



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Machaj

Respondent: Canners & Packers International Limited

Heard at: Manchester (remotely, by CVP)

On: 10 October 2023

Before: Employment Judge M Martin

REPRESENTATION:

Claimant: In person

Respondent: Mr S Hoyle (Employment Consultant)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.
2. The claimant's claim for a redundancy is also not well-founded and is hereby dismissed.

REASONS

Introduction

1. The claimant gave evidence on her own behalf. Mr Paul Tate, Mr Simon Tate and Mr Mark Tate, all directors of the respondent company, gave evidence on behalf of the respondent.
2. The Tribunal was provided with a bundle of documents marked "Appendix 1".

The Law

3. The law which the Tribunal considered was as follows:
4. Section 95(1) Employment Rights Act 1996 states:

“For the purposes of this Part an employee is dismissed by his employer if –

- (a) The contract under which he is employed is terminated by the employer (whether with or without notice).”

5. Section 98(1) Employment Rights Act 1996 states:

“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) The reason for the dismissal.”

6. Section 98(2) of the Employment Rights Act 1996 states:

“A reason falls within this subsection if it –

- (c) is that the employee was redundant.”

7. Section 98(4) of the Employment Rights Act 1996 states:

“The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.”

8. Section 135 Employment Rights Act 1996 states:

“An employer shall pay a redundancy payment to an employee if the employee –

- (a) is dismissed by the employer by reason of redundancy; or
- (b) is eligible for a redundancy payment.”

9. Section 136 Employment Rights Act 1996 states:

“An employee is dismissed by his employer if –

- (a) The contract under which he is employed by the employer is terminated by the employer (whether with or without notice).”

10. Section 136(3) of the Employment Rights Act 1996 states:

“An employee shall be taken to be dismissed by his employer for the purposes of this part if:

- (a) The employer gives notice to the employee to terminate his contract of employment.”

11. Section 86 Employment Rights Act 1996 states:

“The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more:

- (a) ..
- (b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than 12 years; and
- (c) is not less than 12 weeks’ notice if his period of continuous employment is 12 years or more.”

12. The Tribunal was referred to and also considered the following case law:

- *Edwards v Surrey Police* [1999] IRLR 456 where the EAT held that a contract of employment will not come to an end unless the employee (or employer) has communicated to the other, either by words or by conduct, the fact that they are terminating the employment.
- *Johnson v Monty Smith Garages Limited* EAT 657/79 which held that an employee’s resignation may be inferred from his or her conduct and all the surrounding circumstances.
- *Beeley v London Sail Planes Limited* EAT 1345/96 where the EAT held that a statement of intention to terminate a contract of employment in the future (in this case by reason of redundancy) is not evidence of an intention to break the contract. Such conduct did not amount to a dismissal of an employee or a constructive dismissal of the employee.
- *Morton Sundour Fabrics Limited v Shaw* [1967] ITR 84 where the divisional court overturned a Tribunal’s decision to award a redundancy payment when an employee was warned that they would be made redundant. In that case the divisional court held that in order to terminate a contract of employment the notice must either specify the date of termination or contain sufficient information from which that date is positively ascertainable. In that case there was found to be no dismissal and no claim to a redundancy payment.
- *Doble v Firestone Tyre & Rubber Company Limited* [1981] IRLR 300 where it was held that an announcement of redundancies did not amount to a notice of dismissal terms – there was no firm date on which the employees’ contracts were due to come to an end.
- *Burton Group Limited v Smith* [1977] IRLR 351 where the EAT held that the requirement for the date of termination to be positively ascertainable is not met when there is a statement that a date of termination may be a specific date or such earlier date as the employer may select. The court held that would not be sufficient to amount to a notice of dismissal.

- Kinmond v Rushton Connections EAT 799/97 where the EAT held that a letter informing employees that, from a provisional date, the employer would be closing down its premises, did not amount in itself to a notice of dismissal.

The Issues

13. The issues which the Tribunal had to consider were as follows:

- (1) Did the claimant resign or was she dismissed? In that regard the Tribunal had to consider what was said or written by both parties and take account of all the surrounding circumstances.
- (2) If the claimant resigned there would be no dismissal.
- (3) If the claimant was found to have been dismissed the Tribunal had to consider:
 - (a) what was the reason for dismissal;
 - (b) whether there was a redundancy situation;
 - (c) whether the respondent followed a fair procedure, in particular whether they warned and consulted with the claimant and considered alternative employment;
 - (d) whether dismissal was a reasonable response in the circumstances of the case.

14. The Tribunal explained that the burden of proving the dismissal lay with the claimant, whereas the burden of proving that the dismissal was fair lay with the respondent.

15. In relation to the claim for a redundancy payment, the Tribunal had to consider whether the claimant was dismissed and whether the reason for her dismissal was for redundancy. If so, the Tribunal had to consider what, if any, redundancy payment the claimant was entitled to and in what amount.

Findings of Fact

16. The respondent is a small family run business run by three brothers, who are all directors and who gave evidence at this Tribunal hearing.

17. The respondent company is made up of a number of different businesses dealing with the canning and packing of goods. One part of the business was a cat food business called Feline Fayre.

18. The claimant was employed by a Mr I Oliver from September 2009. The claimant initially worked as Operations Manager. Her employment transferred to the respondent in or about 2015. She was subsequently made Brand Manager by the respondent. The claimant never received any new contract of employment from the respondent.

19. The claimant was the respondent's only employee by the time her employment terminated other than the three brothers, who were all directors of the company.

20. The claimant's contract which had transferred from her previous employer provided for six months' notice, which was unusual bearing in mind the claimant's status in the company. The claimant indicated that this was because Mr Oliver was regularly out of the country.

21. The claimant worked from home, but attended various meetings including meetings with suppliers outside the office as requested.

22. In autumn 2022 the respondent lost a major supplier called St Dalfour with whom they had been in business for over 30 years.

23. The claimant and Mr Simon Tate (with whom she worked closely) attended a meeting on 20 October 2022 with a new supplier. After that meeting Mr Tate suggested they go for coffee at Costa Coffee. Both parties agreed that this meeting was informal.

24. At the meeting Mr Simon Tate told the claimant that the respondent had lost the St Dalfour contract. The claimant says Mr Simon Tate then said that the company "would have to let her go" and that they would all have to look for new jobs. The claimant said that Mr Simon Tate talked about him and his brother Mr Mark Tate having mortgages to pay but being able to draw down on their pension. Mr Simon Tate could not recall what he said at this meeting other than that he had told the claimant about the St Dalfour contract being lost. He denied saying anything to the claimant about losing her job or that they would all have to look for alternative work. When he was cross examined about the discussion, he could not recall what was said during the meeting. Both parties agreed that Mr Simon Tate was very upset at the time and that it was an emotional meeting. Mr Simon Tate said that at the time he had some other personal issues.

25. On 21 October 2022 Mr Simon Tate sent a text message to the claimant in which he said, "Once again we are sorry for the 'bombshell' yesterday" and he then indicates that Mark and Paul (his brothers) were supposed to call the claimant "today" and talks about them dealing with legal issues. He then indicates in the text that he hopes they will call her soon to confirm their support for her through this "horrible situation".

26. Mr Simon Tate was unable to give any clear indication of exactly what he meant when questioned in the Tribunal over the reference to "bombshell" or "horrible situation for the claimant". He suggested that this all related to the St Dalfour contract; albeit that he was unable to explain how that would really have any real impact on the claimant as the claimant did not really work on that contract and was principally only employed to work on the Feline Fayre part of the business, which was unrelated.

27. On 22 October 2022 Mr Mark Tate telephoned the claimant at home. The claimant said that Mr Mark Tate again confirmed that she would be losing her job and that they would all have to seek alternative employment. Mr Mark Tate again

also could not recall this conversation, but denied in Tribunal that he had indicated to the claimant that she would be losing her job.

28. The claimant said that she was in effect told during discussions with Mr Simon Tate that her employment would be terminating in January 2023. She then informed him that she was entitled to six months' notice. She understood that the Christmas Party would be the last Christmas when they would all be working together.

29. Since she believed she was being made redundant, the claimant went off and sought alternative employment. She informed Mr Simon Tate that she had been offered a job with the NHS on 5 January 2023.

30. The respondent was then approached for a reference for the claimant from the NHS on 24 January 2023. The NHS Foundation Trust states in the letter at page 25 of the bundle that the claimant has been offered the post of Receptionist and that they have permission from her to contact the respondent for a reference. The respondent provided a good reference for the claimant, however refused to the release of a copy of that reference for these proceedings., which may have indicated the reason why the claimant was leaving her position with the respondents.

31. In cross examination the claimant acknowledged that she had been offered a job in January 2023 by the NHS, but that it was conditional. She accepted that the conditions related to an Occupational Health assessment and a reference.

32. Mr Simon Tate commenced new employment on 16 January 2023. He said that the new employment was in addition to still working for the respondent company.

33. The respondent's witnesses all stated that the respondent company was still in business, and that they were all still employed working for that company. They said that Feline Fayre was still in existence, although they acknowledged that there were no retail sales now ongoing and that their online services had substantially reduced. They said they were continuing to look for new suppliers.

34. In her evidence to the Tribunal, the claimant said that she agreed a date to leave the respondent company at the end of March 2023. She was due to commence her new employment with the NHS on 1 April 2023. She said this had followed discussions when she had explained to Mr Simon Tate, who had initially suggested that she would need to leave in January, that she was on six months' notice.

35. The claimant's employment did not terminate as initially indicated in January 2023.

36. On 3 March 2023, the claimant said that she spoke to Mr Simon Tate about her remaining holidays. She said that, at that stage Mr Simon Tate had indicated that he would action it before the payroll was run, but she became concerned because there was no reference to any redundancy or severance pay.

37. On 3 March 2023 the claimant emailed Mr Simon Tate (page 28 of the bundle) to indicate that, as agreed, her leaving date would be 31 March 2023, and

she referred to 2.5 days' remaining holiday. She also asked in that email about her redundancy/severance pay. The respondent said that that was the first time there had been any reference to any redundancy or severance pay.

38. The Tate brothers indicated that they understood that the claimant was effectively resigning from her employment as she had been offered a new job and that she had indicated when her employment would terminate, namely on 31 March 2023. The claimant stated in evidence that she had not expressly at any stage resigned from her employment.

39. There was due to be a leaving party at the offices in March 2023 for the respondent's tenants, which the claimant had agreed to attend. The claimant said that, even though the party was cancelled, she then took some documentation to the offices. She said that the office premises were up for sale. She said that on that date (10 March 2023), she then asked Mr Simon Tate about her redundancy, and he said that he had asked Mark and Paul to liaise with her. The claimant said it was at that stage she was being told she was not being made redundant. The claimant said that she told Mr Simon Tate that she would then continue working for the respondent if her job was not redundant. Mr Simon Tate did not deny this conversation.

40. On 13 March 2023 the claimant emailed Mr Mark Tate. That email is at page 29 of the bundle. In that email the claimant referred to numerous conversations in October 2022 when she was told she was losing her job and agreeing on a leaving date in March; having sought alternative employment. The claimant then referred to a conversation which she said she had with Mr Simon Tate on 10 March when he told her that she was not being made redundant, so she stated that she would continue working as normal. The claimant pointed out that she was on six months' notice if the situation changed.

41. On the same date Mr Mark Tate replied to the claimant indicating that he understood the claimant had new employment starting on 1 April 2023 and had assumed that she was leaving the company of her own volition. He asked her to let them know if that was not the case (page 29 of the bundle).

42. The respondent's witnesses all accepted in their evidence that they had then sought some legal advice.

43. On 14 March 2023, the respondent wrote to the claimant to clarify the position from their point of view (page 30 of the bundle). They referred to discussions when the claimant indicated that she was leaving the respondent and agreed an exit date of 31 March 2023. They suggested that her email of 3 March was a resignation email indicating a leaving date. They noted that she had accepted alternative employment with the NHS for which they had provided a reference. They stated in that letter that they were not prepared to rescind her resignation. They stated that there was not a redundancy situation, and the claimant was not entitled to a redundancy payment. They said that, if there had been a redundancy process, they would have followed the appropriate process. They refer to the discussion on 20 October 2022 as an informal business update meeting and state that that was not notice of redundancy or dismissal. They then go on to talk about ongoing discussions with regard to Feline Fayre and another agency.

44. This Tribunal found the claimant to be an honest and credible witness. Her evidence was clear and convincing. On the other hand, the respondent's evidence from all three brothers was evasive, vague and lacking in credibility at times. It was somewhat surprising that neither of the brothers could recollect the crucial discussions on 20 and 22 October 2022, nor could Mr Simon Tate explain what he meant in his own text message of 21 October 2023. It was also not clear why the respondent would not agree to the claimant remaining in her job if there was no redundancy situation. They had no legal obligation to do so, but this was an employee who had worked very closely with them for many years, had no issues with her timekeeping, her attendance, or any disciplinary matters. It would have been clear to the respondents that there had been a "misunderstanding" as indeed suggested by their representative on cross examination and described as an "ambiguity" in his submissions. The Tribunal acknowledges that their stance may have been taken on financial grounds. However, without any real explanation given by them in evidence other than relying on their legal position, the Tribunal was left to wonder if they simply took advantage of this "misunderstanding" as their representative put it on the part of the claimant.

45. This Tribunal preferred the evidence of the claimant to that of the respondent for the reasons indicated above.

46. The claimant's employment, if she had worked her six months' notice, would have expired on 20 April 2023. She left the respondent company on 31 March 2023.

Submissions

47. The claimant submitted that she had been dismissed by reason of redundancy in October 2022 and was entitled to a redundancy payment. She said her dismissal was unfair.

48. The respondent's representative indicated that the situation was one of ambiguity and misunderstanding on the part of the claimant. He submitted that the claimant had not been dismissed by reason of redundancy and that there was no clear notice of dismissal as required in law. He referred to substantial case law in relation to the same. He submitted that the claimant had in effect resigned and that, if it was not an express resignation, it was an implied resignation.

Conclusions

49. This Tribunal finds that the claimant was informed in October 2022 that her employment was to terminate by reason of redundancy. In that regard, the Tribunal prefers the claimant's evidence to that of the respondent's witnesses. Neither the main witness in relation to that discussion, who was Mr Simon Tate, nor his brother Mr Mark Tate could recall any conversations which took place in October 2022.

50. However, this Tribunal finds that the claimant was at that stage only warned about a potential redundancy situation. Even on the claimant's own evidence, the Tribunal could not find that she was given notice of dismissal for redundancy. Based on the claimant's own evidence, she was warned at that stage that she may be losing her job, and it was indicated that might occur in January 2023. She has not led any clear evidence as to what date in January 2023 her employment was to end.

51. Further, the claimant remained in employed with the respondent after January 2023. The claimant said that this was because she pointed out to the respondent that she was on six months' notice. It was presumed (by the claimant) that, on that basis her employment would terminate at the end of that six-month period. However, her employment did not terminate at the end of that six-month period. It in fact terminated prior to the end of that six-month notice period. The date on which it terminated was 31 March 2023 and not 20 April 2023 (which would have been the expiry of six months' notice).

52. From the evidence, it seems that the date of 31 March 2023 came from the claimant as opposed to the respondents. There was no evidence that the respondent had in fact done anything other than to agree the date proposed by the claimant of 31 March 2023, which would coincide with the date when her new employment was due to commence on 1 April 2023.

53. The Tribunal therefore finds that, although the claimant was warned of a redundancy situation, taking account of the various cases referred to above, she was not given notice of dismissal by reason of redundancy or otherwise, either in October 2022 or subsequently. No firm date was ever given to the claimant, either orally or in writing, terminating her employment in either January 2023 (which then passed) or indeed on 31 March 2023.

54. Accordingly, this Tribunal does not find that the claimant was dismissed or that her employment terminated by reason of redundancy.

55. The Tribunal also however accepts the claimant's evidence, supported by the documentary evidence, that she never expressly resigned from her employment either. The email of 3 March 2023 did not state that she was resigning. She never uses the word "resign", nor could it be interpreted from that email alone that she had resigned.

56. However, the Tribunal does consider that there is sufficient evidence for the respondent (who appeared quite keen to accept that the claimant had resigned, rather than dismissed by them) to suggest that the claimant had impliedly resigned from her employment, albeit that she had not necessarily intended to do so.

57. In that regard, the Tribunal had to consider all the surrounding circumstances and consider whether there was an implied resignation on the part of the claimant on the basis that it had concluded that the respondent had not dismissed the claimant or given her notice of dismissal on the grounds of redundancy. The claimant stated in her own evidence that she had informed the respondent orally that she had sought and obtained new employment. She had requested a reference. She was aware that she was getting a good reference. She was offered employment in January 2023. She then informed the respondent of her leaving date of 31 March 2023, which was before the termination of any six month notice period. The suggestion of the leaving date came from the claimant and not from the respondent, albeit that the claimant did not say that she was resigning.

58. This Tribunal has concluded that there was sufficient evidence for the respondent to conclude (which they were clearly keen to do) that the claimant had impliedly resigned from her employment by effectively seeking new employment;

accepting an offer of alternative employment; obtaining a reference from the respondent and indicating the date on which she would leave their employment. This Tribunal concludes that would be sufficient for the respondent to conclude that the claimant had effectively resigned from her employment.

59. For those reasons, this Tribunal concludes that the claimant had inadvertently (and certainly not deliberately) herself brought the employment to an end by her actions as referred to above. On that basis the Tribunal can only conclude that the employment terminated by reason of resignation, because the Tribunal does not consider that there is sufficient evidence to show that the claimant's employment terminated by reason of redundancy. No notice of redundancy was issued to the claimant, nor was there any date given to her terminating her employment. Any dismissal by the respondent, as suggested did not occur in January, and nor did it occur at the end of the six months' notice period on 20 April 2023, but rather it occurred on the date suggested by the claimant to coincide with the date when she would start her new employment, namely at the end of March 2023.

60. For those reasons, the claimant's claims of unfair dismissal and for a redundancy are not well-founded and both claims fail.

Employment Judge M Martin

Date: 30 October 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 6 NOVEMBER 2023

FOR THE TRIBUNAL OFFICE

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