whatsapp Rota). Prior to the alleged anticipatory breach there was no evidence that the Respondent declined to offer that pattern of work or that the Claimant refused to perform it. The Respondent was obliged to offer that pattern of work and the Claimant was obliged to accept it. That was the true intention of the parties determined objectively. There was therefore an express term in the Claimant's contract that she would work fixed shifts on Wednesday and Friday.

If so, did the respondent breach that term?

59. The breach may be an actual breach or an anticipatory breach – a clear and unconditional intention not to perform an essential term of the contract. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach.

60. As regards anticipatory breach: "whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract" (***Tullet Prebon plc v BGC Brokers LP 2011 IRLR 420***) However, "all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person" (***Tullet Prebon***).

61. Where there is an anticipatory breach of contract, the employer may withdraw the threatened breach in advance of communication of the acceptance of the

repudiation by way of resignation (***Harrison v Norwest Holst Group Administration Ltd [1985] IRLR 240, [1985] ICR 668, CA***).

62. On 16 March 2018 the Claimant's met with Lauren Struthers (Co-owner) who criticised the Claimant regarding a number of issues. Lauren Struthers (Co-owner) then advised the Claimant that the business was no longer able to accommodate her set shifts which did not suit the needs of the business and that everyone needed to be flexible. The Respondent was aware that the Claimant required set shifts to co-coincide with her childcare arrangements and was unable to be flexible. The Claimant explained that if she didn't have set shifts she couldn't work there anymore. Lauren Struthers raised a number of alternative options which the Claimant declined citing her childcare arrangements. Lauren Struthers then offered to consider the issue of her set shifts further in discussion with her sister (Co-owner) and get back to her as soon as possible. Neither Lauren Struthers or her sister (both Co-owners) subsequently discussed the issue of set shifts with the Claimant despite having opportunity to do so in the 2 month period arising between the meeting on 16 March 2018 and her resignation on 14 May 2018. In that period the Claimant twice asked what was happening about her set shifts but the Co-owners refused to discussed the issue with her pending her return to work. In response to her solicitor's letter the Respondent advised that she was "given set shifts on a temporary basis", that at the meeting they were considering changing her shifts, that they had agreed to look at it again and revert to her, and that her shift pattern has not been changed.

63. Objectively considered a reasonable person in the position of the Claimant would have understood that she was no longer getting set shifts. Lauren Struthers (Co-owner) advised that they could no longer accommodate her set shifts despite being aware the Claimant required set shifts to co-coincide with her childcare arrangements. This was an anticipatory breach in light of her contractual right to set shifts. Lauren Struthers (Co-owner) then undertook to reconsider matters and get back to her as soon as possible but she did not do so. Further their response to the solicitor's letter asserted that she had only been given set shifts on a "temporary basis". The Respondent did not advise

the Claimant that they had changed their mind and that she was to continue to receive set shifts. Objectively considered a reasonable person in the position of the Claimant would have understood that the anticipatory breach had not been withdrawn prior to her resignation.

5 **If so, was that a fundamental breach?**

64. A unilateral change to a shift pattern may amount to a fundamental breach where it is know that an employee is unable to comply because of domestic commitments **(*Greenaway Harrison Ltd v Wiles 1994 IRLR 380, EAT*).**

65. The removal of her entitlement to set shifts was a fundamental breach in the
10 circumstances. The Respondent was aware that the Claimant required set shifts to co-coincide with her childcare arrangements and was unable to be flexible and work floating shifts on weekdays.

Was the respondent's response to complaints made by the Claimant a breach of the implied term of trust and confidence?

15 66. The implied term of trust and confidence is that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties **(*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).**

20 67. Whether there is a breach of the implied term of trust and confidence is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer
25 acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…" **(*Leeds Dental Team Ltd v Rose* [2014] IRLR 8*, EAT*)**

68. The Claimant asserts that the Respondent's response to her complaints, by way of their failure to take seriously, investigate and address these complaints, amounted to a breach of the implied term of trust and confidence.

69. The issues raised by the Claimant in the meeting on 12 October 2017 were relatively minor, few and historic. It appeared that the Claimant was raising these issues in response to the relative formality of the meeting to discuss her having raised her voice to Kellyanne Williams (Waitress). Management discussed her complaints, explained that they didn't mean anything by it, and apologised if their behaviour had made her feel that way. Jill Hunter (Supervisor) explained that this was only intended as social banter and that she wouldn't engage in it if that was the Claimant's preference to which the Claimant agreed.

70. In the period between 12 October 2017 and 16 March 2018 (5 months), the Claimant and Jill Hunter (Supervisor) had only a professional relationship and no longer engaged in any social banter at work. 'Management' (the Co-owners and Jill Hunter (Supervisor)) did not follow up with the Claimant regarding the issues raised on 12 October 2017 because they understood that these issues had been resolved by the agreement not to engage in social banter at work. In that period staff who worked with the Claimant, including management, did not observe any material issues involving or affecting the Claimant at work (albeit there were signs that there was some deterioration in their professional relationship). In this period the Claimant did not raise any issues with management regarding their working relationship or otherwise. No issues were raised in writing at any time.

71. The fact that the Claimant and Jill Hunter (Supervisor) were no longer friends and management were aware of this was not relevant provided that there were no material issues with their professional relationship.

72. The Respondent's response to the issues raised by the Claimant was proportionate to the nature of these issues, and the manner in which they were raised by the Claimant, and was not in breach of the implied terms of trust and confidence.

Did the Claimant resign in response to a fundamental breach of contract?

73. The breach must be a factor (i.e. have "played a part") in an employee's decision to resign (***Wright v North Ayrshire Council 2014 IRLR 4, EAT***).

74. The Respondent submits that the reason for the Claimant's resignation was the breakdown in her friendship with Jill Hunter but that had occurred following the meeting of 12 October 2017 (some 7 months prior to her resignation).

75. In response to the statement on 16 March 2018 that the business was no longer able to accommodate her set shifts and that everyone needed to be flexible, the Claimant explained that if she didn't have set shifts she couldn't work there anymore. She was upset at the meeting and was crying.

76. The Claimant was absent from work from 17 March 2018 (immediately after the meeting) until the termination of her employment. The Claimant secured Fit Notes in respect of her period of absence which stated that she had suffered an acute reaction to stress. The only material communication from the Claimant during her absence was to ask what was happening about her set shifts.

77. In April 2017 the Claimant applied for work with Clarks which was ultimately unsuccessful.

78. On 30 April 2018 the Claimant's solicitor wrote to the Respondent raising issues with unresolved grievances, her supervisor's refusal to speak to her and proposed breach of her entitlement to set shifts.

79. On 14 May 2018 the Claimant intimated her resignation with immediate effect. Her stated reasons were that her supervisor, Jill Hunter, had refused to talk to her since 12 October 2017 and her being told on 16 March 2018 that she was no longer allowed to work set shifts.

80. Accordingly the breach was a material cause of the Claimant's decision to resign.

Did the Claimant resign without delay so as not to constitute affirmation of the contract?

81. The employee "must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged" per Lord Denning, _Western Excavating_. However "the matter is not one of time in isolation" _Chindove v William Morrisons Supermarket plc, UKEAT/0201/13/BA_:

> *"He will do so by conduct; generally by continuing to work in the job... He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. … deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force."*

82. Even where there is a breach, the employee may choose to give the employer the opportunity to remedy it. The employee will not then be prejudiced if the employee delays resigning until the employer's response is known. ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823***: "if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation".

83. On 16 March 2018 Lauren Struthers (Co-owner) advised the Claimant that the business was no longer able to accommodate her set shifts and that everyone needed to be flexible. The Claimant explained that if she didn't have set shifts she couldn't work there anymore. Lauren Struthers offered to consider the issue of her set shifts further in discussion with her sister (Co-owner) and get back to her as soon as possible.

84. In the period between 16 March 2018 and her resignation on 14 May 2018 the Clamant was off sick and was not in receipt of sick pay or other wages.

85. In that period neither Lauren Struthers or her sister (both Co-owners) contacted the Claimant to discuss the issue of set shifts despite having opportunity to do so. On 12 April 2018 the Claimant asked Colette Balfe (Co-owner) what was happening about her set shifts. On 19 April 2018 the Claimant asked Lauren Struthers (Co-owner) if she was still getting her set shifts. Both co-owners refused to discuss the issue with her pending her return to work. Accordingly by 19 April 2018 the Respondent had clarified that they were not withdrawing the anticipatory breach (despite an earlier indication that they might). The Claimant resigned without notice on 14 May 2018.

86. There was therefore no conduct on the part of the Claimant consistent with affirmation of the breach.

Did the Respondent have a potentially fair reason for the breach?

87. Where an employee has been constructively dismissed the employer must show the reason for their conduct which amounted to a repudiatory breach (***Berriman v Delabole Slate Ltd [1985] ICR 546, [1985] IRLR 305*, CA**). The stated reason for the conduct was a desire to change the Claimant's set hours so that all staff worked flexibly. This reason may amount to some other substantial reason and is therefore potentially fair.

Was the dismissal fair in the circumstances?

88. If the reason for the 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, 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 stage of enquiry, the onus of proof is neutral.

89. 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)***).

90. There had been no prior explanation given to the Claimant about the reason for a change to her set shifts and no prior consultation with a view to reaching agreement about that change. The Claimant had been working set shifts for years and was unclear why this no longer suited the needs of the business. No employer acting reasonably would have taken the decision to impose the change without such prior explanation and consultation. The way in which the Respondent sought to achieve the change was not within the band of

reasonable responses. The dismissal of the Claimant was unfair in the circumstances.

If the claim succeeds how much should be awarded by way of compensation?

91. The remedy sought is compensation only and not re-instatement or re-engagement. In terms of Section 118 of the ERA an award of compensation consists of a basic and compensatory award.

92. The basic award is calculated with reference to Section 119 of the ERA. The Claimant was age 38 and had 5 years continuous service as at the EDT. It was agreed that the sum of £120 should be used for a week's pay (both net and gross). The claimant is therefore entitled to a basic award of 5 weeks' pay at £120 namely £600.

93. Section 123(1) of the ERA provides that the compensatory award is to be "such amount as the tribunal considers to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". Given that the Claimant secured higher paid alternative employment within 5 weeks of the EDT it is just equitable that her losses should be capped accordingly. Her loss of earnings for the 5 week period amounts to £600 (£120 x 5 weeks).

94. Loss of statutory rights was agreed at £500.

95. The total monetary award is therefore £1,700 (£600 + £600 + 500).

96. The clamant was in receipt of Universal Credit. This is a recoupable benefit and the Recoupment Regulations accordingly apply. The prescribed period is from 14 May 2018 until 11 January 2019. The prescribed element comprises financial loss in that period which amount to £600. The total monetary award of £1,700 exceeds the prescribed element by £1,100 and the amount of £1,100 is payable immediately. The prescribed element of £600 is subject to the Recoupment Regulations and should not be paid by the Respondent until the position regarding recoupment is advised by the relevant department.

Should an award or uplift be made under Section 38 of the Employment Act 2002 and if so, how much?

97. The tribunal must award the 'minimum amount' of two weeks' pay and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay. No contract was ever provided to the Claimant, or to any other employee, during the period of the Claimant's employment. The Respondent is a small employer with limited knowledge or experience and has since issued such statements to all employees. It is not considered just and equitable to award higher than the minimum of two weeks' pay, namely £240.

Employment Judge: Michelle Sutherland
Date of Judgment: 25 January 2019
Entered in register : 29 January 2019
and copied to parties