



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4118046/2018

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Hearing Held at Wick on 8 and 9 January 2019

Employment Judge: Mr A Kemp

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Miss A Sutherland

**Claimant
In person**

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Thurso Dry Cleaning Laundrette

**Respondents
Represented by:
Mr T Muirhead
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal finds that –

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(i) The Claimant was dismissed by the Respondents on 31 July 2018.

(ii) The dismissal was unfair.

(iii) The Respondents is ordered to pay the Claimant a monetary award in the sum of Four Thousand and Forty One Pounds and Ninety Eight Pence (£4, 041.98).

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(iv) The prescribed sum is One Thousand, One Hundred and Twenty Seven Pounds and Fifty Eight Pence (£1,127.58), and relates to the period from 31 July 2018 to 21 January 2019.

(v) The monetary award exceeds the prescribed sum by Two Thousand, Nine Hundred and Fourteen Pounds and Forty Pence (£2,914.40).

2. The Claim for unpaid holiday pay is withdrawn on settlement.
3. The Claim for notice pay is dismissed in respect that no loss beyond the award made above was suffered.
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4. The claim for a statutory redundancy payment is dismissed in respect that the Claimant was not dismissed for redundancy.

10 REASONS

Introduction

- 15 1. The Claimant made a claim for unfair dismissal, a statutory redundancy payment, and for notice pay as damages for breach of contract, against the Respondents. The Claim was denied. The Respondents did not accept that there had been a dismissal. The Claimant had earlier made a claim for holiday pay, which was settled between the parties in December 2018.
- 20 2. The Claimant represented herself. The Respondents were represented by Mr Muirhead.

Issues

- 25 3. The Tribunal identified the following issues:
 - (i) Had the Respondents dismissed the Claimant under section 95(1) of the Act?
 - (ii) If so, what was the reason for that dismissal?
 - (iii) If the reason was potentially fair under section 98(1) and (2), was that
 - 30 dismissal unfair under section 98(4) of the Act?
 - (iv) If there was an unfair dismissal, what was the extent of the Claimant's losses and what remedy should be given?
 - (v) If there was a dismissal was any sum due in respect of notice?

- (vi) If the reason for any dismissal was redundancy, what was the amount of the statutory redundancy payment that would then be due?

Evidence

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4. A bundle of documents had been prepared, and was added to by text messages from and to Mrs Young, and a handbook relating to Health and Safety. The Claimant gave evidence and called as witnesses Mrs Fiona Young and Mr Ryan Buttress, with their evidence being heard on 8 January 2018. Ms Leask gave evidence for the Respondents that day up to the end of cross-examination, and called on the following day after the evidence of Ms Leask was completed Miss Sharon Sharratt and Ms Caroline Begg. In his evidence Mr Buttress said that he had recorded an event on 4 August 2018. It was accepted subject to hearing submissions as to its admissibility, as addressed below. He played that recording on his mobile phone when he gave evidence but at that stage it was not easy for me to discern what had been said. I asked him to send a copy of that to the clerk, which he did after the end of the first day, and a copy was provided to Mr Muirhead before evidence was heard on the second day. I allowed Mr Muirhead to recall his client for further examination in chief to comment on that recording. The Claimant was also permitted to send a document she had requested to confirm the date of commencement of employment with the predecessor business operating the Launderette, which she did after discussions with HMRC on its details by email dated 17 January 2019. Mr Muirhead was sent a copy and had an opportunity to comment on it., and did so on 21 January 2018.
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Facts

- 30 5. The Tribunal found the following facts to have been established:
6. The Claimant is Miss Alison Sutherland. Her date of birth is 7 July 1963.

7. The Respondents trade under the name Thurso Dry Cleaning Laundrette. They are a firm. The partners are Ms Katrina Leask and Mr Michael Wylie. (I shall describe that firm with those partners as “the firm”).
- 5 8. The business of the firm, as its name implies, is as a launderette (the spelling of the business name is understood to be historic), and it provides services for washing and ironing of laundry. It has premises in Thurso.
9. The Claimant commenced working at the launderette by 5 April 2000, and
10 she had continuous service from that date. She was then, and remained until the termination of employment, a Laundry Assistant. The business was originally owned by Mr Iain McGillivray. In 2000 the business was acquired by Mr and Mrs Bridge. The business was in turn acquired by the firm on 5 December 2015.
- 15 10. The acquisition of the business was accepted to be a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006.
11. Ms Leask carried out most of the day to day management of the business of
20 the firm and its administration. She has long business experience. Mr Wylie attended to matters of maintenance and transporting items and people.
12. At around the time of that acquisition the firm discovered that there had not
25 been statements of terms of employment under section 1 of the Employment Rights Act 1996, or contracts of employment, issued to employees of the business at any stage.
13. The firm issued a Handbook in summer 2016, after receiving advice on issues
30 of employment law, and health and safety including for risk assessments, from advisers on such matters, and on employment law, Citation Limited. The Handbook related to Health and Safety. It was given to the Claimant who returned a form confirming its receipt to the Respondents.

14. A second Handbook was prepared by Citation Limited for general matters relating to employment at about the same time. The Claimant had not been provided with it at the time of the termination of her employment.
- 5 15. The Claimant worked a set 36 hours per week, latterly from Tuesdays to Saturdays. On almost all days, except Tuesdays, Mr Wylie collected her by car from her house to take her to work. She commenced work each day at 9am, and save for Fridays when she finished at 1pm she worked to 5pm.
- 10 16. The Claimant worked 36 hours per week at an hourly rate of £8. Her gross weekly wage was £288. The Claimant was paid a net weekly wage of £257.08. There were deductions that included for employee pension contributions of £4.13. The Respondents made employer contributions to pension of £3.44 per week.
- 15 17. The Claimant had not been subject to any disciplinary procedure in her employment, either formal or informal.
18. The other employees of the Respondents latterly included Sharon Sharratt,
20 Nadine Sharatt, who are the Claimant's sisters, and Caroline Begg. There were normally about four employees of the Respondents.
19. In around January 2018 Ms Leask discussed with the staff the possibility of
25 having reduced hours of work during winter months when the level of work reduced materially. No steps were then taken to effect such a reduction.
20. In July 2018 Ms Leask prepared her own draft of a contract of employment.
30 She did not have advice from Citation Ltd to do so. She did so using as a template the contract her son had. He was employed at a café on what was a zero hours contract. She used that template with the provision on zero hours as she wished to be able to reduce the hours of work of her employees during periods of less activity, particularly during the winter months.

21. She produced a document in the form of a draft contract which had no space for the name of the employee, and blanks for the date of continuous service and rate of pay. It referred to a Handbook, which it said “will” be produced.
- 5 22. It had a provision for hours of work which stated:
“The Company does not guarantee to provide you with a minimum or maximum number of hours of work. You will be expected to keep your working hours flexible to a reasonable extent, depending on the needs of the Company. At times needs of the Company will require these hours to be modified and you will be expected to vary your hours of work accordingly”.
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23. There was a provision for deductions from pay which included losses “caused through your conduct, carelessness, negligence, recklessness or through your breach of the company’s rules or any dishonesty on your part”.
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24. There was a provision entitling the Respondents to “make reasonably amendments to your terms and conditions of employment.” It referred to the Data Protection Act 1998. The acknowledgement referred to the Handbook, and that it had been provided in copy. (There were other provisions which were not material for the present case).
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25. The Respondent left about six copies of that draft contract in the rear area of the premises on 27 July 2018, the date the draft bears. She said to the employees present, including the Claimant and her sisters Sharon Sharratt and Nadine Sharatt, that they should read them.
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26. The Claimant did so and was concerned at the terms of the draft contract. She sought advice from the Citizens Advice Bureau (CAB) on 30 June 2018. They in turn sought advice from ACAS that day. The Claimant was advised that a number of the provisions were not advantageous to her, and could not be imposed without consultation about them. She was advised to work under protest if necessary. She was advised that the statutory provision as to data
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protection was not the current provision, and that other aspects were not appropriate.

27. On 31 July 2018 shortly after 9am the Claimant arrived at the Respondents' premises and started to work in the rear area of the shop. Miss Sharratt was also present in that area, towards the rear of it. Ms Leask came into the rear area, placed a copy of the contract beside where the Claimant was working and said that she had to sign it. The Claimant stated that as it stood she could not. She was told that she must sign it, or she could no longer work there. The Claimant reiterated that she would not sign it as it stood, but that she would work under protest as advised by CAB and ACAS the previous day.
28. Ms Leask told her to take five minutes and write on the contract everything she thought was wrong with it. The Claimant did so, seeking to recall what she had been advised. She sat at a table towards the front of the rear area, near a doorway leading to the front area of the premises, whilst Ms Leask remained standing next to her. Miss Sharratt remained working a little further to the rear of that area. The document with the Claimant's written comments commences at page 37 of the bundle.
29. The comments included the lack of consultation or reason for changing the terms, the absence of a date of continuous service, that the Handbook issued only covered H&S (meaning health and safety), the absence of a rate of pay, questioning what constituted negligence or carelessness for deductions, that the zero hours contract was not acceptable, that the wrong DP (data protection) Act was cited, and that there had been no variation clause previously, amongst others.
30. Whilst the Claimant was doing so Ms Leask said that she had taken legal advice from Citation the previous evening and she had been told that the contract was "fine".

31. Ms Leask had not taken advice from Citation Ltd, or any other party, about that draft contract, and her comment was untrue.

5 32. Ms Leask believed that the Claimant had not obtained advice from the CAB and asked for a letter from them stating what was wrong with the contract, in the expectation that the Claimant could not do so.

10 33. Ms Leask separately stated that CAB and ACAS had given her bad advice, and that her solicitor was correct.

15 34. After the Claimant had finished writing Ms Leask stated that if the Claimant had been to the CAB the previous day they would have given her a letter, and alleged that the Claimant was lying about having done so. She said that the Claimant should go.

35. The Claimant moved to collect her handbag and jacket, at which point Ms Leask stated that the Claimant would “not get another penny” out of her.

20 36. The Claimant stated that Ms Leask “would definitely hear from Citizens Advice now”. That was not heard by Ms Leask. She left the premises at about 9.30am.

25 37. The Claimant immediately went to the CAB office, where she related what had occurred. She was distressed, and crying. She did not have another job to go to, and no other source of income.

30 38. Later that same day, on 31 July 2018, the CAB wrote to Ms Leask confirming that the Claimant had attended their office the previous day and been advised with regard to the draft contract, and recorded that they had been advised that day, in summary, that “if she did not sign the contract, she could not work at your premises and must leave.” It sought confirmation that she had been dismissed.

39. During the afternoon that day the Claimant and Mrs Young discussed matters at the Claimant's home. The Claimant told Mrs Young that she had been given a draft contract she was not happy with and that Ms Leask had said that if she did not sign it she could not work there any more.
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40. Ms Leask wrote some comments of her own on the draft contract during the course of that day, disputing some of her comments with regard to the Handbook and in relation to health and safety.
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41. Ms Leask attempted to contact the Claimant by telephone around lunchtime that day, but in error used an old number for the Claimant, and the call did not connect. Ms Leask attempted later to contact the Claimant by Facebook, but unsuccessfully as shortly following what she considered to be a dismissal the Claimant had removed Ms Leask from her list of Friends on her Facebook page which denied her contact by that method.
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42. Ms Leask sent a text to the Claimant at 17.05 that evening, but again to the wrong number in error such that it was not received. It stated "Will u b in tomorrow? If not I will b up for key shortly." She sent a further similar message to the same wrong number at 17.33 that day as follows "I need to know for putting in your work hrs for this week."
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43. Ms Leask was with Mr Wylie when sending those two texts. They live together. She informed him of the meeting that had taken place that day with the Claimant.
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44. Mr Wylie did not attend to pick up the Claimant for work on 1 August 2018, which was a Wednesday and a day he would be expected to do so. The Claimant was prepared to be picked up for work that morning. She did not attend for work as she believed that she had been dismissed.
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45. At 9.03 on 1 August 2018 Ms Leask sent a further text to the same wrong number stating "You are late!"

46. Ms Leask was not aware when making the phone call or sending the texts referred to that she had used the wrong number. She wrote to the Claimant by letter dated 1 August 2018 referring to what she described as the Claimant having “walked out of work yesterday at approximately 9.20am without informing the Company of the reason as to why”. She sought a reply by Saturday 4 August 2018 and stated that the leave was unauthorised and may be a disciplinary issue. She sent that letter prior to seeing the letter from the CAB sent the day before.
47. On that day Ms Leask contacted Mrs Fiona Young, a former employee of the launderette and known by her to be a friend of the Claimant, by text to try and obtain the Claimant’s full address. Mrs Young replied that she did not have the house number.
48. Also on 1 August 2018 Ms Leask contacted Citation Ltd. She sent them the draft contract with the Claimant’s handwritten comments. They advised her that she had been wrong to use such a style which did not conform with their own one. At some point thereafter, on a date not established in evidence, they provided the Respondents with a revised draft in materially different terms to the original draft (pages 43-47). That draft was not issued to the Claimant. It has not been provided to other members of staff.
49. On 2 August 2018 Ms Leask sent a text to Mrs Young with a request to pass on a message to the Claimant which included “ask her to put key back”. Mrs Young informed the Claimant of that. The reference to the key was to the key for the launderette premises.
50. On 2 August 2018 also the Claimant attended the local Job Centre. She made a claim for Job Seekers Allowance. She commenced searching for new employment.

51. On 3 August 2018 at about 4pm the Claimant received the letter from Ms Leask dated 1 August 2018. The Claimant wrote a reply that day. It included her description of events as follows:

5 “On Tuesday morning you told me to sign a new contract, which I wasn’t happy to do. I informed you I would not sign but I would work under protest. You replied NO if I didn’t sign I could not longer work there, and I wouldn’t be getting paid. You then asked me to write everything down I felt was wrong with the contract, which I did. While I was doing so you told me that Citizens Advice Bureau and ACAS were wrong and had given
10 me bad advice as you had sought legal advice the previous night and you were adamant you didn’t need to consult or negotiate with staff and that what I was writing was wrong. When I finished writing you told me to go, I wouldn’t get paid, and that I wouldn’t get another penny out of you.”

15 52. The Claimant later placed that letter in an envelope and also placed in the envelope the key for the premises she had been asked to return by the message passed to her by Mrs Young. She then attended at the premises on 4 August 2018 accompanied by Mr Buttress. He recorded matters on his mobile telephone.

20 53. The Claimant entered the front of the premises which is a public area with washing machines and tumble driers. Towards the end of that area was a small kitchen. She reached into there to recover her cup. She then handed the envelope to Ms Leask, who was standing behind an open doorway in the
25 rear area of the shop. Ms Leask said “You can’t just walk in here”. The Claimant replied that she had only come to collect her cup. She then left the premises. These events took approximately 30 seconds.

30 54. On 6 August 2018 Ms Leask wrote to the CAB to reply to the letter dated 31 July 2018. It also replied to the Claimant’s letter of 3 August 2018 which had by then been received also. Ms Leask denied making the comments alleged. It stated that there had not been a dismissal. Ms Leask in effect

invited the Claimant to return to work, although it did raise an issue as to whether or not the Claimant was on an unauthorised absence.

55. In addition she attached a statement in writing from Miss Sharon Sharatt. It
5 had been requested by Ms Leask after she received the CAB letter. Ms Leask informed Miss Sharratt about the claim in that letter that there had been a dismissal.

56. The statement by Miss Sharatt was written on or about 3 August 2018. It had
10 the following description:

“Katrina asked Alison to read her contract of employment, sign it and bring it back. Alison said ‘No, I’m not signing that.’ Katrina asked ‘Why was there a problem’ Alison replied ‘quite a few’. Katrina said ‘We’ll take 5 minutes now and sit down and discuss it’ which they did. There was a
15 discussion back and forth about CAB and Citation and Katrina then asked Alison to get a letter from CAB stating what was wrong about contract. Alison then got up from where she was sitting, got her jacket and handbag, said she was going to CAB, walked away mumbling. I assumed she’d gone to get the letter but she never came back that day or rest of
20 week. Katrina never said she was sacked.”

57. The Claimant attended at the CAB on 9 August 2018 and read the terms of the letter dated 6 August 2018. She was shown the statement from Miss Sharratt. She decided that she wished to pursue matters through ACAS for
25 early conciliation and a letter to confirm that was sent that day to the Respondents. Early conciliation was commenced that day through ACAS.

58. The Early Conciliation Certificate was issued by ACAS on 14 August 2018.

30 59. The Respondents wrote further to the Claimant on 17 August 2018 in relation to the correspondence including the letter of 6 August 2018, asking if she was not fit to work, and unless she was to return to work immediately. She also referred to unauthorised absence which, in the event of no reasonable

explanation, may be gross misconduct. She urged a reply by 16 August 2018. The Claimant did not reply.

5 60. Also on 17 August 2018 the Claimant commenced new work. She works 36 hours per week. Her income is £7 per week less than she had received from the Respondents.

10 61. On 22 August 2018 Ms Leask wrote further, arranging a disciplinary hearing for 27 August 2018 in relation to allegations of gross misconduct. It referred to a possible sanction of summary dismissal.

62. The Claimant did not attend that meeting or reply to the letter.

15 63. Ms Leask wrote again on 29 August 2018 arranging a further disciplinary hearing for 3 September 2018. The Claimant did not attend or reply to the letter, but the Respondents did not proceed with the hearing and did not write further to the Claimant.

Submissions for Claimant

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64. The following is a summary of the Claimant's submission. She had been given the draft contract on 27 July 2018 and had not been happy with it, as it appeared to be a zero hours contract. She contacted the CAB who in turn contacted ACAS who advised that any changes to terms should be done in consultation with employees. On 31 July 2018 Ms Leask had approached her, told that she must sign the contract, that if she did not she could not work there, and eventually being told to go. She was told that the advice she had received was bad, and that she (Ms Leask) had taken advice the previous evening. She was told that she would not get another penny out of her.

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65. The evidence had disclosed that advice had been sought by the Respondents after that meeting not before it. Following that meeting she went to CAB, and they wrote to the Respondents to establish the position. The following day the

usual transport failed to arrive, reinforcing her belief that she had been dismissed. She was in a difficult position with no job and no income.

- 5 66. On 4 August 2018 she handed in the key and letter and was told that she couldn't just walk in. She felt that to be a strong indication that she had been dismissed. Ms Leask had said that from 31 July 2018 she no longer trusted her, and said she could not have people working for her she did not trust, yet wanted her to return. The letter about returning to work was not received until 10 3 August 2018. Advice had by then been taken. The contract provided was dated 27 July 2018 and that was when it was first given, but Ms Leask said it was 10 July 2018. The final letter which was claimed not to have been sent was sent. Ms Leask had asked for the key to be returned and a reply by 4 August 2018 and she had to deliver the letter that day to be on time.

15 **Submissions for Respondents**

- 20 67. The following is a summary of the submission made by Mr Muirhead. The claims were for unfair dismissal and notice pay. The onus was on the Claimant, to prove dismissal on the balance of probabilities. There was a clear dispute on the facts. Even if the words were spoken as alleged by the Claimant, there was a strong argument that they were promptly retracted.
- 25 68. Although the Claimant said that she loved her job, it was clear from the notes each side produced that each had concerns as to the other. The Respondent firm took over in 2015 and there was very little paperwork. They tried to rectify that in July 2018. There was a dispute over whether the first date was 10 or 27 July 2018 and he accepted that in some ways the Claimant was supported by Ms Begg and Miss Sharatt.
- 30 69. The document produced was very clearly a draft contract. It was an error by Ms Leask to invite the Claimant to sign it. The key events were on 31 July 2018. The remarks alleged by the Claimant were not said. A witness was present. The suggestion that Ms Leask said that if she did not sign it she

could not work there was not consistent with Ms Leask asking for a CAB letter. Both Ms Leask and Miss Sharratt should be accepted as credible, and their evidence should be preferred. The allegation of being told to go was not in the Claim Form, and that cast doubt on whether it was said.

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70. The attempts to contact the Claimant by telephone and text, but using the old number, were a genuine error. The Claimant made no attempts to contact the Respondents, but did say that she expected Ms Leask to cool down. There was a good reason for Mr Wylie not to undertake the pick up on 1 August 2018, and the Claimant had not attempted contact then. There was no appeal, but that was in the mind of CAB in their letter of 31 July 2018. The letter of 1 August 2018 made it clear that the Claimant had not been dismissed. The Claimant's letter of 3 August 2018 was prepared before the attendance on the following day. She came unannounced, but there was no attempt at a discussion. The letter closed the door to a return to work. The words recorded by Mr Buttress were not what either side alleged, and were consistent with her arriving unexpectedly, and were understandable. The Respondents gave further reassurances in the letters of 6 and 17 August 2018.

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71. Even if the Claimant's evidence on the words was accepted, they were not entitled to be relied upon. They were promptly retracted. The Claimant had either deliberately misinterpreted them, or misunderstood them. There was no dismissal. The Tribunal was invited to reject the claim. The notice issue depended on a dismissal and in any event there can be no double recovery. There should be no award for ongoing losses.

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72. Mr Muirhead confirmed that although a some other substantial reason was pled, he did not seek to rely on that if a dismissal was found to have taken place. He also sought a contribution in the way the matter was handled by the Claimant in relation to the contract, and not for any prior issues.

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Law

73. Section 95 of the Employment Rights Act 1996 (“the Act”) provides as follows:

“95 Circumstances in which an employee is dismissed

5 (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) —

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

10 74. Section 98 of the Act provides, so far as material for this case, as follows:

“98 General

(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—

- 15 (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (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 subsection if it—

- 20 (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,
- (c) is that the employee was redundant, or
- 25 (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 an enactment.

.....

30 (4) Where the employer has fulfilled the requirements of subsection (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
- 5 (b) shall be determined in accordance with equity and the substantial merits of the case”

75. The issue at the heart of the present case is whether there was a dismissal as the Claimant alleged, or a resignation as the Respondents alleged. Dismissal was denied by the Respondents, and the onus lay on the Claimant to prove that there had been a dismissal. It is not necessary for the word “dismissal” to have been used by the Respondents in order to lead to there being a dismissal. If the words as used unambiguously refer to the termination of employment, that will amount to a dismissal under the terms of section 15 95(1)(a) of the Act unless there is an exception for words spoken in the heat of the moment that are then retracted, referred to below.

76. The authorities in relation to whether there has been a dismissal include a Court of Appeal decision, ***Sothorn v Franks Charlesly & Co [1981] IRLR 278*** and decisions of the EAT: ***B G Gale Ltd v Gilbert [1978] IRLR 453***, ***Martin v Yeoman Aggregates Ltd [1983] IRLR 49***, ***J & J Stern v Simpson [1983] IRLR 52***; and ***Barclay v City of Glasgow District Council [1983] IRLR 313***. The following propositions can be derived from those authorities:

(1) The intention of the speaker is not the relevant test. As Mr Justice 25 Arnold commented in the case of ***Gale***:

“It is of course well-known that the undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not properly to be taken into account in concluding what its true meaning is. That has to be decided from the language used and from 30 the circumstances in which it was used.”

In the ***Sothorn*** case, Lord Justice Fox approved the decision in that case, adding that

'the non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is.'

5 (2) If the words used by the speaker are on their face ambiguous, then the test is how the words would have been understood by a reasonable listener. Provided the listener honestly and reasonably construed them as a dismissal or resignation, she should be permitted to rely upon his construction even if that was not the intention of the speaker. The test is an objective one and the question of whether or not there has been a
10 dismissal or resignation must be considered in the light of all the surrounding circumstances. In **Stern** the EAT stated that the test was
'to construe the words in all the circumstances of the case in order to decide whether or not there has been a dismissal'.

15 77. The Respondents' position was that the Claimant had walked out of the meeting on 31 July 2018, and that she had resigned rather than been dismissed. The **IDS Handbook on Unfair Dismissal** has the following commentary at paragraph 1.6 on when there is a resignation:

20 "A resignation is the termination of a contract of employment by the employee. It need not be expressed in a formal way, and may be inferred from the employee's conduct and the surrounding circumstances – **Johnson v Monty Smith Garages Ltd EAT 657/79**".

25 78. It is not uncommon for there to be a dispute over whether there was a dismissal or a resignation. An example is **Oram v Initial Contract Services Ltd EAT 1279/98** which concerned an employee who had been employed by the Respondent for 23 years, and failed to return to work after a disciplinary penalty had been reduced from dismissal to a final written warning. She did not accept the Respondent's proposals for her return and instead sent a letter
30 setting out matters that concerned her. The Respondent replied that it would deal with the issues she had raised upon her return, but she never did return. She claimed she had been dismissed but the Respondent maintained that

she had resigned. The EAT agreed with the Tribunal that she had resigned. The employer had written a letter to state their position, recorded as follows:

“If the appellant did not come to work they would have to assume that she had decided to resign.”

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79. The Tribunal had decided that that was what happened, and the EAT considered that they were entitled to come to that conclusion, adding:

“This resignation was not caused by any statement by the respondents such as occurred in the London Transport Executive case, but rather is simply an analysis of what the appellant did namely that she left her employment.”

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80. Very general, but still helpful, guidance is given from the comments by Sir John Donaldson in the case of *Martin v Glynwed Distribution Ltd [1983] IRLR 198* in which he stated:

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"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who really ended the contract of employment?' "

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Discussion

(i) Observations on the evidence

81. This has been a difficult case to decide. The case centred around what was, or was not, said by Ms Leask to the Claimant on 31 July 2018. Miss Sharratt heard some of what was said, but not all of it, as I shall come to.

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82. I required to consider the credibility and reliability primarily of Ms Leask and the Claimant. There were areas where each was not accurate in their recollection. That was demonstrated most clearly in relation to the incident on 4 August 2018, when the Claimant attended to return a key and give a letter to Ms Leask. The Claimant claimed in the Claim Form that Ms Leask told her

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she “had no right to be in here”. Ms Leask said that she said something like “What are you doing here” or “Where are you going?”. In fact, the exchange was being recorded on a mobile phone by Mr Buttress. The words used by Ms Leask were “You can’t just walk in here”, and that was accepted by Ms Leask after she had viewed that recording with Mr Muirhead. When that phrase was initially put to Ms Leask however, before she had seen or heard the recording, she both denied using those words and said that it was not a phrase she would use.

10 83. The meeting on 31 July 2018 was clearly stressful and difficult for both of them. It is not easy for a person to recall accurately what is said in such circumstances. I comment further below on my assessment of the evidence of each of them.

15 84. The Claimant had immediately gone to CAB, and on her instructions they had written that same day to say that she had been dismissed. Ms Leask had written on 1 August 2018 asking if the Claimant had resigned. On 3 August 2018 the Claimant had herself written to set out what she claimed had been said. Ms Leask had replied, again quite quickly, on 6 August 2018 which was the next business day after she received that letter, refuting that. There was a measure of delay in the Respondents replying to the letter dated 31 July 2018, and I comment on that further below. Nevertheless, each party had set out their basic position in writing.

25 85. Miss Sharratt had prepared a written statement about two days after the incident, which was sent to the Claimant’s adviser at the CAB. It did not note any of the words that may amount to dismissal claimed to have been said by Ms Leask. In her evidence, she agreed with the Claimant that she had not heard her say that she was working under protest. Ms Leask in her evidence in chief said that the Claimant had said that. That confirmed, as put to Miss Sharratt in cross examination, that Miss Sharratt had not heard all that was said. Miss Sharratt was also not able to say all that had been said with regard to the CAB and Citation, which she had referred to in very general terms in

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the written statement. It was clear that she had heard some of the exchanges, but not all of them. It was therefore possible that the words alleged by the Claimant had indeed been used and not heard by Miss Sharratt. Miss Sharratt was generally a good witness, although she did demonstrate some antipathy towards the Claimant in her evidence to an extent. The Claimant is her sister, and Miss Sharratt remains an employee of the Respondents. Ms Begg was generally a good witness, although her recollection of events on 4 August 2018 was identical to that of Ms Leask as to what the latter had said, and was wrong as demonstrated by the recording which indicates a certain partiality on her part.

86. I considered that the evidence of Mrs Young was particularly credible and reliable. I was impressed by the manner in which she gave her evidence. She was a former employee of the launderette, was contacted by Ms Leask after the event to pass on an address and then a message. I did not consider that she was in any way partial in her evidence. Mr Buttress had taken a recording of events on 4 August 2018 as referred to below.

(ii) Recording

87. The recording on 4 August 2018 was accepted into evidence subject to submissions as to its admissibility as referred to above. There was no objection to it latterly, and Mr Muirhead accepted that the recording established that the words used by Ms Leask were as provided above. I did however require to consider whether it was appropriate to receive that recording into evidence. In making that assessment regard is had firstly to the overriding objective, within Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which provides

“2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- 5 (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the
10 overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

88. Secondly, I had regard to Rule 41, which provides:

15 **“41 General**

The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and
20 may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.”

25 89. The general position is that if the recording is relevant to an issue in the proceedings, it is admissible unless there is a proper legal basis for its exclusion, ***Chairman and Governors of Amwell View School v Dogherty [2007] IRLR 198***. Whilst it was made without the knowledge of Ms Leask at the time, I considered that it was admissible. It established precisely what had
30 been said, and that neither the Claimant nor Ms Leask were correct in their initial positions on it.

(iii) What words were spoken on 31 July 2018?

90. I have concluded after much deliberation that the Claimant's version of the evidence is generally to be preferred. There are a number of reasons for that.

5 91. Firstly, and most significantly, Miss Sharratt said that the comments made by Ms Leask to the Claimant at the time of the Claimant writing on the draft contract on 31 July 2018 were to the effect that she (Ms Leask) had spoken to Citation about the contract. Ms Leask in her evidence earlier had denied saying that, and denied that she spoke to Citation until after the meeting on
10 31 July 2018. The Claimant also stated that Ms Leask had referred to having had advice from Citation Limited regarding the draft contract, and that their advice was correct, with that of the CAB or ACAS being "bad".

15 92. It appeared to me that Ms Leask had said the words Miss Sharratt spoke to, and that they were generally consistent with the evidence of the Claimant on that aspect. Ms Leask had in making that remark to the Claimant during the meeting said something that was not true and I consider that she did so in an attempt to have the Claimant sign the draft contract. That was repeated in her own evidence when she denied having said the remark about advice from
20 Citation. In her evidence in chief Ms Leask had claimed that she had said nothing at all when the Claimant was writing on the draft contract. That was also not true, as she later conceded in cross examination to an extent. These matters I considered raised significant doubts as to the credibility and reliability of Ms Leask's evidence.

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93. Secondly, Mrs Young gave evidence that she attended at the CAB office where the Claimant was after the meeting on 31 July 2018, and the Claimant was then very distressed, and crying, saying that she had been sacked. The Claimant told the CAB that she had been told to leave, as recorded in the
30 letter sent that day, and she told Mrs Young later the same day that she had been told that if she did not sign the contract she could not work there. These comments were made by the Claimant shortly after the meeting itself, and support her version of events.

94. The distress is more consistent with the Claimant's evidence as to what she had been told, than the Respondents' evidence that she had been an unhappy employee looking to leave, and using the dispute over the contract as a reason to do so. If the exchange had happened as Ms Leask alleged, in which she had only asked for a letter from CAB, the distress that was spoken to in evidence was entirely inexplicable. In addition however the very recent statements made to two others by the Claimant provide some support for her position. I consider that it is unlikely that she simply made the comments up for purposes of a claim, or that she was mistaken in what had been said to her on such matters.
95. Thirdly, Ms Leask was asked in examination in chief, before the recording had been made available, whether she had said the words alleged by Mr Buttress in his evidence. She emphatically denied that, saying that she "definitely didn't" do so, and said that that was "not a phrase I would say". She however had done so. The adamant rejection of those words indicated that her evidence was more unreliable than that of the Claimant. I take into account that the Claimant arrived unexpectedly, and rather took Ms Leask by surprise, but the words she used are more consistent with an earlier dismissal than continuing employment.
96. Fourthly, when asked about the letter of 29 August 2018 in her evidence Ms Leask said that she had not sent it. That obviously took Mr Muirhead by surprise, as it did the Claimant, and it appeared to me to be highly unlikely to be correct. The Claimant had said in her evidence that she had ignored the latter letters, on advice from CAB. Had she not received one of those letters I consider she would certainly have said so. In any event it was not suggested to her in cross examination that it had not been sent. I considered that Ms Leask was not correct in that evidence.
97. Fifthly, Ms Leask said that she had given the drafts to the staff first of all on 10 July 2018. The Claimant claimed that it was on 27 July 2018. That was

also the date the contract bore. Miss Sharratt and Ms Begg in their evidence supported the timing spoken to by the Claimant. I did not consider that Ms Leask was correct on that issue of timing.

5 98. Sixthly, Ms Leask did ask the Claimant to sign a contract which had no section
for her own name, a blank for date of continuous service, and a blank for rate
of pay. It also had what amounted to no guaranteed hours at all, and
provisions which were new and disadvantageous to the employee such as a
provision for deductions for negligence, and a right to make variations. She
10 was not able to explain satisfactorily why such a request would be made, and
Mr Muirhead accepted in submission that Ms Leask was in error in doing so.
No employee acting sensibly would sign a contract with blanks for such
important matters. The rate of pay at £8 per hour was higher than the national
minimum wage provisions. Ms Leask accepted in evidence that she wished
15 to introduce the contract to allow her to reduce hours in winter when there
was less work to do. The reaction of the Claimant was not one she received
well, and that context does provide the circumstances where words to the
effect that you must sign or you can't work here might be used, as an attempt
to secure signature.

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99. Seventhly, Ms Leask said that she had sent a new draft of the contract to the
CAB in her letter of 6 August 2018. The letter itself did not say so, and its
terms did not indicate that such a draft was attached, but did refer to a wish
"to discuss her contract and agree the amendments to it". The letter later
25 refers to a witness statement of Miss Sharratt and says "I have enclosed the
witness statement". It was not suggested to the Claimant in cross examination
that the new draft contract had been enclosed with that letter, and although it
was sent to the CAB that point should I consider have been put if it was known
to Mr Muirhead. Miss Sharratt and Ms Begg did not recall having seen the
30 new draft contract, which was in the bundle, and although it had the
handwritten comments" This is the contract to be used" Ms Leask said that
no contract had in fact been concluded with staff and she was waiting for the
outcome of these proceedings before doing so. I concluded that, rather like

the 29 August 2018 letter, that was a surprise to him and was not accurate evidence by Ms Leask.

100. Although Ms Leask said that she had the new draft contract by 3 August 2018
5 I was not able to accept that, and there was no evidence of when it was made available to her, although that could have been provided. It was in materially different terms to the first draft, and I consider a substantial improvement on the first draft. It had a section for specific hours of work to be provided per day, but did contain a provision to vary them according to the needs of the
10 Company. It had a section for the employee's name and a full signature section for both parties. It included the name and address of the Respondents, and had been prepared by Citation Limited.
101. Eighthly, Mr Wylie did not appear to give the Claimant a lift on Wednesday
15 1 August 2018, as he would have been expected to do so. I did not accept the explanation given that he was busy. Whilst the Claimant had not replied to messages, the fault for that rests very largely with Ms Leask who used the wrong number. In any event, Mr Wylie was not called to give evidence, and no explanation for that was tendered. I concluded that that was a fact that
20 was consistent with Ms Leask having dismissed the Claimant on the day before.
102. Ms Leask on 1 (although the text was not received) and 2 August 2018
25 (through Mrs Young) sought the immediate return of the keys for the premises. Her explanation that that was as she did not wish the Claimant to be "raking around" the property, and as there had been an issue over the tips jar, I did not find convincing. It was I considered more consistent with her having told the Claimant that she could not work there as had been claimed.
- 30 103. Finally, I had regard to the manner in which each of them gave evidence, and their demeanour when doing so. In my judgment the evidence given by the Claimant is generally to be preferred over that of Ms Leask.

104. It was suggested that Ms Leask had deliberately used an old mobile number to call and send texts. I did not consider that that was likely. If it was simply a ruse I doubt that the messages would have been written as they were, nor would there have been an attempt to use Facebook.

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105. The comments made above do not mean that the Claimant's evidence was not without difficulty. Her position on what Ms Leask said on 4 August 2018 has been referred to above. Some of her recollection of what was said on 31 July 2018 was not entirely accurate, although I consider that it was reasonably reliable. She claimed that she attended the premises on 4 August 2018 prepared to discuss a return to work. Given the terms of the letter of 3 August 2018 that appeared to me to be simply wrong. The video recording shows that the first thing done on arrival was to remove her cup, which I took as an indication that she was not expecting to have a discussion about a return. In her mind however the failure of Mr Wylie to attend on 1 August 2018, and the lack of contact she had received (albeit that there had been attempts made unsuccessfully she was unaware of and she had changed the status of Ms Leask on Facebook) led to the conclusion that the dismissal stood. I address below the issue of retraction.

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106. The Claimant's evidence as to what had been said was not fully consistent, but was reasonably so. The Claim Form did not include the remark allegedly made to "go", but that appeared to me to be a mistake, and that remark was in the correspondence sent on 31 July 2018, albeit using the word to "leave" and the letter of 3 August 2018. The Claimant said that Ms Leask had alleged that she had advice from Citation to the effect that she could do what she liked with the contracts, but I preferred Miss Sharratt's evidence on that, which was that the comment Ms Leask made was that their advice was that the contracts were "fine". That, albeit not true, is more likely to have been what Ms Leask did say.

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107. Miss Sharratt had recorded in her written statement that Ms Leask asked the Claimant to get a letter from the CAB. She confirmed that in her evidence.

The Claimant had not said in her evidence in chief that she had been asked to do so, but she did say that Ms Leask accused her of lying when she referred to having had advice, and I have no record of the point about seeking a confirming letter from CAB on having had that advice being specifically put to the Claimant in cross examination. It did appear to me to be strange to ask someone for a letter, when the issues had been written down just then on the contract. The letter dated 31 July 2018 does commence with a remark relating to the Claimant attending their premises on the previous day for advice. It appeared to me that the most likely explanation was that Ms Leask challenged the Claimant when she said that she had had such advice. Ms Leask accepted in her evidence that she at least had substantial doubts over whether the Claimant had done so. It is more likely that at the time Ms Leask made it clear to the Claimant that she disbelieved her, and asked for written confirmation.

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108. Mr Muirhead argued that that request for a letter with details of why the contract was not correct was inconsistent with someone also dismissing. I have concluded that whilst there is some merit in that argument, the two matters are not inconsistent. The request for a letter of confirmation can be made in the belief that it cannot be obtained as such advice had not in fact been taken. I consider that in this case that is exactly what Ms Leask intended when referring to that., believing that that would catch the Claimant out in a lie. Whilst a strong argument was made by Mr Muirhead on this issue, ultimately, I did not accept it. In addition to the point not being inconsistent as I have described, it must also be set in the context of the evidence as a whole. The greater weight of the evidence is that there had been words said that amounted to a dismissal as I have found.

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109. The Response Form referred to the Claimant as a “troublesome” employee, and Ms Leask gave some limited evidence on that. She had produced some notes with what were said to be examples of that. Despite that however there had been no disciplinary action of any kind, not even informal warnings.

110. The impression I gained from the evidence as a whole was that Ms Leask did not take well to challenges to her authority. An example of that was raised in evidence in relation to a time, when this was not given in evidence, when the Claimant noted that another employee had placed sheets on the floor of the public area, which she (rightly I consider) thought was a safety risk. Ms Leask criticised her for raising that with the employee. In her evidence Ms Leask said that that was in relation to the manner of her doing so, but I did not consider that it was solely for that, rather it was also for what she had done.
111. That impression was reinforced when Ms Leask said in her evidence that some of the Claimant's criticisms of the contract were "picky", by which I took her to mean that she took points that were too unimportant. I did not however consider that they were. A contract of employment is an important document, and the one produced had material flaws. It was also not advantageous to the employee, and was a material variation on the existing terms, albeit that those terms had not been committed to writing.
112. Whilst the Respondents had been aware of the lack of written particulars, nothing had been done until the summer of 2016 and then only in relation to one or more Handbooks. The Claimant had denied receiving the full Handbook, and there was no adequate evidence of that being provided to her. Ms Leask stated that she thought that the Handbook was sufficient as a statement of terms, which was not the case. There was no explanation for the delay in attending to that, save that by the time of the draft contract being tendered Ms Leask wished to have flexibility to reduce hours when work reduced, particularly in winter months. In any event the draft contract produced did not state the employee's name, and had blanks for the date of continuous service, and the rate of pay, and that draft did not even comply with the minimum standards set out in section 1 of the Act, which requires such information (subsection (3)(a) and (c) and subsection (4)(a) respectively).

113. The Respondents suggested that the Claimant was unhappy at work, and had taken advantage of the new contract to pursue a claim. I did not accept that. There was no reliable evidence of that. There had been discussions around the possible reduction of hours, and the Claimant's evidence that she might need a second job, rather than a different one, I accepted. It was suggested to her in cross examination that she had had a discussion about leaving with Ms Begg in 2018, but her evidence was that it was a year earlier. The fact that the Claimant had very long service, and no other job to go to, received Job Seekers Allowance for a period before securing new employment contradicts the suggestion that the whole claim had been in effect fabricated, quite apart from other evidence such as her distress at the time.

(iv) Were the words used a dismissal under section 95(1)(a)?

114. In light of the words used by Ms Leask as I have found them to be as set out in the findings in fact, I considered that they did amount to a dismissal. They were words that terminated the contract of employment. The phrase that the Claimant could not work if she did not sign the contract were I consider ones that had that effect. They were supplemented by an instruction to leave, or to go, when the Claimant did not do so, and challenged in detail the terms of contract. Matters were put beyond any doubt when the comment was made that the Claimant would not get another penny from her. Applying an objective test, and having regard to the circumstances, they met the statutory definition of a dismissal. The Respondents ended the contract of employment, to refer back to the words of Sir John Donaldson quoted above.

(v) Was there a retraction?

115. It is possible that either an employee or an employer may say words in the heat of the moment that could otherwise amount to a dismissal, then realise that that was inappropriate and retract them. More usually the argument on that is made by the employee but it can be made by the employer. An example is *Martin v Yeoman Aggregates Limited [1983] IRLR 49*. The basic facts were summarised by the EAT as follows:

5 “There was an exchange of words and the order to go off and get the proper part was decisively and derisively rejected by the applicant and, as a result, Mr Hammond forthwith gave him the sack. Within a matter of five minutes Mr Hammond realised that he had said things in a fit of temper which he was not authorised to do and which were in breach of the agreed procedures for dealing with a disciplinary situation. So Mr Hammond comes back again and says on this occasion 'You are suspended without pay for two days'. Mr Martin was not having any of that and off he went. Later the same day, be it noted, Mr Hammond 10 instructed the personnel manager to write a letter which was dated 21.10.81. It referred to Mr Martin's refusal to obey a reasonable order. It referred to the fact that he had a position of responsibility and that his attitude was sometimes flippant and insolent, but it corrected the original declaration orally given by Mr Hammond and said:

15 'You have been suspended with pay for two days to allow time for a rational decision to be made. You are expected to report to work as usual on Friday, 23 October.'

116. The very quick retraction of dismissal and substitution of suspension was held 20 not to be a dismissal. The period of time there was five minutes.

117. In **Willoughby v CF Capital plc [2011] IRLR 493** the Court of Appeal considered matters further. It summarised the law in relation to this area as follows:

25 “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 30 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 on the receipt of a claim for unfair or wrongful dismissal. The general rule and the 'special circumstances' exception to it have been recognised in several authorities of both the EAT and this court.”

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118. Whilst those words were in relation to words of resignation, they are apt to apply also to words of dismissal.

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119. That case also referred to opinions of the Court of Session in **Greater Glasgow Health Board v Mackay [1989] SLT 729**. Lord Wylie said this:

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“In essence, as I understood counsel for the respondent to concede, this is a ‘heat of the moment’ case and I question whether the unambiguous language used by a mature employee of some years’ standing at the time of the confrontation alone would have precluded the application of the general rule in Sothern so as to bring it within the exception. Be that as it may, the terms of the letter which she subsequently wrote are in my view conclusive and for these reasons I would allow the appeal. I would only add that where possible exceptions to a general rule are suggested in obiter dicta such as that used in the case of Sothern, there may be a tendency for tribunals to apply the exception to the rule rather than the rule itself and I wish to emphasise that only in highly exceptional circumstances will this be justified.’

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120. Lord Cowie said:

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“These exceptions are not as I understand the position meant to be definitive, because each case must turn on its own facts and circumstances, but they are meant to indicate the sort of situations where at first sight words are used or acts are done which clearly and unambiguously indicate that the employee is terminating his own employment or is being dismissed, but where special circumstances are present which ought to indicate to the employer or employee that that was not intended or at any rate put him on his guard and cause him to realise that the words or acts should not be taken at their face value. Examples

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of these situations were quoted to us by counsel. In particular reference was made to [Martin's case and Barclay's case].”

5 121. Lord Justice Rimer concluded his remarks in *Willoughby* after discussing the authorities as follows:

10 “I would, however, be reluctant to characterise the exception as an opportunity for a unilateral retraction or withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn. In my judgment, the true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place – that, in effect, his mind was not in tune with his words.”

15 122. Applying those authorities to the facts of the present case, I am struck by the fact that Ms Leask has not retracted words spoken in the heat of the moment. She had an opportunity to do so when that was raised in her evidence, but she did not take it. She then, as she has throughout, entirely denied using the words alleged by the Claimant. For that reason alone I do not consider that this case is an exception to the general rule that if words that equate to dismissal are used, they are effective and cannot be withdrawn unilaterally.

20 123. In addition there is the fact that her partner Mr Wylie did not, as he normally did, arrive to collect the Claimant for work on 1 August 2018. Whilst Ms Leask had made attempts to contact the Claimant, and I held them to be genuine, if the Respondents did believe that the employment continued I would have expected that arrangement to be at least attempted, and it was not. The explanation that it was a busy day was not one I accepted as a good one, and as I have noted above Mr Wylie did not give evidence.

25 30 124. The attempts at contact failed, but the responsibility for that failure must rest with Ms Leask, at least those save for the attempted use of Facebook. She had contacted the Claimant using the correct number in June 2018. There

was indirect contact made through Mrs Young on 2 August 2018, but that was not retraction, rather it was the request for return of the keys. That is I consider inconsistent with retraction.

5 125. The letter of 1 August 2018 the Claimant received at 4pm on 3 August 2018, giving her 24 hours in effect to reply, if that, was not a letter retracting words of dismissal, but referred to unauthorised absence and the possibility of that being a disciplinary issue, and asked further about resignation. It did not address the words used by Ms Leask on 31 July 2018 in any way. Even if it
10 could be considered to be a retraction it was received a material length of time after the words were spoken at about 9.20 am 31 July 2018. That is I consider too great a delay.

126. In ***Tanner v D Kean [1978] IRLR 110*** the EAT stated this:

15 “A word of caution is necessary because in considering later events it is necessary to remember that a dismissal or resignation, once it has taken effect, cannot be unilaterally withdrawn. Accordingly, as it seems to us, later events need to be scrutinised with some care in order to see whether they are genuinely explanatory of the acts alleged to constitute dismissal,
20 or whether they reflect a change of mind.”

127. The matter was put this way in the ***Martin v Yeomans*** case

25 “in the heat of the moment words which are clear enough standing alone would indicate a dismissal can lose that affect if one looks at the surrounding circumstances. Of course, it must be a question of degree. Of course, you may get a situation in which the change of mind is so late that it is impossible to recover from the dismissory words expressed in the first place.”

30 128. There was no real change of mind in the present case, but it appears to me that where the words used amount to dismissal, and the employer is a mature person, a partner in a firm with long business experience and the ability to take advice from others, wishes to state that there was no desire on her part

to dismiss when that is alleged, that requires to be done both clearly and as quickly as reasonably practicable. It does not need to be within five minutes, as occurred in *Martin*, but it does require action to be taken reasonably quickly, that could have taken place on the following working day. It was not. Instead there was not the normal lift to work, and Ms Leask sought return of keys the day afterwards.

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129. The letter dated 6 August 2018, received somewhat later although again the specific date and time was not given in evidence, did refute the words used, but for the same reasoning was too late to be a retraction that engaged the exception. In addition, when the letter of 6 August 2018 was put to the Claimant, she said that it had not said something to the effect that there had been a mix up and she (Ms Leask) would like her (the Claimant) to return. There is much in that. Ms Leask in the letter simply refuted that she had made those comments. She did not set out what she alleged she had said, or meant. She also alleged in that letter that she was not seeking to make unilateral changes to the contract, and simply wished to have a written contract of the Claimant's employment particulars. That was not correct – the intention was that the terms were being amended in material ways.

130. I concluded that the exception referred to in authority was not in the circumstances engaged, such that there was a dismissal by the words used on 31 July 2018, and that it was effective that day.

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(vi) Reason

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131. Mr Muirhead did not argue that there was a potentially fair reason for that dismissal. He was I consider right to do so. The dismissal was accordingly unfair. The reason for dismissal was not however redundancy. The dismissal arose in relation to a dispute over the terms of the draft contract. The Claimant is not therefore entitled to a statutory redundancy payment.

(vii) Contribution

132. There was an argument made that by failing to respond to the letters regarding returning to work the Claimant had contributed to the dismissal. For the reasons I shall come to I do not regard that as correct, but there is a separate argument for reduction in the basic award on account of the failure to respond to the letter as I shall also come to.

Remedy

133. The Claimant is entitled to a basic award under section 119 of the Act. It provides:

“119 Basic award

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

- (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
- (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
- (c) allowing the appropriate amount for each of those years of employment

(2) In subsection (1)(c) 'the appropriate amount' means—

- (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
- (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
- (c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.”

134. The week's pay I calculate to be £291.44 being gross pay of £288 and the pension contribution from the employer of £3.44 per week. The Claimant was 55 years of age at the effective date of termination. One issue that required consideration was her length of continuous service. She claimed, and spoke to in her evidence, that she had 25 years of service. She had requested written confirmation from HMRC, which was received late due to a delay by them. Once received, she queried it, and a revised document was tendered. That revealed pay from the Launderette going back to the tax year 1999/2000. The Claimant explained in an email that she was prior to that paid in cash, and the earnings may have been too low for National Insurance Contributions purposes, but accepted that the sum awarded may be less in light of that document. Mr Muirhead argued that either the document was accepted, or a further evidential hearing take place. I considered that it was appropriate to proceed on the basis of the HMRC document tendered, which established that by at latest April 2000 the Claimant was employed by the business eventually acquired by the Respondents, and that it was continuous employment thereafter. The Claimant accepted, as I read her email, that it was appropriate to use the document tendered to do so.
135. On that basis the Claimant has 18 years' continuous service at termination.
136. She had 14 years of that service over the age of 41, assessed at one and a half weeks' pay for each year of service, and 4 to count for the balance at one weeks' pay for each year. That is a total of 25 week pay, which amount to £7,286.
137. It is however an award subject to the terms of section 122(1), which states as follows:
- “(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the

amount of the basic award to such extent as it considers just and equitable having regard to that finding.”

5 138. The letter dated 1 August 2018 was to an extent ambiguous, but indicated that the Respondents did not consider that there had been a dismissal. The letter dated 6 August 2018 did I consider amount to an offer which if accepted had the effect of reinstating the Claimant in her employment under that section. It did not so state specifically, but the words used in the statute is “effect of reinstating”. I noted that that letter referred in terms to discussing
10 the contract and agreeing amendment.

139. The Claimant did not engage with that offer. She instructed a reply on 9 August 2018 that simply referred to commencing early conciliation. It appeared to me that she had closed her mind to that as a possibility from an
15 earlier stage than was evident from her evidence. That is partly understandable in light of the then circumstances, particularly the words used on 31 July 2018, the lack of a lift on 1 August 2018, the request for the key on 2 August 2018 and the words used on 4 August 2018, but I consider, having regard to all of the circumstances, that the refusal to engage with that
20 was unreasonable. It was clear from that letter, and the later one of 17 August 2018, that the Respondents were seeking to have the Claimant return to work. That would have had the effect of a reinstatement, subject to the comments that follow on the terms of contract.

25 140. Had the Claimant accepted that offer and returned to work, it is difficult to speculate as to what may have happened, but such speculation requires to be attempted. I consider that the Claimant and Ms Leask could have re-established a reasonable working relationship. It would have become apparent that messages were sent and a call made to the wrong mobile
30 address, and if the discussions had taken place relatively shortly after the offer was made, they had a better prospect of success than the impression that may be given in a Final Hearing, when positions tend to harden. I also noted the Claimant’s evidence that she did think that Ms Leask may cool

down after the 31 July 2018 meeting, and was ready for work on the following morning. She also said that she was prepared to discuss matters on 4 August 2018. It appeared to me that she could have done so slightly after that, when the letter of 6 August 2018, only about a week after 31 July 2018, was received. It appeared to me that it is just and equitable to reduce the basic award for this reason.

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141. Doing so requires consideration of the position of the Claimant and the indicators that existed of a dismissal, as well as the fact that the Respondents had sought to introduce new terms which were material and disadvantageous variations in a manner accepted as being in error. The new draft contract has yet to be introduced, and in the absence of agreement to its terms would require a more formal process including adequate consultation, and notice of termination of the old terms. It may or may not be the case that such a dismissal would be fair. The Respondents have not however yet introduced that contract, and I consider that in light of that the offer that was made did amount to reinstatement.

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142. Taking account of all of the circumstances, I consider that that reduction should be in the amount of 60%. The reduction is in the sum of £4, 371.60 and leads to a basic award of £2,914.40.

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143. The compensatory award is calculated under section 123 of the Act, the relevant aspect of which states as follows:

“the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

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144. The loss is considered in the present case in two periods of time, firstly when the Claimant was unemployed and secondly after she secured alternative employment. The weekly figure is the net earnings of £257.07, then taking

account of employer pension contribution of £3.44 and employee contribution of £4.13, a total of £264.64. For the first period from date of termination to 17 August 2018, a period of 18 days, there was no employment, but receipt of benefits. The loss I calculate to be £680.58. For the second period from and after that latter date the loss is £7 per week. I consider that the Claimant took reasonable steps to mitigate her losses. She found new employment quickly, after 25 years of working at the premises, and has the same number of hours per week. I do however consider that in light of the circumstances overall the just and equitable finding is that loss should be to date of hearing and not beyond that. That is a period of 21 weeks, and a sum of £147. A further element of loss is the loss of statutory rights by the requirement to start new employment and acquire two years' continuous service to be able to claim unfair dismissal. I award the sum of £300 under that head. The total compensatory award is £1,127.58.

145. That may then be subject to reduction in terms of section 123(6) which provides as follows:

“Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

146. Mr Muirhead wisely did not argue that the background, with what the Response Form referred to as the “troublesome” employee that was the Claimant, was relevant to contribution. His argument related to the meeting on 31 July 2018, and what followed on thereafter. It appeared to me that Ms Leask had not thought through the terms of the draft contract. She was unwise to prepare it without taking advice from Citation Ltd. She sought to introduce new terms which were not advantageous to employees, but did so in a somewhat bizarre way. Asking an employee to sign a contract with blanks for date of continuous service and rate of pay, and no name, quite apart from other concerns, was always liable to be rejected. The Claimant was entitled to do so. She was asked to write down what the concerns were, and did.

Words of dismissal were then uttered. The Claimant did not contribute to that dismissal, which took place that day. I do not consider that a reduction to the compensatory award is appropriate as the statute refers to the contribution to the dismissal, and events after dismissal cannot contribute to it.

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147. Section 3 of the Employment Act 2008 gives the employment tribunal a discretion, if it considers it just and equitable, to increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. In all the circumstances, where there was no disciplinary issue but rather a dispute over the terms of contract the Respondents sought to introduce, I do not consider it just and equitable to do so.

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148. The basic and compensatory awards therefore total £4,041.98.

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149. Whilst the termination was in breach of contract no additional sum falls due for notice as the losses are fully covered in the compensatory award. I have therefore dismissed that Claim. The claims for holiday pay and a statutory redundancy payment I have dismissed as set out above.

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Recoupment

150. The Claimant stated that she was in receipt of Job Seekers Allowance. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations) 1996 apply to the award. The effect of the Regulations is that the sum of £2,914.40 is now payable. The prescribed element of £1,127.58 is retained. There is a period of 21 days after this Judgment is sent to the parties for the service on the parties of a Recoupment Notice, which sets out the amount that must be deducted from the prescribed element and paid to the Department for Work and Pensions. The balance of the prescribed element is then payable to the Claimant. If there is no Recoupment Notice

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served within that time, the full amount of the prescribed element may then be payable to the Claimant.

Conclusion

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151. The Claimant was dismissed, that dismissal was unfair, and the Claimant is awarded the sums set out above. The claims for notice pay and a statutory redundancy payment are dismissed, and the claim for holiday pay having been settled is also dismissed.

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152. I would like to record my gratitude to the Claimant and Mr Muirhead for the appropriate manner in which each of them conducted the Final Hearing.

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Employment Judge:	Alexander Kemp
Date of Judgment:	21 January 2019
Entered in Register:	23 January 2019
Copied to Parties	

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