



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102227/2023

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Held in Glasgow on 21 September 2023

Employment Judge S MacLean

10 **Miss Jennifer McCallum**

**Claimant
Represented by:
Mr M Tierney -
Friend**

15 **Grasshopper Hotel (Glasgow) Ltd**

**Respondent
Represented by:
Mr B Munn -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

- (1) the respondent unfairly dismissed the claimant;
- (2) the respondent is ordered to pay to the claimant the monetary award of
25 £8,929.15. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply.
- (3) the respondent is in breach of its duty to provide the claimant with a written statement of employment particulars. The claimant is awarded the maximum of four weeks' pay, that is £1,800.

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REASONS

Introduction

1. The claimant complains that she was unfairly dismissed when the respondent terminated her employment with effect from 7 December 2022. The claimant

believes that she was penalised for attending university. The claimant seeks compensation.

2. The respondent admits terminating the claimant's employment. The respondent asserts that the employment contract was a fixed term contract which had come to an end.
3. At the final hearing, Barry Munn, represented and gave evidence for the respondent. The claimant gave evidence on her own account. The Tribunal was also referred to a joint file of documents.

The issues

4. The issues that had to be determined were as follows:
 - (1) Has the respondent shown a reason for the dismissal? Was it a potentially fair reason?
 - (2) In all the circumstances, did the respondent act reasonably in treating the reason shown as a sufficient reason for dismissal?
 - (3) What, if any remedy, should be awarded?

Findings in fact

5. The respondent is a company carrying on business as a boutique hotel in Glasgow. Mr Munn is the sole director and shareholder. The respondent employs approximately 18 employees including a manager and assistant manager who run the hotel. The claimant's sister is the assistant manager.
6. Around February 2015, the claimant was employed to assist preparing salads and soup for hotel guests. From September 2015 the claimant ran the kitchen herself. The respondent did not provide the claimant with written terms and conditions of employment.
7. The claimant continued in this role until February 2019 when she went on long term sick absence. The claimant was paid statutory sick pay from March 2019 until September 2019.

8. As it was uncertain when the claimant would be fit to return to work, in April 2019 the respondent engaged another employee to provide suppers to the guests.
9. The claimant's entitlement to statutory sick pay expired on 18 September 2019. The claimant was not yet fit to return to work but wanted to do so. The respondent did not terminate her contract. The contract of employment continued albeit the claimant did not attend work and was not paid.
10. The claimant's health improved. As another employee was preparing guest suppers, in November 2019 the claimant was offered the post of nightshift staff. This involved working two/three nights per week and earning approximately £250 - £270 per week. The claimant agreed. She returned to work around 20 November 2019. She continued in this role. The claimant was furloughed between March 2020 and July 2021.
11. In June 2021, the claimant also started working at Prestwick Golf Club working 11am-4pm on Tuesdays and Thursdays.
12. In September 2021, the claimant commenced studies at Glasgow Caledonian University.
13. The respondent's business was significantly affected by COVID-19 restrictions. Many of the regular customers did not return. Guests were encouraged to have suppers at the hotel which were served in the kitchen. Suppers were mainly Monday to Wednesday although on request, they could be provided on a Thursday.
14. Mr Munn wanted to generate more business, encourage return guests by improving the bespoke service provided by the respondent. He considered that this was an opportunity for employees, particularly the claimant, but it was a radical departure from what had been done in the past.
15. Around May 2022, Mr Munn discussed with the claimant a post of managing the kitchen which involved purchasing and cooking high calibre food for guests. It meant being available in the morning two to three days per week. Mr Munn appreciated that if the claimant took on this role, she would be

unable to continue working at the golf club where she earned about £170 - £180 per week. They agreed that if she took the role of kitchen manager the claimant would be paid a gross weekly pay of £450. That equates to £368 per week net. The respondent also made a weekly pension contribution of £9.90. The claimant accepted the offer and started working in the kitchen manager role from July 2022. The claimant was not engaged on a fixed term contract.

16. Between June and December 2022, only 240 guest suppers were ordered at a cost of £3,935. By December 2023 the role of kitchen manager at the current rate of pay was not financially viable.

17. On 7 December 2022, the claimant was about to go on annual leave. Mr Munn indicated that the financial situation was not good. The claimant asked if she was losing her job. Mr Munn responded maybe. The claimant went on annual leave.

18. The hotel was closed over the Christmas period. In January 2023 the claimant was advised that there was no role for her. There was no discussion about alternative roles.

19. The claimant's last day of employment was 7 December 2022. At the date of termination, the claimant was 28 years of age. She had been continuously employed for seven years. She earned £450 gross per week.

20. The claimant has not been in receipt of statutory benefits. She found alternative employment with Prestwick Golf Club from 31 January 2023. She receives pay of £11 per hour. The hours that she works varies each month but has been increasing. She received payments of £170.50 and £321.75 in February and March respectively.

21. The respondent did not replace the claimant in the role of kitchen manager. Around February 2023 the respondent offered the claimant alternative employment, earning £150 per week. The claimant declined the offer.

Note on witnesses and conflict of evidence

22. The Tribunal considered that Mr Munn gave his evidence in a candid manner. He endeavoured to answer questions honestly even when it was not in his best interests. Mr Munn was proud of the unique business that he had established. He was very complimentary about his employees who had contributed to that success. Mr Munn was very caring and generous towards employees and appeared to put their needs and that of his guests before any financial profit. While Mr Munn had a legal background his expertise was not in employment law. He was surprised that there was a legal requirement to provide employees with a written statement of terms and conditions.
23. The claimant also gave her evidence in a straightforward manner. Although invited to so do, Mr Munn did not want to cross examine the claimant. The Tribunal's impression was that until December 2022 Mr Munn's management style had worked to the claimant's benefit. She was aware of his generosity and business approach which explains her shock following the discussion on 7 December 2022.
24. In relation to the period between September and November 2019, the facts were undisputed. The issue was about the parties' understanding of the implications. Mr Munn understood that when the claimant's statutory sick pay expired and she received no wages her employment contract ended. The claimant considered that there was no break in her employment with the respondent. There appeared to be no doubt that the claimant would return to work when fit to do so. It was agreed that neither party gave the other notice of termination of employment. The claimant accepted that when she was fit to return in November 2019 someone else had been doing her role while she was absent. She was content to take on another role. The Tribunal considered that there was no break in the employment contract.
25. There was disputed evidence in relation to what was agreed at the meeting in May 2022. Mr Munn's evidence was that this role was for a fixed term of six months. It was unclear from his evidence when the fixed term started and the date it came to an end. There was no documentary evidence. The claimant

disputed that the role was time limited. That was not what was discussed at the meeting. While this was a newly created role with a generous salary, the Tribunal was unconvinced that the claimant was told that she was being engaged on a fixed term contract. During her employment she had not been provided with written terms and conditions. Any discussion about the terms of her employment were vague but she had not previously been employed on a fixed term basis. What seemed more plausible was that the parties knew that the role would be reviewed at some point, and, as in the past, with agreement the claimant's role might change but not that her employment would terminate on a fixed date.

26. There was disputed evidence about what was said at the meeting on 7 December 2022. The claimant's position was that Mr Munn said that she was too expensive. Mr Munn denied this. He said that this was not the wording that he would use. The proposal was always expensive. He hoped that it would work out but meantime it guaranteed the claimant six months' employment.

27. The Tribunal considered that in May 2022 the claimant already had "guaranteed" employment with the respondent and at the golf club. While the Tribunal could understand the attraction to the claimant of the post being offered, it would have been less so if the claimant was being offered this on a fixed term basis. The Tribunal considered it more likely that Mr Munn knew that the offer was generous. He is an optimist and was confident that the arrangement would be successful. By December 2022 Mr Munn had details of the number of suppers being ordered over the preceding months. Having reviewed the business finances, he concluded that the business could no longer afford the role of kitchen manager. Accordingly, it was more likely than not that on 7 December 2022 Mr Munn said to the claimant that financial situation was not good. When asked by the claimant if she was losing her job, Mr Munn said maybe.

Deliberation

28. The onus is on the respondent to show the reason (or if there is more than one, the principle reason) for the dismissal. While Mr Munn asserted that the reason was the expiry of a fixed term that was not what the Tribunal found to be the reason. The Tribunal also did not accept the claimant's assertion that is was because of her university course.
29. The Tribunal had difficulty on the evidence available finding the reason for the dismissal. Mr Munn appeared to consider that he could tell employees when they were no longer needed for a particular job and then get in touch when another role became available or was created for them. The respondent did not argue that there was a redundancy situation or that there was a business reorganisation which are potentially fair reasons under section 98 of the Employment Rights Act 1996 (the ERA). The Tribunal understood that in December 2022 it appeared that the role of kitchen manager was not viable as there was insufficient demand by guests for suppers. The Tribunal did not understand the claimant to dispute that the demand for suppers was not what had been hoped. There was a lack of clarity about what happened to guest suppers and breakfast after 7 December 2022 and what alternative role was being offered to the claimant in February 2023.
30. Even if there was a redundancy situation or a reorganisation there was no notice of potential redundancy, no consultation with the claimant; and no evidence that in December 2022 consideration was being given to avoid a redundancy or consider alternative employment.
31. The Tribunal therefore concluded that the dismissal was unfair and turned to consider what remedy should be awarded.
32. As the dismissal was unfair the claimant was entitled to a basic award. At the date of termination, the claimant was 28 years old. She had seven years of continuous service. Her gross weekly salary was £450. The claimant's basic award is 6.5 weeks at £450 a week, that is £2,925.

33. The Tribunal then turned to the compensatory award. The claimant found alternative employment on 31 January 2023 at Prestwick Golf Club. The claimant has been receiving increasing monthly payments as she is working more hours.
- 5 34. The claimant explained that she had difficulty applying for jobs because she did not know what her university timetable would be for the new term. There was no evidence that she mentioned this being a difficulty when working for the respondent. There was no evidence of the claimant applying for any other employment to try and mitigate her loss. Indeed, she confirmed in her
10 schedule of loss that no other efforts were made with regard looking for other jobs. The Tribunal considered that it was likely that jobs would be available in the hospitality sector.
35. The Tribunal considered that it was highly unlikely that even had the claimant's employment not been terminated in December 2023, she would
15 not have continued to receive the level of salary that she did. Further, in February 2023 the claimant was offered employment by the respondent at the rate of £150 per week but declined the offer. In the circumstances, the Tribunal considered that it was just and equitable to limit the claimant's loss until the end of March 2023.
- 20 36. The Tribunal calculated that the loss of earnings from 8 December 2022 until 31 March 2023 as 16 weeks' pay at £368 net per week, that is £5,888. During this period the claimant had a pension loss of 16 weeks at £9.90 that is £158.40.
37. From this total of £6,046.40 (£5,888 +£158.40) must be deducted the
25 wages received from alternative employment of £492.25 (£170.50 + £321.75) leaving a balance of £5,554.15. Added to this is £450 in respect of loss of statutory rights giving a total compensatory award of £6,004.15.
38. When the basic award is added to the compensatory award the total monetary
30 award is £8,929.15 (£6,004.15 + £2,925). The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply.

39. Section 1 of the ERA provides that no later than two months after the beginning of an employee's employment, the employer must give the employee a written statement of their employment particulars. No later than one month after a change in any of the particulars that are required to be included in the statement, the employer must give the employee a written statement containing particulars of the change.
40. Section 38 of the Employment Act 2002 states that Tribunals must award compensation to an employee where upon a successful claim being made under any of the Tribunal's jurisdictions listed in Schedule 5, if it becomes evident that the employer is in breach of its duty under section 1. The Tribunal must award the "minimum amount" of two weeks' pay and may, if it considers it just and equitable in the circumstances, award the "higher amount" of four weeks' pay.
41. The claimant did not receive written particulars of employment or any written notice of subsequent variations. Most of the issues raised at these proceedings could have been avoided had the oral agreements been put in writing. Had this been done any misunderstanding between the parties would have been clarified at the time. The Tribunal therefore decided that it was just and equitable to award the maximum of four weeks' pay, that is £1,800.

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Employment Judge: S Maclean
Date of Judgment: 12 October 2023
Entered in register: 13 October 2023
and copied to parties

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