EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107236/2023

Held by Cloud Video Platform on 3 September 2024

Employment Judge P O'Donnell

Ms E Hill	**Claimant** **Mr Swan - Solicitor**
Lenzie Cars Ltd	**Respondent** **Not present and Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The claimant was unfairly dismissed by the respondent and the Tribunal awards her compensation of £10836.80 (Ten thousand, eight hundred and thirty-six pounds, eighty pence).

2. The Tribunal makes an additional award under s38 of the Employment Act 2002 equivalent to two weeks' wages in the sum of £833.60 (Eight hundred and thirty-three pounds, sixty pence).

3. The claims for redundancy pay and notice pay are hereby dismissed.

4. The claimant is awarded the sum of £4668.16 (Four thousand six hundred and sixty-eight pounds sixteen pence) in respect of holiday pay.

REASONS

Introduction

1. The claimant has brought complaints of unfair dismissal, redundancy pay, notice pay and holiday pay against the respondent. She also seeks an

additional award under s38 of the Employment Act 2002 for the respondent's failure to provide her with a written statement of terms and conditions of employment.

2. The respondent had not lodged a defence to the claim and were not in attendance at the hearing. They had been in contact with the Tribunal during the course of proceedings, either via a representative or by direct correspondence.

3. Having reviewed the correspondence file in advance of the hearing, the Tribunal was satisfied that the respondent had been made aware of the need to lodge an ET3 response form and the consequences of failing to do so. The Tribunal, therefore, considered that it was appropriate to proceed with the hearing in the respondent's absence.

Evidence

4. The Tribunal heard evidence only from the claimant. The Tribunal had no hesitation in accepting her evidence as credible and reliable especially as it was supported by the contemporaneous documents.

5. There was a bundle of documents prepared by the claimant's agent. A reference to a page number below is a reference to a page in that bundle.

Findings in fact

6. The Tribunal made the following relevant findings in fact.

7. The respondent is a taxi company and the claimant was employed by them as a taxi controller from April 2000. She was employed to work 40 hours a week, 8am-4pm, Monday to Friday.

8. The claimant was never provided with any document setting out her terms and conditions of employment throughout her employment. The claimant did request such a document during the events leading her dismissal (p39) but this was not provided.

9. The claimant commenced maternity leave in September 2019. At this time, she was paid an hourly rate of £9 per hour. Although the claimant remained in employment with the respondent until October 2023, she never returned to the office to carry out her duties for a variety of reasons.

10. The claimant intended to take her full year's entitlement to maternity leave due to return in or around September 2020. By this time, the covid pandemic had occurred and she was placed on furlough by the respondent. She remained on furlough until September 2021.

11. In or around November 2020, the claimant was contacted by Mr Wyvar (who ran the respondent) who told her that the respondent had no job for her anymore. There was no explanation why this was the case. Mr Wyvar told the claimant that the respondent could not afford to pay her redundancy pay and that they were offering a deal where she would remain on furlough for a year.

12. As a result of this conversation, the claimant contacted her local Citizens Advice Bureau (CAB) for advice. The CAB wrote to Mr Wyvar on 5 November 2020 (p25) asking for confirmation of whether the claimant was being made redundant or being kept on furlough. The CAB also set out the various payments they considered the claimant would be due if she was made redundant.

13. There was no reply to this letter and no further contact made by the respondent to the claimant until 21 September 2021. During this time, she remained on furlough receiving 80% of her wages.

14. The next contact from the respondent was a letter dated 21 September 2021 (p27) advising that furlough was coming to an end and offering her a return to her role of controller but with reduced hours. The hours offered were 12pm to 6pm, Monday to Friday. There was no explanation why the respondent was offering the claimant revised hours other than a vague reference to the effects of the pandemic on the business. The claimant's hourly rate was to be increased to £10 per hour, although the Tribunal notes that this would be

reflective of increases in the National Minimum Wage since the claimant went on maternity leave.

15. The revised hours were not ones which were suitable to the claimant and she refused to agree to the change to her hours. She was suffering from anxiety about her employment situation and handed in a sick line. She remained on sick leave for the remainder of her employment with the respondent. She was paid Statutory Sick Pay by the respondent and when this was exhausted received state benefits in the form of Employment Support Allowance .

16. The respondent made no contact with the claimant during her sick leave. The claimant sought further advice from CAB who wrote to the respondent by letter dated 26 April 2022 (p29) querying the claimant's current employment status.

17. The respondent replied by letter dated 10 May 2022 (p31) simply repeating the previous proposal of the same job on reduced hours. This was described in the letter as a "revised offer" but was clearly the same terms as had been proposed previously. This was the last contact of any kind which the respondent made with the claimant or her adviser.

18. The claimant continued to correspond with the respondent, either directly or via CAB. Letters were sent on 13 July 2022 (p33), 10 October 2022 (p35), 9 November 2022 (p37), 2 June 2023 (p39) and 7 July 2023 (p43). The letters of 9 November 2022 and 7 July 2023 were formal grievances. The letters in 2023 were signed for by employees of the respondent (pp41 and 45). The respondent did not reply to any of this correspondence.

19. The letter of 7 July 2023 expressly states that the respondent's failure to reply was causing the claimant to lose trust and confidence in them and that if they did not reply to her then she would consider resigning and claiming constructive unfair dismissal.

20. The claimant resigned by letter dated 28 September 2023 (p47). She gives the reason for her dismissal as a loss of trust and confidence in the respondent due to the fact that they have ignored her correspondence. This

letter was received and signed for by an employee of the respondent on 4 October 2023 (p49).

21. After her employment with the respondent came to an end, the claimant did not re-enter the workforce and has become a full-time carer for a family member.

Submissions

22. For the sake of brevity, the Tribunal does not intend to set out the submissions made by Mr Swan in detail. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

23. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

24. Section 95(1) of the 1996 Act states that dismissal can arise where:

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

25. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

26. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

27. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

28. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

29. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

30. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and a respondent must show that the dismissal was for one of those reasons.

31. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd* [1985] ICR 546, CA).

32. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

Decision – unfair dismissal

33. The Tribunal has little hesitation in finding that the claimant was dismissed as defined in s95(1)(c) ERA. The conduct of the respondent set out above was clearly likely to destroy or seriously damage the employment relationship. The respondent, for no reason and out of the blue, unilaterally cut the claimant's hours by a quarter which would have an obvious impact on her wage. This, on its own, would have been sufficient to amount to a fundamental breach of contract.

34. However, the claimant, perhaps reflective of the long work relationship between her and the respondent, sought to give the respondent the opportunity to resolve matters. She engaged in correspondence with the respondent, either directly or through an adviser, querying her position and raising a grievance.

35. For the most part, the respondent completely ignored these efforts and did not reply to this correspondence. In the very limited circumstances when there was a reply, it was cursory and high-handed amounting to no more than a repeat of the reduced hours that the respondent was imposing on the claimant.

36. On the face of the evidence, there was no explanation, let alone any reasonable cause, for the respondent's behaviour.

37. Taking these matters as a whole, the Tribunal considers that the claimant has satisfied the *Malik* test and that the respondent, without reasonable or proper cause, acted in a manner likely to destroy or seriously damage the employment relationship.

38. There is no question that the claimant resigned as a result of this fundamental breach of contract. There is no other reason why she left her employment and this is the express and unambiguous reason for terminating her employment with the respondent given in her resignation letter.

39. Finally, the Tribunal is satisfied that the claimant resigned as soon as reasonably practicable. Although the events giving rise to the claim occurred over a period of time, this is because the claimant was giving the respondent

every opportunity to resolve matters and save the employment relationship. They did not take those opportunities and when the claimant felt she had done all that she could then she resigned without an unreasonable delay.

40. For all, these reasons, the Tribunal is satisfied that the test in Western Excavating has been met and that the claimant was dismissed as defined in s95(1)(c) of the Employment Rights Act 1996.

41. In the absence of the respondent, there was no evidence as to the reason why the claimant was dismissed. The respondent has not, therefore, satisfied the burden of proof in terms of s98(1) ERA and so the Tribunal finds that there was no fair reason for the claimant's dismissal.

42. For this reason, the Tribunal considers that the claimant's dismissal was unfair.

43. Turning to the question of remedies, there were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

44. First, there is the question of the calculation of a week's pay for the claimant. When she last performed her duties for the respondent her contracted hourly rate was £9 per hour. At the effective date of termination, however, the National Minimum Wage was £10.42 per hour. The Tribunal considers that the claimant was legally entitled to be paid at this hourly rate and so it is just and equitable to use this to calculate the claimant's weekly pay.

45. Based on the contractual weekly hours of 40 hours (the claimant never having consented to the reduction in her hours) this produces weekly pay of £416.80.

46. Second, the claimant sought an uplift to her compensation in relation to a failure by the respondent to follow the ACAS Code of Practice. The Tribunal considers that the respondent wholly failed to comply with the ACAS Code given the complete lack of any procedure, either disciplinary or grievance. This failure was wholly unreasonable; there is no explanation for the respondent's wholesale failure to not engage with the claimant. An uplift is, therefore, appropriate.

47. In terms of the amount of any uplift, the Tribunal considers that the wholesale failure by the respondent to act in accordance with the Code means that it is appropriate to start at a 25% uplift.

48. The Tribunal has then considered whether there is any basis why this should be reduced. The Tribunal considers that there was no evidence of any mitigating factors that would lead it to reduce the uplift in any way. There is nothing that would lead the Tribunal to consider reducing the uplift from 25%.

49. Turning now to the calculation of the award to be made and the Tribunal starts with the basic award.

50. Based on the claimant's age and length of service she is entitled to a basic award of 21 weeks' pay at £416.80 = £8752.80.

51. In terms of compensatory award, the claimant does not seek any compensation for loss of wages as she has not been seeking work since her dismissal and become a full-time carer for a family member.

52. The only element of the compensatory award sought by the claimant is compensation in respect of loss of statutory rights. Given the claimant's length of service and the considerable rights to notice and redundancy pay accrued by her, the Tribunal considers that compensation equivalent to four weeks' pay would be appropriate.

53. The total unadjusted compensatory award is, therefore, £1667.20. This is less than the claimant's annual earnings and so the statutory cap does not apply.

54. The Tribunal awards a 25% uplift to the compensatory award as set out above which amounts to £416.80. This brings the total compensatory award to £2084.

55. In these circumstances, the Tribunal makes a total award for unfair dismissal of £10836.80 (Ten thousand, eight hundred and thirty-six pounds, eighty pence).

Decision – Additional award under section 38 of the Employment Act 2002

56. Given that the Tribunal has found in the claimant's favour in respect of her unfair dismissal claim then the power to make an additional award under section 38 of the 2002 Act applies.

57. The question for the Tribunal is whether the respondent failed in their obligation to provide the claimant with a statement of written terms and conditions which complied with section 1 of the Employment Rights Act 1996.

58. There is no question that the respondent failed to provide the claimant with any document setting out her terms and conditions of employment. They provided nothing.

59. In these circumstances, the Tribunal finds that the Respondent had failed in their duties under section 1 of the Employment Rights Act 1996 and so will make an award under section 38 of the Employment Act 2002.

60. The Tribunal considered the amount of award to be made. The relevant statutory provisions state that the Tribunal must (emphasis added) make an award equivalent to two weeks' wages in such circumstances but that there is a discretion to make an award of four weeks' wages where the Tribunal considers it just and equitable.

61. The Tribunal considers that there was a wholesale failure by the respondent to provide the claimant with the necessary documentation. This is not just an omission; the claimant specifically asked for this and the respondent simply ignored it.

62. However, there was no evidence that this had ever caused the claimant any difficulty or hardship and so the Tribunal does not consider there is any basis on which it could be said that it would be just and equitable for the higher amount to be award.

63. The Tribunal therefore makes an additional award under s38 of the Employment Act 2002 equivalent to two weeks' wages in the sum of £833.60 (Eight hundred and thirty-three pounds, sixty pence).

Decision – redundancy pay

64. The award of basic pay in respect of the claim for unfair dismissal renders the claim for redundancy pay academic; both sums are calculated using the same formula and the principle against double-counting would apply.

65. In any event, given the lack of any evidence as to the reason for dismissal (that is, the reason for the respondent's conduct giving rise to the fundamental breach of contract) the Tribunal does not consider that it has the factual basis to conclude that redundancy was the reason for dismissal.

66. For these reasons, the claim for redundancy pay is hereby dismissed.

Decision – notice pay

67. Although the Tribunal has found that the claimant was dismissed for the purposes of the unfair dismissal claim, her employment with the respondent was terminated by her rather than the respondent in contractual terms.

68. In these circumstances, there was no obligation on the respondent to give notice as they were not the ones choosing to terminate the contract. There is, therefore, no breach of contract by the respondent in not giving notice and the breach of contract claim in respect of notice pay is hereby dismissed.

Decision – holiday pay

69. Regulations 13 and 13A of the Working Time Regulations (WTR) make provision for workers to receive 5.6 weeks' paid holidays each year.

70. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and

regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(AxB)-C

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

71. There is no question that the claimant was entitled to be paid in lieu of untaken holidays accrued in the holiday year 2023/2024 for the period from 1 April 2023 to 2 October 2023. Applying the formula above, this amounts to 16 days.

72. The issue in this case is whether the claimant is entitled to have carried over any leave from previous years. The claimant was prevented from taking any annual leave from 1 September 2019 until the end of her employment for a variety of reasons:

a. In the leave year 2019/2020, from 1 September 2019 to 31 March 2020 (the end of that leave year) the claimant was on maternity leave.

b. In the leave year 2020/2021, from 1 April 2020 to 31 August 2020, the claimant was on maternity leave and then from 1 September 2020 to 31 March 2021 she was on furlough.

c. In the leave year 2021/2022, the claimant was on furlough from 1 April 2021 to 3 October 2021. She was then on sick leave for the remainder of that year.

d. In the leave year 2022/2023, the claimant was sick leave for the whole of that leave year.

73. Regulation 13(9) WTR states that leave must be taken in the year in which it is due. However, this is now subject to Regulations 13(14), (15) and (17) which allows an employee to carry over their leave if they are unable to take some or all of it because they have taken some other statutory leave (such as maternity leave), have been off sick or been prevented from taking leave by their employer. There are two limits on this; it only applies to the four weeks' leave granted by Regulation 13; it must be taken within a certain period from the end of the leave year from which it is being carried over, the period differs depending on the reason why the leave had not been taken.

74. The Working Time (Coronavirus) (Amendment) Regulations 2020 also amended the 1998 Regulations for a period of time to allow for annual leave to be carried over where it was not reasonably practicable for a worker to take annual leave in the relevant leave year due to the effects of the pandemic. Again, there were restrictions on this; it was also limited to the four weeks' leave under Regulation 13; the leave must be taken within 2 years of the end of the relevant leave year.

75. Applying these provisions to the claimant's circumstances, in particular the temporal limits on carry over of leave, the claimant was entitled to carry over 4 weeks' leave from the leave years 2021/22 and 2022/23 into the leave year 2023/24. Any untaken leave from the holiday years prior to that are excluded

on the basis that the periods in which the leave must be taken expired by the time the claimant's employment had come to an end.

76. The claimant's total holiday entitlement at the end of her employment was, therefore, 56 days (that is, eight weeks carried over at 5 days a week plus 16 days pro-rated entitlement from the final year). Based on the weekly pay calculated above for the unfair dismissal claim, the claimant was paid £83.36 a day.

77. The Tribunal, therefore, awards the claimant the sum of £4668.16 (Four thousand six hundred and sixty-eight pounds sixteen pence) in respect of holiday pay.

Employment Judge: **P O'Donnell**
Date of Judgment: **05 September 2024**
Entered in register: **06 September 2024**
and copied to parties