



EMPLOYMENT TRIBUNALS

Claimant: Miss C Johnson

Respondent: Townley House Nursery Limited

Heard at: Manchester (by CVP)

On: 11 February 2021

Before: Employment Judge Whittaker
(sitting alone)

REPRESENTATION:

Claimant: Mr Dawson non legal representative

Respondent: Miss Ryding

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent shall pay the claimant the sum of £593.84 as notice pay.
2. The respondent shall pay the sum of £320 to the claimant as a Preparation Time Order.
3. The claimant's claim for a redundancy payment is dismissed.

REASONS

1. The claimant resigned at the conclusion of a grievance meeting which was held on 10 July 2020. The claimant brought claims pursuant to sections 135/136 of the Employment Rights Act 1996 for a redundancy payment. She resigned without giving notice. She alleged that she resigned because of the conduct of the employer and said that it amounted to a fundamental breach of the implied term of trust and confidence. The claimant did not give or work any period of notice due to the conduct of the respondent. She claimed the value of her notice pay representing damages for breach of contract.

2. At a hearing on 3 February 2020 the value of the claimant's notice pay claim if successful, was agreed following discussions with both the claimant and the respondent at a value of £593.84.

3. The claims of the claimant were due to be heard on 3 and 4 February 2020 but the claims were unable to be concluded. It is not necessary for the reasons for that adjournment to be recorded here.

4. When the case was adjourned on 3 February 2020 following an application by the respondent, it was conceded on the part of the respondent that it would be appropriate for a Preparation Time Order to be made in favour of the claimant, who was represented by her partner. At the hearing on 11 February 2020 it was agreed by the respondent that the appropriate number of hours was eight and in those circumstances a Preparation Time Order was made with the agreement of the respondent in the sum of £320 representing eight hours at £40 per hour.

5. In order for the claimant's claim in respect of a redundancy to be successful then she had the burden of proof to show that she had been "dismissed by reason of redundancy". If the claimant had been dismissed for any other reason then clearly the claimant would not be entitled to a redundancy payment.

6. The "dismissal" of the claimant fell to be considered by the Tribunal as a dismissal pursuant to section 136(1)(c) which is commonly known as constructive dismissal:

"An employee is to be regarded as dismissed if they terminate their contract in circumstances where they are entitled to terminate it, without notice, by reason of the employer's conduct."

7. The claimant alleged that she had resigned at the conclusion of the grievance hearing on 10 July 2020 because of the conduct of the respondent. The claimant alleged that that conduct was "by reason of redundancy" and that she was therefore entitled to a redundancy payment.

8. At a preliminary hearing which was held on 2 November 2020, the claimant confirmed during discussions with Employment Judge Benson that she was not making a claim for unfair dismissal pursuant to the Employment Rights Act 1996. It was therefore entirely inappropriate to consider any basic award or compensatory award for unfair dismissal.

9. The claimant began her employment with the respondent as a Baby Team Leader on 1 November 2019. Her written contract of employment included a mobility clause. Her place of work was recorded as Saunders Lane but it was an express term of her contract that she could be required to work "at any of our other sites as directed".

10. In December 2019 the claimant was promoted to the position of Nursery Manager. Her place of work changed. She now began working at Cuerden Nursery. She again signed a written contract of employment which was included in the bundle at page 25. It included an identical mobility clause but this time clearly indicating that her place of work was the Cuerden Nursery.

11. The claimant agreed that during each of those two contracts of employment she had, albeit on only a few occasions and albeit only for a few days at a time, been required to work at other locations in accordance with the mobility clause which was included in her contract of employment. She equally accepted that at all times it was her responsibility to make arrangements to get to and from work, and that any

expenses incurred in travelling to and from work were expenses which were her responsibility. When those expenses were incurred on the occasions when she worked other than at her normal place of work, the claimant met those expenses without complaint.

12. The Cuerden Nursery closed on Friday 20 March 2020 in advance of the first national Covid lockdown which was imposed on Monday 23 March 2020. The claimant was subsequently placed on furlough, with her agreement, in response to a letter sent to her by the respondent on 27 March 2020.

13. In the period from the beginning of June 2020 up to the end of June 2020 there were various discussions between the claimant and the respondent about working at locations other than the Cuerden Nursery. For the purposes of this Judgment it is not necessary to detail those discussions because in an email sent to the claimant by the respondent on Friday 3 July 2020 the claimant was told that she should return to work at the Cuerden Nursery on Monday 6 July 2020. The email said that the nursery was going to reopen on Monday 13 July 2020 and that in those circumstances any further discussions about working anywhere other than Cuerden Nursery were unnecessary. Indeed the respondent said that "this resolves the ongoing consultations". The consultations had been all about the claimant potentially working at other nurseries operated by the respondent, and whether the claimant was or was not redundant. It should be recorded that the respondent had dismissed as redundant all other members of staff who had worked at the Cuerden Nursery, other than the claimant who was employed as the manager. The claimant was told in that email dated 3 July 2020 that "due to the nursery reopening" that the claimant was required to "resume work" on her normal hours. She was "required to attend at the normal start time". Her working hours were 7.30am until 6.00pm. It is clear written instructions were issued to the claimant on Friday 3 July 2020.

14. The claimant had been told that she would be given two weeks' advance notice of any return to work. The respondent was aware that the claimant had childcare arrangements to resolve if she was to return from furlough. However, that two week notice period was not given to the claimant. Indeed she was given just Saturday and Sunday to prepare for her return to work by no later than 7.30am on Monday 6 July 2020.

15. However, by Monday 6 July 2020, her first day back, Mrs Walmsley, a director and owner of the respondent company, rang the claimant. A short note of that conversation appeared at page 76 in the bundle. Indeed the conversation must have been very short because the note maintained by Mrs Walmsley was only seven lines of typing. There was no attempt whatsoever to meet face to face with the claimant despite the claimant having been away from work for over three months. Mrs Walmsley and the other witness for the claimant, Ms Ryding, had however been happy to arrange a face to face meeting with an adjoining Local Authority school which was next to Cuerden Nursery. There was no justification therefore to suggest that the respondent was unable or unwilling to conduct face to face discussions.

16. The claimant was left to turn up for work at 7.30am without any clear instructions. She was left to turn up to an empty set of premises and work alone and to use her own initiative as to how to best prepare the nursery for the anticipated opening on 13 July 2020, just a week later.

17. However, on 6 July 2020, during this telephone call, Mrs Walmsley now told the claimant that the nursery was not opening on 13 July 2020 at all, despite all the words of reassurance from Mrs Walmsley which had been included in the email of Friday 3 July 2020. It was suggested in that email of 6 July 2020 that there had been a low take-up from parents, but no explanation was given as to how that information became available over the weekend of Saturday 4 and Sunday 5 July before the claimant was required to return to work on Monday 6 July 2020. Indeed the witness statements of both respondent witnesses were almost completely silent about the events from and including 3 July. The respondent gave no evidence at all as to how or why their position had changed so dramatically between Friday 3 July and Monday 6 July 2020, particularly in view of the fact that the intervening days were not even work days.

18. Despite the fact that the nursery was not now reopening on 13 July the claimant was still required to work her full working hours with still no face to face meeting with Mrs Walmsley or Ms Ryding to offer any support or guidance to the claimant in those circumstances. She was simply left to her own devices.

19. Following the telephone call on 6 July 2020 between the claimant and Mrs Walmsley, on Thursday the 9th of July, the claimant asked to leave early. She had completed all the tasks which she felt were reasonable, particularly bearing in mind now that there was no date whatsoever for when the nursery was going to open. That request was refused by Mrs Walmsley without any explanation as to why it was necessary for the claimant to remain in empty premises with little or no work to carry out.

20. When the claimant returned to work on 6 July 2020 she encountered the Head Teacher from the adjoining LA school where the respondent operated a before and after school club. The Head Teacher expressed complete surprise that the claimant was at work as she said that in discussions with Mrs Walmsley and Ms Ryding she had been told that the nursery was not going to open for some time and might possibly not open until 2021. There did not therefore appear to be any urgency at all as to why the claimant should be required to work her full working hours, or in particular why she could not be allowed to leave work early on 9 July. No evidence was given to the Tribunal by the respondent about this refusal.

21. In response to the events of 6 July 2020 the claimant wrote an email in the evening on Monday at 8.07pm. That appeared at page 77 in the bundle. The claimant referred to the idea of “constructive dismissal”. Despite the obvious tone and content of that email (which appeared at page 77), no attempts at all were made by either Mrs Walmsley or Ms Ryding to contact the claimant and to arrange for a face to face meeting or perhaps to arrange some form of video conversation, such as a Zoom call. Again no reason for this was given by the respondent. The tone and content of the email from the claimant as very obvious and was written against the background of a complete change of heart about reopening on the part of the respondent.

22. In response the respondent sent a letter of reply which again appeared at page 77. It was sent by email. At this stage the only assurances which were offered to the claimant were that the respondent was “hoping to reopen”. No suggested date was offered. Somewhat bizarrely, in the opinion of the Tribunal, the respondent indicated in that email that they hoped to generate additional business for the

Cuerden Nursery by changing its name, and that “hopefully” that would happen in 2021. Nothing whatsoever was said about when the nursery might be opening. That was left completely uncertain.

23. In response to the letter from the claimant, what the respondent sent was, in the opinion of the Tribunal, a firm and uncaring response which was of an extremely formal nature. It referred to the grievance procedure and offered a grievance hearing. No attempt was made to discuss the matters which the claimant had raised with the claimant at all. This was despite the fact that the real uncertainties surrounding the Cuerden Nursery had been created by the respondent in what they had said on 3 July and then on Monday 6 July 2020. The response of the respondent was a formal approach to suggest matters be discussed in accordance with the grievance procedure.

24. The claimant did not work on Wednesdays. She returned to work as normal on 9 July 2020 but again encountered empty premises and a complete lack of direction and instruction from the respondent. It should be said, however, that on one of the days that week when the claimant had been at work, Mrs Walmsley had telephoned the claimant to direct her as to when she should take her dinner break and other breaks to which she was entitled during the day. No explanation for this was given to the Tribunal. In the opinion of the Tribunal, there was no justification as to why such an instruction should be given to the manager who was at all times working on her own, without instruction, guidance or support from the respondent. It seemed a particularly high-handed approach to the management of the claimant.

25. During the course of the grievance meeting the claimant became obviously frustrated and at one point was cautioned for raising her voice. The claimant was, however, given no further indications or assurances as to when the nursery would open. The claimant referred to the refusal of her request to leave early and the direction that she had been given, again by Mrs Walmsley, about when she should take lunch and dinner breaks whilst working in an empty building.

26. The claimant resigned at the conclusion of the grievance hearing but just before her resignation she once again referred to the fact that she was managing an empty nursery and that the only suggestion that had been made was that the nursery might open in January 2021. The claimant was questioning why the respondent had decided to wait so long.

27. In evidence the Tribunal was actually told that by 10 July 2020 the respondent knew that they intended to open the nursery in September following further discussions with the Head of the adjoining school who by now had indicated that there was demand for the services provided by the respondent. Again this was a dramatic and unexplained change of heart bearing in mind the discussions which had taken place between the Head and the claimant on Monday 6 July. This change of heart and change of opinion as to the opening date for the Cuerden Nursery was never mentioned to the claimant during the grievance meeting and was never discussed with her. The respondent was asked by the Tribunal to explain why those discussions did not take place, and no explanation at all was offered to the Tribunal by the respondent. The grievance procedure therefore concluded without any information being given to the claimant about the fact that by now the respondent intended to open the nursery in September. Indeed the Tribunal was

told that the nursery did indeed open on 1 September. This information was completely unknown to the claimant at the time of her resignation.

28. It was however very clear that the respondent understood the basis of the claimant's grievance which they were dealing with. They noted at page 82 that the first point of grievance raised by the claimant was that she was "not being kept informed about the ongoing situation with the business". That was very clearly understood by the respondent. Despite that being the focus of her grievance, the respondent failed during the course of the grievance to keep the claimant informed about the ongoing situation with the business, particularly its opening date. The claimant, in frustration, therefore resigned at the end of the grievance hearing without waiting for the outcome. She resigned without notice.

The Law

29. The Tribunal has already referred to sections 135 and 136 of the Employment Rights Act 1996. The first issue to be determined by the Tribunal was whether or not the claimant had been dismissed, constructively dismissed, pursuant to section 136(1)(c) of the Employment Rights Act 1996.

Conclusions

30. There was no dispute that the claimant had resigned. The claimant said that she had resigned "by reason of the employer's conduct". The "conduct" was the conduct of the respondent between 3 and 10 July inclusive. It surrounded the confusion relating to the opening of the Cuerden Nursery and the way in which the claimant had been treated during those 7/8 days. Indeed the claimant had, in the opinion of the Tribunal, neatly summarised that in her grievance as "not being kept informed about the ongoing situation with the business".

31. During that seven day period the Tribunal finds that the claimant had been unnecessarily micromanaged particularly in respect of being told about when to take breaks, being refused the opportunity to leave early on Thursday 9 July, and not receiving any guidance or instruction from the respondent as to what she should do when she returned to work. This was a particularly significant failing on the part of the respondent when, on Monday 6 July, her first day back at work, the claimant was in fact then told that the planned opening on Monday 13 July had been cancelled with no other opening date in sight. Indeed at page 76 Mrs Walmsley clearly indicated to the claimant that the respondent "not be looking at opening just yet". No suggested date or even period of time was included in that letter.

32. It should also be recorded very clearly that by now the respondent was not taking any steps whatsoever to rely upon the mobility clause in the claimant's contract of employment. When they had told the claimant to return to work on 3 July they had indicated that those discussions had been brought to an end by the decision to reopen the nursery on the 13 July and the requirement therefore of the claimant to return to work on Monday 6 July. Offers of alternative employment and the operation of the mobility clause therefore became irrelevant.

33. The claimant had also agreed to return to work without the offered two week period of notice and only had the weekend in which to make the necessary preparations against the background of her being told very clearly by the respondent

that she must work her normal working hours, requiring her to be at work no later than 7.30am on the Monday morning.

34. It became very clear during the course of the grievance hearing on 10 July that the claimant was becoming frustrated and this led to her raising her voice. This clearly indicated to the respondent her strength of opinion about what had been going on and how she had been effectively kept in the dark about decisions which were being made about the nursery that she was the manager of.

35. When considering whether there had been a breach of the claimant's contract of employment the Tribunal considered the conduct of the respondent between 3 and 10 July inclusive against the background of the implied term of trust and confidence. This is a fundamental term implied into every employment contract between an employer and an employee. In the very clear view of the Tribunal that clause had been fundamentally breached by the respondent by their conduct between 3 and 10 July. In those circumstances the claimant was entitled to resign in response to those breaches of contract and was not required to work any period of notice. The claimant did indeed resign and refused to work any period of notice in direct response to the conduct of the respondent as described. The tribunal therefore was satisfied that the claimant had been "dismissed" pursuant to the clear wording of section 136(1)(c) of the Employment Rights Act 1996.

36. In those circumstances the claimant was clearly entitled to receive the notice pay to which she was entitled under the terms of her contract of employment. The respondent had conceded this and had agreed that the value of that notice pay would be £593.84 if the claimant was successful. The claimant was successful and the respondent was therefore ordered to pay that sum to the claimant.

37. The claimant, as indicated above, had not made a claim for unfair dismissal but only a claim for a redundancy payment under section 135 of the Employment Rights Act 1996. In order to succeed in that claim the claimant would need to demonstrate that she had been dismissed "by reason of redundancy". The Tribunal was very clearly satisfied that the claimant had not been dismissed by reason of redundancy at all. Indeed in the opinion of the Tribunal there was no redundancy situation that affected the claimant. There obviously was a job for her as the manager of the Cuerden Nursery. At no stage did the respondent indicate that they intended to close the nursery, and there had been discussions with the claimant about her carrying out work at other sites which were operated by the respondent. Those discussions took place against the background of the mobility clause in her contract of employment. At the date of resignation, the respondent would have been entitled to have relied on that mobility and instructed the claimant to work elsewhere. The fact that this would have inevitable inconvenienced the claimant, and indeed perhaps caused her to incur expense which she was not anticipating in travelling to and from work, did not in any way affect the validity of the mobility clause in the opinion of the Tribunal. However, the respondent was not making any attempt to enforce that clause at the time of the resignation of the claimant, but nevertheless it was still valid and it was open to the respondent to do so. Again, therefore, there was work for the claimant to carry out in accordance with the terms of her contract of employment albeit away from Cuerden Nursery but in accordance with the terms of the mobility clause.

38. In view of the fact that there was no redundancy, the conduct of the respondent between 3 and 10 July 2020 was not associated with or on the grounds of redundancy. It was simply misconduct and mismanagement on the part of the respondent. Dismissal of the claimant was not “by reason of redundancy” but was instead by reason of the conduct of the respondent which the claimant concluded amounted to constructive dismissal. If the dismissal of the claimant was not by reason of redundancy then the claimant's claim for a redundancy payment under section 135 of the Employment Rights Act 1996 must be dismissed.

39. The claimant was advised that in view of the findings of the Tribunal, had she made a claim for unfair dismissal, then the judgment of the Tribunal would have been that she had been unfairly dismissed and that she would have been entitled to a “basic award” of compensation for unfair dismissal. That would have been calculated in exactly the same way as the value of a redundancy payment but would have had the label of “basic award” and not “redundancy payment”. However, the claimant had made very clear that she was not pursuing a claim of unfair dismissal and it was therefore entirely inappropriate for the Tribunal to give any consideration to any award of compensation for unfair dismissal.

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Employment Judge Whittaker

Date: 25 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
2 March 2021

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2413475/2020
Miss C Johnson v Townley House Nursery Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 2 March 2021

"the calculation day" is: 3 March 2021

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at

www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.