



EMPLOYMENT TRIBUNALS

Claimant

Miss V Simms

Respondent

Hannah Burke

Heard at: Southampton (by CVP) **On:** 20 May 2021

Before: Employment Judge Dawson

Appearances

For the claimant: In person

For the respondents: In person

JUDGMENT

1. The claim of breach of contract in respect of holiday pay is well founded and the claimant is awarded the sum of £741.76.
2. The other claims of the claimant are dismissed.

REASONS

1. By a claim form presented on 30th September 2020 the claimant presented claims of unfair dismissal, for a redundancy payment, for notice pay and for holiday pay.
2. By her response the respondent denied that the claimant had been dismissed, saying that she had resigned in or around March 2020, she denied the claims made and stated that the claims were presented out of time and the tribunal lacks jurisdiction to consider them.
3. On 7th January 2021 the tribunal wrote to the parties listing the claim for a hearing, noting that the limitation period for a redundancy payment was six months rather than three months and stating that there would be a hearing to determine the following matters:
 - (1) the Claimant's claim for a redundancy payment
 - (2) whether the Claimant's remaining claims have been presented within the statutory time limit and if not whether it was reasonably practicable for her to have presented them within such time and further if not whether she presented them within a reasonable period thereafter so that the Tribunal has jurisdiction to entertain such claims.
 - (3) if the Claimant has presented her claims of unfair dismissal / notice/ holiday pay within the statutory time limit/such time limits are

extended to enable her to pursue them to determine the Claimant entitlement to such monies

4. That is the hearing which has taken place today, although the length was reduced from two days to one. Even with such a reduction the parties finished their evidence and submissions by 11:45 am.
5. Although the respondent has been represented until relatively recently, (including during the completion of the hearing bundle) neither party was represented at the hearing and they both represented themselves.

The Issues

6. At the outset of the hearing I discussed with the parties what the issues were in the context of the matters which had been listed for determination today. It was discussed that they were as follows
7. In respect of the claim for a redundancy payment, the first issue is whether there was a dismissal. That includes the questions of whether the claimant was dismissed by her employer or whether she resigned in circumstances amounting to a dismissal.
8. The claimant says that she was expressly dismissed by the message which appears at page 40 of the bundle and being sent her P45. The respondent denies that.
9. If the claimant's contract of employment was not terminated by the respondent, it is necessary to consider whether she terminated the contract in circumstances whereby she was entitled to terminate it without notice by reason of the employer's conduct. It will be necessary to consider whether the respondent was in breach of the contract of employment, in particular by not offering work and pay to the claimant, and whether that was the reason for any resignation of the claimant.
10. If there was a dismissal it is necessary to consider what the reason for the dismissal was, noting that there is a presumption under the Employment Rights Act 1996 that the dismissal was by reason of redundancy unless the contrary is proved.
11. If the claimant was entitled to a redundancy payment it is necessary to consider the amount of any payment.
12. In respect of the remaining claims it is necessary, in respect of the claim for unfair dismissal and the claim of notice pay brought under the Employment Tribunals Extension Of Jurisdiction (England & Wales) Order 1994 to determine the date of termination of the contract of employment. In respect of the claim for holiday pay, to the extent that the same is brought as a claim of breach of contract the same date is relevant but to the extent that the claim is brought under the Working Time Regulations, the claim must be brought within three months of the date when it should have been paid.
13. Determining the dates for those matters will, again, require the tribunal to consider when and how the contract of employment ended (if it has done so).

14. If the claims were presented in time it is necessary to consider whether or not they are well founded and if so, to what extent.
15. In respect to the claim of unfair dismissal it is necessary to consider whether the claimant was dismissed, if so what the reason was for any dismissal and whether the dismissal was substantively and procedurally fair in accordance with section 98(4) Employment Rights Act 1996. In respect of the claim for notice pay it is necessary to consider whether the claimant resigned or was dismissed and, if she was dismissed, what notice she was entitled to.
16. In respect of the claim of holiday pay, the claimant only claims for payment in respect of 2 weeks holiday that she was to take at the start of April 2020.

The Law

On termination

17. Where language which has been used in respect of a putative termination of employment is ambiguous Harvey on Industrial Relations¹ gives the following guidance “ ...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, he or she should be permitted to rely upon that construction even if that was not the intention of the speaker” [229].

On Failing to Provide Work and Pay

18. It is often said to be an implied term of the contract that an employer will provide work and pay. However, that is something of an oversimplification.
19. In *Craig v Bob Lindfield & Son limited* [2016] ICR 527, Langstaff P stated “However, a contract remains a bargain which the parties have agreed between themselves. If as part of that bargain they recognise that there are some circumstances in which no money will be paid, no work done, or both, then a failure of the employer to pay the employee in such circumstances will be no breach. Non-payment is not then a breach of the contract: it is indeed contractually provided for. If a contract provides that where there is a lack of work the employer may lay off the employee or put him on short-time working with or without pay, it is then no breach to do so, let alone a repudiatory one.” (para 2)

On Redundancy

20. Section 139 of Employment Rights Act 1996 provides that “For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to...”
21. Section 163 (2) of the 1996 Act provides that an employee who has been dismissed by his employer shall unless the contrary is proved be presumed to have been so dismissed by reason of redundancy.

On Time

¹ Harvey on Industrial Relations and Employment Law/Division DI Unfair Dismissal/2. Termination by the Employer/C. Was there in fact a dismissal?/(1) The fundamental question—who really ended it?

22. In respect of a claim for unfair dismissal, section 111 provides
- (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
- (a) before the end of the period of three months beginning with the effective date of termination, or
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
23. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provide at article 7 “an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—
- (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
 - (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
 - (ba) ...
 - (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.
24. The Working Time Regulations 1988 provide as follows
- 30 Remedies
- (1) A worker may present a complaint to an employment tribunal that his employer—
- (a) ...
 - (b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).
- (2) [Subject to [regulations 30A and [regulation] 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—
- (a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months

Unfair Dismissal

25. For a person to bring a claim of unfair dismissal they must have been dismissed- see section 94 of the 1996 Act. Dismissal is defined in section 95 of the same Act as follows:
- 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),
- (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

26. In respect of constructive dismissal (being dismissal under s95(1)(c) Employment Rights Act 1996, in *Kaur v Leeds Teaching Hospitals* [2019] ICR 1, Underhill LJ gave the following guidance at paragraph 55:

In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
- (5) Did the employee resign in response (or partly in response) to that breach?

Holiday pay

27. The Working Time Regulations provide:

16 Payment in respect of periods of leave

- (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

Findings Of Fact

- 28. The respondent runs, or ran, a small bakery business. The evidence suggests that as well as the claimant, she employed four other team members.
- 29. The claimant has worked in the business since 2009, initially for a different owner, but for the respondent for 10 years. There is no dispute that the regulations governing a transfer of undertaking applied when the respondent took over the business.
- 30. The claimant had largely fixed hours and worked 9 to 10 hours a day for four days a week and sometimes also worked on Wednesdays which was her day off.
- 31. When the coronavirus pandemic struck, the bakery ceased operation, at least temporarily, from 20th May 2020. The claimant and her colleagues were told

there was no work for them and they went home. The claimant assumed that she would return to work at the bakery at some point.

32. On 23rd March 2020 the claimant began temporary work with Tesco. I am satisfied that she was employed initially as a temporary member of staff and she told Tesco that she was only available short term and would need to return to her job at the bakery when the coronavirus restrictions eased. As time went on, the claimant's contract with Tesco was extended, until it was made permanent on the 5th of December 2020.
33. I find that what the claimant did was reasonable and was not, as suggested by the respondent, incompatible with her continued employment for the respondent. The respondent was providing the claimant with no work and no pay; there was no reason why the claimant should not obtain alternative employment until that position changed. Moreover I find that the claimant would have been willing to cease working at Tesco to go back to work for the respondent.
34. Matters progressed and because most of the staff who had been working for the respondent obtained alternative employment, issues with taxation arose. I find that they asked the respondent for a copy of their P45s. On 18th May 2020 the claimant wrote to the respondent stating "I was just wondering what the situation was with Baldwins and P45s as I've still not received mine?"
35. In the context of what was going on with the pandemic and work life generally at the time, I do not consider that simply requesting a P45 was indicative of the claimant resigning. There is some ambiguity in this respect because, generally, P45s cannot be issued unless employment has terminated; however I do not consider the claimant had the level of sophistication in taxation matters to be aware of that. P45s were requested by the claimant and her colleagues simply to allow the tax position to be regularised.
36. I make a similar finding in relation to the later message sent by the respondent on 26 May 2020 at page 40 of the bundle. In that message the respondent stated " you all have P45s as I wanted you to have them to sort your tax code not because anyone was sacked as I've been told today".
37. That message starts "Just to keep all in the loop. I won't be having anyone back to work for the foreseeable. I cannot afford find 5k month plus pensions etc for a long while, in fact poss not ever"
38. It is that message which the claimant says amounted to a dismissal. She told me in evidence that there was no associated discussion and, therefore, she relies upon that message, combined with being sent a P45 as being her dismissal.
39. I consider that the message at p40 is at most ambiguous. Although it says that the respondent will not be having anyone back to work "for the foreseeable" and possibly not ever, the respondent is clearly open to the possibility it will be offering work in due course. It expressly says that the respondent has not sacked anyone.
40. I do not consider that a reasonable person reading that email would assume that they had been dismissed. It is saying no more than there is no work

available at the moment and no sign of when the position will change but no one has been sacked.

41. The claimant did not do anything about that message immediately but at some point the claimant was told by somebody that she should be entitled to a redundancy payment. She therefore sent the letter which appears at page 43 of the bundle dated 17th the August 2020. It is clear from that letter that the claimant is treating the contract of employment as having been terminated, since she says that she has been dismissed by reason of redundancy and refers to notice pay. It is plain that the claimant continued to treat herself as having been dismissed insofar as she presented a claim form to the tribunal.

42. In the letter the claimant wrote:

You advised us to look for other work until the situation improved. One member of staff was kept on to work in a much reduced business. Neither dismissal nor redundancy was discussed at that time, neither did you offer to furlough us in accordance with the government's job retention scheme. It was evident at that time, and subsequently, that you still considered us part of your staff.

However, on 26 5 2020 you gave me a P45 dated 20 5 2020 and told me I must now consider myself dismissed and I have a text from you to support this. No mention was made of redundancy or selection for redundancy. I have since taken advice and submit the following:

Redundancy, On 25 5 2020 I was dismissed by reason of redundancy. However redundancy was never mentioned by you and I was offered no redundancy terms for my eleven years of service. I am owed eleven years redundancy payments.

Unfair dismissal, I was offered no consultation, nor selection for redundancy or alternative work. I am owed a compensatory award for loss of earnings since my dismissal together with loss of statutory rights.

Notice pay, I should have been paid eleven weeks' notice pay. This of course might be a nominal sum when taken in conjunction with a loss of earnings claim but nevertheless will form part of my claim.

Holiday pay, I am owed accrued holiday pay till 25 5 2020.

43. The statement contained within that letter- that on 20 May 2020, the claimant was told that she must now consider herself dismissed is inconsistent with what the claimant told me at the start of this hearing that there was no "physical conversation" around the text message of page 40 "just general chit chat".

44. I must decide what the effect of that letter is. At the time it was sent, I have found that the respondent had not terminated the claimant's contract of employment, but the claimant was, by the time she sent the letter, treating the contract as terminated. In my judgment, in sending that letter, it was the claimant who terminated the contract of employment. It was, in effect, a resignation. No notice was given and therefore, the effective date of termination was 17th August 2020.

45. I find that the claimant would have a strong argument to say that, insofar as the respondent failed to provide her with any work or any payment from the end of

March 2020, the respondent was in repudiatory breach of the contract of employment. However, the claimant has never suggested that was the reason why she resigned; the claimant's case has always been that she believed that she had been dismissed. Having found that she was mistaken in that respect, it is not open to me to find that, in fact, she resigned because she was not provided with work- that is not something the claimant has said. The Court of Appeal has made clear in *Kaur v Leeds Teaching Hospitals* that for there to be a constructive dismissal situation the employee must resign in response to the breach of contract. That was not the case here on the evidence that I have heard.

46. Thus, I do not find that there was a dismissal by the employer and nor do I find that there was a resignation by the claimant in circumstances where she was entitled to claim that she had been constructively dismissed.
47. In respect of claim for holiday pay, the claimant's evidence, which I accept, is that the holiday year runs from 1st April to 31st March and she is entitled to 28 days holiday. However each year she carried forward 2 week's holiday from the previous year to take in the first two weeks of April.
48. The claimants evidence is that she was not paid for her holiday in the first 2 weeks of April 2020. There is no suggestion that the claimant was not permitted to take holiday in those two weeks, she could have taken it, but she was not paid for it.
49. The claimant tells me, and I accept, that she was paid on the 18th of each month for the previous month. Thus she should have been paid for her April holiday on 18th May. She was not.
50. I find that the carrying forward of holiday from one year to the next was an express contractual agreement between the claimant and the respondent. The non-payment of holiday pay for the April holiday was a breach of contract because the claimant was entitled to be paid for it. That entitlement was outstanding when the contract was terminated. The claim form was presented within three months of the effective date of termination.
51. I do not need to consider, therefore, the claim under the Working Time Regulations 1998 since it is for the same amount which succeeds as a claim for breach of contract.

Conclusions

52. In respect of the claim for a redundancy payment, I do not find that there was a dismissal for the purposes of s139 of the 1996 Act. The respondent did not dismiss the claimant and the resignation of the claimant was not because of any breach of contract by the respondent. There is only an entitlement to a redundancy payment if somebody is dismissed because of redundancy and in those circumstances, this claim must fail.
53. Likewise a claim for unfair dismissal must fail because the claimant was not dismissed.
54. The claim of breach of contract in respect of notice pay must also fail because it was the claimant who resigned without working for her notice. Thus there was no breach of contract on the part of the respondent.

55. The claim in respect of holiday pay succeeds because the claimant should have been paid for the two week's holiday that she took in April 2020 but was not paid for it. I find that the claimant is entitled to bring a claim of breach of contract in respect of that non-payment which was outstanding at the date of termination of employment .
56. The sums claimed by the claimant were not challenged by the respondent and, therefore, she is entitled to a payment of £741.76.

Employment Judge Dawson
Date: 20 May 2021

Judgment and Reasons sent to the Parties: 28 May 2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Video Hearing

The hearing was conducted by the parties attending by Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.

The judgment could not be given orally due to connectivity problems.