



EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT

RESPONDENT

MRS S HOWE

V

MR KEITH & MRS GAYE BELLIS T/A
HAWARDEN POST OFFICE

HELD AT: WREXHAM

ON: 10 FEBRUARY 2020

EMPLOYMENT JUDGE: M EMERY

REPRESENTATION:
FOR THE CLAIMANT
FOR THE RESPONDENT

Mr A Roberts (solicitor)
Ms K Parkinson (solicitor)

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.
2. The reason for dismissal is redundancy, and the claimant would have been dismissed one week from her termination date under a fair redundancy process.
3. The respondent failed to provide the claimant with a contract of employment

REMEDY AWARD

4. The claimant is awarded one week's compensation for unfair dismissal, totalling £120.00.
5. The claimant is awarded three weeks' pay for the failure to provide a contract of employment, totalling £360.00.

RESERVED REASONS

The Issues

1. The claimant was dismissed without notice on 9 April 2018, purportedly on grounds of redundancy. The claimant disputes redundancy is the real reason for dismissal. By way of an amended claim via her solicitor, the claimant also alleged sex discrimination as the real reason for dismissal, comparing herself with the respondent Mr Bellis. This claim was withdrawn prior to the hearing.
2. The respondents accept they failed to follow any process in dismissing the claimant, but say that the claimant would inevitably have been dismissed by the claimant by 16 April 2017 under a fair process. The issues therefore are:
 - a. What was the reason for dismissal?
 - b. If for redundancy, given the respondent has accepted it failed to follow a process, would the claimant still have been dismissed had a fair process been followed? If so, when?
 - c. If for another reason, what was it?
3. It is accepted that the claimant was not provided with a written contract of employment during her employment. How many weeks' pay should be awarded by way of compensation?

The Evidence

4. I heard from the claimant who provided four witness statements, and from three witnesses for the claimant: David Moore and Mark Rogers, who purchased the respondent's shop in February 2019 and who reemployed the claimant shortly after purchase; and Janet Stephenson an employee of Mr Moore and Mr Rogers. I heard from the respondents and their witness Mrs Barlow, a former employee in their shop whilst they were running it.
5. I read all witnesses statements. I do not recite all of the evidence I heard, instead the evidence and facts as found is confined to the relevant issues in the case. The quotes set out below are not verbatim quotes of the witnesses but are taken from my typewritten notes of the evidence.

The Facts

6. The claimant was employed to work 8am to 4pm two days a week on Monday and Wednesday as a shop assistant in the respondent's shop. The premises also had a sub post-office which was run exclusively by Mrs Bellis. There was one other part-time employee in the shop, Mr Rhys Williams, who worked Sundays. The claimant never received a contract. Her weekly

earnings were under the lower earnings limit and she did not pay tax or national insurance on her wages.

7. There were constant cash-flow and profitability concerns in the shop. On 9 April 2018 the Post Office conducted an audit of the post-office and discovered a shortage, which Mrs Bellis accepted had been used to cover cash-flow in the shop. She agreed a payment plan with the Post Office, but her licence to run the post-office was immediately suspended and temporary licensees were installed to operate the post office.
8. As a consequence, Mrs Bellis lost her post office role and income. The shop was unprofitable. The respondents gave evidence, which I accepted, that their accountants had been consistently telling them that they were putting money into the business for no return, that this could not go on, and their only option was to sell the business as soon as possible and cut costs.
9. The respondents informed the claimant on 9 April 2019 of the audit and said that they were going to have to let her go because they could not afford to pay her. The claimant accepts that she was told this. She also accepts that there was a financial issue with the business at this time. In her evidence she says she now accepts that her role no longer existed. She also accepted in her evidence that there would have been no difference to the outcome as the respondent *"could not afford me"*. Her concern was the lack of process – *"...had I been given notice and process done properly I would not have had cause for concern. I would have accepted it"*. Her argument was that she *"could not argue my case or put my point of view over"*, that she was dismissed without process.
10. The other employee, Mr Williams, was told on his next day of work that he was being dismissed on grounds of redundancy, he worked the following two Sundays before dismissal took effect.
11. It was suggested to the respondents that no other options bar dismissal were considered, for example a reduction in hours. Mr Bellis' evidence was that this would not work as *"we could not afford to pay"* the claimant *"from this moment onwards"*. Mrs Bellis said that it was not possible to offer the claimant a reduction in her hours; at this point both respondents were working for no pay from the shop and with no post-office income. There was no money available to pay the claimant.
12. The claimant was told that she would be paid notice, redundancy and holiday pay when the shop was sold. These sums were paid to the claimant prior to the sale, on 22 November 2018.
13. One issue in dispute which arose in the claim is the start-date of Mrs Barlow who, says the claimant, was employed to replace her, hence her reasoning that this was not a redundancy. Mr Rogers and Mr Moore state that they became aware that the business may be for sale in April 2019; they lived locally and had previously expressed an interest in the business. They started visiting fairly regularly to get an idea of footfall etc. Both say that they

- saw Mrs Barlow working in the shop from May 2019 onwards, regularly working Tuesdays and Sundays. Mr Moore recalls that Mrs Barlow was working there in May 2018, he recalls that he discussed with Mrs Barlow a party they were holding at this time. Mrs Stephenson and the claimant say that Mrs Barlow visited the shop in 2019 when both were working there, during the course of their chat, says Mrs Stephenson, Mrs Barlow said that she used to work Tuesdays and Sundays and that she started around May 2019.
14. Mrs Barlow recollects differently. In the bundle was a copy of her wall calendar showing her dates of work for the respondent alongside her other commitments. Mrs Barlow lived close to the shop, and she was clear that she started working at the shop in August 2018, as noted on her calendar. Her work was mainly casual, an hour here, ½ hour there, and she says she was often offered but refused to accept payment for some of the ½ hours she often worked. The respondent's son in law was gravely ill and in September 2018 she offered to work longer hours and this was accepted; this was in-part to give the respondents time off to visit their family as Mr Bellis was working 7 days a week, and also Mrs Bellis obtained another job. She is clear she did not work over the summer of 2018 as she did cricket club teas at weekends.
 15. Regarding the conversation in the shop in 2019, Mrs Barlow recalls saying she worked for the respondents for 2-3 hours 'here and there' and she quite often worked on Tuesdays, but not all day, and she would sometimes open and close the shop on Sundays. Mrs Barlow says that she would not have said that she worked mornings, because she mainly covered Mr Bellis going to the bank, which was in the afternoon. It was only from September 2018 that her hours increased and she worked more hours on Sundays.
 16. Mrs Barlow's evidence was clear, and I accepted her evidence. I concluded that the claimant, who says she made an immediate note of the 2019 conversation with Mrs Barlow which was not disclosed in this claim, heard what she wanted to hear in what was for Mrs Barlow a casual conversation. I concluded that Mr Rogers and Mr Moore's recollections of the dates of what must have been very occasional casual encounters with Mrs Barlow in the shop were also faulty.
 17. The claimant's evidence was that Ms Annette Lawson was also employed by the respondents shortly after the claimant was dismissed. The respondents' evidence, which I accepted, was that Ms Lawson worked no more than twice between April to August 2018, on both occasions for ½ hour to an hour to allow Mr Bellis to go to the bank. Ms Lawson had very occasionally worked for the respondents in this manner for several years including during the claimant's employment.

Submissions

18. Ms Parkinson for the respondent made it clear that the reason for dismissal was redundancy – the claimant accepted that the business was in severe

- financial difficulty, she was made aware of this, and she accepted that this was the reason for dismissal. The other employee, Mr Williams, was made redundant. While the claimant can point to a failure to apply any selection criteria, in fact the respondents took on the shop work and did so unpaid. On this basis the legal test for redundancy – Employment Rights Act s.139(1)(b) – is met, a reduction in the workforce because of cost.
19. On the facts, Ms Parkinson said that the evidence of Mrs Barlow should be preferred – she did not start work in the Post Office until August 2018 and did so on a very ad hoc basis initially. In total, based on the hours in her calendar, Mrs Barlow worked the equivalent of 10 days over 6 months, the claimant would have worked 52 days. Ms Parkinson said that the claimant's other witnesses have misinterpreted Mrs Barlow's hours and the times/dates she was working based on occasional visits over a period of months.
 20. Ms Parkinson accepted that no proper process was followed, but it was inevitable that the claimant would have been made redundant. There was no money to pay anyone and no alternative role. Considering *Polkey*, a fair dismissal would have occurred in one week as there was little to discuss and consult on once it was established there was no money to pay.
 21. On the failure to provide a contract: s.38 Employment Rights Act states the minimum payment is two weeks' pay, up to four weeks if just and equitable to do so. The respondents were a small business and were not aware that they had to provide contracts – it would be just and equitable to limit the award to two weeks' pay.
 22. Mr Roberts for the claimant argued that it was for the employer to show the reasons for dismissal; his argument was that the dismissal was procedurally unfair, they could have shared the days between the claimant and Mr Bellis. It was clear that the claimant could have been asked to look after the shop – for example when Mr Bellis went to the bank. He argued that the evidence of the claimant's witnesses should be believed, that it was prior to August that Mrs Barlow started work. Two other employees were brought in to do the claimant's work, therefore this is not a genuine or fair redundancy. In any event, it would have taken 4 weeks to follow a fair process in this case.
 23. Mr Roberts asked me to consider the case of *Earl v Slater and Wheeler (Airlyne) Ltd* [1973] 1 All ER 145, which I did. This case states that a dismissal with no process was incapable of amounting to a fair dismissal; however the employee in this case was not entitled to compensation if the only issue rendering the dismissal unfair was "his lack of an opportunity to explain matters ... on the accepted facts he had no valid explanation to offer respecting those matters..."
 24. Mr Roberts asked for an award of four weeks' pay for a failure to provide a written statement of terms and conditions. £480.

The Law

25. Employment Rights Act 1996: s.1 Statement of initial employment particulars

- (1) Where *an employee* begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.
- (2) ...

26. Employment Act 2002: s.38 Failure to give statement of employment particulars etc.

- (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(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 of the claim to which the proceedings relate, and
- b. when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change)...

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 it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies

- a. the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
- b. when the proceedings were begun the employer was in breach of his duty to the employee under s.1(1) or 4(1) of the Employment Rights Act 1996...,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

- a. references to the minimum amount are to an amount equal to two weeks' pay, and
- b. references to the higher amount are to an amount equal to four weeks' pay.

- (5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

27. Employment Rights Act 1996: s.98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show
 - a. the reason (or, if more than one, the principal reason) for the dismissal, and
 - b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it ...
 - (c) is that the employee was redundant
- (5) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
 - a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - b. shall be determined in accordance with equity and the substantial merits of the case.

28. Employment Rights Act 1996: s.122 Basic award: reductions.

- ...
- (4) The amount of the basic award shall be reduced or further reduced by the amount of—
 - a. any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or
 - b. any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise).

29. Employment Rights Act 1996: s.139 Redundancy

- (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to
 - a. the fact that his employer has ceased or intends to cease
 - i. to carry on the business for the purposes of which the employee was employed by him, or

- ii. to carry on that business in the place where the employee was so employed, or
 - b. the fact that the requirements of that business
 - i. for employees to carry out work of a particular kind, or
 - ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
- have ceased or diminished or are expected to cease or diminish...
- (6) In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.

Conclusions on the Facts and the Law

30. I concluded that the claimant was unfairly dismissed as she received no notice of her dismissal, which I accepted caused her distress. I concluded that the real reason for dismissal in the respondents mind on 9 April 2019 was that there was no income in the business to pay the claimant from that date. I concluded that the respondents reasonably believed that the loss of their post office business meant that they had no money to pay the claimant, that they had no option but to reduce the business’ staff costs.
31. I concluded that this was a genuine redundancy, as the respondents reasonably believed that the requirements of business for shop assistants had ceased: there was no money to pay staff, meaning that job of shop assistant had to be done by the respondents for no wage.
32. I did not accept that the respondents had any intention to employ Mrs Barlow, or anyone else, on the date of the dismissal or for a period thereafter. The post office audit was clearly a shock and its outcome an issue of significant concern for the respondents. There was no plan to replace the claimants, the redundancy was genuine. I accepted that the respondents came to rely on Ms Barlow at a later date, as she was a friend who was happy to work on a very ad hoc and occasionally unpaid basis, that this work only became regular after Summer 2018, in particular after Mrs Bellis had secured another income.
33. The dismissal was unfair because of a failure to undertake any process. I accepted the claimant’s evidence that a process would have assisted her to understand the reasons for dismissal. It is apparent that the claimant was aggrieved - and reasonably so - by her sudden dismissal after long service. However, considering the *Polkey* test, I also concluded that the claimant would have been dismissed in any event within a week of 9 April – taking into account the claimant’s working week her dismissal would have occurred under a fair process on 16 April 2018. The reason that the dismissal was inevitable was because the position of the respondents’ business had not changed in the following week: the financial position of what had been a loss-

making shop became significantly worse after the loss of post office income for the respondents.

34. The respondents accept that the claimant was not provided with a contract of employment. I had determined that the claimant is entitled to one week's compensation for unfair dismissal, therefore section 38(3) Employment Act 2002 applies. An award of two weeks' pay must be made, to be increased to up to four weeks if the tribunal considers it just and equitable in all the circumstances to do so.

35. I determined that it would be just and equitable to award three weeks pay for the failure to provide her with a contract. The claimant was employed by the respondents for several years, and at no time was given an indication of her employment terms. She was unsure if she was paid the national minimum wage, a claim ultimately not pursued. I concluded that in these circumstances it would be just and equitable to increase the award made by a further three weeks' pay.

Remedy

36. The claimant is awarded one week's pay as compensation for unfair dismissal, totalling £120.00.

37. The claimant is not entitled to a Basic Award as she has received a statutory redundancy payment.

38. The claimant is awarded three week's pay for the failure to provide her with a s.1 statement of her written terms and conditions, totalling £360.00.

EMPLOYMENT JUDGE EMERY

Dated: 26 February 2020

Judgment sent to the parties on:
2 March 2020

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For the staff of the Tribunal office