EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105421/2020

Held by CVP on 11, 12, 13 October 2021 (deliberation on 14th October 2021)

Employment Judge	**A Jones**
Tribunal member	**L Grime**
Tribunal member	**R Duguid**

Mr A Miller	**Claimant** **Represented by:** **Ms L Miller (mother)**
University of Edinburgh	**Respondent** **Represented by:** **Mr N Maclean** **solicitor**

JUDGMENT

It is the unanimous judgment of the Tribunal that the claimant's claims do not succeed and therefore fall to be dismissed. It is not just and equitable to make any compensatory award in respect of the claimant's unfair dismissal.

REASONS

Introduction

1. The claimant brought various claims against the respondent. By the time of the final hearing, the respondent had conceded some claims and some aspects of the claims had been withdrawn. The respondent had conceded that the claimant had been unfairly dismissed and had paid the claimant a statutory redundancy payment, the respondent's position being that the claimant had been dismissed

by reason of redundancy. The respondent also accepted that the claimant had not been paid the notice pay to which he was entitled and had made arrangements for this payment to be made. In addition, the claimant's two further claims that 1) the respondent had failed to provide up to date particulars of employment as required by sections 1 and 4 of the Employment Rights Act 1996 ('ERA') and 2) the respondent had failed to provide written reasons for termination had been resolved and appropriate payments made.

Issues to determine

2. The remaining issues for the Tribunal to determine at the final hearing were set out in a list of issues agreed between the parties (although there was a small amendment made to that by the claimant at the commencement of the proceedings). The remaining claims were that the claimant alleged that:

- he had been victimised in terms of section 27 (1) (b) of the Equality Act 2010 ('EqA') by the respondent in that he was not given work for a period and was then dismissed. It was accepted that the claimant's mother had done a protected act, in that she had raised a grievance alleging a contravention of the EqA. However, the Tribunal was required to determine whether the respondent believed that the claimant may do a protected act related to his mother's grievance when also employed by the respondent and if so was he subjected to victimisation because of that protected act.
- the respondent had breached his contract of employment by failing to follow the respondent's Managerial Guidance on Management of Guaranteed Hours Contracts;
- the failure to provide him with a P45 and/or notify him of his dismissal amounted to less favourable treatment in terms of the Part-time workers (Less Favourable Treatment) Regulations 2000 ('PTWR'); and
- he was entitled to compensation by reason of his admitted unfair dismissal.

3. The parties lodged a joint inventory of productions which included an agreed statement of facts. The Tribunal heard evidence from the claimant, his mother (who was also his representative) and two additional witnesses, one of whom had previously worked for the respondent and one of whom continued to work for the respondent. The Tribunal also heard evidence from three witnesses for the respondent, Ms McLaren who had been the claimant's line manager initially, Mr Spencer who was the Director of HR for the area in which the claimant had worked and Ms Campbell who was involved in the decision to dismiss the claimant.

4. The hearing was conducted entirely remotely on the Cloud Video Platform. At the conclusion of the evidence, the Tribunal heard submissions from both parties, who very helpfully provided written submissions.

Findings in fact

5. Having considered the evidence heard, the documents to which reference was made and the submissions of the parties, and in addition to the facts agreed between the parties, the Tribunal found the following facts to have been established.

6. The claimant was employed by the respondent initially for three weeks around April 2013 while he was still at school to carry out shredding in one of the respondent's Human Resources offices in which the claimant's mother worked.

7. The claimant continued to work from time to time generally during his holiday periods and was provided with a written 'Guaranteed hours' contract on 29 October 2014 which incorrectly noted that the commencement of the claimant's employment was on that date. The contract provided that the claimant would be offered at least 10 hours work per annum.

8. The claimant's contract was subsequently updated in 2015 to provide that he would be guaranteed to be offered at least 20 hours work per annum, but no written record of this amendment currently exists on the respondent's systems.

9. In addition to carrying out shredding duties, the claimant would carry out work for other managers such as keying information into the respondent's systems as part of a digitisation project, day to day input of addresses, bonus and promotion information and video editing. The additional work was paid at a higher grade than the shredding work for which the claimant had a contract of employment.

10. The claimant mainly worked during the Christmas, Easter and summer holiday periods.

11. The claimant was a student at Strathclyde University from 2014 until 2019.

12. The claimant did not carry out any work for the respondent between the end of September 2018 and 4 April 2019. During part of this period he was abroad as part of his studies. The claimant last worked for the respondent on 4 and 5 April 2019.

13. Around April 2019, the staff in the office in which the claimant worked were relocated to Dalhousie Land. The relocation was part of a centralisation of the HR admin function so that HR staff would be based in the same building. Previously, HR staff were previously based both centrally and in each of the Colleges to which they were assigned.

14. The claimant's mother lodged a grievance against the respondent's HR Director on 5 April 2019 which alleged contravention of the EqA.

15. Around April or May 2019, Susan McLaren, who was principally responsible for arranging the working days of the claimant was seconded to another role. Around this time a number of other managers who had allocated work to the claimant either retired, left the respondent's employment or were seconded to other roles.

16. The claimant worked for Tesco Stores from around 2015 until August 2020.

17. There was no contact between the claimant and the respondent in relation to any work he might carry out from 5 April 2019.

18. Tanya Campbell was recruited by the respondent in September 2019 to cover for Susan McLaren's role while she was on secondment. Ms Campbell was also

allocated additional duties as a result of other staff movements within central HR function.

19. The respondent's staff started working from home as a result of the national lockdown due to the pandemic from around 15 March 2020.

20. Around the end of June 2020, Tanya Campbell had a discussion with George Shannon a colleague in the central HR department regarding the claimant's employment. By this time the claimant had not worked for the respondent for nearly 15 months. At this time, Ms Campbell was carrying out a review of staffing numbers in the HR function.

21. Ms Campbell had never met either the claimant or his mother and was not aware that the claimant's mother had raised a grievance during her employment with the respondent.

22. Following an exchange of emails, the respondent's system was updated to reflect that the claimant's employment with the respondent had come to an end and that the claimant had resigned.

23. The decision that the claimant's employment should be terminated was that of Ms Campbell, although it was approved by Mr Spencer. The claimant had not intimated an intention to resign, nor had any contact been made with him.

24. The claimant, in seeking graduate employment named the respondent in an application form as a reference around May or June 2020.

25. The shredding work the claimant normally carried out was not required between April 2019 and June 2020 partly because of the digitisation of documents already carried out, the new practices adopted after relocation where other HR staff used the services of a contractor, and then the move to remote work. No one else was employed to carry out shredding work during this period.

26. Around July or August 2020, the claimant contacted Susan McLaren by phone as the claimant had become aware that the reference which had been received

from the respondent had provided incorrect information in relation to the dates of his employment.

27. Susan McLaren informed the claimant at that time that the system showed that the claimant's employment had been terminated at the end of June and that it showed the reason for termination as having been his resignation. The claimant's main concern at this time was the incorrect information which had been provided in the reference.

28. The respondent has a guidance document on managing guaranteed hours contracts, which is the type of contract on which the claimant was employed.

29. The respondent did not follow the guidance in terminating the claimant's employment. Ms Campbell was not aware of the existence of the guidance at the time she gave the instruction to terminate the claimant's employment. She was not aware of any procedure to be followed in relation to the termination of a contract in the circumstances of the claimant.

30. The guidance in relation to managing guaranteed hours contracts was not followed consistently by the respondent's managers. It was not a collective agreement, but was a guidance document setting out best practice for managers in handling contracts of this nature.

31. No one involved in the decision to dismiss the claimant was aware that his mother had lodged a grievance or the subject matter of the grievance she lodged.

32. The claimant was dismissed because he had not worked for the respondent for over 15 months and was not likely to be offered work in the near future.

Observations on the evidence

33. The Tribunal found the claimant to be a generally credible and reliable witness. The exception to that view was in relation to his evidence that he was shocked and surprised and very angry when he found out that he had been dismissed. The Tribunal accepted that the claimant was rightly concerned that his application for a graduate role could be impacted by the respondent's provision

of inaccurate information in relation to the claimant's dates of employment with them. However, it did not accept that it was the dismissal itself which surprised him. The claimant had had no contact with anyone from the respondent in relation to carrying out work for nearly 15 months. He had not contacted the respondent at any time to ask why he was not being provided with work. He knew that Ms McLaren had been seconded to another role. His purpose in contacting the respondent was solely in relation to the provision of a reference for a permanent full time role which would involve him relocating to Bristol. While the Tribunal could understand that the claimant was annoyed at the subsequent contradictory and confusing information with which he was provided by the respondent in relation to the reason for his dismissal, the Tribunal did not accept that it was the dismissal or indeed the failure of the respondent to offer work prior to the dismissal which angered the claimant. At the point at which the claimant contacted the respondent regarding the dates in the reference, the Tribunal formed the view that he had no wish to carry out any further work for them. He had been working almost full time for Tesco from around March 2020 and the Tribunal did not accept that the claimant had any firm expectation of carrying out work for the respondent from April 2019.

34. The claimant's mother only indicated her intention to give evidence on the morning of the commencement of the final hearing, which came as a surprise to the respondent. While her evidence in relation to the processes and procedures she followed in the College to which she was assigned was credible, her animosity towards the senior members of the respondent's HR function with whom she had dealings or who were responsible for the claimant's dismissal was palpable. The Tribunal formed the view that her intention in giving evidence was to seek to paint a picture of the respondent's HR function as incompetent, unprofessional, unreliable and untrustworthy rather than provide direct evidence in relation to the claims before the Tribunal. It was clear that her evidence was impacted upon by the manner in which her relationship with the respondent had come to an end.

35. The evidence of Ms Binnie and Ms Boyle was credible and reliable and they gave their evidence in a straightforward manner. Their evidence however was of

limited assistance as it related only to processes and procedures which the respondent had already conceded had not been followed.

36. The Tribunal found the evidence of Ms McLaren to be balanced and credible. The Tribunal appreciated that she was in a difficult position, being both an employee of the respondent, a family friend of the claimant's family and having initially been the claimant's line manager. However, she took care to be accurate and considered in her evidence and gave her evidence in a balanced manner.

37. Mr Spencer was also credible and reliable. He made concessions where appropriate and did his best to assist the Tribunal in understanding the structure and processes of the respondent.

38. The Tribunal also found Ms Campbell to be both credible and reliable. She candidly acknowledged the failings in her actions in relation to the claimant's dismissal, in that she did not know that someone on the type of contract on which the claimant was employed could be made redundant. It appeared to the Tribunal that Ms Campbell genuinely felt very distressed at her part in the circumstances leading to the claimant's claim, both in relation to the consequences for the respondent and the claimant. The Tribunal found her apology to the claimant to be genuine.

Relevant law

Breach of contract

39. The claimant argues that the document entitled Guidance - Management of Guaranteed Hours Contracts was incorporated into the claimant's contract of employment. It was said that the document was incorporated by virtue of reference to 'employment policies' in the claimant's statement of terms and conditions. Sections 1- 6 of ERA impose a requirement on employers to provide to employees a written statement of their terms and conditions of employment.

40. A contract of employment can contain terms not in the original contract. Terms which are either explicit, for instance in a collective agreement or amendment to

a contract, or which are implied, for instance through custom and practice can also be incorporated into the contract.

41. In *Alexander and ors v Standard Telephones and Cables Ltd (No.2) 1991 IRLR 286, QBD*, Mr Justice Hobhouse stated that 'where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract'.

PTWR

42. Regulation 5 of the PTWR provides that a part time worker should not be subject to less favourable treatment than a comparable full time worker.

43. Regulation 2(4) sets out the criteria for establishing who is a comparable full-time worker in relation to a particular part-time worker. A part-time worker can compare their position with that of a full-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place both workers are employed by the *same employer* under the *same type of contract*, both workers are engaged in the *same or broadly similar work*, having regard, where relevant, to whether they have a similar level of qualification, skills and experience the full-time worker works or is based at the *same establishment* as the part-time worker.

44. If there is no full-time worker working or based at the same establishment as the part-time worker, such as to satisfy the third condition set out above, Reg 2(4)(b) provides that the part-time worker may compare his or her treatment with that of a full-time worker who works or is based at a different establishment, provided that the full-time worker satisfies the first two conditions.

Victimisation

45. Section 27 EqA provides that

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Compensation for unfair dismissal

46. Section 123 ERA provides

> Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Submissions

47. Detailed written submissions were provided on behalf of the claimant. The main points of the submission were as follows:

- In relation to the question of victimisation, it was accepted that the claimant had not done a protected act, but alleged that the respondent believed that the claimant may do "any other thing for the purposes of or in connection with this Act" as per section 27 (2) (c) of the Equality Act. It was the Claimant's position that the "other thing" the Respondent believed that the Claimant had done or would do was to *support* his parent in her grievance alleging sex discrimination. It was accepted however on behalf of the claimant that there had been no evidence in relation to what the claimant may have done or what the respondent may have thought the claimant would do.
- It was said that inferences could be drawn from the manner in which the respondent had handled the termination of the claimant's employment and the circumstances between the last day the claimant carried out any work for the respondent and the termination of his employment, that such treatment amounted to victimisation. It was submitted that in terms of a two stage test, the claimant had established a prima facie case and that the respondent's explanation was simply not credible. In particular, the explanations kept changing and were not consistent with what the claimant would have expected would have happened.
- In terms of the claimant's breach of contract claim, it was asserted that the Claimant's contract of employment and the Conditions of Employment were

contractual and that the statement "may relate to elements of your employment which was contained in the statement of terms and conditions was evidence that the Management of Guaranteed Hours document was contractual. It was said that an updated link to policies and procedures would lead to that document.

- In terms of the claim under the PTWR, it was recognised that no evidence had been led in relation to a comparator under the regulations. However, the claimant wished to insist on the claim that there had been less favourable treatment of him in that there had been evidence from Ms Campbell that she had kept in touch with a full time employee who was on sick leave and that she had believed that redundancy was not applicable to employees employed under guaranteed hours contract.
- In terms of the compensation for unfair dismissal, a schedule of loss had been produced.

48. The respondent also provided detailed written submissions and elaborated on these orally. It was said that there was no suggestion that those involved in the dismissal of the claimant had any knowledge of the protected act of Mrs Millar and that explanations had been provided for what had happened.

49. It was also said that the submissions of the claimant did not reflect the evidence which had been heard or a reasonable interpretation of that evidence. It was recognised that the respondent had not followed appropriate procedures, which was why they had conceded the unfair dismissal claim. However there was no evidence to suggest that the claimant had been victimised. There was nothing to suggest that the respondent had though that the claimant would do something in relation to his mother's grievance. The grievance itself had been kept very tight and none of the respondent's witnesses had any knowledge of it prior to their involvement in the employment tribunal.

50. In terms of the breach of contract claim, it was said that the document referred to was guidance and was not a collective agreement. In any event no loss flowed from any breach which might have occurred.

51. Turning to the question of compensation for unfair dismissal, the payments already made to the claimant were highlighted. Further, it was pointed out that only future loss after the termination of employment can be awarded and the claimant has already received 7 weeks' notice pay. Therefore, it was not just and equitable to make any award of compensation.

Discussion and decision

Victimisation

52. It was accepted that the claimant's mother had done a protected act, but that the claimant had not done such an act. Rather it was said that the respondent believed that the claimant *might* do a protected act. However, there was no evidence before the Tribunal to allow it to conclude that this was the case. None of those involved in the dismissal of the claimant were aware of the protected act of Ms Miller or that she had raised a grievance at all. In any event, while it was said in submissions that the respondent thought that the claimant may make supportive comments of his mother or critical comments of the Director of HR, Mr Saville, against whom the grievance had been lodged, there was no evidence to substantiate this position. Indeed, the position was entirely inconsistent with the evidence which was heard from the claimant, which was that he and his mother agreed at an early stage in his employment that they would keep matters separate and not discuss employment matters. While it is accepted that the claimant was aware that his mother had raised a grievance which alleged discrimination, there was no evidence from him to suggest that he would have said or done anything in support of his mother's grievance while at work. Further, the claimant's mother left the employment of the respondent in November 2019 and there was no suggestion that her grievance was ongoing thereafter. It is therefore difficult to understand what protected act it was being suggested that the claimant may have done after his mother's employment had terminated, where there was no ongoing grievance. In any event, there was simply no evidence to allow the Tribunal to come to a view that the respondent thought that the claimant may do a protected act or what the nature of that protected act might be. It was not in the Tribunal's view sufficient simply for the claimant to be the

son of someone who had done a protected act to demonstrate that he may also do a protected act following on from his mother's protected act. There had to be some evidence about what it was the respondent thought the claimant might do in order to meet the requirements of the provisions. In the present case, there was simply no evidence at all either about what the claimant might have done or what the respondent thought that the claimant might do.

53. The Tribunal recognised that victimisation may not be a conscious act on the part of an employer. It also recognised that the provisions of the section are widely drawn. However, there needs to be a causal link between the alleged victimisation and the protected act (or the belief that a person might do a protected act). In the present circumstances, the Tribunal concluded that there was simply no evidence whatsoever to establish such a causal link. Therefore even if it could have been said that the respondent believed that the claimant may do a protected act (for instance simply because of the family connection between the claimant and his mother), there was no evidence to establish a causal link between that and the claimant's dismissal or the respondent's failure to offer him work between April 2019 and his dismissal.

54. Although it was suggested in submissions for the claimant that decisions were taken in relation to the claimant under the instruction of Mr Saville, this was never put to any of the witnesses. They were never challenged on their evidence about their decision making. In any event, the Tribunal accepted the evidence of Ms Campbell and Mr Spencer that they acted independently for the reasons they gave in relation to the decision to terminate the claimant's employment.

55. Similarly there was simply no evidence to suggest that anyone had been told not to give the claimant work from 5 April 2019 until the termination of his employment. The Tribunal accepted that the claimant's main contact with the respondent had gone on secondment to another role and the other principal contacts had either retired, or also been seconded. Further, the office in which the claimant had worked had relocated amid a wider reorganisation and transformation of the HR function. Thereafter of course, the pandemic took hold and all the respondent's staff were working from home and had to be provided

with laptops and other equipment to allow them to work effectively. The Tribunal accepted that the duties in relation to shredding which had been the main focus of the claimant's work was less likely to be required after the office move, given the process of digitisation which had been underway, the clear desk policy enforced by Mr Spencer and the likelihood that staff would use the contractor in place for shredding which had been used by other parts of the HR function with whom the Central office was now located.

56. Moreover, the Tribunal were of the view that the claimant was likely to have been offered additional tasks only if he was in the office for shredding in the first place. The longer the claimant was away from the office, the less likely he would have been to be on the mind of those who might offer him work. Further, the Tribunal accepted that the only staff with guaranteed hours contracts in the central services of HR were now notetakers, who were engaged on contracts of 100 hours a year. There was no suggestion that the claimant had ever done notetaking when employed by the respondent or that he ought to have been considered for one of these roles.

57. Further, the Tribunal concluded that the claimant had no firm expectation of being offered any work after April 2019. He did not contact anyone at the respondent, including his main contact Ms McLaren, who was a family friend to ask why he wasn't being offered work or who he should contact about carrying out work.

58. In these circumstances, the Tribunal concluded that the claimant had not established a prima facie case of victimisation. There were simply no facts from which the Tribunal could draw an inference that the reason for the treatment he complained of was that the respondent believed he may do a protected act. Even had the Tribunal been satisfied that the burden of proof in this regard had shifted to the respondent, the Tribunal would have accepted the reasons put forward by the respondent, that there was no work for the claimant to do between April 2019 and June 2020 for the reasons set out above, and that he was dismissed because he had not done any work for 15 months were not related in any way to any belief that the claimant may do a protected act. The claimant's claim of victimisation therefore fails.

Breach of contract

59. The Tribunal considered the terms of the claimant's contract of employment and the accompanying summary of conditions of employment. The Tribunal also considered the terms of the document called Guidance – Management of Guaranteed Hours contracts. It accepted that the guidance was not a collective agreement, and it was not followed by all managers. It was not the type of guidance which one might expect to be incorporated into a contract of employment. Taking all of these factors into account, the Tribunal had no hesitation in concluding that the document did not and was not intended to confer contractual rights on the claimant.

60. The Tribunal considered the case of *Alexander and ors v Standard Telephones and Cables Ltd (No.2) 1991 IRLR 286, QBD* in relation to whether the content of the guidance document was apt for incorporation into the claimant's contract of employment. It concluded that this was not apt for incorporation into an individual's contract of employment.

61. Rather the document was guidance, which represented best practice for managers to follow when they were dealing with staff on guaranteed hours contracts. While there had been a working group involved in drafting the document which involved one or more of the trades unions, and unions may have been consulted on the documents, there was no intention for it to create contractually binding rights. Had there been an intention to create contractual rights, then the Tribunal would have expected that there would be evidence in relation to one of the trade unions being aggrieved that the guidance was not followed. The document itself did not take the form one might expect of a collective agreement, particularly where it was accepted that a number of trade unions were recognised by the respondent. It was merely as it was entitled 'guidance', and no contractual rights flowed from that in respect of the claimant.

Part time worker claim

62. In submissions it was acknowledged that the claimant had not identified a full time comparator in relation to his claim that he was not issued with a P45 because he was a part time worker. There was some evidence that Ms Campbell had kept in touch with an employee who was on sick leave, but the Tribunal did not hear any evidence about the specific circumstances of that individual, what type of contract that person was employed under, what sort of work they did or how long they were on sick leave for. In any event, the Tribunal did not consider the circumstances comparable. The claimant's situation was that he did not work for the respondent for long periods of time. He was not on sick leave during those periods. The Tribunal also heard that the claimant had provided Tesco and the University of Strathclyde with a fit note when he was ill between September 2018 and early 2019. There was no suggestion that he provided the respondent with a fit note at that or any other time.

63. Therefore, the claimant's claims under PTWR fail at the first hurdle as he failed to identify a comparable full time worker.

Unfair dismissal compensation.

64. The respondent had accepted that the claimant had been unfairly dismissed. A statutory redundancy payment had been made and therefore no basic award is due to the claimant. Further, the claimant was paid, albeit belatedly, notice pay of 7 weeks. His employment was terminated on 30 June 2020, so the notice pay covered the period from then until 18 August. The claimant started his new job in Bristol on 4 September 2020. He is recorded as ceasing work for Tesco on 7 August.

65. The Tribunal concluded that even if the claimant had not been dismissed by the respondent on 30 June 2020, he was unlikely to have worked beyond the period for which he worked for Tesco. The Tribunal did not accept that he would have been likely to have either been offered or have wished to carry out any work for the respondent in the weeks leading up to him commencing a new job in Bristol,

which required him to relocate. In these circumstances, the Tribunal concluded that the claimant had not suffered any financial losses as a result of his unfair dismissal, and that it was not just and equitable to make any compensatory award.

Employment Judge: Amanda Jones
Date of Judgment: 26 October 2021
Entered in register: 03 November 2021
and copied to parties