



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111746/2019

Held in Glasgow on 2 March 2020

Employment Judge P O'Donnell

Mrs M Butler

**Claimant
In Person**

Mairi Claire Dwyer

**Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

- (1) The Claimant was dismissed by reason of redundancy and is entitled to a statutory redundancy payment of £1102.00 (One thousand one hundred and two pounds).
- (2) The Claimant was dismissed without notice and is entitled to compensation for breach of contract in the sum of £735.00 (Seven hundred and thirty-five pounds).
- (3) The Claimant is entitled to pay in lieu of untaken holidays on the termination of her employment in the sum of £73.50 (Seventy three pounds and fifty pence).

REASONS

Introduction

1. The Claimant has brought the following claims:-
 - a. Statutory Redundancy Pay
 - b. Breach of contract arising from a failure by the Respondent to provide notice of dismissal
 - c. Holiday pay

2. The Respondent resists the claims; she does not dispute that the Claimant was dismissed when she ceased trading but argues that the Claimant does not have the necessary continuous service to claim statutory redundancy pay or notice. She makes this assertion on the basis that she took over the business on 1 October 2018 and only employed the Claimant from that date.

Evidence

3. The Tribunal heard evidence from the following witnesses:-
 - a. The Claimant
 - b. The Respondent.
4. There was a bundle of documents prepared by the Claimant. The Respondent did not produce any further documents. Page numbers below are references to the pages in the bundle produced by the Claimant.

Findings in fact

5. The Tribunal made the following relevant findings in fact.
6. The Claimant was born on 8 March 1956.
7. She started working as a waitress at Nellie Browns, a coffee shop, which, at the time was owned by Lillian Tighe. Her employment started on 17 March 2014.
8. The Claimant worked 18 hours a week, working 4.5 hours over 4 days each week.
9. She earned £147 a week.
10. The Claimant was issued a written statement of terms and conditions of employment by Ms Tighe (pp2-3). At clause 8, the Claimant's holiday year started on 1 March each year and ended in February the next year.
11. In the summer of 2018, Ms Tighe decided to retire and the business was put up for sale. It was purchased by the present Respondent who happens to be Ms Tighe's daughter.

12. The Respondent took over the business with effect from 1 October 2018. She continued to trade under the name “Nellie Browns” from the same premises with the same staff and using the same equipment. The business remained that of a coffee shop.
13. There was no gap in the Claimant’s employment; she finished work on Saturday 29 September 2018 with Ms Tighe as her employer and came into work on Monday 1 October 2018 with the Respondent as her employer.
14. In the early part of 2019, it became increasingly clear to the Respondent that the business was struggling; nearby businesses had closed decreasing the footfall; bad weather had kept their traditional customer base (which tended to be older) away; another coffee shop had opened nearby and increased competition.
15. The Respondent had negotiated a decrease in her rent to assist in the financial difficulties of the business. However, by the middle of June 2019, the Respondent saw no choice but to cease trading.
16. The Claimant was on holiday at the time attending her daughter’s wedding. She had stopped work on 8 June 2019 and had flown abroad a few days later. These were the first holidays she had had since March 2019.
17. On 17 June 2019, the Claimant received a text from the Respondent (p9) advising her of the decision to close the business with immediate effect. The Claimant was dismissed on this date. There had been no previous indication given to the Claimant that she would be dismissed.

Submissions

18. Prior to submissions being made, the Tribunal drew parties’ attention to the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and section 218(2) of the Employment Rights Act 1996 which it considered were important to the issues to be determined in order that parties could address these statutory provisions in their submissions.

Claimant’s submissions

19. The Claimant made the following submissions.

20. She received her contract in March 2014 and her employment ended in June 2019.
21. She was never told that her employment ended when Ms Tighe sold the business nor was she offered redundancy pay by Ms Tighe.
22. She was not offered a job or given an interview by the Respondent when she took over the business; she had worked continuously with no breaks.
23. When the Respondent took over the business, the staff transferred, the name transferred as did everything in the shop.
24. The Claimant believes that she qualifies for redundancy pay, notice pay and holiday pay.

Respondent's submissions

25. The Respondent made the following submissions.
26. She had continued the business for the welfare of the staff. Documentation which she gave to staff when she took over were all relevant to the start of a new business and she followed the procedures for the start of a new business.
27. She had worked with the staff for four years and so did not feel that there was a need to interview them.
28. A line was drawn between the previous owner and the Respondent which was a new business.

Relevant Law

29. Section 135 of the Employment Rights Act 1996 provides that an employee is entitled to redundancy payment where they are dismissed in circumstances where they are redundant.
30. The definition of redundancy can be found in section 139 of the Employment Rights Act 1996 and includes the situation where the employer ceases to carry on the business in which the employee is employed.

31. The amount of any redundancy pay is determined by section 162 of the 1996 Act and is a number of weeks' pay depending on age and length of service.
32. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996 which is based on length of service.
33. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.
34. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
35. The statutory concept of "continuous service" is relevant to redundancy pay and notice in two ways; an employee must have at least two years' continuous service to have the right to redundancy pay; the amount of any redundancy pay or notice is determined by the amount of continuous service.
36. Section 211 of the Employment Rights Act states:-
 - (1) *An employee's period of continuous employment for the purposes of any provision of this Act—*
 - (a) *(subject to [subsection] (3)) begins with the day on which the employee starts work, and*
 - (b) *ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.*
37. Section 212 goes on to state:-
 - (1) *Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*

38. Section 218 of the Act deals with changes in employer and sub-section 2 is relevant for the purposes of this case:-

If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment.

39. The Transfer of Undertakings (Protection of Employment) Regulations 2006 provide that where there is a “relevant transfer” as defined in Regulation 3 then, by virtue of Regulation 4, the transfer does not terminate the contract of employment of any person employed by the transferor who is part of the organised grouping of employees that is subject to the transferor. Regulation 4 goes on to provide that the transferors rights, duties, powers and responsibilities in relation to any such contract transfers to the transferee.

40. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker’s wages unless this is authorised by statute, a provision in the worker’s contract or by the previous written consent of the worker.

41. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks’ paid holidays each year.

42. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:-

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is

entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

- (2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*
- (3) *The payment due under paragraph (2) shall be—*
- (a) *such sum as may be provided for the purposes of this regulation in a relevant agreement, or*
- (b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

(AxB)-C

where—

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|----------|---|
| <i>A</i> | <i>is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];</i> |
| <i>B</i> | <i>is the proportion of the worker's leave year which expired before the termination date, and</i> |
| <i>C</i> | <i>is the period of leave taken by the worker between the start of the leave year and the termination date.</i> |

Decision

Redundancy Pay and Notice Pay

43. There is no question that the Claimant was dismissed in circumstances where the Respondent ceased the business in which the Claimant was employed. Indeed, this was not in dispute between the parties. The Tribunal, therefore, finds that the Claimant was dismissed by reason of redundancy; the circumstances in which she was dismissed fall squarely into the definition of redundancy in section 139(1)(a)(i) of the 1996 Act.
44. Similarly, there was no dispute that the Claimant was dismissed on 17 June 2019 and had been given no prior notice of her dismissal. The Claimant was, therefore, dismissed in breach of contract.
45. The question to be resolved is what the Claimant's continuous service at the date of dismissal was and, in particular, whether the change of ownership in October 2018 broke her continuity.
46. In the Tribunal's view, s218(2) of the 1996 Act clearly applies to this case and the Claimant's period of employment with Ms Tighe counted toward her continuous service with the Respondent and the change in ownership did not break service as provided for in this section.
47. There is no doubt in the Tribunal's mind that there was a transfer for the purposes of s218(2); the Respondent carried on the same business, using the same name, from the same premises, with the same employees and equipment as the previous owner.
48. Further, and for the same reasons, the Tribunal considered that the purchase of the business amounted to a relevant transfer as defined in Regulation 3 of the 2006 Regulations. The effect of this is that the transfer did not terminate the Claimant's employment and she transferred to work for the Respondent with the same terms and conditions of employment as she had with Ms Tighe.
49. In these circumstances, the Tribunal considers that the Claimant had 5 years' continuous service when she was dismissed. She is, therefore, entitled to Statutory Redundancy Pay.
50. The Claimant was 63 at the time of her dismissal and had 5 years' service. She is therefore entitled to a redundancy payment of 7.5 weeks' pay.

51. The claimant's gross pay per week was £147. She is, therefore, entitled to a redundancy payment of 7.5 weeks x £147 = £1102.00.
52. The Claimant was dismissed without notice or pay in lieu of notice. She was entitled to 5 weeks' notice under s86 of the 1996 Act. The Tribunal, therefore, awards the Claimant compensation for breach of contract equivalent to 5 weeks' pay in the sum of £735.00

Holiday Pay

53. The Tribunal finds that the Claimant's holiday year was that set out in the contract issued by Ms Tighe in 2014; this term transferred with the Claimant under the 2006 Regulations when the business transferred to the Respondent.
54. By the date of her dismissal, the Claimant had been employed for 108 days in the leave year beginning on 1 March 2019.
55. The Claimant had taken 5 days' holiday by the date of her dismissal (that is, 4 days in the week commencing 10 June 2019 and 17 June 2019)
56. Applying the formula in Regulation 14 of the 1998 Regulations, the Tribunal calculates the pay in lieu of untaken holidays due to the Claimant on her dismissal as follows:-
 - a. A is 23 days (5.6 weeks at 4 days a week rounded up to a whole day)
 - b. B is 108 days divided by 365 = 0.3
 - c. C is 5
 - d. The calculation is therefore $(23 \times 0.3) - 5 = 2$ days (rounded to a whole day)
 - e. The amount of holiday pay owed to the claimant on the termination of her employment would be £73.50 (£36.75 a day x 2 days).

57. The Tribunal, therefore, awards the Claimant the sum of £73.50 in respect of pay in lieu of untaken holidays on the termination of her employment.

Employment Judge: P O'Donnell

Date of Judgement: 05 March 2020

Entered in Register,

Copied to Parties: 06 March 2020