



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109415/2021

Held in Edinburgh on 21 and 24 September 2021

Employment Judge M Sutherland

Linsey Calder

**Claimant
In person**

William Calder

**Respondent
Represented by:
Mr I Burke,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that -

1. The Respondent is ordered to pay the Claimant unpaid wages in sum of £408 (gross) from which tax and national insurance contributions fall to be deducted.
2. The Respondent is ordered to pay the Claimant to notice pay in sum of £1,010.76 (gross).
3. The Claimant was unfairly dismissed and the Respondent is ordered to pay the Claimant a basic award in sum of £1,516.14.
4. The Claimant is entitled to holiday pay in sum of £808.61 (gross).

E.T. Z4 (WR)

REASONS

Introduction

5. The Claimant presented a complaint of unfair dismissal and for notice pay, holiday pay, failure to issue terms and condition and unlawful deduction from wages. The complaints were resisted by the Respondent.
6. The Claimant appeared her own behalf with assistance from Ms McLean, a volunteer from Citizen's Advice. The Respondent was represented by Ms L McKenna, Solicitor.
7. Following discussion it was agreed that the Claimant's complaint was that she had been dismissed on 15 February, failing which, that she was dismissed on 17 February 2021. Following that clarification the Respondent was permitted to adjust his position in response namely that she resigned on 16 February 2021, failing which, she was dismissed on 17 February 2021 for some other substantial reason namely the breakdown of their personal relationship. The Claimant did not seek to claim constructive dismissal in the alternative.
8. At the hearing both the Claimant and the Respondent gave evidence on their own behalf. No other witnesses were called.
9. The parties lodged an agreed set of documents which were added to during the hearing.
10. The Claimant and the Respondent made oral closing submissions. In recognition of her status as a litigant in person the Respondent agreed to give his submissions first.
11. The following issues were to be determined –

Unfair dismissal, notice pay and unlawful deduction from wages

- a. Was the Claimant continuously employed by the Respondent from mid 2006 until 15 February 2021? It was accepted by the Respondent that the Claimant was employed by the Respondent from 6 April 2014 to 31 January 2021.
- b. At the hearing it was accepted by the Respondent that she was employed until 15 February 2021, that she was paid in respect of

the period to 31 January 21, and she was therefore entitled to wages in respect of the period 1 February to the termination date.

- c. Was the Claimant dismissed by the Respondent on 15 February 2021? If not did the Claimant resign on 16 February 2021? If not it was accepted that the Claimant was dismissed by the Respondent on 17 February 2021.
- d. If the Claimant was dismissed to what period of statutory notice was she entitled?
- e. If the Claimant was dismissed, was there some other substantial reason for the Claimant's dismissal?
- f. Was the reason for any dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?
- g. Was the dismissal, if any, fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant? Did any decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17
- h. If the Claimant was dismissed, did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?
- i. If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.

- j. To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?
- k. What loss has the Claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable in all the circumstances? Did the Claimant contribute to her dismissal? Has the Claimant taken reasonable steps to mitigate her losses?

Holiday pay

- l. What accrued but untaken holidays did the Claimant have at the termination date?

Failure to issue written statement of terms and conditions

- m. The Respondent accepted liability in respect of a failure to issue a written statement of employment particulars. Are there exceptional circumstances which would make an award unjust or inequitable make an award of 2 weeks' pay? Is it just and equitable in all the circumstances to increase the award from 2 weeks to 4 weeks' pay?

Findings in fact

- 12. The Tribunal makes the following findings in fact:
- 13. The Respondent is a self-employed plumber whose business commenced in 2006 and continues to date. The Claimant was married to the Respondent. The Claimant provided book keeping and accountancy services to the business on an as required basis (on average about 10 hours a week). In summary, the Respondent undertook the plumbing work and the Claimant undertook the administration. The parties had little direct contact with each other in undertaking their respective roles. At the financial year end, and on the advice of his accountant, the Respondent's accounts included a sum in

respect of “wife’s wage.” The purpose of the wife’s wage was to take advantage of the Claimant’s personal tax allowance and the amount attributed to the wife’s wage in accounts depended upon the business turnover that financial year.

14. The Claimant was the only employee of the business. The Claimant was not issued with, and did not seek, a contract of employment or a statement of terms and conditions. There were no formal arrangements regarding holidays. The Claimant did not receive, and did not seek, payment of a wage (or payslips). The Claimant would take drawings out of the business account as available, and put these into the family joint account as required, regardless of the sum attributable to wife’s wages.
15. The Claimant and Respondent did not regard each other as employee and employer – they were simply running a family business and the wife’s wage was regarded as a tax advantage.
16. For the financial year ending 5 April 2014 no wife’s wages were included within the account because the Claimant had secured full time work elsewhere and had therefore exhausted her tax allowance. The Claimant provided the same book keeping and accountancy services during that financial year but it was a matter for the Claimant as to when, how and where she performed work for the business which required to fit around her full time work elsewhere.
17. For the following financial years after 5 April 2014, wife’s wages were included in the accounts with an entry of £6,500 being made for year ended 4 April 2020.
18. In April 2020 the Claimant was put on furlough by the Respondent and the Respondent also claimed, in respect of his own business earnings, though the self employed income support scheme. The Claimant remained on furlough until her employment ended. During furlough she received a gross monthly payment of £584 (80% met by the furlough scheme) and a payment of £146 (20% met by the business). The Claimant did not undertake any work for the business whilst on furlough (apart from occasionally checking the business account and the business insurance).

19. On 13 February 2021 the Respondent advised the Claimant that their marriage was at an end. He intimated to the Claimant that he no longer wanted to work with her (as he said in evidence “I just couldn’t work with her...I was going to find someone else or I would manage”). The Claimant wanted continue working for the Respondent and thought they could sort something out. The Claimant and the Respondent were still in dialogue with each other about aspects of the business. They agreed that the business invoices needed to be issued so that they could be paid which would enable them to could sort out their finances in light of their impending separation. On 15 February 2020 the Claimant texted him asking him to do bills with her. The Respondent replied the same day stating “Sorry can’t do bills with you I’m going to a solicitor and Change business account.” The Claimant understood from that he wanted her to have no further involvement in his business. She was still prepared to do her job and was unsure as to how he was going to proceed. She understood that there was a process to follow if he wanted to terminate her employment.
20. On 16 February 2020 the Claimant texted the respondent stating “I’ve transferred money over to cover the mortgage payment and direct debits. I’ve emailed Mark [the Accountant] to let him know I have nothing to do with your business or tax liabilities. I’ll see a solicitor today. As I’m employed by you, you will need to end my employment officially and sort out my P45 so I can see if I’m eligible for any benefits. I have no other income.”
21. Upon receipt of the Claimant’s text of 16 February 2021 the Respondent understood that “she wanted to be finished”. He understood she expected him to dismiss her. He then advised his accountant that “she’s asking for her P45” but did not show him the text. The accountant explained in response that she was resigning. He instructed his accountant to issue her P45 with a backdated termination date of 31 January 21 (he had been advised that furlough could not be paid for part of a month). He would not have issued the P45 then had she not sent that text. He would have taken advice and would have terminated her employment because of the breakdown in their relationship at some point thereafter.

22. On 16 February 2021 the Claimant emailed the accountant stating “Unfortunately Will has decided to leave me which means I will no longer be able to act on his behalf ... he does not want to do the invoices with me but regardless of who does them, he needs to get on with it. He is removing me from his business account so I will have no further input or authority regarding his finances.” She thanked him for his services. She received an out of office message from the Accountant.
23. On 17 February 2021 the Accountant’s colleague emailed the Claimant as follows: “Following a telephone call from William [the Respondent], I have attached copies of your pay slips from April 2020 to January 2021, together with your P45 as at 31.1. 2021” The Claimant replied the same day asking “Is there a reason why my P45 was dated from 31/01/2021 when the date Will [the Claimant] announced he was leaving was the 13 /02/21? Up until then I was still working for him.” The accountant’s colleague replied the same day stating “William advised me that there were no wages for February 2021 and I [sic] he confirmed that the P45 leaving date was to be 31.1.2021”
24. On 18 February 2021 the Accountant replied to the Claimant’s email of 16 February. He stated I have “spoken to Trish [his colleague] and she has advised that she has had a number of conversations with you and Will [the Claimant]. Will has stated that you no longer work for the business and has asked that we issue a P45 as at 31st January 2021. Your solicitor seems to be implying that you should still be on the payroll and ‘furloughed’. I would advise you the ‘furlough’ is designed to ensure that employees are retained, when there is no work available due to COVID. The ‘furlough’ shouldn’t be claimed when an employee no longer works for the business. We really have two issues here the first being the separation and the second your employment. You have been heavily involved over the years but legally it is Will’s [the Claimant’s] business and we must take instruction from him. As things stand a P45 has been issued and unless we hear from Will [the Claimant] to the contrary, we are unable to revoke this and put you on ‘furlough’.”
25. The Respondent was aware that the Claimant did not want termination of her employment and instead wanted to be put back on furlough. The Respondent

did not want her to be put on furlough and instead wanted the termination of her employment.

26. As at the termination date the Claimant was in receipt of weekly wages of £168.46 (gross).
27. The Claimant advised that due to the emotional stress and trauma caused by the breakdown of her marriage she was unable to pursue any job opportunities. Her Work Capability Assessment for Universal Credit found that her health condition prevented her ability to work and that she did not require to produce further fit notes. She has been in receipt of Universal Credit since termination.
28. Sometime after the termination of her employment, divorced proceedings commenced and are continuing.

Observations on the evidence

29. Having regard to the words of the Respondent's text of 15 February 2021 and the words of her text of 16 February 2021, it was not credible that the Claimant thought he had dismissed her on 15 February. The Claimant understood from that text she was to have no further involvement in his business. She understood that there was a process to be followed for him to terminate her employment 'officially'.
30. Upon receipt of the Claimant's text of 16 February 2021 the Respondent understood that she no longer wanted to be part of the business. However, having regard to the words of the text it was not credible that he thought she had resigned. Indeed at one point in evidence the Respondent stated with reference to the text: "she is asking me to dismiss her"; "she is wanting dismissed." It was apparent that the Respondent conveyed to his accountant that she's asking for her P45 and the accountant explained in response that she has resigned. Contrary to his assertion, the Respondent did not think she had resigned upon receipt of the text of 16 April, but rather that she expected him to dismiss her. When the Claimant asked to be put on furlough he refused. He did not want to "undo the break" – "it would have made it harder".

Relevant Law

Length of service

31. A contract of employment requires mutuality of obligation to offer and to accept work and requires that work to be performed personally, subject to the other's control and in consideration of remuneration (*Ready Mixed Concrete (South East Ltd) v Minister of Pensions and National Insurance [1968] 2 QB 497, HC*).
32. Under Section 212 of the Employment Rights Act 1996 any week during which an employee's relations with their employer are governed by a contract of employment counts in computing the employee's period of employment. Any week during which there is no contract of employment breaks continuity subject to exceptions relating to sick absence, temporary cessations of work, arrangement or custom.

Dismissal or resignation

33. The Claimant has the burden of proving, on balance of probabilities, that she was dismissed. The tribunal must consider whether it was more likely than not that the contract was terminated by dismissal rather than by resignation or by mutual agreement.
34. The issue of whether words amount to a dismissal or a resignation is determined objectively. In considering whether words amount to a dismissal or a resignation unambiguous words may be taken at their face value. Where words are ambiguous all the surrounding circumstances (both preceding and following the incident) must be taken into consideration including if necessary what a reasonable employer or employee would have understood in those circumstances.
35. Only in exceptional circumstances may resignation or dismissal be inferred from conduct rather than communication. Ordinarily a refusal to perform the contract (e.g. by the employer refusing to pay wages or the employee refusing to perform work) would amount to a repudiatory breach entitling the other party to resign (if the employee) or to dismiss (if the employer).

36. The Respondent has the burden of proving the reason for the dismissal and that it is a potentially fair one. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' (*Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*).

Notice pay

37. Under Section 86 of the Employment Rights Act 1996 an employee is entitled to not less than one week's notice for each year of continuous employment up to a maximum of 12 weeks.

Unfair dismissal

38. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.
39. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.
40. If the reason for her dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.
41. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances. (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell

out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*).

42. The Tribunal should consider whether any procedural irregularities affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal. It is irrelevant that the procedural steps would have made no difference to the outcome except where they would have been utterly useless or futile (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*).
43. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to SOSR dismissals based on a breakdown in the working relationship (*Phoenix House Ltd v Stockman 2017 ICR 84, EAT*).
44. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.
45. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.
46. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
47. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)*). In this event, the Tribunal requires to assess the percentage chance or risk of the

Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

Holiday pay

48. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks leave in each holiday year.
49. Under Regulation 14 a worker is entitled to a payment in lieu of holidays accrued during the holiday year but unused by the termination date.
50. In the absence of a relevant agreement the holiday year begins on the date when the employee's employment began.

Statement of terms and conditions

51. Section 1 of the ERA 1996 provides that an employee is entitled to receive a written statement of terms and conditions of employment within 2 months of starting work. Section 38 of the Employment Act 2002 provides that an employee is entitled to an award of 2 weeks' pay unless there are exceptional circumstances which would make an award unjust or inequitable. The tribunal may increase the award to 4 weeks' pay if considered just and equitable.

Claimants' Submissions

52. The Claimant's submissions in summary were as follows-
 - a. The Respondent made clear he no longer wanted to work with her. She understood his words to mean that he was dismissing her
 - b. She never said she was resigning, or used any words to that effect
 - c. She wanted to continue working and thought she could make it work. She could in any event have remained on furlough
 - d. She wasn't fit to do another job on account of her mental health but she was fit to carry on doing the same job which was flexible work from home which she was familiar with.

Respondent's submissions

53. The Respondent's submissions in summary were as follows-

- a. Financial year 2014 was a break in her employment
- b. She had never asked for any holidays – she could take them when she liked
- c. It was reasonable for the Respondent to interpret her words as a resignation.
- d. She couldn't have continued working for the business on account of the breakdown in their relationship
- e. She didn't apply for any jobs and therefore failed to take reasonable steps to mitigate her losses
- f. There was no unreasonable failure to comply with the ACAS Code.

Decision

Length of service

54. The Respondent accepted that the Claimant was employed by him from 6 April 2014 to 31 January 2021.

55. In respect of financial year 6 April 2013 to 5 April 2014, there was no mutuality of obligation (to offer and accept work in return for wages); whilst the Claimant continued to undertake administrative work as required for the family business, there was little if any control over when, how and where she performed it, not least given that she was employed full time elsewhere; and furthermore she did not receive any remuneration for her work (there was no wife's wage for that year and the drawings she took from the business account and paid into the family joint account were a distribution of the profits of the business on behalf of the Respondent). Having regard to the *Ready Mix* test there was no contract of employment with the Respondent for the year ending 5 April 2014.

Dismissal or resignation

56. On or about 13 February 2021 the Respondent conveyed to the Claimant that he no longer wanted to work with her which was confirmed in his text of 15 February 2021. He did not convey that she was dismissed. Whilst his conduct may have amounted to a repudiatory breach entitling the Claimant to resign it did not amount of itself to a dismissal.
57. On 16 February the Claimant conveyed her understanding that he wanted to dismiss her - "you will need to end my employment officially and sort out my P45." Upon receipt of that text the Respondent understood she expected him to dismiss her. He then advised his accountant that she's asking for her P45 who explained in response that she was resigning. The Claimant did not convey that she was resigning. The Respondent's understanding was based upon the accountant's interpretation in circumstances where the accountant had not seen the text. The Claimant had not asked for her P45. She had asked him to sort out her P45 once he had ended her employment officially.
58. The Claimant was not dismissed by the Respondent on 15 February, and did not resign on 16 February. The Claimant was therefore dismissed by the Respondent on 17 February 2021 by reason of the breakdown in their personal relationship.

Notice pay

59. The Claimant was entitled to one week's notice for each year of continuous employment up to a maximum of 12 weeks. The Claimant was employed by the Respondent from 6 April 2014 to 17 February 2021. Accordingly the Claimant is entitled to notice pay in sum of £ 1,010.76 (6 x £168.46 (gross)).

Unfair dismissal

60. There was no basis upon which to challenge the Respondent's reason for dismissal (namely a breakdown in their personal relationship) as not genuine. Such a breakdown would amount some other substantial reason for dismissal (SOSR) under S.98(1)(b) of the Employment Rights Act 1996 (ERA) in circumstances where there was a direct, personal relationship between the

employer and the employee in a small family business. Accordingly the reason for her dismissal was potentially fair.

61. If the reason for her dismissal was potentially fair, the Tribunal must determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. The Respondent was a very small family business comprising the Respondent who undertook the plumbing work and his wife, the Claimant, who undertook the administration. They had access to external professional advice to assist with their business affairs. The Respondent had just announced that their marriage was at an end. The Respondent no longer wanted to work with the Claimant. The Claimant thought that there was a way that they could work together especially since she was currently on furlough.
62. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range.
63. The Claimant was summarily dismissed by the Respondent on 17 February 2021 without notice (indeed the Respondent backdated the termination to 31 January 2021). No procedure was followed and no consideration was given to alternative arrangements before taking the decision to dismiss. When the Claimant raised the possibility of being re-instated on furlough the Respondent refused because he did not want to "undo the break" following termination.
64. Given the size and administrative resources of the business it cannot be said all employers acting reasonably in the circumstances would have adopted a formal procedure before taking the decision to dismiss. However no employer acting reasonably in the circumstances would have failed to hold a meeting with the employee (whether directly or with the assistance of an intermediary given the ending of their marriage) to discuss whether there were possible alternative arrangements in the circumstances.

65. The Respondent's announcement to the Claimant that their marriage was at end was made less than 1 week before her summary dismissal. At that stage the effect of the breakdown of their personal relationship on their business relationship was unknown. The Claimant thought it could work. The Respondent did not. At that stage it was unclear that the breakdown was irretrievable. The Claimant and the Respondent had little contact with each other in undertaking their respective roles within the business when not on furlough. At the time of dismissal the Claimant was on furlough and was not doing any work for the business apart from occasionally checking the business account and the business insurance (neither of which required any contact with the Respondent). The Claimant would have remained on furlough had she not been dismissed. In these circumstances it cannot be said that holding a meeting with her to discuss how to proceed in the circumstances would have been utterly futile.
66. The Tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted out with the band of reasonable responses in summarily dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent's undertaking).

Basic Award

67. The Claimant is entitled to a basic award of £1,516.14 (6 weeks x 1.5 x £168.46).

Compensatory Award

68. With the benefit of hindsight it is apparent that the breakdown in their personal relationship was irretrievable. If the Claimant had not been summarily dismissed, but there had instead been a meeting between the parties to discuss matters, is considered materially likely that the Claimant's employment would have ultimately terminated by mutual agreement at some point during the course of her 6 week statutory notice period (which is to be paid) and accordingly it is not considered just and equitable to make a compensatory award.

69. On the same grounds it is not considered just and equitable to make an award for loss of statutory rights.

70. There is accordingly no monetary award under the Recoupment of Benefits Regulations 1996.

Holiday pay

71. The Claimant's holiday year ran from 6 April (the date when her employment began). The Claimant had accrued but not taken 4.8 weeks leave at the termination date of 17 February 2021 (45 weeks / 52weeks x 5.6 weeks annual entitlement). The Claimant is entitled to holiday pay in sum of £808.61 (4.8 x £168.46).

Statement of terms and conditions

72. The Claimant was not provided with a written statement of terms and conditions. The Claimant was responsible for administration of the business and did not seek a written statement of terms and conditions from the Respondent. It is considered that there are exceptional circumstance which would make an award unjust or inequitable under Section 38(5).

Unlawful deduction from wages

73. The Respondent accepts that the Claimant is due to be paid wages in respect of the period from 1 February 2021 until her termination date, now determined to be 17 February 2021, in sum of £408 (17/365 x 52 x £168.46).

Employment Judge: Michelle Sutherland
Date of Judgment: 04 October 2021
Entered in register: 06 October 2021
and copied to parties