



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122256/2018

5

Held in Glasgow on 14 May 2019

Employment Judge: Robert Gall

10 **Miss P Harkins**

**Claimant
In Person**

15 **Irene Duffy t/a Caulfield Flowers**

**Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is: –

- 20 (1) The claimant was dismissed by the respondents on Monday, 3 September 2018. That dismissal was in terms of the Employment Rights Act 1996. It was wholly or mainly by reason of redundancy.
- 25 (2) The claimant had 7 complete years of service with the respondent having regard to her employment with Glasgow Flowers Ltd and transfer of that employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 30 (3) The claimant is awarded a redundancy payment of £770 having regard to her length of service (7 years), her weekly wage (£110) and her age (38) at date of termination of her employment. The respondent is ordered to pay that sum to the claimant.
- (4) In breach of contract, the claimant did not receive notice of termination of her employment. She did not receive payment in lieu of notice. She was entitled to 7 weeks notice in terms of the Employment Rights Act

E.T. Z4 (WR)

1996. She is awarded the sum of £770 by way of damages for breach of contract (notice pay). The respondent is ordered to pay that sum to the claimant.

REASONS

- 5 1. This case called for hearing at Glasgow on 14 May 2019. The claimant and respondent both appeared in person. They were unrepresented. There were 2 pages of productions submitted by the claimant. Those comprised copies of text messages. The respondent did not submit any productions.
- 10 2. Evidence was heard from the claimant herself and from the respondent herself.
3. This case had been preceded by a Preliminary Hearing which had permitted the response, form ET3, to be accepted as a defence in the case although submitted late and therefore the case proceeded as defended.

Background

- 15 4. The respondent operated a business as a florist. The claimant worked for her. The claimant had previously worked for a company in which the respondent was a co-director and, it is understood, co-owner. This was Glasgow Flowers Limited. At the very end of August or beginning of September 2018 the landlord for the shop premises from which the respondent traded as a florist had issued a blunt demand that the respondent vacated the shop premises from which carried on business. This was in circumstances where rent had not been paid. That had led to a conversation between the respondent and the claimant. The claimant was of the view that she had been dismissed and that this was due to redundancy. The respondent did not agree with that, saying that no dismissal had occurred.
- 20
- 25 5. The claimant had initially sought holiday pay, redundancy pay and notice pay. During the course of the case holiday pay had been paid by the respondent to the claimant. That ground of claim had been then been withdrawn and dismissed. The claim was therefore in respect of redundancy pay and notice

pay. The claimant limited her claim for redundancy pay to a seven-year period. She sought pay in respect of notice for a seven-week period.

Facts

6. The following were found to be the essential facts as admitted or proved.

5 *Background and Initial Working by the claimant*

7. The claimant was born on 17 August 1980. As at 31 August 2018 she was earning £110 per week, that sum being paid to her gross and net.

8. The respondent formally traded from premises at 171 High Street Dumbarton. She was in business as a florist. There had been a flower shop there for many years. It had been operated by the Caulfield family. Mr Bell was the member of the family who operated the flower shop there until January 2011.

9. The claimant worked, initially on Saturdays, with Mr Bell in the business which was operated through a limited company HD Caulfield Limited. She subsequently obtained a full-time job there around 1997.

15 *Glasgow Flowers Limited*

10. In 2011 the respondent was with her husband. They owned a company by the name of Glasgow Flowers Ltd. The opportunity arose to take on the business of Caulfield Flowers at Dumbarton Road. They took that opportunity. As part of the arrangement the premises were taken over on a leasehold basis by Glasgow Flowers Ltd. This became effective in January 2011.

11. There was no change in the running of the business in January 2011 as between the HD Caulfield Limited and Glasgow Flowers Ltd. The premises were painted and smartened up. The business however remained the same with the same staff and means of operation. The claimant commenced working for Glasgow Flowers Ltd at this point in a seamless move from HD Caulfield Limited.

12. The claimant and respondent developed a close working relationship. They were friends.

Respondent trading as Glasgow Flowers

5 13. Unfortunately, the respondent's marriage broke up. This was in November 2016. The respondent decided to continue with the business at 171 High Street Dumbarton but to operate that business as a sole trader. Glasgow Flowers Ltd ceased trading. There was no appointment of a liquidator or other insolvency practitioner in any capacity.

10 14. At time of the respondent commencing trading as a sole trader the business trading from the shop premises remained the same. The equipment and means of operating were the same. The trading name of the respondent was Glasgow Flowers. Stock formerly used by Glasgow Flowers Limited continued to be used by the respondent. The claimant understood that she was to be working for the respondent rather than for the limited company. Her days of work were reduced, by agreement, from 4 days per week to 2 days per week. 15 Everything else, however, carried on as before.

15. Throughout this period from 2011 to 2016, and beyond until 2018, the business of the florists remained the same in that they were receiving orders for flowers from the general public and businesses who visited the shop or 20 online. They supplied flowers for weddings, funerals and other occasions.

16. When the respondent commenced as a sole trader some firms of undertakers who had ordered flowers from the business brought that service "in-house". Orders therefore diminished. The claimant's hours were cut back as mentioned.

25 17. The claimant has at no point received any contract of employment from any of her employers. She has not received any terms and conditions of employment or any copy of employment policies. She received payslips from the respondent only in course of this Tribunal case.

30 18. The respondent found trading conditions very difficult. Financial pressures meant that she was unable to pay her rent in time. Mr Bell had been very

understanding as a landlord. A new landlord however appeared. That was Mr Gillies. He was not understanding and was very keen to receive payment of rent at the due time.

Ending of the claimant's employment

5 19. The claimant worked for the respondent on 31 August 2018. Later that day, the respondent received a text from Mr Gillies. That text demanded payment of the rent from the respondent. It said that she required to pay up the rental or to get out of the premises.

10 20. The respondent had no means of making payment of rent at that point. She decided that the only course open to her was to vacate the shop premises. She also decided that she would not however inform the claimant of this until she saw the claimant at work on Monday, 3 September 2018.

15 21. The claimant and the respondents spoke on the telephone on Monday 3 September. There was an issue with the claimant attending work due to ill-health on the part of her nephew. The respondent said to the claimant that she did not want to have to tell her over the phone what she was about to tell her. She wanted to pass on the information in person. She said however that she might as well tell the claimant as she would be likely to hear from others. She informed the claimant that the shop was closing. The claimant asked
20 what was going to happen now. The respondent said that the claimant did not need to go in to work, that it was up to her whether she did that or not. She said that she was going to clear the shop out as the landlord had given her a week to do that. The claimant was somewhat surprised by this turn of events.

25 22. Later in the same day or on the subsequent day the claimant and respondent spoke with one another again. Both were upset. Each was raising with the other what they might do next. The respondent said to the claimant that the claimant should go to the job centre to look for another job. It was mentioned between the claimant and respondent that that there might be possible job for
30 either of them in Morrisons. Both the claimant and respondent were

exchanging information as to where they each might possibly get another job. The respondent did not at this point plan to continue trading.

23. The claimant sent the respondent a text regarding collection of possessions which she had in the shop premises. She did this on 4 September saying that she was going to *"pop into the shop and get my stuff."* She sent this text at 20:29.
24. On 5 September the claimant visited the job centre and signed on with a view to obtaining alternative employment. She was asked as to whether she had a P45. She raised this with the respondent by text.
25. On 5 September the respondent replied to the claimant's text of the previous evening regarding collection of her "stuff" from the shop. The respondent replied *"Not a problem babe soz I was in bed last night."* That text was sent at 08:35. By text timed at 12:23 the claimant replied stating *"How did u get on at the accountant I don't think I can sign on until I have p45"*. The respondent replied by text timed at 13:06. She said *"He's gonna post it out to you."* The claimant subsequently received form P45.
26. A few days later the claimant was informed by others that there was a sign on the shop premises. It said that orders could still be taken via the website and by use of the shop telephone number. The respondent had put up the sign as she was conscious that those who had pre-ordered flowers, for weddings for example, might be upset and angry and might panic if they thought that the shop had closed and there was no means of obtaining their orders or obtaining information about them. She took the telephone from the shop premises to her home where, on plugging it in, she was surprised to find that calls to the shop number were able to be answered by her.
27. Having received information as to the sign giving the shop number and saying that orders could be obtained through it, the claimant phoned the shop telephone number. The respondent answered. A heated conversation between the claimant and respondent followed. The respondent said that the phone had not been disconnected. The claimant said that the situation was not right and that she would potentially take it further. The respondents said

“okay, on you go”. The respondent said that she “*did not need this*”. The claimant said that she knew what the respondent meant. The claimant was seeking to imply that she did not need this situation either.

- 5 28. The claimant’s view was that the respondent had ceased trading. The claimant would have been happy to continue working for the respondent. She was keen to do that. She now believed, however, from the sign on the shop and from the conversation over the telephone that the respondent was in fact still trading. The respondent had not said and did not say to the claimant that her job remained open for her.
- 10 29. The respondent has continued in business only in order to fulfil any prepaid orders such as for weddings. She has used her home as the base of her business. She has not employed anyone in that business. The respondent is in a very difficult position financially at time of this hearing.
- 15 30. The claimant had a set of keys for the shop premises at 171 High Street Dumbarton. The respondent did not ask for those to be returned to her. The claimant has not returned the keys to the respondent or to any other party.
31. The claimant subsequently obtained employment a friend who was a former colleague of hers and who had worked with the respondent some years prior to 2018.
- 20 32. The claimant took advice. She wrote to the respondent seeking an insolvency reference number with a view to making a claim for sums which she regarded as being due to her. There was no reply to that letter. The claimant therefore took steps with a view to initiating an Employment Tribunal claim. She contacted ACAS under the Early Conciliation scheme on 30 September 2018.
- 25 The claim was presented to the Employment Tribunal on 1 November 2018.

The issues

33. The issues for the Tribunal were:
- (i) whether the claimant had been dismissed by the respondent or not;

- (ii) if the claimant had been dismissed, was a payment by way of notice pay due to her?
- (iii) whether the dismissal was wholly or mainly by reason of redundancy
- (iv) whether the claimant had continuity of employment enabling her to bring a redundancy claim
- (v) What, if any, redundancy payment was due by the respondent to the claimant?

Applicable law

34. An employee seeking a redundancy payment firstly requires to establish that she has been dismissed. Under the Employment Rights Act 1996 (“ERA”) Section 136, an employee is dismissed if her contract of employment is terminated by the employer either with or without notice.
35. It is for the employee to prove, on the balance of probabilities, that there has been a dismissal. The Tribunal must therefore decide whether it was more likely than not that the contract was terminated by dismissal rather than by either resignation or mutual agreement.
36. Where there are no specific unambiguous words used dismissing an employee, the Tribunal properly considers all the surrounding circumstances and how words would have been understood by a reasonable employee. In considering whether resignation has occurred, it is only in exceptional circumstances that from an employee’s conduct resignation would be viewed as having occurred. It is not possible, for example, for the conduct of an employee to terminate the contract automatically. An employer would require to act to accept repudiatory breach of contract by an employee.
37. Where a dismissed employee claims a redundancy payment, there is a presumption that the employee who has been dismissed has been dismissed by way of redundancy. That is in terms of Section 163 of ERA. Redundancy is defined in Section 139 of ERA. That Section refers to the situation of the

closure of the business, the closure of the workplace and whether there is a diminishing need for employees to do the available work.

5 38. In calculating a redundancy payment, there is a formula applicable which involves the length of service of the employee in question, their age at date of termination and their wage at date of termination.

39. For the application of the Transfer of Undertaking (Protection of Employment) Regulations 2006 (“TUPE”) to apply such that there is continuity of employment when a new employer appears, there must be a relevant transfer. A relevant transfer is defined in regulation 3 as “*a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity*”

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40. In terms of section 86 of ERA notice requires to be given by an employer to terminate the contract of employment of an employee who has been employed for over a month. That notice is to be one week’s notice for each year of service.

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Submissions

Submissions for the Claimant

41. Ms Harkins said that she had been dismissed. If she had been offered continuing work by Ms Duffy when the shop premises closed she would have taken that. She would not have walked away from her work. She sought what she said she was entitled to.

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Submissions for the Respondent

42. Ms Duffy said that she had no prior warning that the landlord would end her lease of the shop. Everything happened so quickly. If she had had money she would have given to Ms Harkins what she was due. She still however had no money. She maintained that she had not dismissed the claimant.

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Discussion and decision

43. This was a very unfortunate case in that the claimant and respondent had been friendly with one another and had worked closely together for some years. The relationship between them now was very fraught however. Both were emotional in giving evidence and in asking questions, one of the other. Each of them used the expression in talking of the other that they “*felt betrayed*”.
44. The first question which I have to determine and is whether the claimant was dismissed by the respondent.
45. The respondent’s position was that no dismissal had occurred. On the evidence, this was based on three facts regarded by Ms Duffy as being key. Those were firstly that there had been no express words said to the claimant dismissing her and secondly that the claimant had not been asked to return the keys. Finally, although Ms Duffy had issued a P45 to Ms Harkins, Ms Duffy was keen to emphasise that it was the claimant who had asked for her P45.
46. I considered these points as advanced by Ms Duffy. It was accepted by Ms Harkins that she had not been told in terms that she was dismissed. The evidence as to what had been said by Ms Duffy to Ms Harkins was not in dispute. Ms Duffy had said to Ms Harkins that the shop was shutting. Ms Harkins of then been told by Ms Duffy that she did not need to go in and that Ms Duffy was going into the shop to clear it out having been given a week to do that by the landlord. In a subsequent call, on the same day or the following day, Ms Duffy and Ms Harkins had then discussed what they were going to do next. Ms Duffy had advised Ms Harkins to go to the job centre. An alternative place of employment had been mentioned as a possibility. The discussion was on the basis of both Ms Duffy and Ms Harkins seeking alternative employment.
47. This conversation did not chime with resignation by Ms Harkins. It was consistent however with dismissal having taken place as a result of the business ceasing at that point. Ms Duffy was herself openly talking about

obtaining alternative employment. She had intimated that the shop had shut. She had encouraged Ms Harkins to register with the job centre with a view to obtaining alternative employment.

- 5 48. Ms Harkins treated the conversation as intimation to her that her job had come to an end. She went to the job centre as suggested by Ms Duffy. In course of seeking to sign on there she was asked to produce her P45. She then sent a text to Ms Duffy seeking her P45. It was confirmed to her by Ms Duffy that this would be sent on. It was then sent on.
- 10 49. All of these actions and the words used were consistent with the claimant's job coming to an end at the instigation of Ms Duffy, albeit for practical reasons rather than through the claimant being "fired". They were not consistent with resignation. They were not consistent with mutual termination of the contract. It was Ms Duffy who had initiated the conversation, understandably, due to closure of the shop. Ms Duffy did not, again understandably given the
15 abruptness of the message and notice from the landlord, say that her business was continuing from home. That was not part of any conversation at this point. It was not her decided course of action at this time. In fact, ultimately, the business continued to an extent in order that Ms Duffy did not let people who had pre-ordered flowers down. At the point however where
20 that occurred, the employment relationship between Ms Duffy and Ms Harkins had been ended.
- 25 50. I am of the clear view that the words used by Ms Duffy, whilst not expressly stating that dismissal had occurred, amounted to dismissal, on the balance of probabilities, rather than supporting the view that resignation or termination by mutual consent had occurred. The claimant has discharged the onus to show, on the balance of probabilities, that dismissal occurred.
- 30 51. The context of the claimant asking for form P45 is again consistent with dismissal rather than the claimant suddenly without explanation or due to her resignation asking for her P45. It was a follow-up to the claimant's visit to the job centre, something which was undertaken by the claimant at the suggestion of Ms Duffy and with a view to finding alternative employment. In my view it

supports the outcome of the call from Ms Duffy to Ms Harkins as being that Ms Harkins' job had ended. It had ended at instigation of Ms Duffy rather than through resignation by Ms Harkins or by mutual agreement. I regard the view taken by Ms Harkins of what was said to her by Ms Duffy, that view being that her employment had ended, as being a view which would be taken by a reasonable employee. It requires to be borne in mind that Ms Harkins was keen to continue in her job.

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52. Equally, I do not see retention of the keys as indicating that employment continued. Ms Harkins used the keys to access the shop to remove her personal belongings. It is true that she was not asked at any point to return the keys by Ms Duffy. This was not a situation however where the shop continued to trade. Neither party raised the subject of the keys. Again that is perhaps not surprising in the circumstances where trading from the shop was coming to an end within a matter of days and where that had been a situation forced upon Ms Duffy at short notice.

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53. I am left therefore with the fact that Ms Harkins still had a set of keys for the shop premises. That is not of itself in my view sufficient to outweigh the other factors, specifically the closure of the shop, the conversation between Ms Duffy and Ms Harkins and the signing on at the job centre by Ms Harkins at the suggestion of Ms Duffy with consequent supply by Ms Duffy of the P45 to Ms Harkins. All of these elements point firmly in my view to dismissal having taken place, on the balance of probabilities.

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54. Dismissal established, there is a presumption in a claim for statutory redundancy payment that an employee has been dismissed for redundancy unless the contrary is proved.

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55. The workplace had closed. At the point when employment came to an end, the business had ceased. When Ms Duffy decided that she would fulfil orders then in place, that was not said by her to Ms Harkins. It certainly was not Ms Duffy's immediate thinking to follow that course given her discussions with the claimant on 3 and 4 September. She had talked at that point to the claimant on the basis that both of them were looking for alternative employment. She

had not sought any assistance from Ms Harkins in completing orders. Circumstances therefore existed to confirm that dismissal was by reason of redundancy.

56. Ms Duffy's position was that there was no dismissal. She did not maintain, for example, that dismissal had occurred but for a reason other than redundancy. She gave evidence at one point that circumstances existed where dismissal might have occurred. That evidence was disputed. I halted it as it commenced. This was on the basis that it did not seem to me relevant to the question of whether there was a dismissal and whether or not that dismissal was by reason of redundancy. Circumstances may or may not have existed in which Ms Harkins might have dismissed. It appeared Ms Duffy wished to lead that evidence to establish that she was, in general terms, a good employer. She also wished to lead evidence about other situations where employees had left and had, she said, been treated appropriately by her. Again that evidence did not seem to me to be relevant to the points which I required to determine in this case.

57. In my view dismissal was by reason of redundancy. The issue which then arises is that of an award in respect of redundancy.

58. Ms Harkins had been employed for less than 2 years by Ms Duffy herself. She had however been employed for 7 years if she had been transferred to the respondent from Glasgow Flowers Limited in terms of TUPE. It was in respect of that seven-year period that she sought a redundancy payment.

59. I was satisfied on the evidence that there had been a relevant transfer in terms of TUPE between Glasgow Flowers Limited and the respondent. There had been a reduction in the hours which Ms Harkins worked at time of Ms Duffy assuming responsibility for the business as a sole trader. Ms Duffy was however clear in her evidence that she had "*taken on*" the business in the circumstances of the breakup between her husband and herself. Both Ms Duffy and Ms Harkins confirmed that the business traded in the same manner and fashion before and after Ms Duffy took it on. The premises were the same. The trading name was the same, Glasgow Flowers. The staff were the

same (albeit with a reduction in hours on the part of Ms Harkins). The nature of the business was the same. The materials used were the same, naturally with fresh flowers being used on a daily basis. Both parties accepted that a customer coming into the shop would not have known the difference between the position when Glasgow Flowers Ltd operated the business and that when Ms Duffy operated the business as a sole trader.

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60. Continuity of employment therefore was established by reason of the relevant transfer in terms of Regulation 4 of TUPE. 7 years service existed. Given Ms Harkins' age at date of termination of her employment and her wage, the award is of 7 weeks pay, a total of £770.

Notice pay

61. The last payment to Ms Harkins was in respect of work for the period to 31 August 2018. She did not receive notice of termination of her employment. She did not receive pay in lieu of notice. Having regard to her service of 7 years as claimed, she is entitled to 7 weeks pay by way of compensation for the breach of contract in not giving her notice or making payment in lieu of notice. The sum awarded is £770.

Conclusion

62. I realise, from what Ms Duffy said in evidence, that her financial position is extremely difficult. She referred to various liabilities and to advice which she is receiving from a debt counsellor. As I sought to explain to Ms Duffy, I required to consider the facts and the law and to make an award if that was regarded by me as being appropriate. As I said, I could not, for example, decide that an award was appropriate however not make such an award due to difficult financial circumstances on the part of the party potentially being found liable to pay that award.

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63. I also explained to Ms Harkins that it was not within my power to ensure that payment of any award was actually made. I would make my decision having heard the evidence. If an award was made, it would then be for Ms Harkins

to consider possible recovery, whether directly from Ms Duffy or through the Insolvency Service.

Employment Judge:

Robert Gall

5 Date of Judgement:

17 May 2019

Entered in Register,

Copied to Parties:

22 May 2019

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