



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102343/2018

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Held in Glasgow on 11, 12 and 13 February 2019

Employment Judge: Iain F. Attack

10 **Ms H Moran**

Claimant
Represented by:
Mr M Allison -
Solicitor

15 **Mr I McKenzie**

First Respondent
Represented by:
Ms M Jenkins -
Solicitor

20 **Mr G Fairhurst**

Second Respondent
Represented by:
Ms M Jenkins -
Solicitor

25 **Mr P Stewart**

Third Respondent
Represented by:
Ms M Jenkins -
Solicitor

30 **Mr I G Marshall**

Fourth Respondent
Represented by:
Ms M Jenkins -
Solicitor

35 **Mr D Turnbull**

Fifth Respondent
Represented by:
Ms M Jenkins -
Solicitor

40 **The Royal Gourock Yacht Club**

Sixth Respondent
Represented by:
Ms M Jenkins -
Solicitor

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E.T. Z4 (WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal and breach of contract are dismissed.

REASONS

5 **Introduction**

1. The claimant in this case complains of unfair dismissal and breach of contract. The respondents deny both claims. The first to fifth respondents are the office bearers of the sixth respondent, The Royal Gourock Yacht Club.
- 10 2. At a preliminary hearing held on 31 October 2018 it was clarified that the unfair dismissal case was essentially a single issue case; that issue being whether the claimant was dismissed, or whether she resigned. Both parties at this final hearing confirmed their understanding of this position.
- 15 3. The parties helpfully lodged a joint bundle consisting of 100 pages. At the commencement of the hearing further documents were added comprising pages 101 to 105. During the course of the hearing further documents were lodged comprising pages 106 to 111. Reference to those productions will be made by reference to the page number.
- 20 4. The tribunal heard evidence for the claimant from the claimant herself and from Mr Jim McCourt, manager of the Inverclyde Advice and Employment Rights Centre. For the respondent evidence was led from Mrs. Rita Keenan currently a supervisor with the respondent, Mr Stephen Keenan, who at the
25 relevant time was the sixth respondent's house convenor and from Mr George Fairhurst who at the relevant time was the sixth respondent's honorary secretary.

Findings in Fact

5. From the evidence which was led and the documents to which I was referred I made the following material findings in fact.
6. The claimant's employment began on 14 April 2014 and terminated on 16 November 2017.
7. At the time of the termination of her employment the claimant was employed as a head chef. She was the only chef then employed by the respondents.
8. She was paid at the rate of £8.59 per hour. The claimant alleged she had suffered an accident at work on 23 April 2017 and submitted a claim to the respondent via her then solicitors on or about 8 August 2017.
9. The claimant was invited to attend a disciplinary meeting on 6 August 2017. The minute of that hearing is contained at page 111. As a result of that disciplinary hearing the claimant received a verbal warning, pages 105 and 109.
10. The hours worked by the claimant were variable and depended upon the needs of the respondent.
11. On 24 May 2017 the claimant attended a meeting with representatives of the sixth respondent when she was advised that her hours would be variable and dependent on the number and size of bookings taking place each week. The claimant accepted at that meeting that her hours would fluctuate, page 104.
12. Following that meeting the claimant contacted Mr Jim McCourt. Mr McCourt requested a copy of the claimant's contract.
13. The claimant requested a copy of her contract of employment from the sixth respondent. Thereafter two copies of the contract were given to her.
14. She did not sign either of them or return them to the respondents. The respondents did not pursue the matter of the signature of the contract. A copy of the contract presented to the claimant is shown at page 31-34.

15. The claimant continued to work following the meeting on 24 May 2017 and the receipt by her of the contract of employment.
- 5 16. The claimant's hours of work dropped below 20 in July and again in September, page 107. That began to cause her financial difficulties. At that stage the claimant began looking for alternative employment.
- 10 17. On Tuesday 7 November the claimant spoke to Rita Keenan and advised that she was resigning to take up a new job at the Bakehouse café, and that Thursday would be her last shift with the sixth respondent.
- 15 18. It was not Mrs. Keenan's position to accept a resignation from an employee. She informed the claimant that she would tell Stephen Keenan, the house convenor what she had been told by the claimant. Mr Keenan was absent on business and would not return until Thursday 9 November.
19. Mrs Keenan had had a good relationship with the claimant.
- 20 20. Mrs Keenan informed Stephen Keenan of what the claimant had told her. He said he would contact the claimant on Thursday when he returned.
- 25 21. Mr Keenan met the claimant in the sixth respondent's premises on the evening of Thursday 7 November. Another employee, Maida McNeill, was present for part of the meeting but had left in the middle to answer a telephone call so was not present for the entire meeting.
- 30 22. At the meeting the claimant repeated to Stephen Keenan that she was resigning and it was agreed that, rather than her leave immediately, she would work a week's notice.
23. Following that meeting Mr Keenan informed George Fairhurst on Friday 10 November that the claimant had resigned and given a week's notice.

24. Mr Keenan contacted a potential new chef to discuss if he would accept employment with the respondent. That potential employee indicated he would consider the matter over the weekend and contact Mr Keenan.
- 5 25. Mr Keenan also investigated the possibility of franchising the sixth respondent's catering requirements to an outside contractor and also obtaining interim help to cover the catering requirements they might have.
26. Franchising the catering requirements was not the respondents' preferred option as to do so would deprive them of a source of income.
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27. On Monday 13 November the potential employee whom Mr Keenan had contacted confirmed he would accept the position.
- 15 28. Mr Fairhurst drafted a letter to the claimant accepting her notice of termination and confirming the date of her departure, page 35.
29. On 14 November Mr Fairhurst attempted to give the letter to the claimant advising her what it contained. The claimant refused to accept the letter and stated she had not resigned.
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30. Mr Fairhurst took back the letter from the claimant.
31. He contacted Mr Keenan to advise him of what the claimant had said to him. Mr Keenan confirmed that the claimant had resigned. He was no doubt about that.
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32. Mr Fairhurst was not back in the sixth respondent's premises until Thursday 16 November. He did not see the claimant again before that date.
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33. Mr Fairhurst met the claimant on Thursday 16 November and gave her the letter dated 14 November. The claimant reiterated her position that she had not resigned. She stated that the respondents were sacking her.
34. The claimant contacted Mr McCourt and was advised not to leave the premises until directed to do so.
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35. The respondent had planned that there would be a handover meeting between the new chef and the claimant on Thursday 16th but Mr Fairhurst decided in the circumstances that it would be preferable if the claimant left the respondent's premises.

36. Eventually she did leave the premises.

37. Mr McCourt wrote to the respondent on 16 November, page 36 appealing against the decision to dismiss her.

38. Mr Fairhurst on behalf of the respondents replied on 20 November stating that the claimant had not been dismissed but had resigned giving 7 days notice, page 38.

39. The claimant was paid for the 16th and 17th of November.

40. Following termination of her employment the claimant has been unfit to work and in receipt of fit notes until 21 December 2018. She has been in receipt of Universal Credit.

41. The catering function has not been franchised. The replacement chef is still working for the respondent.

42. The respondent did not regard the claimant as a troublesome employee.

Claimant's Submissions

Claimant

43. Mr Allison submitted that this was a single issue case issue with the issue being whether the claimant resigned or was dismissed. In the event of it being found she had been dismissed she was seeking compensation only.

44. He suggested that the claimant, her witness Mr McCourt and Mr Fairhurst were reliable but that neither Rita Keenan or Stephen Keenan could be regarded as reliable witnesses.
- 5 45. He submitted that the onus of proof was neutral and it was for the employment tribunal to reach a conclusion on the balance of probabilities. He referred the case of *In re B (Children)* (FC) [2008] UKHL35 paragraph 2.
- 10 46. It was accepted by Mr Allison that if the claimant was held to have resigned on 9 November that was the end of the matter. If however it was not accepted that she resigned on that date then what had happened the 16th was important. He urged me to consider the conversations on the 9th and suggested an inference could be drawn from the absence of Maida McNeill as a witness. The respondents could have called her to confirm what they claimed did happen at the meeting with Mr Keenan.
- 15 47. Mr Allison submitted that a resignation must be unequivocal and referred to the case of *East Kent Hospitals University v NHS Foundation Trust* UKEAT/0232/17/LA at paragraphs 27 and 30 as authority for that proposition.
- 20 48. It was his submission that the weight of evidence indicated the claimant did not resign which meant that what happened on the 16th was in law a dismissal. It was what happened on the 16th which brought the contract to an end.
- 25 49. Mr Allison accepted that the claimant could not unilaterally withdraw her resignation if she had given it but in his submission there was no resignation.
- 30 50. In addition to the cases quoted above Mr Allison also referred to the following cases

Societe Generale v Geys [2012] UKSC 63

Wilding v British Telecommunications Plc [2002] EWCA Civ 349

Dignity Funerals Ltd v Bruce [2004] ScotCS230

Respondents' Submissions

51. Miss Jenkins submitted that the issues of the personal injury claim submitted by the claimant and the initial lack of provision of a contract of employment to her were irrelevant to the single issue which the tribunal had to consider.
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52. It was her position that the tribunal was entitled to take the facts at face value. The words which were spoken by the claimant to Rita Keenan and then to Stephen Keenan were clear and were not idle words or words spoken under emotional stress or in the heat of the moment which the employer knew or ought to have known were not meant to be taken seriously.
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53. In this case it was clear that the claimant was resigning and the words used were unambiguous. She said that clearly to both Rita Keenan and to Stephen Keenan. There were no special circumstances applying in this case and no special circumstances entitling the tribunal to depart from the general rule that unambiguous words of resignation are to be understood as implying a resignation.
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54. Miss Jenkins also submitted that the claimant could herself have called Maida McNeill as a witness since the claimant had given evidence that she had told Maida McNeill she had not got the job at the Bakehouse for which she had allegedly applied and would not be leaving her job with the sixth respondent.
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55. It was also submitted that the claimant had not sought to withdraw her notice but in an event she could not unilaterally do so.
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56. It was submitted that in construing what happened, the tribunal must not take into account what either party subsequently thought or said but requires to look at the matter as it stood at the time. It was irrelevant the claimant subsequently claimed she had not resigned if the tribunal held that that is what she did at the relevant time.
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57. The fact that the claimant's contractual notice was one month did not matter as that the parties could agree the notice period could be varied which is what had happened in this case.

5 58. Miss Jenkins referred to the following cases

Norton Tool Co Ltd v Tewson [1973] 1 WLR45

Harris and Russell Ltd v Slingsby [1973] ICR 454

Sothorn v Franks Charlesly & Co 1981 WL 186837

10 *Minolta (UK) Ltd v Eggleston* [1981] IRLR 278

Sovereign House Security Services Ltd v Savage [1989] IRLR 115

Ali v Birmingham City Council UKEAT/ 0313/08

Societe Generale v Geys [2013] IRLR 122

Decision

15 59. The issue for the employment tribunal to consider in this case is whether the claimant resigned on 9 November or whether she was dismissed by the respondent on the 16th. The respondent accepts that if the employment terminated by a dismissal on 16 November it was an unfair dismissal and the question of remedy would require to be addressed.

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60. I considered that Mr McCourt and Mr Fairhurst were credible and reliable witnesses but they could only speak to what they had been told by, respectively, the claimant and Mr and Mrs. Keenan. I did not consider the claimant to be a wholly reliable witness. She was for example unsure as to when she received the contract of employment, firstly denying she had received it all and then suggesting it may have been received about a year after she started. She was also confused about the disciplinary meeting which she attended and she could not recall if she had been paid up to 17 November.

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61. These matters did not have any direct bearing on what happened on 9 November that they did give me cause to consider the claimant's reliability and accuracy of recall. She was quite clear about what she had stated to Rita

Keenan and to Stephen Keenan. namely that she was going to an interview for a job and that if she was successful she would hand in her notice. She was adamant that she did not resign as they claimed.

5 62. The way in which the evidence was presented did not allow any simple misunderstanding on either side. Rita Keenan was adamant that she had been told by the claimant that she had another job and Thursday 9 November would be her last shift. Mr Keenan was equally adamant that the claimant had said she was resigning when he met her on Thursday 9 November.

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63. I accepted Mr Allison's submission that it was up to the tribunal to decide the matter on the balance of probabilities. I therefore had to consider which evidence I could accept as being more likely than not.

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64. It was clear from the claimant's evidence that she was suffering financial difficulties as a result of her hours having been reduced. She said she began looking for alternative employment.

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65. The evidence of Rita Keenan that she had a good relationship with the claimant was unchallenged and the respondents denied the specific allegation that they had found the claimant to be a troublesome employee. I did not accept that the fact the claimant had intimated a claim for an alleged accident at work or had been the subject of disciplinary proceedings for a minor matter would, in the absence of anything else, make the respondent regard her as a troublesome employee.

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66. There was no doubt that the claimant had a meeting with Rita Keenan on Tuesday 7 November but no evidence was produced as to why Rita Keenan would make up a story saying that the claimant had resigned if the truth had been that the claimant was merely intimating she was to attend an interview and that if she was successful at that interview she would intimate then her resignation.

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67. If the claimant had wished to contact Stephen Keenan merely to find out what notice she required to give should she be successful at interview, it is difficult

to see why a special meeting would be required since that information could perfectly easily have been conveyed in a telephone call or through the claimant's line manager. The fact that a meeting was required raises the probability that something other than the issue of the amount of notice to be given was to be discussed.

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68. The meeting with Mr Keenan took place in the evening when Mr Keenan had gone to the club. It took place after the claimant had finished dealing with her work for that evening. Again, no explanation was suggested as to why Mr Keenan would make up the story that the claimant was resigning if all she was trying to do was to ascertain what notice she would require to give if she was successful in obtaining another job.

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69. The claimant had been given a verbal warning for a minor act of misconduct in August but there had been no disciplinary problems prior to that or indeed after it. The claimant had intimated a claim to the respondent but despite Mr Allison's efforts to suggest the respondents were upset about that, Mr Fairhurst's evidence was it had simply been passed to the insurers to deal with. There was no suggestion of any animosity towards the claimant or any reason why Mrs. Keenan should make up an allegation that the claimant had resigned and pass it on to her husband. There was simply no reason advanced as to why Mr Keenan would have colluded in such proceedings and fabricated a story that the claimant had resigned.

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70. Whilst both parties suggested that the other could have called Maida MacNeil as a witness I did not find any inference which would be helpful to either party could be drawn from her absence. On the one hand the claimant alleged that Maida MacNeil could have given evidence confirming that the claimant had told her she had not been successful in the job interview whilst, on the other, Mr Keenan alleged that Maida MacNeil could have confirmed what was said at the meeting he had on the 9th with the claimant. In other words each party claimed this potential witness could have helped them with their case but neither chose to call her. I did not consider that any inference could usefully be drawn from the fact that neither party chose to call Maida MacNeil.

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71. The evidence that the claimant was going to have an interview for a job at the Bakehouse cafe came solely from the claimant and no other evidence was produced either as to the fact of the interview itself or its outcome which the claimant said resulted in her being unsuccessful. Mr McCourt gave evidence that the claimant had told him that she was going for an interview but would not learn this outcome for about a fortnight. No explanation was given why, assuming the claimant's version of events was correct, that she learnt so quickly that she had not been successful.
72. I also took into account that when that Mr Fairhurst endeavoured to give the claimant his letter accepting her resignation, on 14 November she did not inform him that she had not got the job she had applied for and that would now have no job. All she said was that she had not resigned. She had stated that she had told Maida MacNeil that she had been unsuccessful at the interview but did not tell Mr Fairhurst that fact when he attempted to give her the letter accepting her resignation.
73. The claimant also claimed that she had tried to contact Stephen Keenan by telephone but had been unable to do so. Mr Keenan's evidence, which I accepted, was that he had no notice of any calls made to him by the claimant and no messages had been left for him by her. If the claimant had indeed been endeavouring to contact Mr Keenan I would have expected it likely that she would have left a voice message explaining what she was trying to speak to him about. That however was not her evidence. If calls had been made it should not be too difficult to have obtained details of calls made and to have produced that in evidence or to have given an explanation as to why that was not possible. Neither of those things happened.
74. I had to consider all the evidence in deciding which version was the more likely. There were some inconsistencies in the evidence of the claimant and of Mr and Mrs. Keenan but overall it appeared to me that the evidence of Rita Keenan and Stephen Keenan that at their respective meeting with the claimant she had said she was resigning was the more likely version. In reaching that conclusion I took into account the matters I stated above.

75. Having concluded that the claimant resigned and was not dismissed that is sufficient to dispose of this case. The claimant's claims for breach contract and unfair dismissal are dismissed.

Employment Judge:

Iain F. Attack

5 Date of Judgement:

25 February 2019

Entered in Register,

Copied to Parties:

01 March 2019