



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Ordish

**Respondent:** Forest Lodge Edu-Therapy Centre Limited

**Heard at:** Nottingham      **On:** Monday 1 April 2019

**Before:** Employment Judge P Britton (sitting alone)

## Representatives

**Claimant:** Mr E Brown, NASUWT      **Respondent:** Mr P Maratos,  
**Consultant**

## JUDGMENT

1. The claim for unfair dismissal succeeds in that the Claimant was procedurally unfairly dismissed. However as she wholly contributed to her dismissal, no award for basic award or compensation is made.
2. The claim for breach of contract (failure to pay notice pay) is dismissed.
3. As to the failure to provide written particulars of the employment, I make no award.

## REASONS

### Introduction

1. The claim (ET1) was presented to the Tribunal on 26 October 2018. It is a claim for unfair dismissal and breach of contract, namely failure to pay notice pay. The issues were clearly set out. In summary the Claimant was employed for my purposes today between 11 April 2016 and 13 June 2018 when she was summarily dismissed. An issue before me in terms of the response (ET3) had initially been as to whether in fact she was an employee. It has been conceded early on today by the Respondent that she was an employee at all material times.

2. Otherwise what the response pleaded and for reasons which again were clearly set out was that this was a fair dismissal. Furthermore, as the conduct of the Claimant was repudiatory she was therefore not entitled to notice pay.

3. To determine the issues I have had before me a joint bundle which has been added to during the course of today's proceedings. Of most importance, for reasons which will become clear it means that I now have the text by which the Respondent's principle director, Karen Hale, dismissed the Claimant on 13 June 2018 and which clearly sets out the reason why. Essentially it was that the Claimant had with Helen Tilly, who had recently left the employment of the Respondent, set up a company known as Cape Cabin Limited in competition. Thus, as this constituted a conflict of interest in terms of the Claimant's duty of fidelity to the Respondent; hence her dismissal.

4. I have heard sworn evidence. First for the Respondent from Karen Hale who is the owner of the Respondent. Then from the Claimant. In each case evidence in chief was by a written witness statement. The Claimant also put in statements from Mr and Mrs Southern. The Respondent did likewise viz Jane and Jamie Johnson. None of these witnesses gave evidence before me. I have taken into account those statements but observe that as none have been called it means there evidence has not been tested.

### **Findings of fact**

5. The Respondent is in the business of providing educational, behavioural, support services. It is a very small business based at a large house known as Forest Lodge. There is no doubt from reading the bundle before me that it has struggled financially since its inception. It is very much dependent in terms of income upon being provided with pupils by schools and education authorities and which is restricted in these cash strapped times. In that sense and dealing in passing with the original issue of self-employed or not, the Claimant and her colleagues, a small team of about 5 workers, including at the material time Helen Tilly who was another Educational Needs teacher, were promised on a repeated basis that their employment situation would be regularised but it never happened. I will accept that the Respondent's reason was that she was loathe to commit to the obligations of being an employer because of the financial restrictions to which I have referred. If I had been required to deal with the issue of self employed or not, then applying the well-known jurisprudence I would have found that they were employees wholly engaged working as teachers or other support staff for the purposes of the Respondent. As it is the Respondent conceded that issue

6. What that means when I come to sketch out the material issues, is that I can conclude from the documentation that this lack of commitment on the employment front by the Respondent caused considerable disquiet with the employees; and in particular it is obvious to me that the Claimant increasingly was unhappy with the situation and for what it matters she was perfectly entitled to so be disquieted. I can detect that the same may well have applied to Helen Tilly.

7. There has been considerable confusion about events on 26 April 2018 or conversely the weekend circa 29 May 2018. What I can deduce from the muddled evidence before me essentially is as follows and in that sense the Respondent via Ms hale is not convincing. It is said that the Claimant improperly visited the premises on 26 April. This would be in defiance of the clear e-mail to the employees issued by Ms Hale on 11 April 2018, see Bp 61. She was concerned to have found the premises unlocked. I can understand entirely why she would be so concerned given first that Forest Lodge would obviously need to be secure in terms of the protection of property also because it contained confidential files on

children being assisted by the Respondent. Accordingly she made plain that from then on:

*“no staff are permitted to enter Forest Lodge premises out of hours or holidays without my knowledge or consent. You can text me to say you are gaining entry and then sign into the book with the date and time of your entry and exit. This protects everyone. Should anyone enter without my consent then it will be deemed trespass and will result in instant dismissal”.*

8. And so she relies upon the statement signed by 5 employees<sup>1</sup> to the effect that the Claimant is seen to have gone onto the premises in defiance of this edict:

*“We confirm that we watch CCTV footage of Mrs Jennifer Ordish trying to enter Forest Lodge premises on the evening of Sunday 29 April at 9:28 pm. She can clearly be seen clutching files. She arrived at the door; tried to open it; looked perplexed and then walked away”.*

9. Now I will accept the Claimant is actually very conscientious, and despite the fact that Ms Hale said she had had disciplinary concerns about her previously I have no evidence to that effect at all. It flies in the face of the very amicable texts between them until we get to 13 June. And so I will accept that the reason she would go to the premises was in order to bring back files she had been working on in order that they were back in school before for instance the start of a new term. However, as she was never interviewed about this matter because she was summarily dismissed it is a red herring. This is because that weekend including 29 April I am wholly satisfied she was with her husband going back and forth to Exeter to take their son back to the university and that she would not have gone onto the premises on that night. And if it was such a concern, then how is it that Ms Hale never discussed it with her at the material time?

10. But what I also find is that on or about the last weekend of May, which coincided with the bank holiday on the Monday, that on the CCTV was seen Ms Tindall (HT) in the premises. The CCTV unfortunately wasn't preserved. What was she doing there? On the evidence which I otherwise have she was emptying her room of her own possessions and her teaching aids. She also took away her certification which had been on the wall. When challenged by Ms Hale on this matter, and the Claimant has not called HT to contradict, she gave no explanation to contradict that she was obviously about working elsewhere but instead resigned.

11. As to the Claimant that weekend, again it is muddled. Suffice it to say that I am not persuaded that the Claimant was herself doing anything untoward, and because I saw during the course of the hearing that she was seeking permission to come to the premises on Monday 30 May. She wanted to clear out old files. It was left that Ms Hale, who would be at the premises but was first dealing with a pupil would see the Claimant at about 1:30pm. She did so and let the Claimant in. Did the Claimant take away anything untoward that weekend? I have no evidence to that effect at all. And so if this case was based upon the Claimant being dismissed for being on those premises for no good reason in breach of the edict of 11 April, then I would have had no hesitation in finding that such a dismissal was unfair. Why does it matter? Because the reasoning which I am now going to come to and which I have touched upon and has to do with trading in competition or

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<sup>1</sup> See add documents from the Respondent in the supplemental bundle headed “ Statement Bundle Index”.

setting about doing so, was elaborated upon when the Respondent replied to the letter before action from NASUWT which is dated 29 June 2018. That reply went into some detail about these issues to do with CCTV footage and very serious allegations are included in there. Effectively seeing the Claimant as complicit in what was thought to be deliberate vandalization of part of the premises by HT, although the latter was never seen or interviewed about it.

12. However that is only one reason for this dismissal. The fundamental one has to do with what I shall now turn to. HT, and for reasons I shall come to the Claimant, as at 4 June 2018 had set up a limited company which is Cape Cabin Limited. They were listed as its directors at Companies House. They were the sole shareholders. The fundamental is that this business was listed as an educational support service. It goes further, and because around the time that HT resigned she had a discussion with the Claimant to the effect that she was thinking of setting up a business. It is essential that I touch upon what it was going to do. It brings back also into the equation Ms Hale. There is another educational support business within a short distance of the Respondent business known as Chestnut Woodland Forest Centre. The proprietor is Samantha Pope. Her business provides students with the opportunity to undertake "survival skills", specific reference being made to "den building"; and although it works mainly with secondary school children it is also the type of place that could provide facilities for primary school children. I detect, and no more than that, that this centre also deals with children with behavioural problems. Ms Hale had made plain to her staff before we get to the dismissal in this case, and on this issue the Claimant does not disagree, that it made sense if they could develop the possibility of using the facilities at Chestnut in order that they could enhance the skills of their own pupils needing behavioural support. To that end she had already discussed matters with Samantha Pope. She was aware that there was a new cabin under construction in the grounds which could be used as a teaching centre for children being assisted by the Respondent. She made that plain as an aspiration. So what was HT doing and what was she telling the Claimant? First, even if HT was unhappy at the uncertain situation with the Respondent, going into the building and taking away her personal possessions and teaching aids cannot be other than seen as a preparatory act to go into competition. She was burning her boats by doing so in terms of the Respondent and being equivocal as to what it is she was about doing. Second, the Claimant supported HT. Learning that the latter was going to set up her business based at Chestnut with financial help from her parents of £1,000, but otherwise needing to sell her car to match that investment as start up capital, the Claimant decided that she would put in £1,000. This was not simply altruistic<sup>2</sup> despite what she has told me so often today. I so find because the two of them went to the effort of incorporating this business, which the Claimant would not have needed to do if the investment was simply a goodwill gesture.

13. It is said by the Claimant that the business was primarily only going to be working with primary school children. But it still conflicts with the aspirations of Ms Hale and the Respondent. Why does it matter? That is because I have before me a document entitled "Staff Code of Conduct" commencing at Bp 24. Paragraph 1.2 could not be clearer:

*"Act in the best interest of Forest Lodge at all times. Accordingly you must not without the written or verbal consent of Karen Hale undertake any employment or*

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<sup>2</sup> The Claimant says HT needed her car given two children of school age one with special needs.

*engagement which might interfere with the performance of your duties or **conflict with the interests of Forest Lodge**<sup>3</sup>".*

14. That document is not signed by the Claimant. I have however the statement from Jane Johnson, the Deputy Manager. In this she states:

*"can confirm that Mrs Jennifer Ordish signed a copy of the Staff Code of Conduct. This was later shredded in line with our GDPR policy".*

15. As to why, as I understand it the Claimant having requested her "personal file" post her dismissal, Ms Hale directed Ms Johnson to take out of it anything bearing the business logo, given the competition issue. Unfortunately Jane Johnson must have misunderstood her because having taken said documents out of the file these were shredded including the code of conduct which bears the logo. But was the Claimant aware of this document? Was she at least taken to it in her employment? Now on this issue the Claimant was equivocal. Words such as "I don't recollect" or "I might have", then later on "I don't think I would have done but I don't recollect". On the other hand Ms Hale was quite clear that the Claimant was taken to the document and required to sign it, the original thus being placed on the file and indeed I heard that all the other employees similarly signed. I conclude on this issue that the Claimant doesn't persuade me, and here I am dealing with in particular the breach of contract issue where it is an objective test, not a range of reasonable responses test. It is for me to decide on the balance of probabilities who I believe. And given the zealousness with which Ms Hale ran the business, on occasion somewhat dictatorial ie the 11 April memoranda to which I have referred, I am persuaded that it is inconceivable that the Claimant would not have been made aware of this document and this all important clause.

16. Even if she hadn't been, there is of course the implied term of duty of fidelity to act honourably whilst in the service of the employer and not to engage in competition or acts preparatory thereto which show a clear evinced intention to compete. What the employee should do in those circumstances is of course be honest and open with the employer and see what the employer thinks about the proposal. Sometimes it can actually lead to a collaboration. But none of that happened.

17. As it is Ms Hale found out from a local feeder school. The special needs teacher contacted her with words to the effect "*did you know that 2 of your employees have set up a business in competition and are already making overtures to us as to whether or not we have children who can be assisted by them*". This finds corroboration as to HT at Bp 113. And that this was a business in competition cannot be but clearer from inter alia the mission statement at Bp 110 and the fact that the Claimant appears prominently on the website (Bp 111). Finally it was the Claimant who penned, being the authoritative Director because of her lengthy experience, her name with the date being June 2018 to the various documents relating to Cape Cabin to be found commencing at Bp 102.

18. What it means is that once Ms Hale found all this out she dismissed the Claimant on 13 June. First was this in breach of contract; by that I mean the common law contractual provisions that apply to the world of employment? Basically a breach of contract will occur to the extent that it means there is no

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<sup>3</sup> My emphasis.

entitlement to notice pay, if the employee has acted without reasonable and proper cause in a manner which is repudiatory and fundamentally undermines trust and confidence. The Claimant may have been naive about what was happening here. It may well be that she herself was going to see out the term working for the Respondent whilst HT went about setting up the business; but that doesn't square with the Claimant clearly starting to take an active role which is preparatory at the very least ie participating in the incorporation of Cape and then becoming one of the original subscribers in terms of the shareholdings and a Companies House director, all of which had occurred by 4 June. Second of course putting her name to the promotional documents to which I have referred.

19. It thus follows that I conclude that the Respondent persuades me that the behaviour of the Claimant was repudiatory. Thus she forfeits any right to notice.

### **The Unfair Dismissal**

20. There was no procedure and of course in a terms of good employment practice there should have been. The Claimant should have been suspended and there should have then been a disciplinary investigation followed by a hearing and an offering of an appeal; none of which happened. So this dismissal falls foul of at very least procedural unfairness even though it is a very small employer. But does it make any difference? I conclude that at most 2 weeks in this particular case would have been the requisite time line to complete the matter. What was there to investigate? The facts speak for themselves. Yes the representative for the Claimant points out that it might be unfair in terms of who did the investigation and thence did the dismissing and heard the appeal but this is a very small business and all that needs to be said is that there have to be exceptions obviously made in terms of realism and particularly the size and administrative resources of an undertaking when cross referencing to the ACAS code of practice.

21. I remind the parties of the definition of Section 98(4) of the Employment rights Act 1996. The determination of whether the dismissal was fair or unfair, a reason which comes within that section having been established by the employer<sup>4</sup>, is to be assessed in accordance with the size and administrative resources of the undertaking, equity and the substantial merits of the case. What it means is even if the procedure had been best practice the outcome would inevitably have been the same, namely summary dismissal without notice because of repudiatory conduct 17.

22. I conclude 2 weeks as I have said is about the right time in this case that it would have taken to deal with all that ending with dismissal. Perhaps, erring on the side of caution, it might have even stretched to 4 allowing for an appeal. But that then brings me to contribution pursuant to s122 and s123 of the Act. The level of contribution is so obviously substantial that I place it at 100 per cent.

### **Failure to provide written particulars of the employment.**

23. This engages Section 38 of the Employment Act 2002. Engaged is 38(2):

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<sup>4</sup> In this case obviously conduct.

“(2) If in the case of proceedings to which this section applies –

- (a) the employment tribunal finds in favour of the employee, but makes no award to him in respect to the claim to which the proceedings relate, and;
- (b) when the proceedings were begun, the employer was in breach of the duty ( paraphrased to provide written particulars of the employment to provide pursuant to Section 1 of the Employment Rights Act 1996) (Written Particulars of Employment)

*the Tribunal must subject to subsection 5 make an award of the minimum amount to be paid by the employer to the employee and may if it considers just in all the circumstances award the higher amount instead.”*<sup>5</sup>

24. But the caveat is as stated s32(5):-

*“The duty under subsection (2) or (3)<sup>6</sup> does not apply if there are exceptional circumstances which make an award or increase under that subsection unjust or inequitable.”*

25. In this particular case the Claimant has technically won her claim for unfair dismissal but achieved no award. And the Respondent has conceded she was an employee at all material times. That the employer realised it should be providing employment contracts is to me clear from the various minutes that I’ve seen, but it was trying to avoid doing so on what I could only describe as a sham by pretending that these were not employees but self-employed when they manifestly weren’t. The reference for instance to the presenting of invoices for the purpose of paying for invoiced work is a fiction. There never were any invoices.

26. I realise that the employer had financial constraints but that should not override his obligations to its employees, a fundamental of which is to be supply written particulars of the employment and this it failed to do and over a relatively long period of time. I thus therefore concluded that the justice of the matter means that I start on the premise that there ought to be 4 weeks’ pay. But then of course I come back to the fact that the Claimant repudiated this contract of employment. In those circumstances I have therefore concluded there are exceptional circumstances that makes an award unjust and indeed inequitable. Accordingly I make no award for the failure to provide written particulars of employment.

Employment Judge Britton

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<sup>5</sup> Minimum is two weeks; the maximum is four. <sup>6</sup>  
Not engaged.

Date: 13 May 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE