



EMPLOYMENT TRIBUNALS

Claimant

Mrs Maira Whittaker

Respondent

Mrs Amanda Staveley

v

Heard at London Central on: 24-25 May 2021

Before: Employment Judge Sutton QC

Representatives

Claimant: Mr S Whittaker (claimant's husband)
Respondent: In person

REASONS

By a judgment dated 25 May 2021, the claim was dismissed. Written reasons are provided following a request from the claimant.

Introduction

1. By a claim presented to the Tribunal on 19 August 2020, the claimant complained of unfair dismissal; non-payment of notice pay; non-provision of written reasons for dismissal and unpaid holiday pay. She confined her remedy claim to compensation. The claim was brought against the respondent solely, although the written contract of employment records that the claimant was in fact employed by the respondent and her husband Mr Mehrdad Ghodoussi. No application was made to amend the claim in this regard, and the Tribunal proceeded on the footing that the respondent was correctly named as the employer for the purposes of the claim.

2. There is a dispute as to when and by what means the claimant's employment was brought to an end. The claimant contends that she was dismissed by the respondent's email dated 7 July 2020. The respondent maintains instead that the claimant resigned in the course of a telephone conversation on 27 April 2020. As recorded below, the claimant's assertion on this point is accepted.

Witnesses

3. The Tribunal heard evidence from the claimant, the respondent and the respondent's housekeeper Miss Joanne Mills. The Tribunal was also provided with a bundle of documents, which included a copy of the employment contract, a number of text messages and written transcripts of certain telephone conversations which had been covertly recorded by the claimant's husband.
4. The Tribunal was also provided with audio recordings of these discussions and was able to assess the tenor of the relevant exchanges. The Tribunal considered that the claimant and her husband had no grounds to mistrust the respondent and hence to record telephone conversations. On the contrary, each had been treated generously in various ways. That they did so was, in the Tribunal's view, driven by a hope of accumulating evidence which might be deployed to the claimant's advantage in a subsequent claim. The respondent came across as a candid witness who continued to hold the claimant in affectionate regard and was clearly saddened that matters between them had become acrimonious and contentious.

Findings of fact

5. The claimant was employed by the respondent as a nanny for her son with effect from 29 May 2018 at a gross basic salary of £46,146 a year. When the claimant was offered the role it was explained to her that a degree of flexibility in working arrangements was anticipated, for example occasional swapping of weekdays for weekends as necessary. The claimant was permitted 20 days holiday per annum in addition to statutory and public holidays. She was provided with a written contract which stipulated, by clause 7.4, that holiday entitlement, and pay in lieu of untaken holiday, could not be carried over to the next calendar year.
6. In September 2019, the claimant's son commenced full time school and was away from home from 8.30am until 3.45pm. Contrary to the original expectation, the claimant indicated that she was unwilling to work at weekends or nights save in emergency situations. When the claimant's son commenced school, the claimant's hours were altered so that her new working hours were 7.30am – 11.30am and 3.00pm – 7.00pm.
7. In late January 2020, the claimant requested and was granted compassionate leave of absence of 3 weeks to visit her sick father in Brazil. This followed a period of holiday which the claimant had taken earlier the same month. The claimant returned to work on 22 February 2020 and explained that she had undergone cosmetic surgery whilst she was in Brazil. The respondent was disconcerted by this, given the purported

reason for the claimant's absence, but the matter was overlooked and the employment relationship was allowed to move on.

8. At all material times, the claimant and her husband shared living accommodation with their landlord, an elderly gentleman who was in poor health, with what was described as a respiratory illness. As a result of the Covid 19 pandemic, the claimant maintained that her landlord was insistent that she should not attend work but instead provide shielding for the period of lockdown.
9. As a result, in or about late March 2020, the claimant informed the respondent that she would not be able to attend work. She declined the respondent's offer of rent-free accommodation for herself and her husband in a self-contained flat at the respondent's home which would have facilitated the performance of her role. The claimant was also offered the option of taking taxis to work outside rush hour times, rather than having to use public transport. The claimant also rejected these proposals.
10. Having reached a stalemate, it was agreed, as recorded in the respondent's email to the claimant of 26 March 2020, that the claimant's employment would continue for an indeterminate period of time on an unpaid basis with her undertaking no duties, while the respondent considered 'other options' that might be available. The performance of the employment contract was effectively suspended from that point onwards.
11. On 27 April 2020, the claimant telephoned the respondent and explained that she would need to return to Brazil as her father's health condition had worsened and that she was unsure whether or when she would be returning to the United Kingdom. The claimant indicated that regretfully she would have to resign. Although the claimant produced covertly taped transcripts of several conversations with the respondent, she maintained that she did not record this critical discussion.
12. The Tribunal finds that the claimant's reference to resignation was understood by the respondent as a statement of intent, rather than notification of an immediate termination of employment. Whether and for how long the employment relationship would continue was left ambiguous, although the respondent took from the conversation that it was highly unlikely that the claimant would be returning to her role.
13. Consistent with this expectation, the next day, the respondent asked Miss Mills to contact a nanny agency to try and locate a replacement. Given the lack of clarity surrounding the claimant's future intentions and the pressing need to find a nanny for the respondent's child, this was an understandable and reasonable step to take. A new nanny was subsequently identified and engaged on a trial basis.
14. On 29 April 2020, the claimant notified the respondent by text message that her father had unfortunately died.

15. A fortnight later, on 13 May 2020, the claimant participated in a facetime conversation with the respondent and her son. In the course of this conversation, the respondent told the claimant that if she regretted her decision to resign, she would be welcomed back but that she would have to let the respondent know quickly as a replacement nanny was already being trialed. The claimant assured the respondent that she would come back to her quickly with confirmation of her position.
16. In the following days, the respondent heard nothing further from the claimant and assumed that she had decided to stay in Brazil and make her life there. The new nanny was accordingly confirmed in her position. Then, out of the blue, on 1 June 2020 the respondent received a text message from the claimant stating that she had managed to book a return flight on 7 June 2020.
17. The respondent answered the claimant's text message by explaining that, having heard nothing further from her for nearly 3 weeks, she and her husband had filled the nanny position. The claimant then responded: 'I thought when we spoke last time we both agreed that I would let you know when I would return home, sorry I'm a bit confused, do I still have a job?'
18. On 16 June 2020, the claimant submitted a grievance letter requesting formal termination of her employment and the provision of a P.45., together with a reference and a financial settlement. The letter began with the words: 'I am trying to resolve the termination of my job amicably'.
19. By an email dated 7 July 2020, the respondent wrote to the claimant stating 'whilst we tried to accommodate your needs in this regard (a reference to the claimant's most recent trip to Brazil) you did not provide a date upon which you would be available to return to work. Again this extended period of time was covered by the period of continuing unpaid leave'.
20. The email continued: 'we propose that we terminate your employment with immediate effect.' In the same email, and notwithstanding the fact that the claimant was on nil pay, the respondent offered to pay a month's salary in lieu of notice, reflecting the claimant's contractual entitlement in normal circumstances. The Tribunal finds that this email brought about the termination of the employment with effect from 7 July 2020.
21. In the event, the claimant elected to wait until September 2020 before seeking alternative employment, at which point she secured another nanny position. This was in consequence of the domestic arrangements described above.

Legal framework.

22. Section 98 of the Employment Rights Act 1996 (ERA) indicates how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in S.98(1) and (2), and if the employer is successful at

the first stage, the tribunal must then determine whether the dismissal was fair or unfair under S.98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

23. An erroneous belief that an employee has resigned has been recognised in case law as an example of 'some other substantial reason' providing a potentially lawful ground for dismissal for the purposes of s.98(1)(b) of the ERA. *Ely v YKK Fasteners (UK) Ltd 1994 ICR 164, CA.*
24. If such a reason is shown, it is still necessary for the Tribunal to give separate consideration to the issue of procedural fairness in the given circumstances. In accordance with s.98(4), the resolution of this issue will :-
 - (i) depend on 'whether in the circumstances (including the size and 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
 - (ii) be determined 'in accordance with equity and the substantial merits of the case'.

Conclusions

25. The reason for the claimant's dismissal stemmed from an erroneous belief on the part of the respondent that the claimant had indeed resigned, and the filling of her role in consequence. Although the respondent's belief was mistaken, that state of belief was strongly encouraged by the claimant's equivocation and delay in providing clarification of her future intentions. The respondent cannot be blamed for proceeding as she did, given the pressing need to locate a nanny to assist with the care of her son and the lack of any timely contact from the claimant.
26. Turning to the issue of procedural fairness, the Tribunal does not consider that the dismissal can be viewed as unfair, notwithstanding the lack of any formal process or indeed a pre-dismissal meeting. The nature of the employment did not lend itself to the institution of formalised procedures. A meeting to understand the claimant's future intentions would in any event have proved wholly nugatory and produced no different outcome.
27. The claimant conceded in evidence that she was not willing to resume performance of her duties and indeed declined to seek any alternative employment for several months. The continuation of the employment relationship was, in practical terms, untenable. Had the dismissal been found to be unfair on procedural grounds, such a finding would accordingly have been subject to a 100% *Polkey* reduction in any event.

28. Turning to the other headings of complaint, as was acknowledged by the claimant's representative in the course of the hearing, the claimant had consumed her full pro-rata entitlement to holiday in the relevant leave year. Her claim for unpaid holiday is accordingly unsustainable.
29. As to the provision of written reasons for dismissal, a sufficient statement was provided in the respondent's email of 7 July 2020. Finally, in the same communication, the respondent tendered payment in lieu of notice, in satisfaction of the claimant's contractual entitlement. No breach of contract is shown.
30. For the above reasons, the claim fails.

Employment Judge Sutton QC

6 August 2021

JUDGMENT SENT TO THE PARTIES ON

06/08/2021.

FOR THE TRIBUNAL OFFICE