



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112379/2021

Held in Glasgow on 5 and 6 September 2022

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Employment Judge F Eccles

Members Ms LJ Grime and Mr J Gallacher

Ms F Johnstone

**Claimant
In Person**

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Piranha Pedi Ltd

**Respondent
Represented by:
Mr S Wilson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was unfairly
20 dismissed by the respondent and that the respondent shall pay to the claimant (i) a
basic award of **£1,360** (£340 x 4 weeks); (ii) a compensatory award of **£978.10**
and (iii) statutory notice pay of **£930** (£310 x 3 weeks). The claims of disability
discrimination and for holiday pay are dismissed. (The total monetary award for the
purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996
25 is **£978.10**. The amount of the prescribed element is **£578.10**. The period to which
the prescribed element relates is 19 October 2021 to 1 December 2021. The total
monetary award exceeds the prescribed element by **£400**).

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REASONS

Background

1. The claim was presented on 10 November 2021. The claim was for unfair dismissal, disability discrimination, breach of contract (notice pay) and holiday pay. The claim was resisted. It was the respondent's position that the claimant was not dismissed and that her employment had ended by mutual agreement. The respondent denied that the claimant was a disabled person for the purposes of the Equality Act 2010. The respondent denied that any payments were outstanding to the claimant including holiday pay and notice pay. At a preliminary hearing held on 23 May 2022, the Tribunal found that the claimant was not a disabled person for the purposes of proceedings under the Equality Act 2010. It was not in dispute that the claimant's grandfather had been diagnosed with cancer. The claimant informed the Tribunal that she intended to proceed with a claim of discrimination by association.

2. The claim was listed for a final hearing to determine the following issues:

Unfair dismissal

- i. Was the claimant dismissed by the respondent?
- ii. If so, what was the reason for dismissal?
- iii. Was the reason for dismissal a potentially fair reason?
- iv. If so, did the respondent act reasonably in treating the reason as a sufficient reason for dismissing the claimant?
- v. If not, how much should be awarded to the claimant?

Direct disability discrimination by association

- vi. Was the claimant dismissed by the respondent?
- vii. What was the reason for dismissal?

viii. Was the claimant treated less favourably (that is, dismissed) than someone who was not associated with a disabled person was or would have been treated?

5 ix. Was that treatment because of disability (that is, the disability of the associated person)?

Breach of contract

x. Was the respondent in breach of contract by failing to pay the claimant notice pay?

xi. If so, what damages should be awarded to the claimant?

10 *Holiday pay*

xii. Did the respondent fail to pay the claimant for any holidays taken or accrued during her employment?

xiii. If so, how much holiday pay is due to the claimant?

15 3. At the final hearing, the claimant represented herself. She was accompanied on 5 September 2022 by Ms Amy Davitt and on 6 September 2022 by Ms Caira McMartin. Both Ms Davitt and Ms McMartin gave evidence for the claimant. The respondent was represented by Mr S Wilson, Solicitor. Ms Jennifer McLaughlin, Manager of the respondent and Ms Rebekka Costello, Director of the respondent gave evidence. The Tribunal was provided with a
20 Joint Bundle to which additional documents (text messages and printed downloads) were added during the course of the hearing (P12.1 to 12.3).

Findings in fact

25 4. The Tribunal found the following material facts to be admitted or proved; the claimant was employed by the respondent as a Beauty Therapist from 15 October 2017 to 28 September 2021. The respondent operates a beauty salon in Paisley trading as Elixir Lounge. The respondent has around eight employees. The claimant's average weekly pay was £340. Her average

weekly take home pay was £310. At the date of her dismissal, the claimant was aged thirty. Her date of birth is 31 January 1991.

5. In September 2021, the claimant and her two school aged children were living with her grandfather. The claimant relied heavily on her grandfather. He helped care for the children allowing the claimant to obtain paid employment. He provided a stable home environment for the claimant and her children. On Thursday, 23 September 2021, the claimant's grandfather was admitted to hospital. The claimant left work to be with her grandfather and it was agreed she would not return to work that day or the following day. The claimant's grandfather was diagnosed with a tumour which was thought to be cancerous. The claimant was distraught. She had a close relationship with Jennifer McLaughlin, the respondent's Manager. They were in regular contact. The claimant spoke to Jennifer McLaughlin on Friday, 24 September 2021. The claimant expressed concern about how she would manage to attend work while her grandfather was in hospital. Jennifer Mclaughlin was sympathetic but also concerned about how the claimant's work would be covered. They discussed whether the claimant would be able to attend work the following day to cover appointments for a couple of clients. The claimant's priority was to visit her grandfather in hospital.
6. The claimant did not attend work on Saturday, 25 September 2021. The claimant sent a text message (P7.1) to Jennifer McLaughlin to say that she did not think that she would be back at work until she knew more about her grandfather's condition. The claimant explained that she was struggling and needed to "*take time off just now for both myself and family.*"
7. The claimant remained in regular contact with Jennifer McLaughlin. They discussed her grandfather's condition and what she was being told by the hospital doctors. The claimant sent Jennifer McLaughlin a note of her grandfather's possible treatment (P12.2). The claimant spoke to Jennifer McLaughlin again about how difficult it would be for her to attend work while her grandfather was in hospital. They discussed the possibility of the claimant taking some time off work. The claimant was concerned about being without an income. They discussed the claimant having no annual leave left to take.

They discussed whether the claimant would be entitled to additional benefits if she was not working. The possibility of receiving statutory sick pay was not mentioned. Jennifer McLaughlin told the respondent's Director, Rebekka Costello about the claimant's situation. Rebekka Costello contacted the claimant by WhatsApp (P7.7) later that day. Rebekka Costello confirmed that Jennifer McLaughlin had told her that she was not *"going to be able to come back to work just now and (you) don't know when."* Rebekka Costello explained that while she was sympathetic to the claimant's situation, the respondent needed to know what was *"going on for the sake of the business."* Rebekka Costello asked the claimant whether she was *"saying that you are having to leave for the time being and possibly come back at later day depending on circumstances?"*.

8. The claimant did not reply to Rebekka Costello's WhatsApp message (P7.7). She was too distraught about her grandfather's rapidly deteriorating health. She was spending most of her time at the hospital. Jennifer McLaughlin sent the claimant a text message on Sunday, 26 September 2021 (P7.3) asking if she had received Rebekka Costello's message. The claimant did not reply.

9. The claimant received her final pay from the respondent on 28 September 2021. It was less than her normal pay as the respondent had deducted overpayment for additional holidays. The claimant was too preoccupied with her grandfather to notice that she had received less than her normal pay. The claimant did not receive any notice or notice pay on the termination of her employment.

10. On Wednesday, 29 September 2021, the claimant sent Jennifer McLaughlin a copy of the diagnosis and post treatment plan for her grandfather (P12.3). The claimant saw her own doctor on Monday, 4 October 2021. She was issued with a Fit Note (P9.1) back dated to 24 September 2021. The claimant was considered unfit to work until 15 October 2021 because of an acute stress reaction. The claimant informed Jennifer McLaughlin by text message (P7.2) on 4 October 2021 that she had been told by her doctor to hand in the back dated Fit Note *"so, I don't get nothing"*. Jennifer McLaughlin replied by text message (P7.2) that the respondent *"did it as a stopper employment"* because

the respondent did not know for how long the claimant would be off work and to allow her to *“get universal credit which is way more than sick pay.”*

11. The claimant’s doctor questioned why she was not in receipt of statutory sick pay and whether her employment had been terminated. Jennifer McLaughlin informed the claimant by text message (P7.4);

“Yeah you asked as you couldn’t work and didn’t know when you would be able to come back to work as you would be caring for your grandpa. Not a sick line for stress. Which is totally understandable.”

12. The claimant was shocked and upset to learn that her employment had been terminated. She told Jennifer McLaughlin by text message (P7.4) on 4 October 2021 *“Well I had no clue I was just let go”*. Jennifer McLaughlin replied by text message (P7.4); *“But it wasn’t let go. You said you couldn’t work. We said when you are ready to come back we would make it work. Even if it is reduced hours for your grandpa’s appointments.”* The claimant replied by text message (P7.6) that she had been unable to return to work straight away because she had to *“play it day by day right now.”* She expressed her upset at being *“left with nothing.”* Jennifer McLaughlin replied by text message (P7.6) and sought to reassure the claimant about her entitlement to state benefits.

13. The claimant’s grandfather died in October 2021. The claimant has been in receipt of Fit Notes (P9) for acute stress or stress reaction from 28 September 2021 to date. Since around 1 December 2021, the claimant has felt well enough to work an average of one day a week for which she has earned a total of £3,409. This work is on a self-employed basis. The claimant has received Employment Support Allowance totalling £149.40 since her employment with the respondent ended.

Notes on evidence

14. There was a dispute over the facts in this case between the claimant and Jennifer McLaughlin. It was the claimant’s evidence that at no time had she informed Jennifer McLaughlin that she wished her employment to end. It was

Jennifer McLaughlin's evidence that the claimant wanted to stop working to allow her to claim benefits and care for her grandfather. The Tribunal had regard to all the evidence before it including the oral evidence and the text messaging between the claimant and Jennifer McLaughlin and the WhatsApp message from Rebekka Costello. While the Tribunal did not doubt that there had been discussions about possible options available to the claimant with regards to claiming benefits while caring for her grandfather, the Tribunal was not persuaded that the claimant had at any time indicated that she wished to resign from the respondent's employment or, as described by the respondent, mutually agree to end her employment. The text messaging (P7), which the Tribunal considered to be more reliable than the oral evidence, in part given the passage of time, was inconsistent with the respondent's position that the claimant had agreed to end her employment. They showed that the claimant was surprised and upset on learning that her employment had been "stopped." Obtaining a Fit Note on 4 October 2021 was inconsistent with having agreed to end her employment on or before 28 September 2021. The Tribunal was not persuaded that informing the respondent that she did not think that she would be back until she knew more about her grandfather's condition and needed to take some time off "*just now*" entitled the respondent to conclude that the claimant had agreed to leave their employment.

15. The respondent also relied on the evidence of Jennifer McLaughlin in relation to the conversations that were said to have taken place with the claimant. While the Tribunal did not doubt that Jennifer McLaughlin had spoken to the claimant about whether she would be entitled to additional benefits if she were not working, there was a lack of clarity in her evidence as to when the claimant was said to have accepted this, or indeed agreed to leave the respondent's employment. It was also unclear as to exactly what the terms of any mutual agreement were said to be. In her evidence, Jennifer McLaughlin referred to the claimant saying that she wished to leave the respondent's employment "*indefinitely*." This did not remain her position in answer to questions from the Tribunal. Her explanation that reference to the claimant being an "*employment stopper*" was a "*typo*" was also unclear and over defensive. Similarly, Rebekka Costello's evidence did not assist the Tribunal in determining when

a conversation was said to have taken place during which the claimant agreed with the respondent that it was in her best interests, if only financially, to leave their employment. Rebekka Costello did not have direct contact with the claimant at the material time. Her evidence that “*there would have been a conversation*” between the claimant and Jennifer McLaughlin was not sufficient to persuade the Tribunal that the claimant had agreed to the termination of her employment.

16. The Tribunal did not doubt that the claimant was in a state of anxiety and distress around the time her employment was said to have ended “*by mutual agreement*.” The claimant conceded that she had discussed her ability to return to work with Jennifer McLaughlin. The Tribunal however found that on balance, the claimant’s evidence was to be preferred to that of the respondent’s witnesses that she had not agreed to leave the respondent’s employment. Her evidence was clear and convincing that at no point did she agree with the respondent that her contract of employment would end by “*mutual agreement*.”

Discussion and deliberations

17. In terms of Section 94 of the Employment Rights Act 1996 (“ERA”), the claimant had the right not to be unfairly dismissed by the respondent. In terms of Section 95(1) (a) of ERA, an employee is dismissed by their employer if the contract under which they are employed is terminated by the employer (whether with or without notice). It was the claimant’s position that her employment contract was terminated by the respondent. For the reasons given above, under notes on evidence, the Tribunal was not persuaded that the claimant had agreed to the termination of her contract of employment. The Tribunal was persuaded that in all the circumstances the respondent had terminated the claimant’s contract of employment and that she had been dismissed in terms of Section 95(1) (a) of ERA. The effective date of termination was found to be 28 September 2021 when the claimant received her final wage slip. There was no evidence of any other date on which the claimant was informed that her employment had ended by mutual agreement or otherwise.

18. In terms of section 98(1) of ERA, when determining whether the dismissal of the claimant was fair or unfair, it is for the respondent to show the reason or if more than one the principal reason for the dismissal, that it is either a potentially fair reason or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
19. The respondent, while denying that the claimant was dismissed, submitted that in the event there was such a finding the reason for dismissal was the assertion by the claimant that she was unable to work due to her grandfather's poor health and no indication had been given as to when she might be able to return to work. In all the circumstances, the Tribunal did not accept that the reason for dismissal advanced by the respondent in their submissions, was a sufficient reason to justify the claimant's dismissal. It was not in dispute that the claimant had informed Jennifer McLaughlin that she needed to "*take time off just now*" but the Tribunal did not find that this amounted to an inability to work or agree a date to return to work sufficient to justify her dismissal. In any event, the respondent submitted that as there was no disciplinary process or reasonable procedure followed in advance of the claimant's dismissal, the Tribunal would be entitled to find that the dismissal was unfair in terms of Section 98(4) of ERA. The Tribunal found that in all the circumstances, the claimant was unfairly dismissed.
20. The Tribunal did not find that the claimant had contributed to her dismissal. She had been in regular contact with her employer, providing them with updates as regards her ability to attend work. By 4 October 2021, believing she was still employed by the respondent, she had obtained a Fit Note confirming her inability to attend work due to ill health. Had the claimant not been unfairly dismissed, the Tribunal was satisfied that she would have remained in the respondent's employment in receipt of Statutory Sick Pay until she was able to return to work at the start of December 2021. Accordingly, no deductions have been made to the basic and compensatory awards.
21. Turning to remedy, having been unfairly dismissed, the claimant is entitled to a basic award. The claimant was entitled to statutory notice of 3 weeks' notice

in terms of Section 86 of ERA. The Tribunal found that the claimant did not receive any notice of the termination of her contract of employment. The effective date of termination for the purposes of calculating the claimant's basic award is therefore postponed to 19 October 2021 giving the claimant continuous employment with the respondent of four years in terms of Section 97(2) of ERA. Based on her weekly wage (£340), length of service (4 years) and age (30) at the effective date of termination (19 October 2021), the claimant is entitled to a basic award of £1,360 (£340 x 4 weeks).

22. The claimant is also entitled to a compensatory award. The Tribunal considered that in all the circumstances, it was just and equitable to award the claimant the equivalent of Statutory Sick Pay for the period after her notice period would have expired (19 October 2021) to when she was able to return to work (1 December 2021). The Tribunal was satisfied that this was the loss sustained by the claimant in consequence of her dismissal, amounting to £578.10 (£96.35 x 6 weeks). From 1 December 2021 onwards, the Tribunal was satisfied that the claimant has sustained no further loss as a consequence of her dismissal. She has felt able to return to work for up to one day a week and has been able to obtain this amount of work on a self-employed basis, earning a daily rate equivalent to the amount she was paid while employed by the respondent. The Tribunal was satisfied that the claimant should be awarded compensation for loss of statutory rights of £400. The total monetary award is therefore £978.10 (£578.10 + £400). The claimant has received Job Seeker's Allowance since the date of her dismissal and the Recoupment Provisions therefore apply to the compensatory award.

23. The claimant was also entitled to notice of the termination of her employment which she did not receive. The respondent was therefore in breach of contract. In terms of Section 86 of ERA, the claimant was entitled to three weeks' notice of the termination of her contract of employment and totals £930 (£310 x 3 weeks).

24. The claimant did not pursue her claim of disability discrimination at the final hearing. Similarly, the claimant did not provide the Tribunal with evidence to show that she was due any outstanding holiday pay. The respondent's

witnesses referred to the claimant having taken more holiday entitlement than she had accrued by the date of termination of employment. This evidence was not challenged by the claimant. The claim of disability and discrimination and for holiday pay have therefore been dismissed.

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Employment Judge: Frances Eccles
Date of Judgment: 24 October 2022
Entered in register: 26 October 2022
and copied to parties

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