



EMPLOYMENT TRIBUNALS

Claimant:

Mrs Tiffany Walker

v

Respondent:

Miss Nwaz Obiagwu

Heard at:

Watford

On: 22 August 2017

Before:

Employment Judge I Henry

Appearances

For the Claimant: In person

For the Respondent: Mr C McDevitt (Counsel)

JUDGMENT

1. The claimant did not resign from her employment.
2. The claimant was unfairly dismissed when her employment was terminated on the 15 January 2017.
3. I award the claimant a total award of £8,130.64

REASONS

1. The claimant by a claim form presented to the tribunal on 8 April 2017, presents a complaint for unfair dismissal when her employment was terminated on 15 January 2017.
2. The claimant commenced employment with the respondent on 5 December 2014, the effective date of termination was 15 January 2017; the claimant then having been employed for two complete years.

Issues

3. It was agreed at the outset of the hearing that the issue for the tribunal's determination was whether the claimant had resigned from her employment or was there a dismissal.
4. It was accepted that, if there was a resignation that was determinative of the case, and if there was not a resignation, on the respondent operating on the premise that there was, where there is no suggestion that there were otherwise circumstance for which it was reasonable to terminate the

claimant's employment pursuant to section 98(2) of the Employment Rights Act 1996, there would follow an unfair dismissal.

5. The tribunal heard evidence from the claimant and from Mr Muctaru Fofanah and Ms Karen Hackshaw-Sey on the claimant's behalf, and from the respondent. The witnesses' evidence in chief was received by written statements. Having received the written statements, and having considered the high watermark of the respondent's case, as to the words of resignation, and on the respondent having no further factual evidence to proffer beyond that contained in her witness statement, cross examination of the parties was not deemed necessary. The tribunal received oral evidence in respect of remedy.
6. The tribunal had before it a bundle of documents exhibit R1.
7. From the documents seen and the evidence heard, the tribunal finds the following material facts.

Facts

8. The respondent, Ms Obiagwu, is the sister of Mr Obiagwu, an individual who has severe learning difficulties and physical disabilities including microcephaly, cerebral palsy, spastic quadriplegia and epilepsy, for which he has very limited mobility and no speech. Ms Obiagwu is the responsible person and care manager for Mr Obiagwu.
9. Mr Obiagwu requires 24-hour care, and lives in supported housing accommodation with another tenant, a Mr McNulty. Funding for the care of the residents are through direct payments from the local authority with cash payments being given to individuals in need of care and support, so that they can source their services themselves. As part of the process, Ms Obiagwu engages the carers for her brother, and so engaged the claimant; being employed as a personal assistant support worker (PA) for her brother, the appointment following a recommendation from one of Ms Obiagwu's former personal assistants.
10. Payroll services for the PAs are processed by the National Payroll Service, on the respondent furnishing relevant information as to hours worked by the PA.
11. The claimant was employed on a zero hours contract. It is however accepted that at the material time, when the claimant's employment came to an end, she was working weekend shifts commencing at 2.30 pm on the Saturday to 2.30 pm on the Sunday, the hours of 9.30 pm Saturday to 7.15 am on Sunday, the claimant had sleep in duties.
12. It is the practice within the home that food which is purchased for the residents is also available for staff's consumption.

13. It is not in dispute that until 15 January 2017, there was a positive relationship between the claimant and the respondent. There were no issues with regard to the care of Mr Obiagwu, and no issues of concern between the claimant and the respondent and indeed, the respondent had been very supportive of the claimant in respect of difficult financial circumstances she had been encountering.
14. On 15 January 2017, according to the practice of staff availing themselves of food in the house, on preparing a meal utilising one of two pieces of salmon, leaving one further piece of salmon for Mr Obiagwu and Mr McNulty to eat during the week, the respondent challenged the claimant as to her eating the salmon, informing the claimant that she had noticed that she was regularly preparing salmon whilst working her shifts, the respondent's evidence to the tribunal, being that, *"I asked her to "shake it (her meals) up" in case the other PAs began to complain"*. The claimant thereon advised that other staff equally ate the salmon when she prepared it. It is the respondent's further evidence that, she further advised the claimant that *"in future, if there was only one piece of salmon in the fridge then she should save it for Mr Obiagwu or Mr McNulty to have"*.
15. It is not in dispute that the claimant took exception hereto, and stated that she had been humiliated and belittled for having taken a meal and was upset.
16. On the claimant having been spoken to, she returning to the living room, in a state of agitation, and threw away her meal.
17. The claimant, still upset, was then engaged in discussions with a colleague advising of her sense of grievance.
18. The respondent subsequently returned to the living room, the claimant still in a state of upset, and asked the claimant to join her in another room. It is the respondent's evidence that:

"I waited approximately five minutes before going to speak with the claimant because I wanted to allow opportunity for her to calm down. I wanted to explain why I had asked to speak with her about the salmon. I had not intended for this situation to escalate and had not anticipated that the claimant would be so angry about the matter. I was surprised that the claimant had reacted in such a volatile and unprofessional manner.

I went into the sitting room and the claimant was still shouting that I had "humiliated" and "belittled" her for having eaten the salmon... I apologised to the claimant for the way she perceived that I had spoken to her. Although I had spoken to the claimant calmly, she had become very angry and appeared to me to still be angry. I asked to speak with her again privately and we went upstairs into the office room."
19. It is the respondent's evidence that she thereon sought to explain a previous incident with another PA regarding the preparation of food and the use of provisions, and that she was conscious that food should be

equally apportioned to last until the end of the week in order to avoid any further disputes between PAs, and that that was why she had raised the issue with the claimant.

20. It is the respondent's evidence that the following occurred, which I set out in full, as it is the material circumstance leading to the alleged resignation:

"The claimant refused to listen to my explanation and appeared to become angrier. She continued to say that I had "humiliated" and "disrespected" her.

The claimant stated "*I will be leaving*" and it was clear to me from her language and behaviour that she no longer wanted to work for me. I took this to be the claimant's resignation with immediate effect."

21. The claimant thereon left the room and was followed by the respondent, who then asked her to leave the premises. The respondent's evidence being that:

"The claimant said that she still had paperwork to complete so I waited for her to complete Mr Obiagwu's health chart and I asked her to return the keys to the property which she did without question".

22. The claimant does not accept this account, giving evidence that whilst in the kitchen/living room discussing with her colleague PA how the respondent had belittled her and reprimanded her about the consumption of food, and that she (the respondent) had made her feel uncomfortable in relation to food within the premises, which she felt was wrong she had then stated "*she made me feel like I shouldn't be here (in the workplace)*" at which point the claimant states the respondent entered the kitchen, and having heard what she had said, stated, "*Is that right?*"... "*If that's how you feel, then give me your keys and leave*". The claimant here states that, she thereon asked the respondent what it was that she was talking about. The claimant further advances that the respondent was agitated and kept repeating her command for her to give her (the respondent) the keys to the premises and to leave.

23. It is the claimant's evidence that she did not then wish to have any further dispute with the respondent and left peacefully.

24. The following day, 16 January, the claimant texted the respondent asking for a meeting with respect to the events of the previous day. The respondent responded, advising:

"You told me yesterday that you do not want to work at 41B Evening Road any more. Please note that based on your decision, I will not be able to attend any meeting with you regarding the matter. I wish you all the best for the future. Kind regards ..."

25. Despite further efforts of the claimant to have a meeting with the respondent, the respondent declined.

26. On 21 January, the claimant's next scheduled shift, having attended work, on her being observed by the respondent, she was instructed to leave, which after the respondent threatening to call the police to have her removed the claimant left the premises.

The law

27. It is trite law that, unambiguous words of resignation are to be taken at their face value without the need for any further analysis of surrounding circumstances, see Southern v Franks Charlesly & Co [1981] IRLR 278, Court of Appeal. This rule however, has been qualified that there might be exception in cases of an immature employee making a decision or otherwise decisions taken in the heat of the moment or where an employee is coerced into a decision by the employer. Dame Elizabeth Lane in Southern v Franks Charlesly & Co addressed the relevant issue as follows:

“25. It appears to me that there are three questions to be asked and answered:

- (i) What did the employee say...
- (ii) What did the words... used mean
- (iii) Did she mean those words?

As to answers:

- (i) She said “I am resigning” as the Industrial Tribunal found
- (ii) Those words in my view, had the same meaning as “I resign”. Both are in the present tense and, at any rate in the context of this case, both expressed an intention to resign then and there and were so understood and accepted.
- (iii) Those were not idle words or words spoken under emotional stress which the employers knew or ought to have known were not meant to be taken seriously. Nor was it a case of employers anxious to be rid of any employee who seized upon her words and gave them a meaning which she did not intend. They were sorry to receive the resignation and said so.

In my judgment, what happened thereafter was irrelevant to the determination of the issue.”

28. And in Martin v Yeomen Aggregates Ltd [1983] ICR 318, EAT, Mr Justice Kilner Brown, opined that: It was desirable, as a matter of common sense and good industrial relations, that an employer (or employee) should – in special circumstances – have the opportunity of withdrawing words spoken in the heat of the moment. If words spoken in anger were immediately withdrawn there was no dismissal. It is here to be noted that the general rule in this respect is that once notice to terminate a contract has been given, it cannot be withdrawn unilaterally. See CF CAPITAL plc v Willoughby [2012] ICR 1038 that:

“Per Rimmer LJ

27. “... the “special circumstances” exception to which I have referred is one that finds its expression and application in several reported authorities. They are cases in which either the employee has given an oral notice of resignation or (less commonly) the employer has given an oral notice of dismissal. The words of the notice so given may, on the face of it, be clear and unambiguous and may take effect according to their apparent terms. Indeed, the general rule is that they will do so. The authorities recognise, however, an exception to that general rule, namely, that the circumstances in which the notice is purportedly given are sufficiently special that it will or may *not* take such effect. For example, the words of notice may be the outcome of an acrimonious exchange between employer and employee and may be uttered in the heat of the moment such that there may be a real question as to whether they were really intended to mean what they appeared to say. In such circumstances, it will or may be appropriate for the recipient of such a notice to take time before accepting it in order to ascertain whether the notice was in fact intended to terminate the employment. If he does not do so and, for example, simply (and wrongly) accepts an employee’s purported resignation at face value and treats the employment as at an end, he may find himself in receipt of a claim for unfair or wrongful dismissal. The general rule and the “special circumstances” exception to it have been recognised in several decisions of both the Employment Appeal Tribunal and this court.”

29. Where there is ambiguity in the words used, the test whether the ambiguous words amount to a dismissal or a resignation is an objective one, to take into account all the surrounding circumstances, both preceding and following the incident, and the nature of the workplace in which the words were used are to be considered.
30. If the words are still ambiguous, the tribunal is tasked to ask itself how a reasonable employer, or employee, would have understood the words in light of those circumstances.
31. It is further to be noted that, it is a well established principle in the construction of commercial contract that, any ambiguity will be construed against the party seeking to rely on it which was supported in the authority of *Graham Group Plc v Garratt* EAT 161/97, upholding the principle that it should also be applied to ambiguous words or acts in the context of a dismissal or resignation.
32. The tribunal was also referred to Harvey’s on industrial relations and employment law division D1C paragraph 224.02 to 263 and division D1 3H. 543 to 600.

Submissions.

33. The tribunal received oral submissions from the claimant and the respondent. The submissions have been fully considered.

Conclusions

34. I have not sought to determine the factual matrix of the case being presented by either the claimant or the respondent, but have considered it from the highest point of the respondent's case, the respondent maintaining that the claimant had resigned, the claimant maintaining that she had not.
35. In approaching a determination of the issues from this perspective, I do not dismiss the claimant's contentions, but in light of the issues for the tribunal's determination, the determination of the case advanced by the claimant is not necessary.
36. The high-water mark of the respondent's case is that, on 15 January whilst addressing the claimant for the second time regarding the claimant's availing herself of food within the house, the claimant uttered the words "*I will be leaving*" from which the respondent maintains she understood this to be the immediate resignation of the claimant.
37. It is accordingly the issue for termination in the first instance, whether these words amount to an unambiguous statement of resignation. The statement "*I will*" is a clear indication of an intention in the future which can be readily distinguished from the expression which one would usually encounter in circumstances of utterances of dismissal, being, "*I am*," and a clear indication as to a present state of affairs. I am satisfied on a literal reading of those words, that it is not a reference to present circumstance but is a reference to a future state. This is not sufficient to amount to unambiguous words of a present act of resignation.
38. The respondent here submits that, at most, the expression then is ambiguous, and I am asked to consider surrounding circumstance as evidence of the claimant's intention to resign on 15 January.
39. On a consideration of the factual matrix at the material time, that of the claimant being emotionally upset at having been spoken to by the respondent, the claimant in that state of upset having uttered the words the subject under consideration, then returning to continue her work, only then leaving the premises on direction of the respondent, the factual matrix supports the claimant's submission that, she had not thought to resign, which on an objective view of events, I would concur.
40. For these reasons, I find, giving consideration to the respondent's case at its highest, that the words used by the claimant and the circumstance existing at the material time, both before the utterance of the words alleged and after, do not exhibit circumstance from which a resignation can be gleaned.
41. I accordingly find that the claimant did not, on 15 January, resign from her employment.

42. On it not being advanced that there were reasons pursuant to s.98(2) of the Employment Rights Act 1996 for the termination of the claimant's employment, and in circumstances where the claimant's continued employment was brought to an end by actions of the respondent, I find that the claimant has been unfairly dismissed.

Remedy

43. The claimant pursuant to section 112 of the Employment Rights Act 1996 seeks reinstatement. The respondent submits that it is not practicable to reinstate the claimant on grounds that the relationship between the claimant and Ms Obiagwu, the individual who has responsibility for commissioning care for her brother has broken down, and that on that premise she does not trust the claimant to give her brother the care that is required, on the premise that the claimant's employment being terminated, albeit there were no questions as to the claimant's care for her brother, that situation has since changed in that the respondent now does not believe that will endure.
44. In giving consideration to the questions for the tribunal's determination, the tribunal's role is set out at section 116 of the Employment Rights Act, which on the claimant expressing a preference under section 116(1)(a) it is the tribunal's task to determine whether it is practicable for the respondent to comply with an order for reinstatement.
45. I am reminded on the evidence, that there was no question as to the care being offered by the claimant and indeed, prior to 15 January the claimant was highly regarded. However, in giving consideration to the situation that now exists, I am conscious that the respondent, Ms Obiagwu, is not present at the premises and to all intents and purposes need not be present at the premises in respect of the care for her brother. It is nevertheless the case that, Ms Obiagwu will from time to time attend the premises and it is clear that there is animosity, as exhibited during this tribunal hearing, between the claimant and Ms Obiagwu.
46. Whether this animosity is temporary in nature I am not able to say, but what is evident is that at this current time it is deeply felt, and indeed this is not just from the respondent, it has also been expressed by the claimant. It is evident that, should Ms Obiagwu attend the premises as she is prone to do and is entitled to do, on the times when the claimant is likely to be present on a weekend, it is likely that they will come into contact and there is potential for conflict on such occasions.
47. This does not however, necessarily translate to reflect on the care that the claimant would afford the respondent's brother, which I believe would in the main be satisfactory, but the potential for conflict is great. In these circumstances, as best I am able, I find that it would not be practicable to order reinstatement in this instance on account of the potential for conflict.

48. In these circumstances, I do not order reinstatement.
49. I accordingly turn to consider re-engagement. There is no evidence of there being any role within the establishment for which the claimant could then be engaged. I do not order re-engagement. I further here note for completeness that, re-engagement has not been formally sought by the claimant.
50. On my not ordering reinstatement or reengagement, I turn then to a consideration of compensation pursuant to section 118 of the Employment Rights Act. The claimant's gross weekly wage was £171.50. The claimant was aged 36 years at the time of termination.
51. I award the claimant the following:

Basic award

52. The claimant had been employed for two complete years. Her weekly salary was, £171.50. I award the claimant £343.00.

Compensatory award

53. I am satisfied that the claimant has made reasonable efforts to mitigate her loss. I accordingly award the claimant loss of wages for the period from dismissal to the date of today's hearing, being a total of 31 weeks. The claimant's net weekly wage was £143.08.
54. I award the claimant the sum of £4,435.48.
55. In giving consideration to the claimant's future losses, the claimant has experience in the care industry and in retail, as best I am able, taking into account the current employment market, I believe that the claimant taking into account her current immigration position, that of establishing her right to work in the UK, namely having her indefinite leave stamped in her live passport; it having been in her expired Jamaican passport, I believe that within a period of four months, the claimant would be able to secure gainful employment at a wage of £10.00 per hour or close thereto.
56. I accordingly award the claimant future loss of earnings for a period of four months. The claimant's weekly wage was £143.08. The claimant's monthly wage was £620.00 per month. I award the claimant £2,480.00.

Accrued annual leave

57. The claimant would have accrued annual leave for the period 16 January to 28 August, a total of 31 weeks. The claimant would have accrued 3.3 weeks' annual leave. The tribunal awards the claimant £472.16.

Contributory fault

58. I do not find the claimant to have contributed to her dismissal. The claimant was dismissed on the premise that she had resigned. The words attributed to that resignation did not amount to words of resignation and was therefore an error on the part of the respondent in treating it as such, where the claimant sought to return to her duties immediately thereafter only being prevented from so doing by the actions of the respondent. In these circumstances, I do not find the claimant to have contributed to that dismissal.

Polkey

59. Save for the events on 15 January, there is no question of the claimant's employment being in jeopardy; there being no question as to the level of care being given to the respondent's brother.

60. Following the events of 15 January, the consequence of the claimant being spoken to in respect of matters not connected with her performing her duties as carer, which had every potential to have been resolved on the day. There was nothing there from that would have called into question the further employment of the claimant. I am unable to find circumstance for which the claimant's employment could have been terminated save for the misunderstanding going to resignation. This is not a case for which a Polkey reduction would apply.

61. Having delivered judgment at hearing, in fairing the decision I have noted that an award in respect of loss of statutory rights had not been addressed for which I here amend the judgment to include an award of £400.00 for loss of statutory rights.

62. I award the claimant a total award of £8,130.64

Employment Judge Henry

Date: 9 November 2017.....

Judgment and Reasons

Sent to the parties on: 9 November 2017

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For the Tribunal Office