EMPLOYMENT TRIBUNALS (SCOTLAND)

EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4122628/2018
Held In Glasgow on 18 and 19 March 2019
Employment Judge: Laura Doherty

Miss L Hamilton	**Claimant** **Represented by:** **Ms S Faheem -** **Solicitor**
The Niaroo Pub Company Limited	**Respondents** **Represented by:** **Mr M Howson -** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:
1) The respondents breached the claimant's contract of employment by dismissing her without notice, and the respondents shall pay to the claimant damages for failure to give notice in the sum of **£1,456.44.**
2) The respondents unfairly dismissed the claimant and shall to pay the claimant a monetary award of £3,529.13.

REASONS

1 . I n a claim presented on 9 November 2018, the claimant claims of constructive unfair dismissal, and breach of contract.

2. The respondents deny that the claimant was dismissed within the terms of Section 95 (1) (c) of the Employment Rights Act 1996 (the ERA). The respondents deny they breached the claimant’s contract employment; alternatively, in the event the tribunal determines that there was a breach of contract, they deny that that the breach was fundamental, entitling the claimant to resign; lastly, the respondents submit that if there was a beach, that was not the reason why the claimant resigned.

3. In the ET3 the respondent's position was that also that if there was a breach of contract , then the claimant affirmed the breach, but Mr Howson confirmed in the course the hearing that this position was not insisted upon.

4. The issue for the Tribunal is therefore whether there was a fundamental breach of the claimant's contract of employment, and whether the claimant resigned in response to that breach and was thus constructively dismissed from her employment.

5. From the terms of the ET1 , it appeared the claimant was relying upon a breach of the express terms of her contract relating to working hours, and that she was also relying upon a breach of the implied term of mutual trust and confidence, however it was confirmed during the course of the hearing that the claimant only relies upon a breach of the express term in relation to her Sunday working hours.

6. The Tribunal heard evidence from the claimant. For the respondents the Tribunal heard evidence from Miss Crews, the manager of the bar in which the claimant worked, and Mr David Irvine, a director of the respondent company.

7. Both parties lodged bundles of documents

Findings in fact

8. The respondents had a company engaged in the operation of two public houses, one in Inverness, and one in Glasgow, the Niarro Pub in Glasgow.

9. The claimant's date of birth is 1 7 January 1 986. She has been employed since 6 June 2008 as bar staff in the Niarro Pub. On occasion , for example when cleaning staff did not attend work the claimant also carried out some cleaning duties, but she principally worked as bar staff.

10. The claimant was issued a staff handbook, which is produced in the respondent's bundle. Clause 2 of the handbook dealt with hours of work and stated:
"Your hours of work will be discussed with you and your line manager. Due to the nature of the business, your hours of work may include unsociable hours such as weekends, evenings and bank holidays. You should refer to your contract for further details. Please do ensure that you discuss any particular personal circumstances or needs with your line manager. "
Job flexibility and mobility
In order to meet the constantly changing needs of the business, you may be expected to undertake other reasonable duties and responsibility from time to time or your job may need to change on a more permanent basis to reflect the needs of the company. You may also be required to work on a temporary or permanent basis in other company sites, the locations of which will be reasonable to your personal circumstances.
We will speak to you should any of this be necessary and explain our reasons and take on board any comments you may have."

11. From the commencement of her employment up until 2012, the claimant worked on a rota system, and therefore did not have fixed hours.

1 2. The claimant has three children, now aged 14,12 and 6.

13. When the claimant returned from maternity leave in November 2012, she made an application for flexible working which was granted on 4 December 2012.

14. In terms of the flexible working request, it was agreed that the claimant's working pattern would be by a weekly basis as follows:
'Week 1
Thursday day, Saturday night, and Sunday day.
Week 2
Wednesday night, Thursday day and Sunday day. '

15. The claimant received a letter on 4th December 2012 confirming the respondent's agreement to the request. The letter provided that subject to a trial period, the change in the claimant's working pattern would be a permanent change to her terms and conditions of employment, and she would have no rights to revert back to her previous working pattern.

1 6. The claimant successfully completed her trial period, and her working pattern, in line with the flexible working request which had been agreed, was as follows:
Week 1
Wednesday 5pm to 1 1 .30pm, Thursday 12 noon to 5pm, Sunday 12.30pm to 5.30pm
Week 2
Thursday 12 noon to 5pm, Saturday 5pm to close at 12.30am, Sunday (or if late licence was in place until 1 .30am), Sunday 12.30pm to 5.30pm.

17. It was important for the claimant that she maintained a working pattern which allowed her to work 1 6 hours per week, as this meant she could benefit from working tax credits. The claimant attends college on a Monday, Tuesday and Wednesday. The claimant also has childcare commitments and has to make arrangements for her children to be looked after around her working pattern.

1 8. Around 201 7/201 8 the respondents' business in Glasgow began to suffer and it began to lose money. The business went from earning a profit of around £1 0,000 at the end of 201 7, to a loss of over £2,000 in 201 7/201 8.

19. It was not viable for the respondents to continue on this basis, and Mr Irvine, the respondents Managing Director discussed with Ms Crews, the bar manager at the Niaroo Pub, what cost savings that could be made. Mr Irvine is not involved in the day to day running of the pub and relied on Ms Crews for input into this.

20. Changes in staff hours were necessary in order to effect savings to the business, so that the business could remain financially viable. A number of members of staff had their hours changed or reduced as a result of changes which the respondents put in place in an attempt to make savings.

21 . Prior to February 2018, on a Sunday, the staffs working pattern was that the keyholder worked from 09.30am to 5.30pm, the claimant worked from 12.30pm to 5.30pm, and there were two members of bar staff who worked from 5.30pm until 11.30pm; two cleaners were engaged from 09.30am to 11 ,30am. Making changes to the claimant's Sunday shift, and changing that shift from 12.30pm to 5.30pm, to 2pm till 8pm, allowed the respondents to have only one member of bar staff on the late shift (i.e. 5.30pm until 1 1 .30pm

shift) and effected considerable saving to the business over the year.

22. The respondents did not wish to change the claimant's Sunday shift on occasions where there was a function, or a Celtic v Rangers football game, and in those instances they still required her to work her original shift hours of 12.30pm to 5.30pm.

23. Ms Crews approached the claimant in February 2018 and asked if she would work from 2pm until 8pm on a Sunday, in order to suit the needs of the business, unless there was a football match or function on. Ms Crews did not indicate to the claimant over what period of time she would be expected to do this. The claimant agreed to work the 2pm until 8pm shifts, but considered this to be on an ad-hoc basis, rather than a permanent change to her contract.

24. The working rotas are produced at pages 1 36 to 137, which demonstrate that the claimant worked Sunday 2-8pm on 11 February, 18 February, 25 February, 4 March, 1 April, 22 April and 6 May.

25. On an occasion towards the middle of May, Ms Crews asked the claimant to work a 2-8pm shift the following Sunday. The claimant did not wish to do this. Ms Crews told her that she would have to do it as Mr Irvine had decided that was going to be her shift.

26. The claimant contacted Mr Irvine on or around 23 May, querying the position.

27. Mr Irvine emailed the claimant on 23 May advising her that Ms Crews had the claimant on a shift which suited the business needs, and that Sunday needed a 2-8pm shift. The claimant responded on 26 May, asking for a meeting, and she emailed Mr Irvine on 3 June stating that she was raising a formal grievance. The claimant stated that she had taken into account the respondent's stance as to the needs of the business, but it was against her flexible working contract, and she had not been consulted about the changes prior to them occurring.

28. The claimant requested a meeting to try to resolve matters.

29. Mr Irvine agreed to this, and a meeting was arranged which took place on 5 June, between Mr Irvine, the claimant supported by her sister, and Ms Crews. During the course of that meeting, Mr Irvine showed the claimant figures from the business which demonstrated that the business was suffering a loss.

30. At the conclusion of the meeting, Mr Irvine took the view that there had been no formal consultation in relation to the change of hours, and he decided to embark on a formal consultation process. He emailed the claimant on 5 June (page 85) confirming this. He advised in that email that the changes had come about due to a material change of economic circumstances within the business, which were sales coming down while costs were escalating. In relation to the consultation, Mr Irvine advised that he was likely to change the claimant's shift pattern from 12.30-5.30pm, to 2-8pm on a Sunday, which enabled adequate cover for the needs of the business. Mr Irvine invited the claimant to provide her thoughts on this and indicated he would give consideration to any suggestions which she might make. He also advised that the respondents were open to shortening the claimant's shift to accommodate the needs of her family, i.e. 2.30-5.30pm, and that the

respondents would look to see where the claimant could gain an additional two hours from the business. He stated that he appreciated the claimant's reluctance to reduce her hours below 1 6 hours per week as that was what she required to work to gain tax credits. He said however that he was not willing to compromise the needs of the business on that point alone.

31. A further meeting was arranged for 4 July, and there was further email correspondence between the claimant and Mr Irvine about the proposed changes. The claimant emailed Mr Irvine on 27 June with a number of comments as to cost savings on an operational basis, but did not make any proposals in relation to her own position.

32. Further to the meeting on 4 July, Mr Irvine gave the claimant the following proposals. That was the continuity of her 2-8pm shift on a Sunday or 12 to 5.30pm on a Sunday with a 9.30-1 2nooon shift on a Thursday, or 9.30-11 .30 am shift on a Sunday; both of those shifts were to undertake cleaning duties.

33. The claimant contacted ACAS , however during the ACAS Conciliation period, the parties' positions remained unchanged.

34. The claimant did not wish to undertake the cleaning shifts which were offered to her on the basis that she was not employed as a cleaner, and she had childcare and college commitments. She also considered that it would cause her difficulty to undertake a cleaning shift on a Sunday morning, due to her Saturday night work.

35. There was considerable correspondence between the parties, and on Friday 10 August, at the end of the ACAS Conciliation period, Mr Irvine emailed the claimant summarising the position. That was the changes to the claimant's shift were not going to be permanent, in the sense that she would continue working 1 2.30 to 5.30pm on Sundays on the occasion of a function or a Celtic the Rangers football match. The respondents had carried out a formal consultation, and they had offered alternative hours to make up the lost hours. Mr Irvine also advised that the respondents were prepared to enter into an arrangement whereby they provided a month's advance notice of the claimant's proposed shifts.

36. The claimant responded to this email on 1 1 August (page 1 1 2) tendering her resignation, on the basis there had been a fundamental breach of her contract of employment.

37. After her employment came to an end, the claimant began looking for other employment, and has been successful in gaining work as a care assistant.

38. For the purposes of this claim, quantum was agreed, and as per the claimant's schedule of loss at page 35R.

39. It is agreed the claimant's pre dismissal earnings were £121 .37 per week and it was agreed that the claimant's notice period is 12 weeks.

40. It is agreed that the claimant when in employment had enjoyed and received from combined working tax credit and child tax credit £218 per week; and the working tax credit element of £76.37 per week was as a direct result of working over 1 6 hours per week with the respondents. It was agreed that the claimant lost entitlement to that benefit from 3 September 2018. It was

agreed that as from 5 September 2018, the claimant had entitlement to ESA benefit of £73.10 per week but a loss of entitlement of £3.27 per week until 5 December 2018. It was also agreed that during the period the claimant received £19 as a loan payment bursary payment.

Note on Evidence

41 . There was not a great deal which was material to this case which was in dispute between the witnesses, and overall, the Tribunal formed the impression that none of the witnesses had any intention to mislead the Tribunal. The Tribunal formed the impression that Ms Irvine and Ms Crews were both credible and reliable witnesses. Both gave their evidence in a straightforward manner and made appropriate concessions.

42. For example, Ms Crews readily accepted that she had not given the claimant an indication over what period it was anticipated her shift pattern on a Sunday would be altered when she spoke to her in February, and the fact that she was prepared to make this concession enhanced her credibility in the Tribunal's view. The Tribunal had no difficulty in accepting the evidence of Ms Crews, and Mr Irvine, as to the loss which the business was sustaining, and the need to reduce costs in order to keep the business viable. There was no cross examination on this point, and the Tribunal was satisfied that the reason that the respondents implemented the change which they did, was to effect savings which they deemed necessary to the sustainability of the business.

43. There was an issue in relation to the claimant's evidence as to whether she made any counterproposals during the consultation process.

44. It may be that a great deal does not turn on this, given the issues which the Tribunal has to determine, but the Tribunal was not persuaded that the claimant had made any such proposals. In reaching its conclusion, it takes into account the claimant said in evidence that she had made counterproposals in relation to working other shifts, on other days of the week, but it was Mr Irvine's evidence that no such proposals were made, and on balance the Tribunal preferred his evidence to that of the claimant. In reaching its conclusion, the Tribunal attached weight to the fact that throughout the email correspondence to the respondents (which was not inconsiderable) the claimant did not specify the proposals which she was making, despite the fact that the respondents made it clear in their emails that they would consider alternative proposals.

45. Ms Faheem suggested that a statement in the claimant's email of 21 June to the effect that "I *have previously highlighted this issue which explained to me that Joan Crews does certain tasks, for example on a Monday she will go to the bank, Tuesday and Wednesday she will visit the cash and carry:* This does not in the Tribunal's view support the conclusion that the claimant proposed alternatives to work on those days. It is not clear from that statement what the claimant is proposing by way of an alternative.

Submissions
Claimant's submissions

46. For the claimant, Ms Faheem suggested that the claimant had resigned in response to a fundamental breach of her contract of employment.

47. Ms Faheem confirmed that the term upon which the claimant was relying on was the express term for contract to the effect that she would work on a Sunday from 12.30-5.30pm.

48. She submitted the claimant's childcare and college commitments were such that the other proposals which the respondents made were untenable, and in any event the claimant was not engaged to work as a cleaner. To suggest that she did amounted to a fundamental change of her duties. There was a fundamental breach in terms of the and hours of work that the respondents were imposing on the claimant, and this entitled had to resign.

Respondent's submissions

49. Mr Howson firstly confirmed that the respondents were no longer insisting upon an argument to the effect that the claimant had acquiesced in any change to her terms and conditions of employment. He also made clear the respondents accepted that the respondents agreeing to the claimant's flexible working request had the effect of fixing her hours, and therefore the claimant was no longer working under a flexible hours contract. The respondents therefore accepted that the claimant was working on a fixed hours contract , and that was a term of contract that she work from 1 2,30 to 5:30 PM on a Sunday

50. Mr Howson began by addressing the Tribunal on the case of *Western Excavating v Sharpe* and submitted that the Tribunal had to consider whether the respondents without reasonable and proper cause acted in the manner which they did.

51 . He submitted the respondents had good reasons to act as they did, and the Tribunal should accept the business's loss which the business made in 2018, and that the respondents needed to take steps to make savings. The respondents had reasonable grounds to take the steps which they did in relation to the amendment of the claimant's hours. The changes meant that the respondents could save six hours of work per week, which was significant over the year.

52. Further, Mr Howson submitted that the respondents were not in fundamental breach of an express term of the claimant's contract of employment. The change of shift pattern from of 12.30 to 5.30 pm to 2- until 8pm, in fact gave the claimant additional hours, and the alternatives which the respondents had proposed were also entirely reasonable. Given the claimant had an opportunity to make up her hours by working on a Thursday or Sunday morning, and the flexibility clause in the claimant's contract of employment io meant that she could be reasonably required to cover cleaning duties. In any event, it was not a fundamental change to her role; while the majority of her working time was still as bar staff , she did from time to time carry out cleaning duties. Furthermore, the changes had to be looked at in the context of the claimant's working pattern, and it was simply one shift per week.

53. In addition to that, the change was not permanent, in that if there was a function or football game on then the claimant would revert to the 12.30 to 5.30pm shift on a Sunday. Consideration of the rota demonstrated that the claimant would revert to this shift not infrequently.

54. In considering whether there has been a fundamental breach, an objective

20 test applies, and not simply whether the claimant considers it reasonable. There was, Mr Howson submitted, no fundamental breach of the express term of the claimant's contract in this case.

55. Mr Howson submitted that as the respondents had behaved reasonably, they could reasonably do what they did, and they carried out a thorough consultation process, suggested reasonable alternatives, and the claimant had not made any counterproposals at all. The Tribunal should take into account when considering whether the respondents were in fundamental breach of the claimant's contract of employment.

56. Ms Faheem submitted that the fundamental breach was a unilateral change of the claimant's terms and conditions in relation to hours of work on a Sunday and the proper course for the respondents would have been to dismiss the claimant with notice. However, Mr Howson argued that this was not the correct course, that the respondents had acted reasonably. Had the claimant been dismissed with notice, then the claimant could have claimed unfair dismissal, and the respondents would have had to argue that dismissal was for an SOSR.

57. Mr Howson agreed that the quantification provided by the claimant, subject to the caveat that in the event that the breach of contract claim was successful, there should be no double counting. The Tribunal should award damages for breach of contract, and then calculate the compensatory award on the basis of the remaining period claimed. Ms Faheem agreed that this was the appropriate way to approach the assessment of loss.

Consideration

58. Section 95 of the Employment Rights Act 1 996 (ERA) provides that:
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) .. only if) —
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

59. Section 94 of the ERA provides that an employee has the right to not be unfairly dismissed by his employer.

60. The dismissal was said to have taken place in terms of section **95 (1)(c)** in of the ERA Mr Howson referred the Tribunal to the case of *Western Excavating (ECC) Limited v Sharpe 1979 ICR 221,* in which the Court of Appeal ruled that the employer's conduct which gives rise to constructive dismissal must involve a fundamental breach of contract. What was said in that case was;

61. "/f *the employer is guilty of conduct which is a significant breach going to the 5 root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract,*

then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'.

62. In order therefore to be successful in a complaint of constructive unfair dismissal, the claimant must establish that firstly there was a fundamental breach of the contract on the part of the employer, and that breach caused her to resign, and that she did not delay too long before resigning thus ending the contract and losing the right to claim constructive dismissal.
15 63. Affirmation of the contract is not in issue in this case.

64. In order to consider whether it was a fundamental breach of contract on the part of the respondents, it is necessary to consider the term of the contract which it is said has been breached.

65. That term was identified by Ms Faheem as an express term as to hours of 20 work on a Sunday which were expressly stipulated as 1 2.30 to 5.30pm.

66. Mr Howson submitted that the Tribunal's firstly had to consider whether in seeking to change the claimant's hours of work on a Sunday, the respondents acted with reasonable and proper cause. The Tribunal however did not consider this was the correct approach. That is the test which the Tribunal 25 would apply if it were considering a claim based on an alleged breach of the implied contractual term of mutual trust and confidence. In such cases the Tribunal has to consider whether the employer without reasonable and proper cause acted in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. However, 30 what is relied on here a breach of an express term of the contract. That requires the tribunal to identify the terms relied upon and then to determine if it has been breached.

67. The respondents accept there was an express term in the claimant's contract as to the hours she worked, which were fixed shifts worked over a two-week cycle, and included a fixed shift every Sunday, from 12.30 - 5.30pm.

68. The issue for the Tribunal is whether the changes which the respondents implemented to the claimant's working hours, amounted to a fundamental breach of that express terms of her contract in relation to her hours of work.

69. That change imposed was that the claimant's hours were changed to 2pm until 8pm on a Sunday, other than on occasions when there was a function, or Celtic v Rangers football match, when her hours reverted to 12.30 to 5.30pm. This therefore entailed a change of the express terms of her contract, in that the claimant's hours of work were no longer fixed but were flexible to that degree on a Sunday dependent on business needs. The claimant's hours of work changed to the extent that her start time was altered from 12.30 until 2pm, and her finish time was altered from 5.30pm until 8pm, other than when the business required her to revert to her original shift hours.

70. Mr Howson argued this was not a fundamental change to the claimant's contract of employment. He submitted it was a relatively minor change to her shift pattern, and she not going to be affected every week. The claimant would be given advance notice of the changes.

71. In determining this point the Tribunal has to apply an objective test of

reasonableness. Applying that test, and the Tribunal considered that unilateral changes in contractual terms imposed on the employee, which resulted in the employee no longer enjoying a fixed hours contract, but which required the employee to work flexibly on one shift out of three shifts worked each week dependent on the to the business, and altering the start time of the shift by one and a half hours, and the finish time of the shift by 2 1Z>hours, did amount to a fundamental breach of the express term of the contract.

72. The Tribunal took into account Mr Howson's submission as to the reasonableness of the respondents' actions, in attempting to find suitable alternatives for the claimant, and engaging in a lengthy consultation process. Applying an objective test, the Tribunal was satisfied the respondents acted reasonably in attempting to find alternatives with the claimant. The tribunal was also satisfied there was a business need to implement the changes which the respondents put in place. Those were the factors which would have been be relevant for the Tribunal to take into account, were it considering a dismissal for some other substantial reason (an SOSR), however no alternative reason for dismissal was pled in this case, and it was not argued that the constructive dismissal was for an SOSR. The terms of the ET 3 are clear in the respondent's position is that they deny there was a dismissal. The ET 3 sets out a number of basis on which it is said dismissal did not occur, and that being the case it is not for this tribunal to engage in exercise of constructing a reason for dismissal which was not pled.

73. The Tribunal found that the respondents imposed a unliteral ly variation of the claimant's contract, which variation amounted to a fundamental breach of the expressed term of her contract of employment as to her hours of work, and the claimant resigned in response to that breach. The claim for constructive unfair dismissal therefore succeeds.

Remedy

74. The parties had helpfully agreed remedy in this case.

75. In relation to the breach of contract claim, it is agreed that the claimant is entitled to 12 weeks' notice, and for her pre-dismissal earnings for the purposes of calculation of notice were £121 .37. Therefore, the Tribunal shall make an award of damages for failure to give notice of £1 ,456.44.

76. It was agreed the claimant is entitled to a basic award of 1 2 weeks' pay, which reflected her age and length of service of £1 21 .37 per week, being £1,456.44.

77. Thereafter, the claimant's claim of compensation was restricted to a period of 26 weeks. It was agreed by Ms Faheem that the compensatory period should be reduced to a period of 14 weeks, to reflect the award for damages for failure to give notice, and thereafter it was agreed that the compensatory award should be £1 ,699.1 8, on the basis of 1 4 weeks x £121 .37. Further, it was agreed that the claimant's loss of employment rights was £350, and her loss of tax credits amounted to £42.51. Finally, it was agreed the claimant had received £19 in respect of a loan payment and bursary which should be deducted from the award.

78. The total compensatory award is therefore £3,529.13

Employment Judge: Laura Doherty
Date of Judgment: 01 April 2019
Entered in register: 03 April 2019
and copied to parties