



EMPLOYMENT TRIBUNALS

Claimant: Mrs Margaret Ford
Representative - Mr Ahmed - Counsel

Respondent: Lillian Rose Walker t/a Sue and Sally's Card Shop
Representative - Mr A Walker – Husband of Lillian Rose Walker

Heard at: Birmingham **On:** 29 and 30 April 2021

Before: Employment Judge Hindmarch

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded and the Claimant is awarded the sum of £8940 uplifted by £480 under s38 Employment Act 2002 on account of the Respondent's failure to issue written particulars of employment.
2. The complaint of failure to pay holiday pay is well founded and the sum of £672 is awarded.

Reasons.

1. This case came before me on 29 and 30 April 2021. The case was listed for a two day hearing. The case was conducted as a hybrid hearing with myself, the Claimant and the Claimant's Counsel joining by CVP and Mr Walker, husband of and sole witness for the Respondent, appearing by CVP from a room at the Tribunal building in Birmingham.
2. On day one, 29 April 2021, I heard evidence from the Claimant and Mr Walker and heard submissions. With the parties agreement, and to save Mr Walker any further journey to the Tribunal's office, we agreed day two would be used

by me to reach a reserved decision which would be sent to the parties with written reasons.

3. I had two bundles of documents, the main one including the pleadings, and a smaller one containing the Claimant's phone records. I had written witness statements from the Claimant and Mr Walker.
4. Following a period of ACAS Early Conciliation from 14 July – 14 August 2020, the Claimant commenced proceedings on 14 October 2020 for unfair dismissal, notice pay and holiday pay. The ET3 was filed by Mr Walker on behalf of the Respondent on 14 April 2021. In this he denied that the Claimant had been dismissed.
5. The Respondent is the wife of Mr Walker, Mrs Lilian Rose Walker. She owns a shop which sells gifts and cards and which prior to the COVID-19 Pandemic, employed five staff including two of Mr and Mrs Walker's daughters, Sue and Anne. Mr and Mrs Walker are in their 80's and Mr Walker has most of the responsibility for the day to day running of the business.
6. The Claimant is now 72 years old, date of birth 24 August 1947. For 20 years, from 20 February 2000 she worked for the Respondent as a sales assistant in the shop. She worked two days a week, Thursday and Friday, and was paid £120 per week. It is common ground she was not issued with written particulars of employment and was not paid holiday pay. Mr Walker did tell me in submissions that he did pay annual Christmas bonuses to the staff. I have no reason to doubt this, although it is not relevant to the issues I have to decide.
7. The Claimant was due to have a medical procedure on 1 April 2020. In advance of this she telephoned Mr Walker on 18 March 2020 to inform him she would need to self-isolate prior to the surgery and would not be at work. Everything was cordial at this time. At this stage no firm period of absence was agreed but the Claimant says Mr Walker assured her that her job would be waiting for her once she was recovered. Mr Walker agrees with this.
8. A few days later the country went into a national lockdown due to the COVID-19 Pandemic, meaning that non-essential retail including the Respondent shop had to close.
9. The Claimant's operation was cancelled.
10. On 27 March 2020 the Claimant's phone records show she made a phone call to Mr Walker's number. The Claimant, by now aware that the shop had been forced to close, says she spoke to Mrs Walker (Mr Walker did not answer as he himself was recovering from an operation).

11. On 1 May 2020 the Claimant's phone records show she made a further call to Mr Walker's number. Again it was answered by Mrs Walker. The Claimant told me that Mrs Walker told her their daughter Sue was dealing with the return to work situation. Mr Walker was not party to that conversation and Mrs Walker did not give evidence. I accept the Claimant's account of the conversation particularly as Mr Walker told me he and his wife were essentially shielding at this time, and in evidence Mr Walker described his daughter as 'his representative'.
12. Non-essential retail was permitted to re-open on Monday 15 June 2020. The Claimant had heard nothing from Mr and Mrs Walker, nor their daughter Sue since her last phone call on 1 May 2020. She was not contacted about whether she should return to work for her regular shifts on the Thursday or Friday of that week.
13. The Claimant, having heard nothing from her employer, did not attend for work on 18 June 2020. Instead she and a colleague Maxine, who had also heard nothing about her own return to work, prepared letters referring to their dismissals and asking for redundancy and notice payments. On 19 June 2020 the Claimant and Maxine went to the shop and met with Mrs Walker's daughter Sue. The Claimant says she and Maxine asked Sue whether there were any hours for them, and Sue said no. The hours available were being covered by Sue and her sister. The Claimant and Maxine handed over their keys to the shop and the letters they had prepared. On the same day Maxine's husband hand delivered a copy of the letters to Mr and Mrs Walker's home address.
14. The letter delivered to Sue in the shop was dated 19 June 2020 and a copy appears at page B41 of the main bundle. It reads –

'I feel I have been treated unfairly in my dismissal, so I have sought advice with regards to the termination of my employment ...

If I do not hear from you in writing by 3/07/20 I will be contacting ACAS to start proceedings'.

The letter requested notice and redundancy pay.
15. The Respondent never responded to these letters. No contact was made at all with the Claimant to dispute her ascertain she had been dismissed nor to reassure her otherwise. Mr Walker said he was shocked to receive the letter, that he had never encountered anything like it, and that he thought the best thing to do was not to respond. The Claimant received no monies from the Respondent.

Submissions

16. I heard submissions from Mr Ahmed and from Mr Walker. Mr Ahmed referred me to the cases of Avuru v (1) Favermead Ltd (2) Professor Khalili UKEAT/0312/19/AT and Sandle v Adecco UK Ltd (2006) IRLR 941.
17. Mr Ahmed invited me to find, by an objective assessment of the Respondent's words or conduct, that dismissal occurred on or around 19 June 2020 or, in the alternative, certainly by 3 July 2020 that being the deadline given to the Respondent in the Claimant's letter of 19 June 2020 to which she received no response.
18. Mr Ahmed submitted any dismissal must have been unfair in that no procedure was followed and no fair reason was offered.
19. Mr Walker made submissions alluding to some unhappiness on his part with what he described as the Claimant's attitude towards his attempts to diversify the product range in the shop and the fact he believed the Claimant was not well-disposed towards his daughter Sue. He said he was never told by the Claimant she had not in fact had the surgery planned for the 1 April 2020 and that '*COVID caused a lack on contact*' between them.

The Law

20. S95 Employment Rights Act 1996 provides

'(1) For the purposes of this Part an employee is dismissed by his employer if –

(a) The contract under which he is employed is terminated by the employer (with or without notice)'

21. The aforementioned case of Avuru assists in determining whether the Claimant was dismissed.

'14. The Law required the Employment Judge to decide whether the termination of the Claimant's employment had been communicated to her by means of the Respondent's conduct. See in that connection Sandle v Adecco UK Ltd (2016) IRLR 941, at paragraph 40.

A dismissal may be by word or deed, and the words or deeds, in question may not always be entirely unambiguous. The test will be how they would

be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of direct express communication. It may be implied...'

22. If I am to find the Claimant was dismissed by the Respondent, I must then consider what was the reason for dismissal and whether it was a fair dismissal.

23. S98(4) Employment Rights Act 1996 provides –

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or if more than one, the principal reason) for the dismissal, and

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer –

(a) Depends on whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case.

Conclusion

24. This is a sad case given the length of the Claimant's service with a small family business and set against the difficulties posed for many people by the COVID-19 Pandemic. When the first lockdown was imposed the Respondent understood the Claimant to be self-isolating in readiness for surgery. The Respondent did not know how long the Claimant would need to recover, nor did it know how long it would be required to remain closed. Unfortunately, the Respondent failed to communicate with the Claimant about its intentions for her employment going forward, despite Mrs Walker informing her in a telephone call on the 1 May 2020 that her daughter Sue would be dealing with this. The Claimant was effectively left 'high and dry' with no understanding as to whether her services were still required.

25. The shop re-opened on 15 June 2020 and the Claimant still had no communication from Sue. She was offered no work for her regular Thursday

shift on 18 June 2020. She believed her job had been terminated and prepared the letters of 19 June 2020 and went to the shop to deliver one of them. At the shop she met with Sue and was informed there were no hours for her. In my view to the objective observer these words amounted to a dismissal. No work had been offered to the Claimant, and no work was offered going forward. She was effectively communicating the Respondent's position that it had no work for her. I have no doubt Sue was correct. Due to COVID-19 restrictions the shop was not trading at full capacity and it appeared the only hours offered to shop assistants by the Respondent, was to the family members. There was no work for the Claimant. She was offered no wages that week and the Respondent took no steps to counter her assertion in her letter of 19 June 2020 that she had been dismissed. If the Respondent disagreed with that position it could have responded to the letter with reassurance and an alternative position. It did not.

26. It follows that the Claimant was dismissed on 19 June 2020. The Respondent has not offered (or shown) a fair reason for dismissal. The downturn of work may well have been a redundancy situation but even so, there was no evidence offered by the Respondent as to consultation, selection between the five shop assistants and the usual steps one might see. The Claimant had long good service and I cannot see how and why she would necessarily have been selected, even had a redundancy situation been shown to have been at play.

27. In conclusion, I find the dismissal to have been unfair.

Remedy

28. There was a Schedule of Loss in the main bundle at pages A30-A32. The Claimant's witness statement confirmed she had started a new job in April 2021. At the date of this hearing she had worked two weeks in that new job earning £120 in total which she needs to give credit for. The Claimant decided not to look for further work and limits her claim for loss of earnings to the date of this hearing.

29. The Claimant is entitled to a basic award of £3600 given her age at the date dismissal (72), her wage (£120 per week) and length of service (20 years). The multiplier is 30.

30. The Claimant is entitled to a compensatory award for the period from dismissal to the date of the hearing, 45.5 weeks x £120 less the £120 earned in the recently acquired new job = £5,340.

31. The Claimant is entitled to compensation under s38 Employment Act 2002 for the Respondent's failure to issue a statement of written particulars. The

failure was absolute in that in her 20 years of service no document was ever issued so I award the maximum 4 weeks = £480.

32. The Claimant was not paid any holiday pay and claims two years holiday pay up to the date of dismissal at 11.2 days and I award this in the sum of £672.00.

33. The total sum therefore awarded is £10,092.

Employment Judge Hindmarch

Date 04.05.2021