EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104896/2024

Held in Glasgow via Cloud Video Platform (CVP) on 5 November 2024

Employment Judge P O'Donnell

Miss R Lee	**Claimant** **Represented by:** **Mrs C Lee -** **Mother**
Principal Trading Group	**Respondent** **No appearance and** **No representation**

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 £794 (Seven hundred and ninety-four pounds).

2. The Tribunal makes an additional award under s38 of the Employment Act 2002 equivalent to two weeks' wages in the sum of £62.52 (Sixty-two pounds, fifty two pence).

3. The claimant was dismissed without notice. The Tribunal makes no award in respect of this breach of contract.

4. The claims under the Equality Act 2010 are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The claimant has brought complaints of unfair dismissal under the Employment Rights Act 1996, disability discrimination under the Equality Act 2010 and a claim for notice pay. She also alleges that she was not provided with a written statement of her terms and conditions of employment as required by s1 of the 1996 Act.

2. The respondent has not lodged an ET3 response form and so the claim was undefended. They did not attend the hearing. There has been correspondence between the respondent and the Tribunal in which the respondent was provided with the date of the hearing and the joining details. The Tribunal is satisfied that the respondent was aware of both the claim and the final hearing. The Tribunal, therefore, considers that it is appropriate to proceed in their absence.

Evidence

3. The Tribunal heard evidence from only the claimant.

4. The claimant had lodged some documents which were referred to in evidence. There was a very small number of documents and they were not in a paginated file.

Findings in fact

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

6. The claimant's date of birth is 16 September 1994.

7. The claimant was diagnosed with Aspergers at the age of 4 years old. It is a lifelong condition which impacts on the claimant's ability to understand verbal instructions. She needs instructions broken down into smaller chunks or put in writing to assist her in understanding these.

8. The claimant started working for the respondent on 15 January 2017. The respondent is a café and the claimant was employed to make the home

baking which was sold in the café. When she started work with the respondent she worked two days a week (Tuesday and Thursday) at 3 hours a day (12-3pm on Tuesday and 1-4pm on Thursday). She was paid an hourly rate at the National Minimum Wage. She was never provided with a written contract or any document setting out her terms and conditions of employment.

9. The claimant had a clean disciplinary record and there was never any complaints about her attendance, time-keeping or performance.

10. The claimant also runs her own baking business. Over time she wanted to devote more time to that business and so in September 2020 she spoke to her then manager, Fiona Melvin, about reducing her hours at the café. It was agreed that she would reduce to one day a week working 3 hours.

11. In the Spring of 2023, the owner of the respondent passed away and her son, Oliver Gray, took over the running of the business. At the time, the claimant did not see any change to her job.

12. However, over the period from Spring to December 2023, the claimant found that she was not working the same amount of hours. If no baking was needed (for example, because items baked the previous day had not been sold) and there was no other work for her to do then she would be sent home early.

13. After Christmas 2023, the claimant noticed that her name had not appeared on the staff rota. She asked her then manager, Eve, about this and was told that there were no shifts available and Eve had thought that Mr Gray had spoken to the claimant about this.

14. The claimant was not given any hours for the month of January 2024. She asked Eve about this on more than one occasion and would receive the same reply that the claimant should speak to Mr Gray. When the claimant spoke to Mr Gray his only reply that no shifts were available.

15. The claimant was due to take a holiday to Thailand from 28 January to 15 February 2024. This had been arranged for some time and she had booked annual leave with the respondent.

16. When she returned from her holiday she checked the rota again. It was shared with staff on a group chat. Although her name was on the rota there were no hours against her name. The claimant again contacted Eve to find out when she was next due to be at work and was told that she needed to speak to Mr Gray. When she spoke to Mr Gray he repeated that there were no shifts available.

17. The claimant's mother also spoke to Mr Gray to find out what was happening with her job but the position was no clearer and the claimant was not put on the rota to work.

18. On 13 March 2024, the claimant's mother wrote to Mr Gray on the claimant's behalf setting out the position that the claimant had a contract for 3 hours work a week and that this cannot be taken away from her. The letter alleges that the failure to provide work amounts to a breach of employment law and potentially unlawful discrimination.

19. Mr Gray replied by letter dated 10 April 2024 to the claimant. The letter asserts that the letter of 13 March 2024 contains *"inaccuracies, falsehoods and fabrications"* but does not say what these are. It makes reference to the claimant seeking flexibility in order to operate her own business although the relevance of this is not clear from the terms of the letter.

20. The letter of 10 April 2024 goes on to assert that the business had been quiet which required an adjustment in employee hours. Mr Gray states that there was an intention to revisit this in 2024 if the situation changed but that this was not occurred. The letter states that employees are engaged without formal contracts and are employed on a zero hours basis.

21. On receiving this letter, the claimant concluded that the respondent no longer wanted to employ her and that her employment was at an end.

22. After the end of her employment with the respondent, the claimant increased the amount of time spent in her own business and was able to take on more orders. This did not, however, result in an immediate increase in her earnings that would replace the wages she earned from the respondent. The reason

for this is that customers would place orders for cakes for birthdays or other occasions in advance and so payment for these orders would not be made until the cake was provided. It was 3 months after the end of her employment with the respondent that the claimant saw her earnings increase to the point that they replaced her wages from the respondent.

Relevant Law

23. Under s95(1)(a) of the 1996 Act, an express dismissal is defined as the employer terminating the contract of employment with or without notice.

24. The general rule is that unambiguous words of dismissal (or resignation) should be taken at face value with no need for analysis of the surrounding circumstances *(Sothern v Franks Charlesly & Co [1981] IRLR 278).*

25. Where there are ambiguous words or conduct then an employee should investigate further before jumping to the conclusion that they have been dismissed (see, for example, *Leeman v Johnson Gibbons Tools Ltd [1976] IRLR 11*). The same principle applies where an employer relies on ambiguous words or conduct in arguing that there has been a resignation.

26. 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."

27. 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

28. A breach of contract can arise from an express term of the contract or an implied term.

29. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

30. 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.

31. If the respondent discharges the burden of showing that there was a potentially fair reason, 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.

32. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

33. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd [1987] IRLR 503* it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called “Polkey” reduction).

34. Procedural fairness includes giving an employee the opportunity to explain their actions or provide some form of mitigation.

35. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures in Employment (“ACAS Code”) in assessing the

procedural fairness of any dismissal as well as considering whether the employer had complied with their own procedures and policies.

36. The second broad issue in considering s98(4) is that the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

37. The Equality Act 2010 protects individuals from discrimination on the grounds of various protected characteristics. These include, for the purposes of this case, disability.

38. The definition of direct discrimination in the 2010 Act is as follows:

"***13 Direct discrimination***

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

39. These provisions do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is:

"39 Employees and applicants

An employer (A) must not discriminate against an employee of A's (B)— by dismissing B"

40. The burden of proof in claims under the 2010 Act is set out in s136:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

41. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

42. Although the test for direct discrimination forms a single question, the caselaw indicates that it is often helpful to separate this into two elements; the less favourable treatment and the reason for that less favourable treatment.

43. In order for there to be less favourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL*).

44. A claimant can rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment. There must be no material difference in the circumstances of the claimant and comparator (s23 of the Equality Act 2010). In deciding how a hypothetical comparator would have been treated, the Tribunal is entitled to have regard to the treatment of real individuals (see, for example, *Chief Constable of West Yorkshire Police v Vento [2001 IRLR 124*).

45. However, a difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; "something more" is required *(Madarassy v Nomura International [2007] IRLR 246).* The Tribunal needs

evidence from which it could draw an inference that race was the reason for the difference in treatment.

46. It is important to remember that unreasonable or unfair behaviour is not enough to allow for an inference of direct discrimination (*Bahl v The Law Society [2004] IRLR 799*).

47. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong [2005] ICR 931* (as approved by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*).

48. The duty to make reasonable adjustments is set out in s20 of the Equality Act with s21 making a breach of the duty an unlawful act. The relevant provisions of s20 are:

> ***20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *…*

49. In relation to the duty to make adjustments, the degree to which any adjustment would overcome the disadvantage to the claimant is relevant to whether the adjustment is reasonable (*HM Prison Service v Johnson [2007] IRLR 951*). Further, the duty is intended to integrate disabled people into the

workplace and this is also relevant to whether any adjustment is reasonable (*O'Hanlon v Revenue and Customs Comrs [2007] IRLR 404*).

Decision

50. The Tribunal will deal with the unfair dismissal claim first before addressing the other claims.

51. The first issue to be determined in the unfair dismissal claim is the question of whether the claimant was dismissed as defined in s95 of the Employment Rights Act 1996 (ERA).

52. In order to address that point, the Tribunal needs to make findings about the claimant's terms of employment. In particular, the assertion that the claimant was employed on a zero hours basis made by the respondent in the letter of 10 April 2024. This is important because, if the assertion is correct, the respondent was acting in accordance with the contract when no work was being provided to the claimant.

53. The Tribunal considers that this assertion is wholly baseless and without any foundation. There was no written contract between the claimant and the respondent nor was there any document setting out the terms of employment. This is a problem for the respondent as there is, therefore, no written evidence which sets out that the claimant was employed on a zero hours or "as and when" basis.

54. There could, of course, be a verbal contract to this effect but that would require clear and unambiguous evidence that this was agreed between the parties. There was no such evidence of any verbal agreement at all to this effect.

55. In these circumstances, the Tribunal is satisfied that the claimant was not employed on a zero hours contract and, rather, she was employed to work 1 day a week at three hours a day.

56. To the extent that the letter of 10 April 2024 seeks to assert that there was an alteration to either the claimant's hours of work or to a zero hours contract at some point, the Tribunal considers that there is no evidence of this. A

contract is a mutual agreement which cannot be unilaterally changed by one party. There was no evidence whatsoever that the claimant had ever agreed a change to her contract other than when she requested a reduction in her hours in 2020.

57. With all that being said, the Tribunal turns to the question of whether there had been a dismissal. There were certainly no express words of dismissal used by the respondent at any time and this is a case where the Tribunal has to assess whether the respondent's actions were such as to amount to a dismissal.

58. The Tribunal considers that a reasonable employee who was not being provided with work would consider that they had been dismissed. This is especially true when they query this with their employer and, not only are they not given an adequate explanation, the employer, as in this case, makes a wholly false and baseless assertion (that is, the claimant was employed an a zero hours basis) in reply.

59. The Tribunal does consider that the respondent's actions in taking the claimant off the rota and, when she queried this, making false assertions to justify the lack of hours amounts to a dismissal under s95(1)(a) ERA.

60. If the Tribunal is wrong about that then it considers that the respondent's actions amount to a dismissal under s95(1)(c) ERA. It is the core of any employment relationship that the employer provides work which is done by the employee in return for payment. A failure by an employer, as in this case, to provide any work at all is a fundamental breach of contract entitling the employee to repudiate the contract.

61. This is exactly what has happened in this case; the respondent ceased to provide the claimant with work and, given the finding above that the claimant was employed to work 1 day of 3 hours a week, this was a fundamental breach of contract. This breach was compounded by the respondent making false and baseless assertions that the claimant was employed on a zero hours contract to try to justify the breach.

62. There is a question of whether the claimant resigned as soon as reasonably practicable given that the situation continued for a number of months. However, it was not the case that the claimant sat idly by while this continued; she queried the lack of hours; her mother sought to speak to the respondent to find out what was going on; she sent a letter setting out her views that what the respondent was doing was potentially unlawful which it took the respondent almost a month to respond.

63. The Tribunal considers that it was not until the claimant received the letter of 10 April 2024 that the situation was clear; she was not being provided with work and the situation was not going to change in the immediate future; the respondent was making a false assertion about the nature of her contract.

64. The Tribunal is, therefore, satisfied that the claimant did not leave it too long before resigning as it was not until 10 April 2024 that the position was clear.

65. Having found that the claimant had been dismissed, the Tribunal turns to the question of the fairness of that dismissal. The respondent, not having entered a defence or attended the hearing, have not discharged the burden of showing that there is a potentially fair reason for dismissal. For that reason alone, the Tribunal finds that the claimant's dismissal was unfair.

66. However, it is also the case that the respondent did not follow any form of fair procedure. There was no attempt to engage or consult with the claimant about the situation. It was only at the very last moment that the respondent provided any form of substantive response to the claimant's queries. Prior to that there was no attempt to meet the claimant, arrange some form of disciplinary or similar meeting or otherwise consult with her. The Tribunal would also find that the claimant's dismissal was procedurally unfair.

67. The second claim is the breach of contract claim relating to notice pay. The claimant was unquestionably dismissed without notice and the Tribunal, therefore, finds that she was dismissed in breach of contract.

68. Finally, there are the claims of disability discrimination under the Equality Act 2010. There are three claims; a claim of direct discrimination alleging that

the claimant's hours had been reduced because she was disabled; a claim of discrimination arising from disability relating to the reduction in hours alleging that this was done because the claimant would not challenge this due to her disability; a claim that the duty to make reasonable adjustments was breached by the respondent in failing to make such adjustments that would allow the claimant to understand any changes to her contract or working arrangements.

69. The Tribunal does not consider that there is any evidence from which it could conclude that the changes to the claimant's hours were made because she was disabled or for a reason arising from her disability. There was simply no evidence of this at all; the Tribunal had asked the claimant if there had been any issues with her disability or comments made about and she very honestly replied that there had not; there was no evidence about what happened to the hours of other employees over the same period from which the Tribunal could conclude there had been some difference in treatment.

70. Whilst the Tribunal can appreciate that the claimant, in the absence of any obvious explanation, has concluded that it must be something to do with her disability, the Tribunal needs evidence from which it can draw such an inference and there is simply no such evidence.

71. In relation to the reasonable adjustments claim, the Tribunal needs to be satisfied that the duty was engaged and this requires there to be a policy, criterion or practice (PCP) applied to the claimant which placed her at a disadvantage as a disabled person.

72. In this case, the claimant is, effectively, alleging that she was disadvantaged by being required to attend meetings about changes to her contract or working arrangements on her own and with nothing put in writing to assist her understanding of what was being said. However, the Tribunal has made no findings of fact that there were any such meetings.

73. At most there is a suggestion in the respondent's letter of 10 April 2024 that there had been some meeting about the claimant needing flexibility to develop her own business but there was no evidence and no finding by the Tribunal

that there had been any meeting where the claimant agreed to a zero hours contract or some other reduction in hours.

74. In these circumstances, there is no basis on which the Tribunal can conclude that the respondent did apply any PCP to the claimant which placed her at a disadvantage and so the duty to make reasonable adjustments was not engaged.

75. Again, the Tribunal can appreciate why the claimant has sought to advance such a claim; she was clearly anticipating that the respondent was intending to argue that she had agreed to some change to her contract or working arrangements. However, that has not materialised.

76. For these reasons, the Tribunal considers that the claims under the Equality Act are not well-founded and are hereby dismissed.

77. In light of the Tribunal's conclusion on the substantive merits of the claim, it does not consider that it is necessary for it to determine whether the claimant meets the definition of "disability" under s6 of the Equality Act.

Remedies

78. 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.

79. First, the Tribunal does not consider that there is any basis to make a deduction for contributory fault nor is there any basis on which it would be prepared to make a "Polkey" deduction to reflect the prospects of the claimant having been dismissed anyway if a fair procedure had been followed.

80. In the circumstances of this case, where there was no fair reason for dismissal, there is no basis on which the Tribunal could conclude there was any prospect of the claimant being dismissed at all nor was there any evidence that the claimant had in anyway contributed to her dismissal.

81. Second, there is no question of a failure to mitigate the claimant's loss. The burden of proving this lies on the respondent who has advanced no evidence

or argument to discharge this burden. In any event, the claimant gave evidence that she has sought to replace the earnings from her job with the respondent by increasing the amount of work she took on in her own business.

82. Third, there is the question of whether to Tribunal should apply any uplift to any 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 dismissal procedure. This failure was wholly unreasonable; there was no explanation, let alone an adequate one, why they did not engage in any process that emerged from the evidence. An uplift is, therefore, appropriate.

83. 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.

84. The Tribunal has then considered whether there is any basis why this should be reduced. The Tribunal considers that there are no mitigating factors that would lead it to reduce the uplift significantly. The Tribunal has taken into account the actual amounts of money involved as well the size and resources of the respondent. It is only those latter factors which has led the Tribunal to consider that a 15% uplift is appropriate.

85. Fourth, the Tribunal considers that the claimant's contractual wage should be used to calculate any compensation. Although her hours and pay fluctuated over the later part of 2023, the claimant was contracted to work 3 hours a week and the relevant provisions of the Employment Rights Act relating to the calculation of "a week's pay" require the use of the contractual wage.

86. At the relevant time, the National Minimum Wage was £10.42 for the claimant and so a week's pay was £31.26.

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

88. Based on the claimant's age and length of service she is entitled to a basic award of 7 weeks' pay at £31.26 = £218.82.

89. Turning to the compensatory award, there are a two heads of damages; loss of past wages and loss of statutory rights. The Tribunal will address each of these in turn before considering whether the statutory cap applies.

90. In respect of the loss of past wages, the Tribunal considers it appropriate to award this from the date of dismissal (10 April 2024) for a period of 12 weeks (3 months) whilst the claimant increased her earnings in her own business.

91. The total loss of past wages to the date of the Tribunal amounts to 12 weeks x £31.26 = £375.12.

92. The Tribunal makes no award for future loss on the basis that the claimant's increase earnings from her own business has replaced her wages from the respondent.

93. Given the claimant's length of service and the rights to notice and redundancy pay accrued by her, the Tribunal considers that compensation equivalent to four weeks' pay would be appropriate in respect of compensation for loss of statutory rights. This amounts to £125.04.

94. The total unadjusted compensatory award is, therefore, £500.16. This is less than the claimant's annual earnings and so the statutory cap does not apply.

95. The Tribunal awards a 15% uplift to the compensatory award as set out above which amounts to £75.02. This brings the total compensatory award to £575.18.

96. In these circumstances, the Tribunal makes a total award for unfair dismissal of **£794 (SEVEN HUNDRED AND NINETY FOUR POUNDS).**

97. 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 Employment Act 2002 applies.

98. 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.

99. 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.

100. 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.

101. 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.

102. The Tribunal considers that there was a wholesale failure by the respondent to provide the claimant with the necessary documentation.

103. 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.

104. The Tribunal therefore makes an additional award under s38 of the Employment Act 2002 equivalent to two weeks' wages in the sum of **£62.52 (SIXTY TWO POUNDS, FIFTY TWO PENCE).**

105. The Tribunal does not make any award for notice pay in order to avoid double counting. The notice period falls within the period for which the Tribunal has awarded loss of wages in the unfair dismissal claim and the claimant cannot receive compensation for loss of wages twice for the same period.

P O'Donnell
Employment Judge

12 November 2024
Date of Judgment

Date sent to parties **15 November 2024**