



EMPLOYMENT TRIBUNALS

Claimant

Mrs M Brennan

-v-

Respondent

Fresh Transformations Ltd

trading as ***Fresh Doors***

FINAL MERITS HEARING (HEARD IN PERSON)

Heard: **at the Employment Tribunal sitting in Birmingham**

On: **17 August 2023**

Before: **Employment Judge Perry**

Appearances

For the Claimant:

Mr McBride (friend and lay representative)

For the Respondent:

Mr K Duggal (director)

JUDGMENT

1. The claimant was dismissed by the respondent on 4 November 2020. No potentially fair reason having been advanced, her dismissal was unfair. She is awarded the sum of £723.00 calculated as set out in the reasons below.
2. Her claim for wrongful dismissal duplicates the sums claimed in her unfair dismissal complaint.
3. The claimant's claims for unpaid wages and holiday pay claims were not pursued and are dismissed on withdrawal.
4. The Employment Protection (Recoupment of Jobseekers Allowance & Income Support) Regulations 1996 do not apply.

Oral reasons having been given at the conclusion of the hearing written reasons were requested by Mr Duggal. I made him aware given the findings I made regarding both parties if requested these would be posted on the web. He repeated that request.

REASONS

Background

1. This claim was presented on 16 January 2021 following early conciliation between 17 November and 31 December 2020. It included complaints of unfair dismissal, notice pay, holiday pay and unpaid wages.
2. Following a Preliminary Hearing held on 26 January 2023 Employment Judge Flood determined Mrs Brennan was an employee of the respondent within the meaning of section 230 Employment Rights Act 1996.



3. The respondent is a small kitchen design and renovation business that operates from a showroom in Upton upon Severn in Worcestershire. The business trades under the name “Fresh Doors” and was originally set up in 2013. Mrs Brennan worked as a studio sales administrator. Employment Judge flood determined that Mrs Brennan was employed from 3 January 2017 until 4 November 2020. The respondent was sold by the original owners to the current owner Mr Duggal in 2019.
4. On Saturday 31 October 2020 the then prime minister announced a second national covid lockdown was to commence on Thursday 5 November 2020. This claim concerns the circumstances of claimant’s exit from the business on Wednesday 4 November 2020, the day before that lockdown was due to start.

The issues and evidence

5. I took a considerable time (2 hours) in the context of what was listed as a 2 day hearing to explain the law to the parties, the issues involved and to clarify their positions. It became apparent that it was not in dispute that Mrs Brennan left the respondent’s premises on 4 November having been told by Mr Duggal “*give me your keys ...*”. There were disputes as to the sequence of events and if additional words (“... *and leave*” amongst others) were used.
6. Having explained the law Mr Duggal made clear that dismissal was disputed but that a fair reason was not advanced. Thus, if Mrs Brennan was dismissed the dismissal will be unfair. Mrs Brennan made clear that she had not resigned and/or left because she felt she was entitled to do so but because she believed she had been dismissed despite the background events that she relayed as to the respondent’s previous conduct regarding COVID, health and safety issues and more generally concerning his bullying behaviour to her. She was thus not arguing she was constructively dismissed.
7. Mr McBride confirmed that the unpaid wages and holiday pay claims were not pursued and so they were dismissed on withdrawal.
8. The notice pay claim duplicates her claim for compensation for unfair dismissal. If I find she was dismissed I therefore do not need to consider the wrongful dismissal claim separately.
9. The issues for me to determine were therefore agreed as follows:-
 - 9.1. was the claimant dismissed and
 - 9.2. if so should any award be reduced for her contributory conduct.
10. I explained at the outset to both parties if they were unclear on any points they should tell me. Mr Duggal did not appear to be paying attention throughout the hearing. Whilst he stated he was having difficulty understanding I consider that was principally because he was not paying attention despite that I repeatedly went over and explained points again and to ask him to make notes.
11. I had before me a bundle of 130 pages (reference to pages in the bundle are in “[]”) and various witness statements from both parties. Whilst Mr Duggal took issue with the contents of what Mrs Brennan stated was her witness prior to the date for exchange for witness statements. That was because her statement comprised her email of 10 November and the email from Mr Duggal of 4 November timed at 11:01 [49] that that it was in reply to. Only Mrs Brennan and Mr Duggal were in attendance so I indicated



whilst I would read the other statements I would give the other statements only such weight as I deemed appropriate.

12. Mr Duggal also complained amongst other matters that extra documents had been supplied late and included without prejudice correspondence. I explained I would ignore the without prejudice documents. I then clarified when the late documents had been supplied and identified if any prejudice had been caused. The documents were supplied a few days late, that was long enough before the trial to limit any prejudice caused and thus a fair trial was not prejudiced.
13. The documents also included a series of notes made electronically by Mrs Brennan via a phone but no evidence from the phone's metadata when they were created or amended was supplied. I stated I would thus give them such weight as was appropriate as they could have been created at any point and not on the day stated. I also explained that save for a number of key documents I expected the parties to take the witnesses and I to any documents that were relevant and challenge the witnesses about them.

The Law

14. I explained to the parties that given the words used on the day in issue appeared to be ambiguous (not least because Mr Duggal accepted Mrs Brennan had not intended to depart permanently) I had to decide if the words amounted to a dismissal. The test is an objective one and I explained I have to considered all the surrounding circumstances. If the words are still ambiguous, the employment tribunal should ask itself how a reasonable employer or employee would have understood them in the circumstances. Any ambiguity is likely to be construed against the person seeking to rely on it ¹.
15. I talked them both through an example of that referring to the case of Futty v D and D Brekkes Ltd 1974 IRLR 130, ET (see IDS (Contracts of Employment) at 11.7).
16. As to contribution, the test in s.122 Employment Rights Act 1996 is wider than that in s.123, although the starting point is that any reductions will usually be same. The former requires there to be conduct of the claimant before the dismissal, for the Tribunal's discretion to reduce the award by a just and equitable amount to be engaged. The latter provision requires a finding the dismissal was to some extent caused or contributed to by any action of the claimant before the Tribunal's discretion is engaged.

My Determinations

17. There are issues concerning the accounts of both parties. I find that based on the documents before me that Mrs Brennan exaggerated in several respects the allegations she made. I form that view based on :-
 - 17.1. the content of the emails I was referred to being at odds with the bullying alleged against Mr Duggal (despite what I find below was their poor working relationship (at least on the day of the matters in question) some of the emails are positively friendly rather than negative or neutral toward him),
 - 17.2. his alleged attitude being inconsistent with the flexibility he showed her,

¹ Graham Group plc v Garratt EAT/161/97



- 17.3. in her claim form [7] she asserted the premises would remain open to the public whereas in her witnesses statement she stated

“By the way we are in tomorrow, the shop will be closed but you still need to come in, ...”

- 17.4. the inconsistency in that email which continued :-

“... to which my reply was “I don’t think we can, we are in lockdown and we are classed as a non-essential business, it’s not safe”, to which you replied “Okay give me your keys and leave”.

I then replied “oh ok”, and proceeded to put my keys on the desk and started to get my possessions together, I then said “You’re asking me to come in when it is not safe.” You stayed in your chair and you then said “there’s been no discussion about this”, to which I replied “I have just tried and you have just asked me to give you my keys—back and leave, I feel as though you are bullying me. For the last few months, your bullying has made me so nervous and anxious to come into work”. I then left the premises.”

and her claim form [7] in which Mrs Brennan makes no reference to the second round of we are coming in – something Mr Duggal accepts occurred.

18. Those matters cast doubt on her account of the discussion in issue and generally.
19. Those issues aside it was common ground Mr Duggal asked Mrs Brennan for her keys. He told me that by he had decided that he and Mrs Brennan would attend the studio to do admin work during the lockdown but the shop would be closed to the public. After Mrs Brennan (MB) arrived on 4 November he said this:-

“... around 10am, straight away [she] took a call on her mobile from one of her housekeeping clients, confirming working for them following day, which indicated to me she would continue her housekeeping business through restrictions.”

20. For context she told me one of her concerns was that her second job was to help and visit older, vulnerable people in their homes, some of whom had been in isolation since March 2020. She alleged she was concerned that coming into work would place them at risk because Mr Duggal had not followed the lockdown rules during the pandemic with regards to keeping his employees safe, had also arranged surveys in people's homes during lockdown, and had scheduled kitchen fittings where he would be working with contract fitters.
21. I found the suggestions Mrs Brennan made with regard to the lack of PPE being provided were at odds with the documents and if she had been following social distancing rules and government guidance when undertaking her second job, she did not explain how she would have put the people she visited at risk.
22. That demonstrates an issue at play; the potential conflict between Mrs Brennan’s two roles and how Mr Duggal saw this.
23. Mr Duggal states he informed her that the :-



“... studio was still closing to public, but following government direction that employees should attend work, when they cannot work from home, she was to come in to do admin work.

MB replied indignantly that non-essential retail had to close and she would not be working.

I explained again the government has directed that employees attend work, when they cannot work from home and we will be working. MB again told me in a harsh raised tone of voice that non-essential retail had to close and that no one else in non-essential retail in Upton was working (incorrect) and she would not be working.

They were the sole reasons given for refusal to attend. Feeling unsafe was not raised by MB, which would have led to a conversation about how best to deal with.

MB had repeatedly stated, contrary to government guidelines, that she was refusing to attend work from 5th during restrictions, which would be lasting a minimum of four weeks.

Her indignant manner and non-sensical reason did not engender sympathy. Wanting to break circular conversation, remaining in my seat I calmly said, without raising my voice “give me your keys”, I felt it was reasonable to ask her for her keys as she had told me she would not be working for a minimum of four weeks and therefore would not need the keys.

I was surprised this did not illicit a ‘what for?’ or ‘why?’ response. MB put her keys on her desk, gathered her belongings, said she felt bullied, she asked me to confirm our interaction in writing, then exited.

I would like to make it absolutely clear, I did not ask her to leave the premises, her action of walking out was her decision, I did not dismiss her.”

24. Mr Duggal told me he had assumed when asking for her set of keys that her refusal to work related only to the forthcoming lockdown and he did not treat this as her resigning at that point.
25. If so Mr Duggal did not provide an adequate explanation
 - 25.1. why he needed her to return her keys when he had not sought them at all during the first national lockdown despite having had plenty of opportunity to do so once the lockdown declared if the keys were an issue, and
 - 25.2. given he told me that he needed Mrs Brennan to perform administrative work in the office why he didn't seek to clarify if she was coming back in his email of an hour later.

His account on those issues was inexplicable.

26. Those issues aside, given the doubt I place on Mrs Brennan's account, I find he did not ask her to leave.
27. Both parties' accounts agree that Mr Duggal having told Mrs Brennan they would be doing administrative work from the studio she had told him that the rules did not permit that. On her account (that I reject for the reasons I give above) she stated she was asked for her keys and told to leave and started to pack up her things.



28. On the accounts in both parties' witness statements there was then a repeat of the exchange relating to his instruction they would be working in the studio and her insistence that it was not permissible to do so, before Mr Duggal asked her for her keys and on her account told her leave again. Both parties state she packed up her things and left.
29. Mr Duggal told me he treated her comments as a refusal to come in. That refusal was a potential disciplinary matter yet Mr Duggal did action it as such. He also told me that nor did he treat it that she was not going to return to work at all (that is to say that he did not treat it as her resigning) yet he asked her for her keys.
30. Against the backdrop of her having been told they were working from the studio, her maintaining it was not permissible to do so twice, I find Mr Duggal treated that as her refusing to do so, and he asked her for her keys. He could have clarified the position. He did not. He told me that was because he wanted to elicit "a what for or why" response from her. That by his own admission was to create a reaction from her. He could and should have addressed that situation very differently.
31. I find the words used in that context of his believing that she was refusing to come in and that having been repeated twice was such that she was entitled to treat them as words of dismissal and what she did, handing over her keys and picking up her things and leaving, reinforces that is how she interpreted it, and his acceptance of the keys further supports that was his view also.
32. I find viewed objectively, the words used, in context, were words of dismissal, that she was entitled to and treated them as such and that she was dismissed .

Remedy

33. At the outset Mr McBride confirmed the sums claimed were :-

Basic Award	£567
3 weeks notice	£378
Loss of Statutory Rights	<u>£250</u>
	£1,195

34. Given it was apparent Mrs Brennan undertook cleaning roles and it transpired she increased the hours she undertook from those roles to make up the shortfall from this job I queried why she had not detailed what steps she had taken and when these were to reduce her loss she had suffered.
35. I subsequently noted that as her claim of 3 weeks pay was entirely subsumed by the 4 week lockdown she could not have done so.
36. That aside there was no dispute as to the sums claimed other than if I should reduce the award due to the claimant's conduct.
37. She made an assertion to Mr Duggal that it was not permissible to continue to work in the studio without explaining the basis for it or her concerns. I find she was refusing to attend the premises. I conclude based on Mrs Brennan's evidence that she had made a number of assumptions concerning if customer visits would be being made and work accepted during the forthcoming lockdown without a basis for doing so or checking these issues. That was a potential disciplinary matter and should have been treated as such and a procedure followed. It was not.



38. By the time the parties were before me it was clear their relationship was fractious. That is understandable and is more often than not the case. Their exchange that day demonstrates a poor working relationship, at least by that point and both were behaving unreasonably. There was substantial fault on both sides. Accordingly, I considered there was conduct on the claimant's part before the dismissal, that it was culpable or blameworthy, contributed to her dismissal and it is just and equitable to reduce the basic and compensatory awards (save for the loss of rights) by 50% to reflect the significant fault on both sides..
39. Mrs Brennan confirmed that during the period to which the claim relates she was not in receipt of the benefits which engage the Employment Protection (Recoupment of Jobseekers Allowance & Income Support) Regulations 1996. Accordingly those Regulations do not apply.
40. I made an award as follows:-

Basic Award	£189
3 weeks notice	£284
Loss of Statutory Rights	<u>£250</u>
Total	£723

Employment Judge Perry

Dated: 21 August 2023

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