



EMPLOYMENT TRIBUNALS

Claimant: Mrs M D Webb

Respondent: EB Johnston Limited

HELD AT: Hull

ON: 18 July 2019

BEFORE: Employment Judge Lancaster
Mrs S Scott
Dr D Bright

REPRESENTATION:

Claimant: In person
Respondent: Mr E Johnston

JUDGMENT having been sent to the parties on 27 August 2019 and written reasons having been requested by the Employment Appeal Tribunal, the following reasons are provided, taken from the transcript of the oral judgment delivered upon the conclusion of the hearing :

REASONS

The issues

1. The issues were set out in the case management order of Employment Judge Maidment dated 9th April 2019, a copy of the material parts of which is now annexed as an endnote to this judgment¹.

The factual background

2. The Claimant Mrs Margaret Webb had worked at the butchers and delicatessen of EB Johnston Limited on Carr Lane in Hull for some 12 years up until September 2018.

3. There is a dispute about what happened at that time. In 2018 extensive roadworks have been undertaken outside the shop, it was affecting trade and Mr Johnston, who is effectively the owner of this family firm, decided he needed to cut the hours of staff.
4. We have heard evidence from both Mr Johnston, Mrs Webb and also one other employee, Beverley Latus. We are afraid that the recollections of all appear to be not entirely clear, but we can establish this set of facts.
5. We are satisfied that there was a conversation with Mrs Webb on Thursday 20 September. That was at the same time as other members of staff were told by Mr Johnston that their hours would be reduced because the opening hours of the shop were changing. On that occasion it is quite clear that Mrs Webb came away with an understanding that she was being "let go". On balance we do not accept that those words were actually spoken. Certainly it would not have been at the time Mr Johnson's intention to let her go permanently. And certainly nothing was said to indicate precisely when she would finish. And indeed, on her own evidence, the following day Mrs Webb decided she needed some clarification as what was meant.
6. So something was said on the Thursday, but whatever it was it did not amount to unambiguous words saying that Mrs Webb was dismissed at that point. When she went back and asked for clarification on the following day the Friday, at that point it seemed to be common ground that Mr Johnston did set out his position that he was not "dismissing" her but intending to "lay her off". As to the immediate future it is unclear to us whether anything was said about the Claimant coming back for Christmas or not. Certainly there were no dates given as to how long it would be anticipated that the purported lay off would last for. And it is now common ground that there was some conversation whereby Mrs Webb was asked to ensure that she had left her phone number, so that if there was any upturning work she would be contacted.
7. This was not a satisfactory state of affairs for Mrs Webb who needed certainty. Not least because she required clarification whether she was or was not in work in order to secure her housing benefits for her rent with the council. And again it is common ground therefore that her position was that if she was not going to be given any work at all in the immediate future she wanted that to be made permanent to confirm that she was dismissed, receive her P45 and she would have a clear understanding of what her position was. It is equally clear that Mr Johnston was adamant in his view that he was not intending to dismiss her and therefore he said if she wanted to end her employment she would need to send in a resignation letter before she could receive her P45 and confirmation that the employment had ended. It was some two weeks later on 6 October the Claimant did then send in a resignation letter.

Was the Claimant dismissed?

8. So in these circumstances although there is still some lack of clarity as to precisely who said what we do not accept that Mrs Webb was actually dismissed by Mr Johnston on the Thursday. He purported to "lay her off", and her employment actually ended when she put in her resignation letter. But at that stage when she

resigned her employer was in breach of contract. She had not been given any work at all for two weeks. It is right that the contract does not state what hours she would work and talks only of an obligation to work “such hours that are required to carry out your duties to the satisfaction of the company and as necessitated by the needs of the business”. But that contract, properly construed, does not give the employer the right unilaterally to say that the employee will not work any hours at all.

9. In actual practice for the whole of the 12 years she had worked for this store the Claimant had had a set shift pattern. She had varied it by negotiation, reducing her hours as she got older and latterly it is agreed that she was working a fixed and set pattern Tuesday to Saturday 10.30 till 1.45 a total of 16 and a quarter hours a week.
10. This is not as Mr Johnston seems to believe a “zero hours contract” that means he is not obliged to give the Claimant any hours at all. Either by variation of those written terms of the contract or by an implied term arising from custom and practice, the Claimant worked particular hours. Indeed looking at the contract it does not say it is a “zero hours contract: It says “you are to work”. The expectation is that she will work some hours, and it is simply the amount of those hours that is capable of being negotiated from time to time between the employer and the employee.
11. So as at the date of the resignation letter, 6 October, the employer was in breach of contract. These terms do not allow the Respondent simply and unilaterally to say the Claimant would not have work at all. And, as has already been pointed out at the earlier case management hearing by Employment Judge Maidment, there is certainly nothing in that contract that gives an express right to lay an employee off.
12. So at the point she resigned the Claimant would have been entitled to do so without notice because there was a fundamental breach. It is an essential term of the contract of employment that you are given work and paid if that is what the contract provided for, and this one did. By the Respondent not doing that it is a breach of contract that goes to the very heart of the employment relationship. So the Claimant is entitled to say, as she has done that this is a breach of the implied term of trust and confidence or, indeed, a breach of the particular term that she should be offered work and not be laid off without her consent.
13. So that means that although the Claimant resigned rather than being actively dismissed, it is in law a constructive dismissal (applying section 95 (1) (c) of the Employment Rights Act 1996).

What was the reason for dismissal?

14. However, the reason for that dismissal is quite clearly redundancy, as defined by section 139 of the Employment Rights Act 1996. That is a diminution in the requirement for employees to carry out work of a particular kind. It is clear that because of the down turn in business as a result of the extensive roadworks Mr Johnston’s business did not require all staff to work their full hours. Redundancy is a potentially fair reason for dismissal.
15. That diminution in the requirement for workers does not have to be permanent, it can be temporary. This may well have been temporary so that in due course Mr Johnson did employ somebody else. But at this particular point in time there

was a redundancy situation. That is the reason for dismissal and the Claimant is therefore entitled to a redundancy payment. On a claim before the Tribunal, where the issue is whether an employer has a right to a redundancy payment, where there has been a dismissal (including a constructive dismissal) then there is also a presumption that the dismissal was in fact by reason of redundancy: section 163 (2) Employment Rights Act 1996. The Claimant is entitled to a redundancy payment under section 164 (1) (d) of the Employment Rights Act 1996 by reason of her having presented a complaint of unfair dismissal in good time.

16. She is also entitled to receive compensation for the notice period she should have received, which should have been 12 weeks (under section 86 Employment Rights Act 1996 – one week for each completed year of service up to a maximum of 12)..

Was the Claimant treated less favourably because of her age?

17. The Claimant has further raised an argument that because only she and one other employee of similar age (the Claimant being 69 at the time and her colleague Mrs Hudson being 70) were the only two employees who had their hours cut completely that is an indication of age discrimination. An employee has the right not be treated less favourably than an employee in a different age group was treated, sections 5 and 39 Equality Act 2010.
18. It is certainly enough to raise that inference (section 136 Equality Act 2010). However, we heard Mr Johnston's account and we are satisfied he has persuaded us that the reason why these two ladies were the ones who lost all their hours was not in fact because of their age. They are older than all the other employees but not significantly so. They are some five or six years older than the next oldest employee. But the reason why they were singled out was because all the other employees worked longer hours and particularly covered those hours from the start to the end of the day. So, to reallocate hours in the midday shift - where the Claimant worked in particular - could not have been achieved by those hours being redistributed amongst other employees. It would not be reasonable to expect somebody to come in, for instance, to open up the shop then take an extended gap in the middle of the day and come back to close up the shop simply to accommodate the Claimant. That is sufficient reason to show that these other workers, as compared to the Claimant, were not in the same material circumstances that she was: so that section 23(1) of the Equality Act 2010 is not in fact satisfied. Mrs Hudson is slightly different because she worked on a Saturday, but again she is in a different position to any other employee.

Remedy

19. So the claim of age discrimination fails but the claims that this was a dismissal on grounds of redundancy and a dismissal in breach of contract succeed.
20. After this had happened and after she had put in her notice and received her P45, the Claimant then decided that the best option was simply to say she would treat this as an enforced retirement and she did so. She does not therefore claim any further loss of earnings. She has not sought work since this time. But the position

is even if she was thinking that she may be closing in on her retirement age, she had not made that decision finally. It was forced upon her to take it slightly earlier than she otherwise will have done.

21. She had worked for 12 years. She is entitled therefore to be compensated on a statutory redundancy payment for one and a half week's pay for each of those 12 years. That is 18 weeks' pay. She was working 16 and a quarter hours at the national minimum wage which was then £7.83. That is £127.24 gross per week. 18 weeks at that rate entitles her to redundancy payment from the company of £2,290.32. She is also entitled to 12 weeks' pay in lieu of notice and that at that same rate of £127.24 entitles her to damage in breach of contract of £1,526.88. Total figure is therefore £3,817.20.
22. That is the award we make and it seems there is no other need to refer to any further matters of remedy and compensation, nor to consider any possible element of unfairness in making the Claimant redundant.. So she receives a redundancy payment and the pay in lieu of notice, but as the claim for age discrimination does not succeed we do not therefore need to explore any issue as to any hurt feelings.

Employment Judge Lancaster
Date 7th January 2020

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and respondent(s) in a case.

ⁱ The complaints

1. By a claim form presented on 3 January 2019, the Claimant brought complaints seeking a redundancy payment, for unfair dismissal, age discrimination, damages for breach of contract (notice pay), holiday pay and unpaid wages. The Claimant in fact confirmed today that she was paid up until 22 September after which she did not work any hours at all for the Respondent such that there do not appear to be any unpaid wages. She further accepted that she had no entitlement to a payment in respect of accrued but untaken holidays. Otherwise, the remaining complaints continue to be pursued.
2. The Respondent is a small butcher/baker/delicatessen. The Claimant had been employed by the Respondent for in excess of 12 years and at the date her employment ended was 69 years of age.
3. The Respondent's case is that it had suffered a prolonged and significant downturn in business and needed to reduce the hours worked by its staff. All of the staff it says saw their hours reduced albeit only the Claimant and one other individual, approximately a month older than the Claimant, were offered no hours at all.
4. The Respondent's case is that the Claimant was told that it did not have any hours for her in the immediate future. The Respondent's case is that the Claimant

said that she would rather leave her employment altogether and that indeed subsequently she did provide a letter of resignation. The Claimant said that this letter was provided only when she was told by the Respondent that he would not provide her with a P45 unless she wrote such letter. She maintains however that she did not resign. On the other hand, in her grounds of complaint when she says she was told that the Respondent was not letting her go, but just laying her off, she refers to her request of the Respondent to “make it permanent”. Whilst the Claimant’s primary position is that there was in all the circumstances an actual dismissal in the alternative she will maintain that if she is found to have resigned from her employment she did so only because of a fundamental breach of contract (the Respondent’s decision not to provide her with any hours) so that she was constructively dismissed.

5. The Respondent’s position is that the Claimant was employed on a zero hours contract. The written statement of terms which the Tribunal has seen in fact refers to the Claimant being provided with hours of work as required subject to the needs of the business. The Claimant says that she had worked full time up to the age of 60 but since then had, at various stages, reduced her hours, firstly down to 20 hours and then subsequently to 17.5 and 16.25 hours per week. At the time of her alleged dismissal she says she was working 16.25 hours per week working, she thought, 3.75 hours per day Tuesday – Saturday. The Respondent nevertheless maintains that she had no entitlement to a specific number of hours or indeed any hours of work at all and therefore in telling her that no hours would be provided for a period there was no breach of contract.
6. The Claimant, in the alternative, would say that a breach of contract (the implied duty of trust and confidence) arose because she was only one of two members of staff who it was determined would be provided with no hours at all. Other members of staff had their hours reduced but not down to zero. Further, as will shortly be referred to, she maintains that the decision was related to her age.
7. Certainly, within the contract of employment there is no express right to lay employees off or introduce short time working.
8. A key question to determine therefore in this case is whether there was a dismissal. If there was then it appears to be clear on the Respondent’s own case that the reason for any dismissal must have been redundancy.
9. The Claimant also brings a complaint of unfair dismissal. In this she complains both about her selection to be given no hours of work at all as against other members of staff whose employment was preserved, a lack of consultation in advance of her being told there would be no hours of work for her and on her assertion that the decision was related to her age.
10. The Respondent’s primary position appears to be that it was entitled not to offer her any hours. Age had nothing to do with the decision, other people worked hours at the opening and closing of the store and it was therefore thought that their employment ought to be maintained. In contrast the Claimant worked her hours across the busier lunchtime period when more staff were employed. It is clear that Mr Johnston did not look at the variable hours across the entire working week and then seek to distribute those amongst all staff evenly or in a way which might have provided the Claimant with some continuing albeit reduced hours. Whether or not it was reasonable for him to take this approach would be a question for the Tribunal.

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11. As already referred to, the Claimant maintains that the decision to give her no hours was because of her age. Mr Johnston before the Tribunal referred to the fact that it was known already that the Claimant intended to leave at some future point noting that she was approaching 70 years of age and that the normal retirement age within the business was 65 years of age. The Claimant will point to the coincidence of the only other employee given no hours being of a very similar age to herself i.e. late 60s whereas employees in a younger age group were retained albeit on reduced hours.
 12. The Claimant's remaining complaint is in relation to her notice period and is dependent upon her dismissal.
 13. In terms of compensation sought, the Claimant has not taken up any paid employment since leaving the Respondent but nor has she sought any. She has effectively chosen to retire. The Tribunal pointed out to the Claimant potential difficulties she might have therefore in obtaining compensation for continuing loss of earnings.
 14. The Tribunal explained these issues in detail to the parties and what was required in terms of the subsequent Orders the Tribunal makes below. For the sake of completeness and of potential further assistance to the parties the Tribunal nevertheless sets out in more legalistic terms the tests which will be relevant to the issues.

The issues

15. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:
 16. **Unfair dismissal claim**
 - 16.1. Was the Claimant dismissed? Did the Respondent terminate the Claimant's employment? Alternatively, did the Respondent by removing the Claimant's hours of work or in the selective way he did so act in fundamental breach of the Claimant's employment so as to entitle her to resign with immediate effect. Did the Claimant resign in response to such breach of contract?
 - 16.2. If the Claimant was dismissed, does the Respondent show a potentially fair reason for dismissal. The Respondent would inevitably rely on the reason for dismissal being that of redundancy and/or some other substantial reason such as to justify dismissal. In the case of a redundancy dismissal the Tribunal will be concerned with issues of the selection of the Claimant as an employee not to be offered any hours of work, the level of consultation with her in advance of such decision and whether the decision in her case related to her age.
 - 16.3. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?
17. **Section 13: Direct discrimination because of age**

- 17.1. Has the Respondent subjected the Claimant to the following treatment, namely, selecting her as an individual to whom no future hours of work would be allocated or at least for a period and/or in dismissing her?
- 17.2. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the remaining shop assistants within the Respondent's workforce who could not be classified as falling within the age group of late 60s.
- 17.3. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's age?
- 17.4. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for its treatment of the Claimant.
- 17.5. And/or does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?