



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104595/2020

Final Hearing

Held in Edinburgh
on 6 February 2023

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Employment Judge Jones

Ms C Rao

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Claimant
Represented by
Mr Bathgate solicitor

Angela Colvin t/a Angela's

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Respondent:
In person

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JUDGMENT

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1. The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant a basic award of £5250 and a compensatory award of £7028 net.

Background

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1. A final hearing had been due to commence in this case on 17 October 2022. That hearing was postponed on the basis that the respondent sought to amend its grounds of resistance on the morning of the hearing. Expenses were awarded against the respondent in that regard, although the Tribunal has been advised that payment of those expenses remains outstanding. When postponing the hearing, the Tribunal ordered the claimant to lodge an

updated Schedule of loss within 48 hours. The respondent was ordered to lodge any counter schedule within 7 days thereafter, and if the respondent intended to argue that the claimant was in employment during any period she said she was unemployed, they were required set out the factual basis on which they made such assertions.

- 5 2. While an updated schedule of loss was lodged by the claimant, no further correspondence was received from those acting for the respondent until an email on 26 January indicating that agents were now coming off record and no longer acting in the proceedings.
- 10 3. The respondent's position in the amended ET3 which had been accepted was that the claimant had been dismissed for gross misconduct. Reference was made to the claimant having been spoken to regularly regarding her behaviour and that a reasonable investigation had been conducted. It was also said that even if the dismissal was procedurally unfair, the claimant
15 would have been dismissed in any event and/or that the claimant had contributed to her dismissal. It was said that the claimant did not suffer financial losses.
- 20 4. A bundle of documents was lodged in advance of the hearing. On 1 February, the respondent contacted the Tribunal to advise of the identity of a number of witnesses to be called by her. However, on the morning of the hearing the respondent indicated that no witnesses would be present to give evidence. Although she alleged that this was because the witnesses had been
25 intimidated by the claimant, she did not seek to produce any evidence to substantiate these serious allegations other than to refer to a letter sent to the claimant's representative by her agents in October 2022. She did not suggest that anything had taken place between her email last week and today which could prevent those witnesses attending the Tribunal today.
- 30 5. Therefore, the Tribunal heard from the respondent in person. The claimant gave evidence on her own account and a further witness, Ms Hutchinson was called by her. Parties made oral submissions.
6. Having listened to the evidence and considered the documents to which reference was made and submissions, the Tribunal made the following findings in fact.

Findings in fact

- 5 7. The claimant commenced work at what was then known as Morelli's in Easthouses around September 2012. Morelli's was a take away fish and chip shop and the claimant worked as a counter assistant, serving customers and cooking food. The claimant was paid in cash for her work. There was no break in her service.
- 10 8. The marriage between Mr Morelli and the respondent broke down in 2018 and the respondent took over the lease of the premises of the shop around June 2018. The shop was subsequently renamed 'Angela's', and the respondent took over the running of the business as a sole trader. The claimant continued to work in the shop on the same basis as previously.
- 15 9. The respondent registered for vat and tax purposes with the appropriate authorities and began to issue payslips to staff. The claimant continued to be paid in cash. Her gross weekly wage was £500 and her net weekly pay was £393.
- 20 10. The respondent did not close operations during the lockdown which arose from the COVID-19 pandemic. The claimant continued to work during that period.
- 25 11. The respondent did not ever raise any disciplinary proceedings against the claimant, give her an oral or written warning or advise her that her employment was at risk because of her conduct or performance. The respondent did not at any time carry out any investigations into the claimant's conduct or capability. She did not raise any concerns with the claimant in this regard.
12. Although there was some discussion between the parties regarding the furlough which was introduced by the government, the claimant did not repeatedly or indeed at any time ask that she be placed on furlough.
- 30 13. On 29 March 2020, the claimant was working at the respondent's shop. The claimant was not the only person working at the time. The police attended the premises and asked to speak to the respondent outside. The police informed the respondent that there had been a complaint raised regarding an alleged failure to follow the rules in place at the time to limit the transmission of the

COVID-19 virus. The police left the premises and did not take any further action against the respondent.

14. The respondent came back into the shop and shortly thereafter asked the claimant what she was laughing at. The respondent told the staff that a
5 complaint had been made and the claimant asked if she was being accused. The respondent said someone had to leave and told the claimant to 'just go'. That amounted to a dismissal.

15. The respondent intended at the time to dismiss the claimant. The respondent attended the claimant's house some days later when she gave the claimant's
10 husband the claimant's outstanding wages.

16. The respondent did not confirm her decision to dismiss the claimant in writing or provide written reasons as to why the claimant was dismissed. The respondent did not pay the claimant for any notice period.

17. The claimant obtained alternative work for around 13 weeks between April
15 and June 2020 at a rate of £140 per week. She worked occasional shifts thereafter over the following year including a period of three weeks when she worked part time in a takeaway called Luigi's. The claimant has been paid in cash for hours worked and is not able to provide details of the exact income she has received during the period.

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Observations on the evidence

18. Ms Colvin's evidence was somewhat inconsistent and contradictory. She was not a credible witness. While the Tribunal accepted that she had suffered
25 difficult personal circumstances in relation to the breakdown of her marriage, the Tribunal could not accept that this caused her to be unable to remember matters in the manner suggested by her or indeed explain why she signed a probative document which had an incorrect address for her. Further, much of her evidence was what others were alleged to have said to her had taken
30 place.

19. The Tribunal found the claimant to be generally credible. Her evidence regarding her efforts to mitigate her losses was somewhat unreliable in that it was vague. The claimant did however attempt to answer questions on the basis of what she could remember. Ms Hutchinson who gave evidence

regarding the claimant's length of service with the respondent was a wholly reliable and credible witness. The Tribunal had no hesitation in accepting her evidence.

5 Relevant law

20. Section 98 of the Employment Rights Act 1996 ('ERA') sets out the potentially fair reasons for dismissal. Conduct is a potentially fair reason for dismissal. Section 98(4) provides that even if an employer has established that an
10 employee was dismissed for a potentially fair reason, the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for the dismissing the employee.

15 21 It is well established that for a dismissal for conduct to be a fair dismissal following the test set out in *British Home Stores Ltd v Burchell* [1980] I.C.R. 303 the employer should establish (1) the fact of his belief of misconduct: (2) reasonable grounds to sustain the belief: and (3) that he had carried out as much investigation as was reasonable in the circumstances.

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Submissions

22. The submissions for the claimant were that the dismissal was both procedurally and substantively unfair. It was said that there should be no
25 reduction in terms of *Polkey v AE Day: on Services Ltd* [1987] ICR 142. It was also said that there was no evidence of blameworthy conduct on the part of the claimant which might justify a reduction in any compensation awarded.

23. The respondent made very brief submissions. She seemed to suggest that the claimant had not been dismissed for gross misconduct but that she had
30 **been** dismissed because of a buildup of issues. She said that the claimant had been in full time employment since her dismissal and therefore should not be awarded any compensation.

Discussion and decision

24. The Tribunal had no hesitation in finding that the claimant had been unfairly dismissed. It was not at all clear why the claimant had been dismissed. On the one hand the ET3 suggested it was for gross misconduct. The respondent's submissions were that it was as a result of a buildup of matters. The only evidence given by the respondent related to events on 29 March, although it was suggested that the claimant's attitude was sometimes 'off and that as the claimant had worked in the shop for a long time, she thought she knew better than the respondent. It appeared to the Tribunal that the respondent did not like what she perceived to be the attitude of the claimant towards her. It also appeared that the respondent may have suspected that the claimant had somehow been involved in the complaint made to the police. In any event, as there was so little evidence in this regard, the Tribunal concluded that the respondent had not established a potentially fair reason for dismissal. It did not appear to the Tribunal that the claimant had been dismissed for her conduct, but because the respondent simply didn't wish to work with her anymore.

25. In any event, even if it could be said that the claimant had been dismissed for reasons of conduct, the dismissal was unfair. There was no investigation into any concerns regarding the claimant's conduct. No allegations were ever put to the claimant. The Tribunal was mindful that the respondent was a small undertaking employing around 6 people. However, that does not excuse dismissing an employee, particularly where the employee had significant length of service, for what appeared to be capricious reasons. Some procedure would be required and at the very least the claimant should have been told why the respondent was considering dismissing her before she took the decision to allow the claimant to respond to any allegations or concerns.

26. In these circumstances, the dismissal is both procedurally and substantively unfair.

Remedy

27. The claimant is entitled to a basic award on the basis of her age and length of service of £5250 as she was 56 years old at the date of termination and had 7 years' service and a weekly wage of £500.
28. The claimant's losses were not entirely clear. Initially she indicated that she had an income of around £140 per week for 13 weeks after her dismissal which is a total of £1820. She claimed that she had not worked full time for a year or indeed since her dismissal. However, her evidence was also that she had worked for a number of weeks and then worked on an ad hoc basis when she could find work. She also said that she was now working on an ad hoc basis. She did not appear to be looking for full time work.
29. The claimant did not produce any evidence to demonstrate that she had taken reasonable steps to mitigate her losses. There was for instance no list of jobs she had applied for and her evidence regarding what work she had carried out was somewhat unclear.
30. The Tribunal also bore in mind that while the claimant was dismissed at the beginning of the lockdown period of the pandemic, and that initially it would have been difficult to obtain work, it was a matter of general knowledge that some industries such as supermarkets were finding it difficult to recruit sufficient staff during 2020 and 2021.
31. Taking all these factors into account, the Tribunal determined that it would be just and equitable to award the claimant losses for the 6 month period after her dismissal. Her net income over that six month period would have been £10,218 (26 x £393) and she gave evidence that she had income of £1820. On the basis of her evidence that she also picked up other work during the period, the Tribunal has estimated that she would have had further income of £1820. That would result in a total loss of income of £6578 over that six month period.
32. The Tribunal was also of the view that it would be appropriate to make an award in respect of the claimant's loss of statutory rights of £450.
33. Although no submissions were made by the respondent in relation to issues of Polkey reductions which were set out in the ET3, the Tribunal did consider whether there should be a reduction in the compensation to be awarded to

the claimant on this basis. The Tribunal however was of the view that there was simply no evidence to suggest that the claimant might have been fairly dismissed at some point in the future. Therefore, no reduction is made on that basis.

5 34. Consideration was also given to whether the claimant's conduct had contributed to her dismissal. As the Tribunal has concluded that the respondent has failed to establish a potentially fair reason for dismissal and that it appeared that the decision to dismiss was a capricious one, there is no basis on which to reduce the claimant's compensation on this basis.

10 35. Therefore, in total the respondent is ordered to pay to the claimant the following sums:

	Basic award	£5250
	Compensatory award	£6578
15	Loss of statutory rights	<u>£450</u>
	Total	£12,278

20 **Employment Judge: A Jones**
Date of Judgment: 07 February 2023
Entered in register: 14 February 2023
and copied to parties

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