EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102682/2019

Held in Glasgow on 8 May and 19 November 2019

Employment Judge P McMahon

Mrs B Glanton	**Claimant** **In Person**
Mrs L Grogans (T/A Curiosity Sweets Ltd)	**First Respondent** **In Person**
Curiosity Sweets Ltd	**Second Respondent** **In Person**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

(i) The claimant's employer was the first respondent.

(ii) The claimant's claim for damages for breach of contract in respect of a failure to give sufficient contractual notice, or payment in lieu of such notice, upon termination of the claimant's employment is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Tribunal comprising a complaint of failure to give, or pay in lieu of, her full contractual notice upon termination of

the claimant's employment by the first respondent. The claimant asserts that the first respondent was her employer.

2. It is accepted that the claimant's employment was terminated but the claim is defended by the respondents on the basis that the claimant waived entitlement to be given, or paid in lieu of, her full contractual notice of termination of employment, agreeing instead to accept 2 weeks' notice of termination of employment. The first and second respondents also assert that it was the second respondent, rather than the first respondent, who employed the claimant.

3. The case was heard on 8 May and 19 November 2019.

4. The first hearing date, which was set down for one hour, was taken up dealing with various procedural matters in the case. Subsequent to this, the second respondent was added as a respondent to proceedings in accordance with Rule 34 of the Employment Tribunals Rules of Procedure 2013.

5. On the second hearing date the claimant, Mrs Bernadette Glanton, and Mrs Lilly Lorraine Grogans attended. Mrs Grogans attended in her capacity as being the first respondent and also in her capacity as being a director of the second respondent. All parties were unrepresented.

6. Productions were lodged by the parties which were collated into a single set of productions extending to 23 pages in total (the "Bundle"). Not all documents were referred to in evidence.

7. Evidence was heard on oath or affirmation from all witnesses. For the claimant, evidence was heard from the claimant and for the respondents, evidence was heard from Mrs. Grogans. The claimant and Mrs Grogans made brief closing submissions.

Issues

8. The issues to be determined by the Tribunal were as follows:-

   8.1. Who was the claimant's employer.

8.2. Had there been a breach of contract entitling the claimant to damages in respect of not receiving sufficient contractual notice, or payment in lieu of such notice, on termination of the claimant's employment.

Findings in fact

9. The Tribunal considered the following facts to be admitted or proved:

10. In or around February 2011 several businesses operated from the same address in Dunoon, 125-131 Argyll Street, Dunoon, PA23 7DD. This was known as "The Curiosity Complex" These included a tea room and shops selling sweets, greetings cards, candles and soft furnishings. Mrs. Grogans owned or had an interest in these businesses either directly, or indirectly as a director and/or shareholder of limited companies which owned the businesses.

11. Mrs. Grogans was a director and shareholder in a limited company called The Curiosity Complex Limited which operated from the same address referred to at paragraph 10 above. This company changed its name in April 2017 to Curiosity Sweets Limited. At the same time four new companies were created in which Mrs. Grogans was a director and shareholder; Triffic Card Shop Limited, Dunoon Candles Limited, Curiosity Furnishings Limited and Tudor Tea Room Limited.

12. In or around February 2011 the claimant was told that Mrs. Grogans was looking for staff and the claimant approached Mrs. Grogans about this. Mrs. Grogans told the claimant that she would like the claimant to come and work for her (Mrs. Grogans) in the tea room referred to at paragraph 10 above. It was called the "Tudor Tea Room". Mrs. Grogans said that she would employee the claimant as the tea room supervisor but that she may be asked to work in any of Mrs. Grogans' businesses during her employment. The claimant agreed and commenced her employment on 7 February 2011.

13. There was no mention in the discussions between the claimant and Mrs. Grogans before she commenced employment, or at any other time, of the claimant being employed by any of the businesses referred to at paragraph

10 above or any limited companies which owned or had an interest in any of these businesses or any other person or entity.

14. The claimant received a written statement of main terms of employment dated 1 April 2012 and 2 May 2012, a copy of which was produced at pages 13 and 14 of the Bundle. This document stated that "K& L Grogans, T/A Wizard & Genius Ltd, The Curiosity Complex Ltd, Home Harware, The Traffic Card Shop, 125-131 Argyle Street, Dunoon, PA23 7DD employs [the claimant]". K Grogans is Mr. Kenneth Grogans, Mrs. Grogan's husband. L Grogans is Mrs. Grogans.

15. In or around August 2012 Mrs Grogans told the claimant that she was moving her from working in the tea room to working in the sweet shop referred to at paragraph 10 above. The sweet shop was called "Sweet Memories". The claimant had previous experience of working in confectionary.

16. From this point in time until the termination of her employment, the claimant ordinarily worked in the sweet shop. In January 2014 the sweet shop was very quiet and Mr. Grogans asked the claimant to work on making curtains for Mrs. Grogans' holiday lets instead of working in the sweet shop. The claimant agreed and did this during January and February 2014. She was still paid as normal and her wage slips still referred to "Sweet Memories". The claimant also worked in the other businesses referred to at paragraph 10 above on occasion to help out and/or cover absence.

17. Throughout the claimant's employment Mrs. Grogans ran the businesses, instructed the staff and was evident at all times. Whilst Mr. Grogans was often in the office and also had an interest in the businesses, he never had any dealings with the employees and took nothing to do with the running of the businesses.

18. A copy of the claimant's P60 for the tax year to 5 April 2019 was produced at page 23 of the Bundle, as was a copy of the claimant's P45, at page 20 to 22 of the Bundle. The claimant's P60 and P45 both stated that the claimant's employer was "Curiosity" with an address of 125-131 Argyll Street, Dunoon, PA23 7NA. The claimant's P45, under the heading "Works number/Payroll

number and Department or branch (if any)", stated "Sweet Memories". No payslips were produced but it was agreed that they contained the same details as the claimant's P45. On the claimant's last day of employment, she received a redundancy payment by cheque from Mrs Grogan's personal account and a payment in respect of holiday pay in cash.

19. The claimant's employment was terminated on 31 December 2018. The written statement of main terms of employment referred to at paragraph 14 above provided that the length of notice required to terminate the claimant's contract of employment was one week for each completed year of service to a maximum of twelve weeks. There was no contractual provision entitling the employer to make a payment in lieu of notice when terminating employment. The claimant's gross and net pay per week were £101 and £97 respectively.

20. On 13 December 2018 the claimant was told by a colleague that Mrs. Grogans was closing the sweet shop on 31 December 2018 and they would all be out of a job. The claimant went to see Mrs. Grogans who confirmed to the claimant that she had been told by her accountant on the previous evening that she had to cease trading and close the sweet shop completely on 31 December 2018, although the card shop would remain open. Mrs. Grogans told the claimant that there were two part-time positions available in the card shop but these had been filled. Mrs. Grogans also told the claimant that this meant that the claimant's employment would terminate as at 31 December 2018.

21. On 20 December 2018 the claimant had a further discussion with Mrs. Grogans. The claimant enquired about a redundancy payment and was told by Mrs. Grogans that she would receive a redundancy payment and a payment in relation to holiday pay. There was a discussion in relation to entitlement to notice of termination of employment or pay in lieu of notice. Mrs. Grogans told the claimant that she did not think the claimant was entitled to any additional notice or pay in lieu if notice and the claimant said that she thought she was because her contract of employment provided that she was entitled to seven weeks' notice.

22. Later on 20 December 2018 Mrs Grogans telephoned the claimant and said she now realised that the claimant was entitled to additional notice but that she couldn't afford this and if she were forced to pay this she would have to go into liquidation. The claimant told Mrs. Grogans that she (the claimant) would not want to see Mrs. Grogans go into liquidation, that she (Mrs. Grogans) could only do what she could do and that the claimant would accept what Mrs. Grogans could afford.

23. Later again on 20 December 2018 Mrs. Grogans telephoned the claimant and said that five other employees who were being made redundant had agreed to accept just receiving a redundancy payment and a payment in relation to holiday pay and agreed to forgo their notice periods and not receive additional notice. The claimant told Mrs. Grogans that was fair enough and she (the claimant) too agreed to receive a redundancy payment and a payment in relation to holiday pay only and forgo any additional notice.

24. The claimant later began to feel this was unfair. The claimant intended to say this to Mrs. Grogans before her employment terminated but did not because, on the few occasions she saw Mrs. Grogans between 20 December 2018 and 31 December 2018, they were either both very busy or Mrs Grogans did not want to talk about matters.

25. On 31 December 2018 the sweet shop in which the claimant worked, as well as the adjacent tea room and candle shop referred to at paragraph 10 above, all closed. The claimant was working that day and received numerous gifts from customers and well-wishers throughout the day. The claimant found this, and the fact that the sweet shop was closing, emotional. The claimant did not see Mrs. Grogans until near the end of the day when she was given her redundancy and holiday payments and was invited to a buffet to mark the occasion. Earlier that afternoon a manager had given the claimant a document, a copy of which was produced at page 4 of the Bundle. The manager asked the claimant to sign it and said if she didn't she wouldn't get the payments on that day. The claimant signed the document and gave it back to the manager who witnessed the claimant's signature. The claimant said that she was not thinking when she was doing this. The document was a letter

addressed to "Curiosity Complex Ltd, Company No SC292424, 6th Floor, Gordon Chambers, 90 Mitchell Street, Glasgow G1 3NQ" and read as follows:

"I, Bernadette Glanton, Ardenslate Road, Dunoon hereby acknowledge that I have received the undernoted sums in full and final settlement of all and any sums due by The Curiosity Complex Limited to myself following the closure of the business, and the termination of my employment on 31 December 2018.

Undernoted sum:

1. Redundancy Payment of: 1069.00
2. Holiday Pay due: £356.00
3. Notice: 2 weeks accepted

TOTAL: £1425.00"

26. The use of the company name "Curiosity Complex Limited" was an error as this company had changed its name to Curiosity Sweets Limited in 2017. The address given for the company stated was Mrs. Grogan's accountant's address.

27. On 4 January 2019 the claimant saw an article in a local newspaper, a copy of which was produced at page 5 of the Bundle, which stated in the last paragraph, "The Tearoom is now sadly closed as of Hogmanay, with the shop downstairs to remain open until the end of January." This led the claimant to believe that the sweet shop the claimant had worked in would remain open until the end of January 2019. This was not the case, the premises in which the sweet shop had operated were being used on a day to day basis during January 2019 from which to sell off fixtures and fittings and any residual stock from the sweet shop and other businesses which had also closed on 31 December 2018 which had not been cleared by the time the businesses closed.

Observations on the evidence

28. Generally speaking, the Tribunal considered the witnesses to be giving an honest account of events as they remembered and understood them when giving evidence. The claimant, in particular, struck the Tribunal as being very open and candid in her evidence in relation to the discussions she had with Mrs. Grogans about the fact she would accept certain payments and agree to forego notice entitlement.

29. The only areas in the case where there was any material conflict of evidence on essential matters was in relation to Mrs. Grogans' assertion when giving evidence that the second respondent employed the claimant, rather than her, and in relation to the claimant's assertion that the sweet shop in which she had worked remained open in January 2019.

30. In relation to Mrs. Grogans' assertion when giving evidence that the second respondent employed the claimant, rather than her, apart from this general assertion, none of the evidence given by the claimant in this respect was disputed by Mrs. Grogans.

31. The claimant was very clear and emphatic in her evidence in relation to who she considered her employer was, i.e. that it was Mrs. Grogans who was her employer rather than any company owned by Mrs. Grogans or otherwise.

32. By contrast, Mrs. Grogans' evidence about who employed the claimant was unclear and appeared confused. Initially Mrs. Grogans said that a registered company called Sweet Memories Limited employed the claimant, and explicitly added, "rather than Curiosity Sweets Limited", then said "to be honest, I'm not entirely sure" before saying that there was no company called Sweet Memories Limited and that the claimant had originally been employed by a company called Curiosity Complex Limited and then Curiosity Sweets Limited after a change of name in 2017.

33. Mrs. Grogans also said that the claimant's written statement of main terms of employment, P45 and P60 showed that the second respondent was the claimant's employer. In relation to the claimant's written statement of main terms of employment, the only explanation offered by Mrs. Grogans as to why the employer appeared to be described as Mr. Grogans and Mrs. Grogans

trading as, followed by what appeared to be a list of other entities (including "The Curiosity Complex Limited") was that she and Mr. Grogans were directors in all the entities listed. In relation to the P45 and P60, the only explanation offered by Mrs. Grogans as to why the employer was named as "Curiosity" rather than a limited company was that the completion of these documents was outsourced to another firm.

34. In relation to the claimant's assertion that the sweet shop in which she had worked remained open for a part of January 2019, the claimant said in evidence that this was based on seeing the newspaper article referred to at paragraph 27 above and that during January 2019 residual stock from the sweet shop was being sold off from the premises the sweet shop had operated from. The claimant was candid that the bulk of stock the sweet shop had left had been sold before the sweet shop closed on 31 December 2019 and did not dispute that the fixtures and fittings from the sweet shop, as well as the other businesses which also closed on 31 December 2018 and also any residual stock from those other businesses, were also being sold from the premises in January 2019. Mrs. Grogans' explanation was that the person who wrote the newspaper article had been mistaken as to what was to happen, that the sweet shop did not remain open, but rather the premises in which the sweet shop had operated were being used on a day to day basis to sell off the fixtures and fittings and any residual stock (which included some stock from the sweet shop) from all businesses which had also closed on 31 December 2018 which had not been cleared by the time the businesses closed. This appeared a credible explanation to the Tribunal based on the evidence of both Mrs. Grogans and the claimant and in the circumstances that three businesses operating adjacent to one another where closed down at short notice.

35. There was some discussion and evidence in relation to the existence of alternative positions in the card shop business referred to at paragraph 10 above after 31 December 2018 and whether or not any of them would have been suitable for the claimant. However, as the claimant's claim related only to a complaint of failure to give, or pay in lieu of, her full contractual notice

upon termination of the claimant's employment on 31 December 2018, this was not material to the issues to be determined in this claim, in a way that it would have been material to other types of claim, for example, unfair dismissal, which were not before the Tribunal.

Relevant law

Identity of employer

36. Employment contracts are an exception to ordinary contractual principles that the ability of courts to look behind the written terms of a signed contract is limited to situations where there is a mistake that requires rectification or where the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract, ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC.*** In that case the Court also held that "… the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part".

37. ***Autoclenz*** was a case concerned with whether or not individuals where self-employed or employed. In ***Dynasystems for Trade and General Consulting Ltd and ors v Moseley EAT 0091/17*** the Employment Appeal Tribunal (EAT) applied ***Autoclenz*** to determine who was the true employer under a contract of employment. In that case the EAT also endorsed the approach of considering later events when determining what had been agreed at the start of employment. The EAT noted that the parties' actions after an agreement has been made will not be conclusive but may nonetheless help as evidence of the nature of that agreement.

38. When considering the identity of the employer, and where there is evidence that contractual terms have been documented and also non-documentary evidence, the documentation should not be considered in isolation (or even first where the relevant documentation postdates the start of the relationship), but rather the relevant documentation should be considered along with the other evidence in the case by the Tribunal when making its assessment, ***McVeigh v Livingstone EATS 0027/08***

Breach of contract

39. The Employment Tribunal has jurisdiction to hear breach of contract claims to a maximum of £25,000. This includes claims in respect of failure to pay notice. Section 86 of the Employment Rights Act 1996 (the "ERA") sets out the position with regard to the rights of an employer and employee to a minimum period of notice of termination of employment.

40. Section 86(1) of the ERA provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice for each year of continuous employment if their period of continuous employment is two years or more but less than twelve years. The effect of this provision is to incorporate the statutory terms into the contract of employment.

41. Section 86(3) of the ERA provides that Section 86(1) does not affect the right of any party to waive their right to notice on any occasion or from accepting a payment in lieu of notice.

42. Termination of a contract of employment without due notice is not a breach of contract where the employee has waived their right to notice, ***Baldwin v British Coal Corporation 1995 IRLR 139, QBD***.

43. Waiver will mean that the employee also loses the right to receive a payment in lieu of notice, ***Trotter v Forth Ports Authority 1991 IRLR 419, Ct Sess (Outer House)***

44. The waiver by the employee must be clear and certain and any ambiguity is likely to be construed against the employer who is seeking to rely on it, ***Skilton v T and K Home Improvements Ltd 2000 ICR 1162, CA*.**

45. A change to terms and conditions will not be taken to have been agreed by an employee if consent was only acquired through duress, but for there to be "duress" in the legal sense, there must be "no real alternative" for the employee, ***Hepworth Heating Ltd v Akers and ors EAT 846/02***.

Submissions

Claimant's submissions

46. The claimant made brief oral submissions. In summary, her submissions were as follows:

47. The claimant worked for Mrs. Grogans for seven years and 10 months and gave the job her all, she promoted the shop and did things like introducing a training manual.

48. The claimant's contract said that she was entitled to notice and she didn't get it. She had seen a booklet that said in these circumstances she was entitled to a payment for that period and she wasn't paid it. That is the reason why the claimant brought her claim.

49. The claimant would have honoured the contract and fulfilled her side of the bargain, and so expected the first respondent to do so too.

Respondent's submissions

50. Mrs. Grogans, on behalf of the first and second respondents, made very brief oral submissions. In summary, her submissions were as follows:

51. Mrs. Grogans felt that the claimant thought that she had been singled out and hard done to, but there were other employees also. Mrs. Grogans said that she did the best she could at the time with her own money.

Discussion and decision

52. The first issue for the Tribunal to determine was what was the correct identity of the claimant's employer. The claimant asserted that the first respondent was her employer and both the first and second respondents asserted that the second respondent was the claimant's employer.

53. In the circumstances that there was evidence that contractual terms had been documented and also non-documentary evidence in relation to the identity of the claimant's employer, and mindful of the guidance in ***Autoclenz, Dynasystems*** and ***McVeigh***, the Tribunal considered all the evidence in the

round, including the documentary evidence, when assessing the true identity of the claimant's employer.

54. In relation to the written statement of main terms of employment documentation, at page 13 and 14 of the Bundle, as referred to above, this document referred to the claimant's employer as being "K& L Grogans, T/A Wizard & Genius Ltd, The Curiosity Complex Ltd, Home Harware, The Traffic Card Shop, 125-131 Argyle Street, Dunoon, PA23 7DD" with K Grogans being Mr. Kenneth Grogans, Mrs. Grogan's husband, L Grogans being Mrs. Grogans". This document was signed by both Mrs. Grogans and the claimant over a year after the claimant's employment began and there was no evidence of there being any discussion or correspondence in relation to it.

55. The Tribunal were unconvinced by Mrs. Grogans assertion that this document itself showed or indicated that the claimant was employed by the second respondent (notwithstanding the evidence that the second respondent was previously called "The Curiosity Complex Ltd"). The Tribunal concluded that, on the face of it, this document indicated that the claimant was employed by Mr. Grogans and Mrs. Grogans trading as entities called The Curiosity Complex Ltd (which later changed its name to Curiosity Sweets Limited) as well as Wizard & Genius Ltd, Home Harware and The Traffic Card Shop.

56. The Tribunal did, however, note that other than the written statement of main terms of employment, there was no evidence to support a conclusion that Mr. Grogans employed the claimant and this was not asserted by either party. In fact, the only evidence heard in relation to Mr Grogans was that, whilst he was often in the office, and also had an interest in the businesses, he never had any dealings with the employees and took nothing to do with the running of the businesses.

57. The Tribunal went on to consider the other evidence in the case and concluded that the following non-documentary evidence pointed towards the first respondent, rather than the second respondent or any other company, person or entity being the claimant's employer:

58. When the claimant and Mrs. Grogans discussed the claimant becoming an employee, and the claimant agreed to do so, Mrs. Grogans said that she wanted the claimant to come and work for her (Mrs. Grogans). Mrs. Grogans also said that she would employee the claimant in the tearoom business. There was no mention of the second respondent or any other company, person or entity being the claimant's employer during this conversation. In fact, there was never any mention of the second respondent or any other company, person or entity being the claimant's employer during the claimant's employment at all. This evidence as to what was, and was not, said orally by Mrs. Grogans to the claimant in relation to who employed the claimant was a strong indicator that the first respondent, and not the second respondent, or any other company, person or entity, was the claimant's employer.

59. Mrs. Grogans also said that, whilst the claimant would work in the tearoom business, she may be required to work in any of Mrs. Grogans' businesses during her employment. This, in fact, happened. The claimant was moved to work in the sweet shop business in or around August 2012. In or around January and February 2014 the claimant worked on making curtains for holiday lets owned by Mrs. Grogans. In the period between August 2012 and the termination of the claimant's employment she also worked in the other businesses referred to at paragraph 10 above on occasion to help out and/or cover absence. The fact that the claimant worked for other businesses owned by or in which Mrs. Grogans had an interest was consistent with the Mrs. Grogans being the claimant's employer. This struck the Tribunal as being particularly so in relation to the claimant doing work for holiday lets owned by Mrs. Grogans, there being no suggestion that there was any link between the holiday lets and the business the claimant worked in other than the fact that Mrs. Grogans owned them. However, the Tribunal recognised that, whilst this was consistent with Mrs. Grogans being the claimant's employer, it was not incompatible with the claimant being employed by the second respondent, or another company which Mrs. Grogans owned or had an interest in as some employment relationships do provide for an employee being employed by one company and carrying out work for third parties.

60. Throughout the claimant's employment Mrs. Grogans ran the businesses, instructed the staff and was evident at all times.

61. On the claimant's last day of employment, she received a redundancy payment by cheque from Mrs. Grogan's personal account and a payment in respect of holiday pay in cash. There was no suggestion that these payments were being made by the second respondent or any other party other than the first respondent.

62. Other than the written statement of main terms of employment, the only other documentary evidence produced and referred to in evidence in relation to who the claimant's employer was consisted of a P60, at page 23 of the Bundle, and a P45, at page 20 to 22 of the Bundle. Both of these documents referred to the claimant's employer being "Curiosity". It was a matter of agreement between the parties that the claimant's pay slips said the same. The Tribunal noted that these documents did not state that a limited company was the claimant's employer, nor, however, did they refer to the claimant's employer being Mrs. Grogans. Accordingly, whilst the Tribunal considered that these documents were relevant, they were not conclusive of anything.

63. In all the circumstances, therefore, and considering all the evidence in relation to the identity of the claimant's employer, including but not limited to the documentary evidence, the Tribunal concluded that the claimant's employer was the first respondent, as asserted by the claimant.

64. The second issue the Tribunal had to determine was whether there had been a breach of contract entitling the claimant to damages in respect of the claimant not receiving sufficient contractual notice, or payment in lieu of such notice, on termination of the claimant's employment.

65. In accordance with Section 86(1) of the ERA, in the circumstances that the claimant had been continuously employed for seven years as at the termination of her employment, she was contractually entitled to seven weeks' notice of termination of employment. This also reflected the terms of the claimant's written statement of main terms of employment.

66. However, taken together, Section 86(3) of the ERA and ***Baldwin*** make it clear that an employee can waive their right to notice.

67. In this case, the claimant signed a letter that stated, *inter alia,* "I have received the undernoted sums in full and final settlement of all and any sums due by The Curiosity Complex Limited to myself following the closure of the business, and the termination of my employment on 31 December 2018." The letter went on to record certain sums and then the statement "Notice: 2 weeks accepted". The letter was also addressed to The Curiosity Complex Ltd at the first respondent's accountant's address. As noted above, as at the date of termination of employment, which is the date on which the claimant signed this letter, there was no company called The Curiosity Complex Limited, it had changed its name to Curiosity Sweets Limited in or around April 2017. Furthermore, the Tribunal had concluded that the claimant's employer was the first respondent, not The Curiosity Complex Limited or Curiosity Sweets Limited. Accordingly, noting the position highlighted in ***Skilton,*** the Tribunal concluded that this letter was not sufficiently clear, certain and unambiguous so as to amount to the claimant waiving her right to notice from her employer.

68. However, given what the claimant said during her last conversation with Mrs Grogans on 20 December 2018, referred to at paragraph 23 above, and noting the context that the claimant had already said to Mrs Grogans on a previous call that she (the claimant) would accept what Mrs Grogans could afford (in response to Mrs Grogans saying that she couldn't afford to pay additional notice) and the fact that the claimant later began to feel that this was unfair and intended to say this to Mrs Grogans before her employment terminated, but didn't, the Tribunal was satisfied that the claimant did agree to waive her entitlement to notice of termination of employment in addition to that given by her employer, i.e. 18 days, and that this was done in sufficiently clear, certain and unambiguous terms. In accordance with the guidance in ***Trotter***, in waiving her right to notice, this also meant that the claimant was not entitled to a payment in lieu of notice.

69. It was understandable, given what Mrs Grogans had said to the claimant, that that the claimant felt under some degree of pressure to agree to waive her

entitlement to notice and that this was unfair. The claimant made reference to having felt that this was the case when she reflected on it later. The Tribunal considered whether this could amount to the claimant's consent to waive her entitlement to notice only being acquired through duress. However, feeling a moral or financial pressure to agree to waive her entitlement to notice did not go so far as to amount to "duress" in the legal sense because, as observed in ***Hepworth***, for there to be duress in the legal sense there must be "no real alternative" for the employee. The claimant did have the option of not agreeing to waive her notice and instead suing for breach of contract and, as also observed in ***Hepworth***, the fact that the employee has the option of suing for breach of contract means that they are not in the position of having no real alternative.

70. It was clear to the Tribunal that the claimant had been a highly valued and highly regarded employee and that, in retrospect, she had felt badly let down by the failure to give her sufficient contractual notice, or a payment in lieu of such notice. However, the claimant having agreed to waive her notice as set out above, the Tribunal concluded that the claimant's claim for damages for breach of contract in respect of a failure to give sufficient contractual notice, or payment in lieu of such notice, upon termination of the claimant's employment could not be successful and accordingly the claim is dismissed.

71. Having concluded that the claimant's claim for damages was not successful, the Tribunal did not consider it necessary to go on to determine the question of remedy.

Employment Judge: P McMahon

Date of Judgement: 20 December 2019

Entered in Register,

Copied to Parties: 20 December 2019