



EMPLOYMENT TRIBUNALS

Claimant: Ms S Roaf

Respondent: AY & Y Patel Ltd

Heard at: Leeds via CVP **On:** 3rd March 2023

Before: Employment Judge Moxon

Representation

Claimant: Mr Hutchinson, Free Representation Unit

Respondent: Ms Setty, Gunner Cooke

JUDGMENT having been sent to the parties on 3rd March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

These reasons are supplied at the request of the Respondent.

Introduction

1. The Respondent is a company that owns a number of petrol stations. The Claimant was employed by the Respondent as a cashier from 11th September 2019.
2. By a claim form, presented on 21st October 2022, the Claimant claimed that she was unfairly dismissed by the Respondent on 29th July 2022. She also stated that in 2019 her hours of work had increased from 16 to 32, yet she was never assigned or paid for 32 hours per week, and in February 2022 her weekly hours reduced to 8. She claimed unauthorised deduction of wages from the failure to pay her for 32 contractual hours from 2019 until the termination of her employment. She also claimed failure to pay accrued but untaken holiday, failure to pay notice pay and compensation for the failure to provide proper written particulars of employment.
3. The Respondent filed a response resisting the claim and asserting that the Claimant was never dismissed and that her employment continues. Further, it was refuted that there was ever a change of her contractual hours from 16 to 32 per week.

The hearing

4. I fully considered all of the documentation in the case, which included:
 - i. 164-page hearing bundle, together with separate index; and
 - ii. 19-page witness statement bundle, together with separate index.
5. The Claimant provided a witness statement and gave oral evidence.
6. On behalf of the Respondent, I received witness statements from the following:
 - a. Arif Patel, Area Manager;
 - b. Hanif Patel, Director;
 - c. Shaheena Patel, Operations Manager; and
 - d. Yakub Patel, Director.
7. I heard oral evidence from the Respondent witnesses save for Hanif Patel, who appeared from the Maldives, a country that has not given permission to the Tribunal for witnesses to give evidence from its shores. Upon being given time to obtain instructions, Ms Setty confirmed that the Respondent was content to proceed with the hearing upon reliance of only the written evidence of Hanif Patel.
8. I permitted the Claimant's unopposed application to amend the claim, as first outlined within a written application dated 22nd December 2022. Those amendments were as follows:
 - a. Within the claim it was stated that the Claimant had commenced employment with the Respondent in April 2015. Whilst that was correct, she had left that employment and returned on 11th September 2019;
 - b. The purported dismissal did not take place on 29th July 2022. Mr Hutchinson confirmed that the dismissal occurred on 5th August 2022 and that this was the last day of the Claimant's employment with the Respondent; and
 - c. The promise to increase the Claimant's hours of work from 16 to 32 per week was not made in 2019 but was made in June 2020.
9. Mr Hutchinson helpfully confirmed that there were no other amendments sought. Whilst the Respondent agreed to the amendments, it nevertheless resisted the factual matrix of the amended claim.
10. The hearing was conducted remotely via CVP. The technology worked without difficulty and no prejudice was caused to either party.
11. I gave my judgment and reasons orally to the parties upon conclusion of the hearing.

Issues

12. At the outset of the hearing, the parties agreed the following list of issues:

1. Unfair dismissal

1.1 Was the Claimant dismissed on 5th August 2022?

Mr Hutchinson confirmed that the Claimant was claiming express, and not constructive, dismissal without notice on 5th August 2022. The Respondent contended that there was no dismissal.

1.2 What was the reason or principal reason for dismissal?

Ms Setty stated that, if there was a dismissal, it was on account of misconduct, specifically the manner in which the Claimant spoke to Arif Patel on 5th August 2022.

1.3 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

The Tribunal will usually decide, in particular, whether:

1.3.1 there were reasonable grounds for that belief;

1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.3.3 the respondent otherwise acted in a procedurally fair manner;

1.3.4 dismissal was within the range of reasonable responses.

Ms Setty conceded that, if there was a dismissal, the Respondent could not properly argue that it had acted reasonably.

1.4 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

1.5 Did either the Claimant or the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, should any adjustment be made to any compensatory award and, if so, to what extent.

1.6 Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?

1.7 Did the Claimant, by her blameworthy or culpable conduct, cause or contribute to her dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

2. Breach of contract

2.1 Did the Respondent breach the employment contract by failing to pay the Claimant two weeks' notice pay

It was accepted by the parties that if there was no dismissal, there could have been no breach of contract.

3. Holiday pay

3.1 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when her employment ended?

It was accepted between the parties that if there was no dismissal, the claim for holiday pay must fail as the holiday year continues until 5th April 2023.

4. Unauthorised deductions

4.1 Was the Claimant's contract of employment amended in June 2020 to increase her weekly hours from 16 to 32

The Respondent denied any change of contractual hours

4.2 Did the Claimant ask for her hours to be reduced temporarily to 8 hours per week from March 2022

The Respondent asserted that the contractual hours were reduced following a request by the Claimant

4.3 Were the wages paid to the claimant less than the wages she should have been paid?

5. Failure to provide a written statement of employment particulars

5.1 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

Both parties accepted that this claim could only succeed if other issues were resolved in the Claimant's favour. Ms Setty accepted that, whilst there were written particulars, they were not adequate as material information was excluded.

The law

13. The Claimant had the burden of proving that she was dismissed by the Respondent. Unambiguous words of dismissal may be taken at their face value (*Southern v Franks Charlesly and Co* 1981 IRLR 278, CA) although, in exceptional cases, an employer should have the opportunity to withdraw words spoken in the heat of the moment (*Martin v Yeomen Aggregates Ltd* 1983 ICR 314, EAT) and only by agreement between the two parties (*Harris and Russell Ltd v Slingsby* 1973 ICR 454, NIRC). Agreement to the withdrawal of a dismissal can be inferred by the employee's conduct (*Brock v Minerva Dental Ltd* 2007 ICR 917, EAT).

14. If the Claimant was to show that there had been a dismissal, the Respondent had the burden of proving that it had a potentially fair reason for dismissing the Claimant, pursuant to section 98(1). If the Respondent demonstrated that it had a potentially fair reason for the dismissal, I was then required to consider, without

there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing the Claimant for that reason.

15. Section 98(4) provides that the determination of the question whether a dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
16. Section 38 of the Employment Act 2002 provides that compensation be awarded to Claimants where there has been a failure to give a statement of employment particulars. However, section 38 only applies where there is a successful claim under Schedule 5 of the Employment Act 2002

Findings of fact

17. Yakub Patel has been a director of the Respondent since it was established in 1979. Hanif Patel was also a director and Arif Patel and Shaheena Patel reported to him.
18. The Claimant initially worked for the Respondent from April 2015 but left that employ by virtue of a TUPE transfer in 2017, returning on 11th September 2019, to work at the Roseville Road site.
19. On 10th September 2019 Hanif Patel sent a WhatsApp message to the Claimant to ask her to contact him about working at the Roseville Road site. She responded the following day to say that the shop was tidy, clean and well organised. Hanif responded to say: "*no problem will sort out with chreef*". I was told that "*chreef*" was Cherif, the site manager.
20. The Claimant's hours of work were 16 hours per week, consisting of two 8-hour shifts. There was a written contract of employment to that affect, but it was not signed by either party and, as such, I am satisfied that it was never provided to the Claimant.
21. The Claimant asserted that in June 2020 she had a discussion with Hanif Patel, which resulted in her being promised an increase in her hours to 32 per week, consisting of four 8-hour shifts. She detailed in her witness statement that she asked Hanif Patel for four shifts per week and he had replied: "*Yes, as long as you stay permanently working for us*". However, the following day she was told by Cherif that Hanif did not have the authority to change her hours.
22. Hanif Patel accepted that at some point the Claimant asked about four shifts, but contended that he had asked her to speak to Cherif, as it was the site manager who was responsible for rotas.
23. The Claimant was never given 32 hours per week, as demonstrated by documentary records and accepted by the Claimant herself.

24. In October 2020, the Claimant started to also work for a second employer. Within her oral evidence she was asked whether she had started that job as she knew that there were no additional hours available with the Respondent and she replied: "Yes".
25. The Claimant was provided an amended contract, dated June 2021. Whilst there was a section for hours of work, the details were omitted. Within her witness statement, the Claimant stated that she signed the contract in June 2021, which is supported by the date of 21st June 2021 alongside her signature on the document. However, in subsequent written observations, sent by email on 27th February 2023, she detailed: "*The only contract was given to all staff in October, a few months before the site was closed for redevelopment...back dated 21.06.21*". Within cross-examination she stated that: "*..maybe I cannot remember the dates*".
26. The Claimant was asked why she had signed the contract if it did not say that she was contracted to 32 hours, as she believed she had been promised the previous year. She replied that she thought she could negotiate her hours afterwards. She was asked why she did not raise the issue with Hanif Patel, whom she stated had made the promise, and she failed to provide an explanation but stated that she had instead spoken to Cherif.
27. Throughout WhatsApp messages, dated from 2021, there were repeated comments by the Claimant to senior staff within the Respondent that she had been offered 32 hours per week. There was no response in agreement.
28. Arif Patel also detailed, in his witness statement, that the Claimant had said to him in 2021 that she had been promised four shifts by Hanif Patel. Arif Patel stated:
- "I found this strange as I would not expect Hanif to make such promises. I recall briefly speaking with Hanif in the past, and unsurprisingly he said he had not promised anything as he does not interfere with shift allocation."*
29. I am satisfied that there was no promise made and no variation of the employment contract from 16 to 32 hours, for the following reasons:
1. The Claimant was inconsistent as to when the "*promise was made*". Within a WhatsApp message to Yakub on 18th August 2022 she stated that she had been promised for "*...the last 3 years*" which would have been in 2019. That is consistent with the date within her initial claim. However, she has subsequently stated that it was in June 2020;
 2. Hanif Patel denies that he agreed to a contractual change and has outlined that he did not have authority to change the contracted hours. I note that Mr Hutchinson did not have the opportunity to test that evidence, which reduces the weight that I give it, but I am nevertheless able to give it substantial weight having had regard to the corroborative evidence from Shaheena Patel and Arif Patel and the fact that, even upon her own account, the Claimant was told by Cherif at the time that Hanif Patel had no involvement with rotas. I find it far more likely than not that Cherif, as site manager, would be responsible for rotas as opposed to a Hanif Patel, a director. Hanif Patel not having responsibility for the hours is further

corroborated by the documentary evidence, particularly the electronic communication between the Claimant and Hanif Patel in September 2019, as outlined above. He offered her the opportunity to recommence employment with the Respondent's business, and then said that he would have Cherif sort it out, which indicates that it was Cherif's responsibility to arrange details, such as hours of work. I therefore find it unlikely that Hanif Patel would have sought to amend her contract to increase her hours;

3. Even had Hanif Patel made a comment about increasing the Claimant's hours, the Claimant could not have reasonably left the conversation believing that her hours had been increased as, even upon the height of her evidence, it was a conditional offer upon her remaining with the Respondent on a permanent basis. That would indicate that any variation of contract would occur at a future date upon her satisfying the condition. She was told the following day by Cherif that her contract would not be increased;
 4. Thereafter, as demonstrated by the documentary evidence, the Claimant worked 16 hours a week, which shows that her hours of work had not been increased and that neither party believed that they had;
 5. No grievance was submitted in 2019 or 2020 as a consequence of a promise of increased hours not being fulfilled;
 6. The Claimant commenced a second job in October 2020, which is further indication that she knew that there was no agreement with the Respondent that her hours had been increased. In oral evidence she agreed that was the reason why she took the October 2020 job; and
 7. Upon being asked to sign a contract in 2021, and upon seeing that her hours were not included, she did not address the matter with management, particularly Hanif Patel, which I consider she would have done had she believed that he had agreed to an increase in her hours to 32 hours. Instead, she signed the contract, which I find unlikely if she had believed that she was not being given the hours of work agreed.
30. Whilst there is force in the submission by Mr Hutchinson that the Claimant had formed the impression that she would be given four shifts a week, as evidenced by the fact that she mentioned it on numerous occasions to management, I do not consider that this was a reasonable conclusion for her to have drawn. I find that the argument is far outweighed by the seven features outlined above.
31. In February 2022, the Roseville Road site was closed for renovation and extension and the Claimant was transferred to work at the Three Nuns site. This increased her travel time and so she requested that her hours be reduced to 8 hours per week. In her oral evidence, the Claimant stated that she requested that her hours be reduced to eight hours per week. She said that it was agreed that her hours would then be increased when Roseville Road was reopened. As such, as she was asking to work less hours, and this was agreed with her, there cannot have been any duty to pay her for hours that she had asked not to work. I note that this

was helpfully and sensibly conceded by Mr Hutchinson in light of the Claimant's oral evidence.

32. The Claimant was working at the Three Nuns site on 5th August 2022: the date of the purported dismissal. Her shift that day was 6am to 2pm. The Roseville Road site was due to reopen and Arif Patel was responsible for the initial rotas for that site. This would not usually be his responsibility but he was undertaking the task as the site was about to be reopened after extension. He was within the Three Nuns Site on 5th August 2022 and both he and the Claimant accept that the Claimant asked him whether he had completed the rotas. It is accepted that she asked more than once, despite being told by Arif Patel that he had not completed the rotas.

33. It is accepted that this resulted in Arif Patel pointing at the Claimant and telling her "*you are sacked*". I accept Arif Patel's evidence that the Claimant had called him a liar, as that explains why he lost his temper in the manner described by the Claimant. I also accept the Claimant's account that he told her to leave the premises immediately, as this is consistent with him having lost his temper and seeking to dismiss her without notice. They both state that he told her that she had committed gross misconduct.

34. I also accept Arif Patel's evidence that the Claimant responded by telling him that he could not sack her. I take into account that this is consistent with subsequent WhatsApp messages sent by the Claimant to Hanif Patel, Shaheena Patel and Yakub Patel later that day in which she expressed her view that Arif Patel did not have the authority. Arif Patel himself accepted that he did not have the authority to dismiss employees. The fact that the Claimant responded to Arif Patel's "*dismissal*" of her by stating that he could not sack her is also corroborated by the fact that, whilst the altercation occurred at approximately 8:30am, the Claimant completed her shift which ended at 2pm.

35. In accepting the Respondent's evidence that the Claimant had told Arif Patel that he could not sack her, I have taken into account the fact that the Claimant was inconsistent about her response to him. It was put to her by Ms Setty that she had told Arif Patel that he could not sack her and she replied: "*I said that he could not as I was provoked and he was threatening me with index finger and told me to leave*". However, she later denied having told him that he could not sack her.

36. The Claimant sent various electronic messages to Shaheena Patel, Hanif Patel and Yakub Patel.

37. At 10:32am she said that following:

"Every one asks me to spk to Arif about my rota n every time I ask Arif he's answering in a very impolite humiliating way to me in front of customers. He tells me Kenya who left is coming back to take shifts!!!! Whiy this injustice going on!!! I have been asking for 4 shifts since I left Bp n Hanif promised me to have 3 since I reduced the hours at BP. Why my shifts are given to outsider when I'm entitled to 4 !!! No one can stop injustice ? I'm not going to be quiet about this if Kenja comes back n takes my shift

Arif is a very impolite man quick tempered not appreciate for this job he must not exceed boundaries . I m not going to be quiet if I don't get my 4 shift n others take my rights. This is absolute injustice n Allah's penalty is severe”

38. I note that there was no reference by the Claimant to having been dismissed, despite it having been sent approximately two hours after her altercation with Arif Patel.

39. Shaheena Patel asserted that as well as the WhatsApp message from the Claimant, she also received a telephone call from Arif Patel to tell her what had occurred. She detailed that, whilst she was off work ill, she nevertheless attended the Three Nuns site at approximately 11am that day to speak to the Claimant, by which time Arif Patel had left.

40. Shaheena Patel stated that when she arrived at the site, she saw the Claimant stacking shelves. She told the Claimant: *“just ignore Arif, you are not sacked”*. At approximately 12:30pm the Claimant and Shaheena Patel spoke in the office and again the Claimant was told that she had not been sacked and that Arif did not have the authority. They discussed the Claimant's future shifts and Shaheena stated that they were *“...bringing hot food to Roseville Road so we need someone in 'baking' and if I have anything available then I will take you into consideration because you are the best person for the job”*.

41. At 3:26pm the Claimant sent the following to Shaheena Patel, Hanif Patel and Yakub Patel:

“I can take Arif to court for threatening me twice in my work place Arif was threatening with his index finger first on shop floor near the coffee machine in aloud voice saying (you are sacked) this English man customer approached him saying go somewhere else argue with her !!!! The second threatening at the store room at the door again saying you are sacked !!! I have been working for the last ten years what sacking he's talking about !!! This is Uk n it has rules to protect me, he's very rude n exceeded the boundary ask Allah to punish every aggressive person taking my rights unjustly. I'm not going to be quiet about my rights
I want my 4 shifts whether there's baking machine or not I will not tolerate ppl abusing me n taking my rights ,outsiders taking my shifts !!!! U all need to sort this out instead of being escalated to the worse”

42. The Claimant contended that Shaheena did not attend the store and there was no discussion between them that day, save for electronic messages.

43. I find as a fact that Shaheena Patel did attend the store and confirmed to the Claimant what the Claimant had already known: that she was not dismissed, as Arif Patel did not have the authority to dismiss her. In preferring the account of Shaheena Patel, I took into account the following:

- a. Her account was partially corroborated by the electronic messages. Shaheena Patel asserted that, during the in-person conversation, she discussed with the Claimant the fact that Arif Patel did not have

the authority to dismiss the Claimant and there was discussion about the Claimant working on “*baking*”. The subsequent WhatsApp message sent from the Claimant to Shaheena Patel is consistent with that earlier discussion as she makes reference to Arif Patel not having the authority to dismiss her and also makes reference to wanting four shifts “...*whether there’s baking machine or not*”, which corroborates Shaheena Patel’s account that they had discussed shifts and baking earlier that day. The content of the message is a clear indication that the Claimant considered herself to remain employed. The Claimant stated that the discussion about baking had not occurred in person on 5th August 2022, but had occurred by WhatsApp message on 29th July 2022, however she was unable to direct me to those WhatsApp messages;

- b. I found Shaheena Patel to be a more reliable and credible witness than the Claimant. She gave clear and consistent evidence and answered succinctly all questions asked of her. Conversely, the Claimant was evasive throughout her oral evidence and, despite several requests, failed to answer questions directly and instead diverted to other matters. Further, there were variable notable inconsistencies in the Claimant’s evidence:
- i. The dates of important incidents, namely the purported change in contract and dismissal, were materially different within the Claimant’s claim form and subsequent account;
 - ii. The Claimant was inconsistent as to whether she signed the 2021 contract in June or October;
 - iii. Within her witness statement, the Claimant stated that when she moved to Three Nuns “...*I was only given one shift (8 hours) per week*”. However, that masked the reality, as conceded in her oral evidence, that she had asked for a reduction of hours;
 - iv. As detailed below, the Claimant was inconsistent as to why she did not want to work night shifts in Bradford;
 - v. As detailed below, the Claimant was inconsistent as to why she did not subsequently attend a grievance hearing; and
 - vi. As detailed below, the Claimant was inconsistent about whether she had taken any holiday in the 2022-23 holiday year.

44. Whilst I accept the Claimant’s account that Shaheena Patel’s presence or otherwise at the site would have been captured by CCTV, I also accept as persuasive Shaheena Patel’s unchallenged response that footage was automatically deleted after 30 days and so was no longer available at the time the claim was submitted.

45. On 6th August 2022, and therefore the day after she purports to have been dismissed, the Claimant entered a WhatsApp conversation with a colleague and friend called Yusuf, in which she discussed Imran, the site manager of the Three Nuns site. Yusuf asked about her moving to his store and she replied:

“I really like your site but its too far.

*I can continue with one shift on Tuesdays if Imran allows me
I have Fridays n Mondays at Roseville as usual
Then I can do sticking at your site as usual"*

46. That message to her friend is fundamentally inconsistent with the Claimant's subsequent assertion that she had considered herself to have by that time been dismissed by the Respondent the previous day.
47. Following from 5th August 2022 the Claimant sent various messages to the Respondent concerning her shift patterns, including on 8th August 2022 a message to Hanif Patel in which she asked for "... *at least 3 shifts at Roseville*". The following day she sent him a message to say: "*My rota at Roseville is not sorted*". This was followed by numerous WhatsApp messages from her to Artif Patel on 9th and 10th August 2022 about her shifts.
48. Similarly, the Claimant sent WhatsApp messages to Shaheena Patel about her shifts on 8th August 2022, including: "*I need to do Tuesday morning or afternoon why I compromise but no one notices this*". This was followed by numerous messages to Shaheena Patel on 9th August 2022 about her shifts.
49. The Claimant also stated that she had telephone discussions with Shaheena Patel about her shifts. She said in her witness statement that she was offered night shifts at a Bradford site but had refused for safety reasons. However, she said in answer to questions in cross-examination that she had refused as night shifts were "*boring*".
50. The WhatsApp discussions with Yusuf, Hanif Patel, Arif Patel and Shaheena Patel are those consistent with someone who believes themselves to remain employed and are fundamentally inconsistent with the Claimant's subsequent assertion that by that point she had been dismissed and her employment with the Respondent had ended.
51. The Claimant was asked various times in cross-examination why she was negotiating shifts if she believed that she had been dismissed. She was evasive in her answers and at times said that she had been advised by ACAS, although could not explain why she was negotiating shifts if she had complained to ACAS about dismissal and, in any event, the WhatsApp messages were significantly prior to the date of early conciliation. She also stated that she was not thinking straight, which was also the reason for her completing the shift on 5th August 2022, but she failed to adduce corroborative medical evidence. The fit note, dated almost three weeks later and stating work stress, is not sufficient to show any disturbance of the mind on 5th August 2022 and the days following.
52. The Claimant submitted a written grievance to the Respondent on 11th August 2022:

"11.8.22

Dear Directors Hanif and Yaqoob

I am writing to raise a formal grievance. I have many issues to suffer from causing them either by your site managers and area manager who been very rude to me humiliating me in front of customers. But no one was

getting involved to solve them, I was bullied non-stop but you are turning a blind eye on me, I came for training at three nuns for months I get my shifts Friday and Monday back but instead you sent Sumaya [another name used by Shaheena Patel] your family member to force me having night shifts which I never done and never wish to do. She took Fridays from me when Hanif promised to give me 4 shifts at Roseville and Sumaya never got back to me. She kept me waiting this week nothing turned up. I remember she asked me two weeks back to do baking and stocking at Roseville but changed her mind. Please let me know when to meet to discuss it.

Thank you Sarah Raof"

53. Arif Patel replied to the Claimant on 15th August 2022 to say:

"Salam's Hanif and Yakub have asked me to call you to arrange for a meeting with either one of them at Three Nuns to discuss your shifts. Can you come tomorrow?"

54. The Claimant replied on the same day to say that Three Nuns was too far and stated:

"All I want my normal two shifts back Fridays morning and Mondays afternoon with two more shifts as Hanif promised"

55. Yakub Patel also sent a WhatsApp message to the Claimant on 15th August 2022 to ask her to attend a meeting at Three Nuns and she replied to say that it was too far. On 18th August 2022, the Claimant sent a WhatsApp message to Yakub Patel, saying: *"I was promised 4 shifts by Hanif for the last 3 years"*

56. The Claimant was asked in cross-examination why she had not attended the meetings and she said that it was because the office was too far and that she did not want to go to a meeting chaired by Arif Patel and Shaheena Patel. It was put to her that the WhatsApp messages made it clear that it would be Hanif Patel or Yakub Patel undertaking the meeting, but she said that she understood that it would be Arif Patel or Shaheena Patel.

57. The Claimant then submitted further letters of grievance on 16th August 2022 and 18th August 2022:

"16.8.22

Dear Hanif and Yaqoob,

I have sent you a grievance letter last Thursday 11th August an requested to have a meeting to raise grievances issues an my rota hasn't been done. Also my shifts Friday and Mondays not being discussed. I answered the WhatsApp message sent by Jakub asking me to come over to Mirfield, explained it's far away for me to make a journey to three nuns when we can have a meeting somewhere either in Leeds or over phone or zoom. I need to know the outcome to make sure my shifts are secured and your promises (Hanif) giving me for shifts fulfilled.

Thank you.

Regards Sarah Raof"

"18.8.22

Dear Hanif and Yaqoob,

Please may I have a copy of contract employment that I signed in the presence of Hanif in 2015 April and both signed it. I appreciate if I get it sent to my address by post or by e-mail.

Thank you

Regards

Sarah Raof"

58. The grievance letters make no reference to having been dismissed or believing that she had been dismissed. The contents of the letters fundamentally undermine the Claimant's account in her oral evidence that the grievance: "...was a result of sacking...It was a result of sacking, quite clear". It is evident from reading the grievance letters that her grievance did not concern an end to her employment, but her future shift pattern.

59. On 18th August 2022 Yakub Patel sent a WhatsApp message to the Claimant, stating the following:

"Salem, Tried calling you just now but no reply from you. Your shifts at Roseville will be Sunday am ie morning shifts and Monday afternoon".

60. The Claimant replied the same day to state that she had been promised four shifts. She did not reply to say that she was no longer an employee as she had been dismissed. In response, Yakub Patel stated that she would also be given some shifts at Three Nuns, and asked her to confirm that she would be attending the Sunday Roseville shift, 21st August 2022.

61. The Claimant did not attend the shifts and so, on 26th August 2022, she was sent the following message from Yakub Patel:

"Salem. You failed to attend your shifts at Three nuns on 19/08/2022. You also failed to fulfil your shift on 21/08/2022. You also did not reply to my messages asking whether you will be coming to work on Monday afternoon 22/08/2022. On all three occasions you did not attend to work without prior arrangements and authorisation."

62. The Claimant replied to say that she had a sick note from her General Practitioner and so "...my absence shouldn't be classed as unauthorised". She attached a copy of a fit note which stated that she was assessed on 25th August 2022 and is not fit to work for two months due to work stress. The fact that the Claimant submitted a fit note, and contested that her absence from work was unauthorised, fundamentally undermines her assertion that she had been dismissed without notice almost three weeks earlier. She did not reply to say that she had not attended as she was no longer an employee upon dismissal. Her messages demonstrate that she considered herself to remain an employee of the Respondent.

63. The Claimant did not return to work. Her last shift worked was on 5th August 2022. Within his witness statement, dated 16th February 2023, Yakub Patel stated that

the grievance had not referenced being sacked and that the Claimant remains on the company payroll and: *"If she wants to continue working for us we would accommodate her"*.

64. The contents of the WhatsApp messages to various colleagues and managers; the contents of the grievance letters; the face to face and telephone conversations with Shaheena Patel about shift patterns; and the submission of a fit note to support an argument of authorised absence fundamentally undermines the Claimant's account in her oral evidence that *"I accepted the sacking, I would never go back to that place"*
65. The Claimant stated that she had taken no holiday in the 2022-23 financial year. Documentation within the bundle indicated that she had taken, and been paid, for one day's holiday on 13th June 2022. She initially denied this but then later in cross-examination accepted the point.

Conclusions

Issue 1 - Dismissal

66. The Claimant failed to satisfy the burden to show, upon the balance of probabilities, that she was dismissed by the Respondent on 5th August 2022 as asserted.
67. I accept that Anif Patel was angry and I accept that he told the Claimant that she was *"sacked"*. I accept that he told her to leave the site immediately and to go home, as it appears he had lost his temper. That is unambiguous and, on the face of it, would show a dismissal. However, despite those words, the Claimant never considered that she had been dismissed and at no stage did she accept that she had been dismissed, even though she did not return to work after that date.
68. I reject her assertion that she left the Respondent's premises on 5th August 2022 believing that her employment had been terminated with immediate effect, for the following reasons:
1. She told Arif Patel, quite correctly, that he did not have the authority to sack her. She clearly understood this to be the case at the time, as evidenced by the WhatsApp messages that she sent to other senior employees of the Respondent later that day saying that Arif Patel *"... must not exceed his boundaries"* and *"what sacking he talking about"*. That is further demonstrated by her actions in that, whilst he told her to leave immediately, she did not do so and finished her shift, which had several hours left;
 2. I accept that Shaheena Patel attended the store and confirmed to the Claimant what the Claimant had already known: that she was not dismissed, as Arif Patel did not have the authority to dismiss her. The Claimant accepted that reassurance and that, even had she considered herself dismissed, she accepted the withdrawal of any dismissal, as indicated by her following discussion about future shifts and duties. Therefore, even had there been a dismissal, which I reject, this would have been an exceptionally case where it was successfully withdrawn

later the same morning, a withdrawal accepted by the Claimant both expressly in her conversation with Shaheena Patel and by her subsequent actions, namely completing her shift and discussing and messaging about future shifts and duties;

3. The dialogue between the Claimant and the Respondent following the 5th August 2022 incident, including on the morning of the incident, did not relate to her being dismissed or her employment having ended. In fact, it was the opposite and related to discussions about her future shifts, which is a clear indication that both parties considered her to still be in employment. She repeatedly stated in WhatsApp messages the shifts that she wanted, which fundamentally contradicts her oral evidence that "*I accepted the sacking, I would never go back to that place*". Similarly, her grievance letters related to shift patterns and made no reference to her employment having come to an end. She did not submit an appeal against any purported dismissal. Upon being challenged for not attending a shift, and her saying that it was due to health, she submitted a fit note. There is no reason for her to have to explain herself for non-attendance at work, or to provide supportive evidence, if she believed that the employment had come to an end. She could have simply said that she was no longer an employee.

69. I am therefore satisfied that the employment was never terminated and that, as evidenced by Yakub Patel, the Claimant remains an employee of the Respondent. I am satisfied that the Claimant has never believed her employment has been terminated but has fabricated that belief in retaliation to not being given her preferred shifts.

Issue 2 – Breach of contract

70. As properly accepted by the Claimant, there could be no breach of contract if she remains employed by the Respondent. She is not entitled to notice pay as she has not been dismissed and has not otherwise served notice.

Issue 3 – Accrued but untaken holiday pay

71. As properly accepted by the Claimant, this cannot succeed in the absence of termination of the employment contract as the holiday year has yet to expire. There is no assertion that she had been refused requested holiday.

Issue 4 – Unauthorised deduction from wages

72. As I am satisfied that there was no change of contract to 32 hours per week, there can be no unauthorised deduction arising from not paying the Claimant for 32 hours per week. Similarly, the fact that the Claimant reduced her hours temporarily to 8 hours per week does not entitle her to payment for hours not worked. She was paid for hours that she worked.

Issue 5 – Failure to provide written particulars of employment

73. Given that no Schedule 5 claim has succeeded, the claim for a failure to provide adequate written particulars must also fail.

74. I therefore dismissed all the claims brought by the Claimant.

Employment Judge **Moxon**

Date: 28th March 2023