

# THE INDUSTRIAL TRIBUNALS

CASE REF: 5906/18IT

**CLAIMANT:** Jessica McWilliams

**RESPONDENT:** Dr C B Moore (Tara Moore)

## DECISION

The tribunal is unanimously satisfied that the claimant was unfairly dismissed by the respondent. The respondent is ordered to pay to the claimant the sum of £8,310.59.

### CONSTITUTION OF TRIBUNAL

**Employment Judge:** Employment Judge Browne

**Members:** Mr D Walls  
Mr R Black

### APPEARANCES:

**The claimant attended and represented herself.**

**The respondent was represented by Mr S Doherty, Barrister-at-Law, instructed by J Blair, Employment Law Solicitors.**

### EVIDENCE AND FACTS FOUND

1. The claimant was employed by the respondent from 1 December 2016 until 8 April 2018. Her complaint of unfair dismissal was received by the tribunal office on 2 May 2018.
2. In it, she claimed for unfair dismissal. She was informed by the respondent on 11 March 2018 of her dismissal, and her last day at work was 8 April 2018.
3. The respondent's case was that she admitted the dismissal. On her evidence, she had done so because the claimant was refusing to carry out what the respondent claimed were verbally agreed changes to the claimant's original contract of employment.
4. On the claimant's case, any changes to her duties were nothing more than favours carried out by her, to facilitate the respondent in time of need.

5. The parties were agreed that the written contract of employment had in fact been supplied by the claimant. It appeared to the tribunal that there otherwise would have been no such written contract. It was not suggested by the respondent that there would have been; and there was no evidence supplied by her of anyone else employed by her having such a document.
6. The contract of employment did not include a job title for the claimant. The respondent referred to employing her as a groom. The "Responsibilities of Employee" section of the contract stated them to be: "manage the daily running of the equestrian facilities ... maintenance and upkeep of yard ... travelling to and from competitions ... maintenance and fitness of the equines ... teach equitation and stable management".
7. The respondent also employed a handyman, whose duties appeared to include taking the respondent's seven children to and from school. There was no written contract produced in evidence, but that outline of his duties appeared to accord with the claimant's understanding of his role.
8. Sometime after the claimant started her employment, the handyman became ill, and was unable to perform the school run duties.
9. The claimant's case was that she stepped in, when requested by the respondent, to provide the children with transport to and from school. She did not receive any payment for this, but said that it was only done as a favour.
10. On the respondent's case, the arrangement became permanent by mutual agreement. In her view, there was clear understanding and agreement between the parties that the school run function in effect replaced the written contract of employment.
11. There was no evidence from the respondent as to how this would affect the handyman's contract in the event that he became well enough to return to his duties. There also was no evidence as to how or if he was remunerated for this function.
12. It was apparent from the evidence that the claimant stayed overnight in an annex to the property occupied by the respondent and her children. She was not charged for living there, and was able to use the washing machine and Sky television facility.
13. On the respondent's case, this arrangement was evidence in support of her contention that the claimant's contract had been changed, and that the "benefit in kind" was in effect substantial reward, equivalent to remuneration for her additional duties.
14. The claimant however said that she only stayed in the annex to enable her to help out with the school runs, as she otherwise found it difficult to travel to the respondent's property early enough to provide the children with their morning transport to school.

15. The claimant's evidence was that she, in effect, became weary of constantly helping out the respondent and being used by her to perform additional tasks for no extra pay. She made the point in evidence that her qualifications did not include childcare.
16. The respondent stated in evidence that the claimant's attitude to her work deteriorated, to the point where she considered that action had to be taken. On the claimant's case, she had repeatedly asked that her written contractual duties be adhered to.
17. In her witness statement, the respondent included in her concerns about the claimant's attitude the safety of her driving, which included texting and taking selfies; and a driving incident which resulted in police attending her property. The tribunal noted that no such concerns or allegations were put to the claimant in the disciplinary process which the respondent then instigated.
18. The first step in that process was on 27 February 2018, at which time the respondent contacted the claimant to arrange to meet. The respondent texted to the claimant, saying "this is not working out ... we need to discuss notice". The claimant replied that "we need to talk about my contract and what is expected of me ... I have asked for my hours to be made workable countless times and that the workload and expectations are seriously demanding and sometimes unrealistic ... if notice to terminate is your solution this will be provided".
19. It was therefore apparent that from the outset of this process, both parties contemplated termination of the contract. The respondent did not reply to correct or challenge the claimant's response on any point.
20. The two met on 28 February 2018 at the respondent's home.
21. The claimant challenged the respondent's evidence regarding her assertion that the claimant had in effect defaulted on what the respondent claimed was her contractual duties regarding the children. The respondent was unable to point to any occasion on which the claimant had refused to take them to school or collect them.
22. On 3 March 2018, the respondent emailed to the claimant, saying that she was "required to attend a disciplinary meeting" that day or one of the two following days. The respondent concluded the email with "At this meeting the question of disciplinary action against you, in accordance with the disciplinary procedure, will be considered with regard in going issued [sic] around work based attitude ... the possible consequences arising from this meeting might be termination of contract".
23. The claimant replied on 4 March, stating that she had just seen the respondent's email of 3 March. She queried what "disciplinary procedure" was being referred to; no response to that point came from the respondent. There was no provision for any such procedure in the written contract, and the respondent did not seek to adduce any evidence of it to the tribunal.
24. The claimant also challenged her ability to respond and prepare within such a short timeframe. She also asked for information as to what she had done wrong. The respondent replied by return to say "I can talk to you when you are about today", to

which the claimant replied that she would only discuss the timing of the meeting, but would refuse to discuss the content.

25. The claimant's refusal to discuss the matter resulted in an email from the respondent on the evening of 4 March. In it, the respondent stated that "verbal alterations" to the claimant's original contract of employment had changed the claimant's job. She further stated that the claimant had "resigned with effect on Friday 2nd March morning from your position as driver". She also referred again to the termination of the claimant's contract, in the context of the required notice period, and "I want to conduct a face to face meeting to express my concerns about your current employment. ... we can make a decision on the way forward and if termination of contract is the outcome ... you have a right of appeal".
26. The two met on 10 March; the claimant secretly made a recording of it on her mobile phone, the transcript of which was produced in evidence.
27. The respondent refused to discuss the claimant's assertion that she had fulfilled the obligations in her written contract, which the respondent described as being "void now because we have adjusted that verbally".
28. When the claimant asked for specific details of what the respondent meant when she referred to the claimant's behaviour and attitude, the respondent replied "Just your general behaviour and attitude. And your treatment of myself and the children". She provided no further detail or specific allegations, such as the safety of her driving later referred to.
29. Later on 10 March, the respondent sent an email to the claimant, partly written in the third person. It started by saying that the respondent on 3 March had requested a meeting "and you were made aware she was considering dismissing you ... I am ... writing to you to confirm the decision that you will be dismissed".
30. The letter concluded by confirming a right of appeal, which the claimant pursued in writing on 17 March 2018, stating that she believed the decision to dismiss her had been pre-determined.
31. The appeal was conducted on 22 March 2018 by the respondent; Pat Masterson, an HR consultant also attended. It was the respondent's case that because she was a sole employer, she did not have anyone else to conduct the appeal.
32. On 26 March 2018, the respondent wrote to the claimant, stating that the respondent had concluded that the appeal had been unsuccessful. She stated that there had been a "breakdown in confidence and trust leading me to conclude that I can no longer feel confident having you work in my household with the responsibilities for caring for my children as required for example by transporting them to school".
33. The respondent also stated that one of the grounds of dismissal of the appeal was "you have displayed an unacceptable attitude and behaviour to me and to your work".
34. The claimant's last day of work was 8 April 2018.

## LAW AND CONCLUSIONS

35. The relevant legislation is contained in Article 130 of the Employment Rights (Northern Ireland) Order 1996:

“130.—(1) 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 (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (ba)
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under a statutory provision.

(3) In paragraph (2)(a)—

- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(3A) F3. ....

(4) [F4Where] the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.”

36. In this case, it is the respondent’s case that it was the refusal of the claimant to comply with the mutually agreed terms of her contract of employment which was the principal reason for her dismissal. Such refusal, amounting to a “conduct” dismissal, if accepted by the tribunal, is a potentially fair reason for dismissal.
37. In order to reach its conclusion, the tribunal’s primary focus was upon determining the terms and conditions of the claimant’s contract, of which she was alleged by the respondent to be in breach, to the extent that such breach justified her dismissal as the reasonable response of a reasonable employer.
38. The original written contract was claimed by the respondent to have been amended by verbal agreement between the parties to include, in general terms, childcare responsibilities, especially their delivery to and collection from school.
39. The tribunal unanimously concludes that no such agreement was ever reached between the parties, sufficient to be viewed as a change to the claimant’s contract. The tribunal accepts the claimant’s evidence that any such arrangement was only ever performed by her as a favour to the respondent.
40. The situation arose due to the illness of the respondent’s handyman, who then was unable to carry out this task. There was no independent evidence that he was actually employed to do so, as the term “handyman” in itself is not sufficiently specific.
41. There also was no written contract produced to confirm it. There additionally was evidence to suggest that a number of other people had previously performed this task, with no clear information to confirm whether it had been part of their employment role, or if they had been prevailed upon by the respondent to carry it out as a favour.
42. The tribunal found the claimant to be an honest and compelling witness, and accepted as genuine her evidence that at no stage did she agree to vary the terms of her contract.
43. The tribunal found the respondent’s evidence to be unsatisfactory and not credible. Whilst it clearly suited her to have the claimant agree to do the school run, her desire could not credibly be deemed by her to amount to an agreed change in the claimant’s contract. A written contract appeared from the evidence to relate uniquely to the claimant; had she not supplied it herself, there seemed to be little if any prospect of the respondent doing so.
44. The terms of it were limited, but clearly confined to a job which was solely focused upon equine activities, and clearly the claimant’s chosen career path.
45. The tribunal considered it to be more likely than not that the arrangement about staying in the annex was practical, to ensure that the claimant was on site early enough to take the children to school, rather than a quid pro quo in lieu of more money for additional contractual duties.

46. The tribunal concluded from the language and tenor of the respondent's correspondence with the claimant that her mind was in truth made up from the outset to dismiss her, as confirmed by the focus of conversation being termination.
47. It appeared from the evidence that at some point, the respondent realised or was advised that her course of conduct was at least questionable, and possibly unlawful, as reflected in her more legalistic use of language.
48. The tribunal concluded however that such realisation came too late. The entire process could not properly be viewed as a meaningful disciplinary procedure, not least because the respondent did not have one. It was a sham and a shambles from beginning to end.
49. The tribunal therefore is satisfied that the claimant was unfairly dismissed, and that the respondent failed to abide by even the most rudimentary form of fair procedure before reaching her decision to dismiss the claimant.

## **REMEDY**

50. The tribunal has determined that the just and equitable remedy should be as follows:

Effective date of termination: 8 April 2018

Loss of income between EDT and start of new employment on 18 June 2018:

£578.51 x 9 full weeks' unemployment) = £5,207.59

The tribunal considers that, for the purposes of Article 17(3) of The Employment (Northern Ireland) Order 2003, in all the circumstances of this case, as detailed in the tribunal's conclusions, an uplift of 50% is just and equitable. Such uplift therefore is the sum of £2,603.00.

Loss of statutory rights: £500.00

The respondent is therefore ordered to pay to the claimant the sum of:-

£8,310.59

51. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

**Employment Judge:**

**Date and place of hearing: 26 June 2019, Belfast.**

**Date decision recorded in register and issued to parties:**