

THE INDUSTRIAL TRIBUNALS

CASE REF: 7102/19

CLAIMANT: Saoirse Cullen

RESPONDENT: Maoliosa Lennon t/a Lukas Blooms

DECISION

The decision of the tribunal is that the claimant's claims of constructive dismissal and holiday pay are made out but both of these claims are dismissed as they were brought outside the relevant time limits and there is no evidence that it would not have been reasonably practicable for the claims to have been presented within time. The remaining claims in respect of redundancy, notice pay and sick pay have not been made out.

Constitution of Tribunal:

Employment Judge: Employment Judge Wimpres

Members: Mrs G Clarke
Mr B McCreight

Appearances:

The claimant was represented by her mother, Ms Caoimhe Cullen.

The respondent was represented by Mr P Moore of Copacetic Business Solutions Ltd.

SOURCES OF EVIDENCE

1. The tribunal received witness statements from the claimant and Mrs Maoliosa Lennon and heard oral evidence from them by way of cross-examination. A bundle of relevant documents was provided together with a Schedule of Loss which was replaced with a revised version during the course of the hearing.

TITLE OF THE PROCEEDINGS

2. At the outset of the hearing Mr Moore informed the tribunal that although the respondent business at one time had been a limited company it was no longer incorporated and as a result we ordered that the respondent's title be changed to Maoliosa Lennon t/a Lukas Blooms.

THE CLAIM AND THE RESPONSE

3. The claimant brought a claim of constructive dismissal against the respondent and also sought payment in respect of redundancy, holiday pay, notice pay, sick pay and breach of contract. The claimant's claim of constructive dismissal was based on a conversation she had with Mrs Lennon on 13 December 2018 when she was told that the hours would be reduced by 75% due to a downturn in business and that she could work Saturdays if she wanted to. In her claim form the claimant stated that she took up a new job on 17 December 2018 and that her last day of employment with the respondent was 8 January 2019. The claim form was lodged in the tribunal office on 20 March 2019.
4. The respondent denied that the claimant was constructively dismissed or was entitled to any monies under the other headings. The response stated that the claimant resigned with notice on 13 November 2018, employment ended on 13 December 2018 and contended that the claim of constructive dismissal was out of time. The respondent also disputed the claims of redundancy, holiday pay, notice pay, sick pay and breach of contract.

THE ISSUES

5.
 - (1) What is the proper identity of the respondent? Was the respondent a sole trader or an extant limited company at the time of her dismissal?
 - (2) Did the claimant resign of her own volition in November 2018 or was she constructively unfairly dismissed at a later date?
 - (3) If the claimant was constructively unfairly dismissed, what was the date of termination?
 - (4) What is the breach of contract relied upon by the claimant? Was it a fundamental breach of contract and did the claimant resign in response to that alleged breach of contract in a timely fashion?
 - (5) What (if any) is the significance of the claimant's schedule of loss and supporting documents to the issues set out above?
 - (6) Is the claimant owed holiday money in the sum of £448.00? Is the claimant owed notice pay?
 - (7) Subject to any finding of unfair dismissal, what was the claimant's loss?
 - (8) Should there be an adjustment to the award made to the claimant (if any)?
 - (9) Was the claimant a willing participant in any arrangement which amounted to illegality of contract?
 - (10) Has the claim been presented within the requisite time-limit contained in the Employment Rights (Northern Ireland) Order 1996? If not, was it reasonably practicable for the claimant to have done so?

THE FACTS

6. The claimant's date of birth is 21 May 1997 and she commenced working for the respondent on 1 November 2014 when she was aged 17. Mrs Lennon in her witness statement was at pains to stress that the claimant's hours were not regular and that she was required to work as and when. This may well have been the case when she was first taken on and she worked on Saturdays with more hours at busy times such as Christmas. While still at school the claimant worked a 16 hour week and ultimately worked a 28 hour week over 4 days (Tuesday to Saturday – the business closed on Wednesdays prior to 2018) and longer at busy times. This was confirmed in a text message from Mrs Lennon to the claimant, the authenticity of which was not in dispute. The claimant's vocation was to work in the field of domiciliary care and after completing her schooling she undertook a course in domiciliary care at Banbridge and Newry. The respondent business was closed for five weeks every year – one week at Easter, two weeks in July and two weeks after Christmas – and the claimant received paid leave during these periods. The claimant was also permitted to avail of unpaid leave for holidays abroad. The claimant was paid either cash or bank transfer, or a combination of both, and was paid £8.00 per hour during the final year of her employment. This equated to £224.00 per week. No deductions were made from the claimant's pay in respect of tax or National insurance. A letter dated 9 August 2019 from Her Majesty's Revenue & Customs stated that it had no record of any income tax or national insurance payments being made in respect of the claimant's employment with the respondent. Mrs Lennon gave evidence about problems with her accountants and indicated that she was seeking to regularise matters. It is symptomatic of the poor management of the respondent business that the claimant was not given pay slips and at no time was she provided with a statement of her main terms and conditions of employment.
7. Mrs Lennon was aware of the claimant's interest in domiciliary care and did not regard her as having a long term future as as a florist. Had the claimant been interested in working in the florist business on a long term basis Mrs Lennon would have trained her up and sent her on courses.
8. The claimant remained keen to work in the domicillary care area and to this end she attended an open recruitment day in June 2018.
9. On 29 October 2018 the claimant attended an open recruitment day for domiciliary care workers. The claimant was able to apply for a job at this event. She completed a number of forms and attended an interview which lasted approximately 15 minutes. As a result she was told that she was suitable for employment pending further checks. The claimant was concerned that Mrs Lennon would need her to work during the busy Christmas period and she was reassured that the process would take some time and that she would not be offered a post until the new year. As we understand it this constituted a conditional job offer.
10. The claimant visited the respondent's premises with her mother on the same day to wish Mrs Lennon a happy birthday and deliver a card and a present. The claimant was anxious about telling Mrs Lennon her news that day and she accepted her mother's advice not to mention it.
11. The claimant's aunt, Trea Cullen, also worked in the florist and the claimant told her about the job offer the next day, 30 October 2018. She advised the claimant to tell

Mrs Lennon about it. The claimant accepted this advice and in her witness statement claims that she told Mrs Lennon later that week which, if correct, would mean by 3 November 2018 at the latest. In her evidence to the tribunal the claimant stated that she told Mrs Lennon that she had attended the recruitment day and had got through the first stage of the process. This detail does not appear in her witness statement. According to the claimant, Mrs Lennon congratulated her but was quiet for the rest of the week causing the claimant to believe that she had upset her.

12. On 8 November 2018 the claimant receive a phone call from Mr Mel Byrne, from the Human Resources Department in the Southern Health and Social Care Trust, who told the claimant that they had checked her application and realised that she hadn't got a driving licence and therefore the application could not go any further. The claimant explained to Mr Byrne that she had told the interviewer that she was taking driving lessons and should have her licence in the New Year and that they accepted it. Mr Byrne agreed to go and check with someone and get back to her.

13. On 13 November 2018 Mrs Lennon exchanged text messages with her sister, Daghra. The text message that Mrs Lennon sent to her sister, was timed at 20.13 and reads as follows:

"Hello. How's your week going

Saoirse got a new job"

14. On 17 November 2018 the claimant received a letter dated 14 November 2018 from Ms Naiomh O'Brien, Business Manager in the Southern Health and Social Care Trust. The letter informed the claimant that the conditional job offer would have to be withdrawn because she did not have a driving licence at this time.

15. According to the claimant's witness statement she told Mrs Lennon about the letter from the Trust the following week. Mrs Lennon commiserated but didn't make a big issue about it. Mrs Lennon gave evidence that the claimant called in at the shop on 11 December 2018 and said – *"Did you hear about the job – I didn't get it."*

16. On 13 December 2018, on the claimant's account, Mrs Lennon told her that her hours would have to be reduced after Christmas due to a downturn in business but the claimant could work some Saturdays if she wanted to. When the claimant's mother picked her up from work that night the claimant told her that she had been dismissed. The claimant visited her aunt, Trea Cullen, that night. According to the claimant she was shocked and was unaware of a downturn in business.

17. The claimant was upset and did not get much sleep that night. She texted Mrs Lennon the next morning and told her that she wasn't well enough to come into work. No medical evidence was produced and this was treated as self-certified sick leave. The claimant described it as work-related stress.

18. According to the claimant her mother also texted Mrs Lennon on the same day and asked her to clarify the reasons for the decision and whether the claimant was being dismissed or made redundant as she needed that information to determine whether the claimant was eligible for benefits. Mrs Lennon replied that there had been a downturn in business and that she had to reduce the claimant's hours to a Saturday after Christmas and that the claimant agreed and said that she was going to

suggest reducing hours herself. The claimant denied making any such comment. Accordingly to the claimant her aunt, Trea Cullen, also questioned Mrs Lennon about her decision that day and suggested that it would have been fairer reducing her hours too to which Mrs Lennon responded that she was admin staff and not the same role as the claimant. The claimant was also concerned that she was not paid the same day as her aunt that week as would normally occur and anticipated that Mrs Lennon did not want to pay her for the Friday in case she didn't return to work after getting the news of the reduction in her hours. Mrs Lennon normally transferred £150 per week into the claimant's bank account but on Friday 19 December only £120 was transferred. The claimant believed that this was because Mrs Lennon had docked Friday's pay from her wages.

19. The claimant was concerned that she would be short of money in the run up to Christmas and phoned Grafton Recruitment on Friday 14 December 2018 to see if any work was available and made an appointment with them on the morning of Monday 17 December 2018. She attended that morning and in the afternoon was informed that a post was available immediately at Craigavon Area Hospital. The claimant took up this offer of employment and commenced work at 4.00 pm that day.
20. The claimant did not take up the respondent's offer of Saturday work and did not return to work in the florists. The claimant's mother sought advice from the Citizens Advice Bureau and was advised to send the respondent a letter of objection. According to the claimant she followed this advice and wrote to Mrs Lennon on 18 December 2018. The original letter was not produced in evidence to the tribunal and instead a typed version was provided. It read as follows:

“Maoliosa

I refer to our conversation on Thursday 13th December when you informed me that business was slow and in January there would be no work for me. To clarify I do not find the reduction in my hours acceptable. Your suggestion that I could work Saturday (“... if I wanted to”) amounts to a 75% decrease and as such it is a fundamental change to the terms and conditions of my employment.

Regards

Saoirse Cullen”

There was no reply to this letter and Mrs Lennon denied receiving it.

21. At Christmas the claimant was present at her grandmother's house. The respondent was also present. The claimant's mother overheard derogatory comments made by Mrs Lennon about the claimant and reported these to the claimant.
22. The claimant obtained assistance from the Citizens Advice Bureau. The claimant's main concern at this juncture was holiday pay which she believed that she was entitled to.

23. The claimant emailed Mrs Lennon on 3 January 2019 in the following terms:

“Maoliosa

Due to your lack of response to my letter of objection (please find attached) and your lack of positive communication generally I have come to the conclusion that it is in everyone’s best interests for me to resign. Please accept this email as notification of same.

I would be grateful if you would deposit money owed to me for annual leave in my bank account and forward my P45 in a timely manner.

Saoirse”

Again the original email was not produced and Mrs Lennon denied receiving the email.

24. On 13 February 2019 the claimant wrote to Mrs Lennon this time with proof of posting and there is no dispute that this letter was received by Mrs Lennon. It read as follows:

“Dear Maoliosa

I am writing to you with reference to my employment with your business

I started working for you in November 2014. Initially I worked Saturdays with more hours at busy times such as Christmas. Later as my school timetable allowed I worked 16 hours on a regular basis. When my course at school came to an end in 2017 you offered me a minimum of 28 hours per week starting in August 2017 and an increase in wages from £6.50 per hour to £8 per hour. I worked a minimum of 28 hours per week up until 13 December 2018 when you informed me my hours of work were being reduced to 8 per week as there was a downturn in business.

I sent you a letter on 18th December objecting to the change in my hours, you did not respond to my letter. As I did not hear from you and could not afford a reduction in my wages, effectively 75%, I had no option but to resign my job. It is my opinion that your actions amount to nothing short of constructive dismissal which I will be pursuing through an industrial tribunal.

My letter of resignation was sent on 3 January 2019 to which I have had no response.

In addition I am raising a grievance in relation to the following:

I was not issued with a written statement of the main terms and conditions of my job.

I never received any payslips showing the national insurance contributions and income tax paid.

As my hours of work were reduced by 75% this is a fundamental breach to

my contract so my job no longer existed. I was effectively made redundant and should have received redundancy pay along with the reasons why I was selected for this.

I have not yet received my outstanding holiday pay.

I look forward to your response within the next 7 days.

Saoirse Cullen”

25. The claimant continues to work as an agency worker for Grafton and is awaiting confirmation of a permanent job elsewhere.
26. Mrs Lennon’s evidence was that she first learnt of the claimant’s job offer when the claimant handed in her notice on 13 November 2018, a week after the claimant had learned that the conditional offer of a job with the Trust was in jeopardy. According to Mrs Lennon the claimant explained that she had got a new job working in a hospital and that she would work on for a few extra weeks as she didn’t know when the job started. Mrs Lennon congratulated her and thanked her for her offer to work on for a few weeks as Christmas was one of the busiest times. Mrs Lennon regarded this as effectively a resignation with 4 weeks’ notice. While Mrs Lennon’s evidence is in part consistent with what the claimant was told at the recruitment day the date of this event makes no sense at all unless the claimant was confident that her conditional offer remained in place which she could not plausibly have been. One possibility is that Mrs Lennon got the date wrong but she stuck firmly to this date under questioning and relied upon the text exchange with her sister, Dagra, on 13 November 2018 in support of her account.

THE LAW

27. Article 126 of the Employment Rights (Northern Ireland) Order 1996 sets out the right not to be unfairly dismissed and Article 127 in so far as relevant provides as follows:-

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

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

...

(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 ...”

28. In order for an employee to establish that he/she has been constructively dismissed, an employee must show that his employer had committed a serious and repudiatory breach of contract, that the employee had left because of that breach and that he had not accepted and had not waived that breach. A relevant serious breach of contract can include not just the breach of a specific or written contractual term but

a serious breach of the implied term of trust and confidence. Such a breach of the implied term would occur if an employer had acted in a manner which was calculated or was likely to destroy or seriously damage the relationship of trust and confidence.

29. The authors of ***Harvey at D1 [403]*** describe four conditions that an employee must meet if he/she is to claim constructive dismissal:
- (1) There must be a breach of contract by the employer. This may either be an actual breach or an anticipatory breach.
 - (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last of a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting repudiation in law.
 - (3) He must leave in response to the breach and not for some other, unconnected reason.
 - (4) He must not delay too long in terminating the contract in response to the employers breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.
30. The leading case in relation to constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp (CA) [1978] ICR 221*** in which it was held that an employee's entitlement to terminate his contract of employment by reason of his employer's conduct was to be determined in accordance with the law of contract and not by applying a test of unreasonableness to the employer's conduct. However, the courts mitigated the impact of this approach by recognising that there is an implied contractual term to the effect that the employer should not behave in a manner that would undermine the relationship of trust and confidence between employer and employee. The nature of the duty of trust and confidence was described by Lord Steyn in ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606*** and formulated in ***BG plc v Mr P O'Brien [2001] IRLR 496***, as follows:-
- "The question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee."*
31. In ***Brown v Merchant Ferries Ltd [1998] IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract. For a claim of constructive dismissal to succeed it must also be unfair.
32. The Working Time Regulations (Northern Ireland) 2016 provide under Regulations 15 and 16 for a worker to have minimum leave in a year of 5.6 weeks. Under Regulation 17 of the 2016 Regulations where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) therein which sets out a formula to be used in the absence of provision in a relevant

agreement.

Statement of Particulars of Employment

33. Articles 33(1) and 36(1) of the 1996 Order require an employer to provide an initial written statement of particulars of employment covering specified matters and a written statement of any subsequent changes to those particulars. Article 27 of the Employment (Northern Ireland) Order 2003 (“the 2003 Order”) makes provision for a minimum award in respect of an employer’s failure to provide such a statement as follows:

“27 (1) This Article applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4.

(2) If in the case of proceedings to which this Article applies—

- (a) the industrial tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and*
- (b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order (duty to give a written statement of initial employment particulars or of particulars of change),*

the tribunal shall, subject to paragraph (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this Article applies—

- (a) the industrial tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and*
- (b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order,*

the tribunal shall, subject to paragraph (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In paragraphs (2) and (3)—

- (a) references to the minimum amount are to an amount equal to two weeks' pay, and*
- (b) references to the higher amount are to an amount equal*

to four weeks' pay.

(5) *The duty under paragraph (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that paragraph unjust or inequitable.*"

34. The Industrial Tribunals Extension of Jurisdiction Order (Northern Ireland) 1994 ("the 1994 Order") confers jurisdiction on industrial tribunals to hear claims for breach of contract and Article 3(c) provides as follows: -

"Proceedings may be brought before an industrial tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for sum due in respect of personal injuries) if -

...

(c) *the claim arises or is outstanding on the termination of the employee's employment."*

35. The time limit for breach of contract claims by employees are dealt with in Article 7 of the 1994 as follows:

"7. An industrial tribunal shall not entertain a complaint in respect of an employee's contract 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) *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*

(c) *where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of these periods is applicable, within such further period as the tribunal considers reasonable."*

36. In ***Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379***, Scarman LJ indicated that if the claimant was saying he did not know his rights, relevant questions would be to consider the following:

"What were his opportunities for finding out that he has rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."

37. In ***Wall's Meat Company Ltd v Khan [1979] ICR 52***, Brendon LJ gave the following guidance:-

"The performance of an act, in this case the presentation of a complaint, is

not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

38. In **Palmer and Saunders v South-end-and-Sea Borough Council [1984] IRLR 119** and Lord Justice May proposed a test of "reasonable feasibility" in the following passage:-

*"We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand "reasonably practicable" means more than merely what is reasonably capable physically of being done - different for instance from its construction in the context of the legislation relating to factories ... perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in **Singh v Post Office 1973 ICRF 437** and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?" - is the best approach to the correct application of the relevant sub-section."*

39. Harvey on Industrial Relations and Employment Law, Volume 3, Section P1, has emphasised:-

"(207) So, whilst a claimant's state of mind is to be taken into account, it is clear that his mere assertion of ignorance either as to the right to claim, the time-limit or the procedure for making the claim is not to be treated as conclusive ... moreover, as the courts pointed out, the widespread public knowledge of unfair dismissal rights, it is all the time becoming more difficult to an employee to plead such ignorance successfully ...

*(208) [Given] if an employee is reasonably ignorant of the right to claim, it will inevitably follow that he will be unaware either of the correct mode of making a claim or the time within which it should be made. But if he knows in general about the availability of the remedy, he may still be ignorant of how and when to pursue it. In these circumstances, as Brendan LJ noted in the **Walls Meat** case, it may be difficult for him to satisfy a tribunal that he had behaved reasonably in not making suitable enquiries about these matters. Shaw LJ in the same case commented that 'mere ignorance' of the time-limit will not of itself amount to reasonable impracticability, save perhaps where the employee does not discover the existence of his right until a short time before the expiry of the time-limit. Pauler LJ*

took a similar view in Riley v Tesco Stores [1980] ICR 323 at 335."

Submissions

40. Both representatives made oral submissions. The claimant's representative helpfully provided a typed copy of her submissions, a copy of which is appended to this decision.

Claimant's Submissions

41. Mrs Cullen submitted that Mrs Lennon advised the claimant that she was reducing her hours by 75% because she felt slighted by the claimant seeking employment elsewhere. Mrs Cullen submitted that by imposing this change without following procedures and substantially reducing the claimant's pay Mrs Lennon had seriously damaged or destroyed the mutual trust and confidence between her and the claimant and that this amounted to a fundamental breach of contract. Mrs Cullen also cited, in support of this contention, Mrs Lennon's failure to engage with the claimant when she made clear that the change was unacceptable and making allegations of poor performance at a family gathering on Christmas Day. Mrs Cullen also drew attention to the failure to provide the claimant with pay slips and a statement of her main terms and conditions of employment. In addition, Mrs Cullen sought to undermine Mrs Lennon's contention that there was a downturn in business by reference to the absence of supporting evidence and various other matters. Mrs Cullen's submissions also included information from her own knowledge and dealings with the matter but as Mrs Cullen did not give evidence none of this was properly before the tribunal. Mrs Cullen also reminded the tribunal that Mrs Lennon had failed to pay the claimant for the Christmas week.

Respondent's Submissions

42. Mr Moore submitted that the claimant's case was tainted with maliciousness and spite. In support of this contention Mr Moore drew attention to the events at the family gathering at Christmas and sending Mrs Lennon a letter about this matter on Valentine's Day, a very busy time for the respondent business. Mr Moore also pointed out that although it would be good practice to respond to a grievance letter there was no obligation to reply to this letter as the claimant was no longer an employee.
43. Mr Moore submitted that the claimant resigned on 13 November 2018 in order to take up another post. As the claimant had been employed by the respondent for 4 years her notice period was 4 weeks which resulted in an effective date of termination ("EDT") of 13 December 2018. The claimant did not withdraw or renege on her resignation but simply said – "Did you hear about the job – I didn't get it." As an act of kindness and goodwill Mrs Lennon said that she could work up until Christmas for one day week, and a Saturday, in the New Year.
44. On the basis of an EDT of 13 December 2018 Mr Moore submitted that the claim was out of time as it was lodged on 20 March 2019. Mr Moore pointed out that the test for granting an extension was whether it would have been reasonably practicable to lodge the claim on time and that this was a high hurdle to climb. The claimant had sought advice from the Citizens Advice Bureau ("CAB") and it was therefore reasonably practicable to file the claim within time. In addition, the

grievance letter of 14 February 2019 raised all the heads of claim and there was no reason why these could not have been included in a claim form. Accordingly, there was no good reason for not presenting the claim within time. Mr Moore also drew attention to the respondent's contention that the breach of contract occurred on 13 December 2018 and submitted that if this was correct, which it wasn't, the claim was long out of time as time runs from when the breach takes place.

45. In relation to dismissal Mr Moore drew attention to the claimant's agreement under cross-examination that at no time did Mrs Lennon tell her that she was dismissed but rather her evidence was that she was told that her hours were being reduced by 75%. Therefore there was no dismissal and the statutory dismissal procedures did not apply.
46. Mr Moore submitted that the claimant gave clear evidence that she rang Grafton Recruitment on 14 December 2018, secured an appointment with them on 17 December 2018 and started work on the same day. When the claimant was asked in cross-examination whether she was going to do two jobs she said 'No'. Accordingly, 17 December 2018 could be interpreted as a resignation of her previous job with the respondent. The claimant's evidence was that the new post was Monday to Friday from 4.45 pm to 9.30 pm and on the basis of her evidence that she was not going to do two jobs, taking up a new post constituted a resignation. The claim was therefore out of time.
47. Mr Moore submitted that the claimant resigned by her action in taking up another post and that her purported resignation letter was not received by Mrs Lennon. Mr Moore further submitted that the claimant's letter of 3 January 2019 complaining about further breaches of contract was not submitted in a timely manner.
48. Mr Moore submitted that the reduction of hours by 75 % was not a fundamental breach of contract because the claimant had already resigned and offering the claimant the opportunity to work on one day per week was simply an act of good will by Mrs Lennon. Further, the claimant's resignation was not submitted in a timely fashion and accordingly none of the four conditions were met.
49. Mr Moore was highly critical of the Schedule of Loss which he contended amounted to perjury and in particular drew attention to the contention that the claimant still worked for the respondent on 8 January 2019. Mr Moore further submitted that there should be no basic award as the claimant had worked her period of notice and no compensatory award as the claimant had suffered no, or only a minimal, loss of earnings.
50. In relation to holiday pay Mr Moore accepted that the claimant had an entitlement to 28 days paid leave and on the basis that she worked up until she took up her new employment and thus would be entitled to three quarters of 28 days which equated to 21 days. Mr Moore submitted that she was actually paid for this in advance as the respondent business was closed in the first week of January 2018, Easter week and two July weeks which equated to 20 days paid holiday. On this basis Mr Moore submitted that the claim for holiday pay of £448.00 was nonsense. Mr Moore also challenged the larger claim for holiday pay of £582.40 contained in the revised Schedule of Loss which included the closure of the business at Christmas 2018 and 13 days accrued annual leave as being without any foundation or merit.

51. Mr Moore submitted that the claimant had no entitlement to notice pay given that she had resigned without notice and taken up a new job on 17 December 2018. Mr Moore submitted that the claimant had sustained no loss and that there was no basis for an adjustment to be made to any award which would only be appropriate if no procedure was followed but as the claimant left and went to work in another job he questioned what procedure the respondent could be expected to follow. In addition, Mr Moore submitted that no uplift is appropriate as the statutory procedures cannot be followed in a constructive dismissal case.
52. Mr Moore did not pursue the jurisdictional issue of illegality.
53. Mr Moore accepted that the respondent had not provided the claimant with a statement of the terms and conditions of employment but reminded the tribunal that this was not a stand-alone head of claim and must be supported by a breach of contract.
54. In relation to pay slips Mr Moore submitted that no award could be made for the failure to provide pay slips just a declaration as to the claimant's entitlement.
55. Mr Moore submitted that the claimant has no entitlement to sick pay as she went out and sought another job on the same day as she took sick leave and to claim sick pay in these circumstances would constitute fraud. On the basis of both Mrs Lennon's and the claimant's evidence she was not entitled to sick pay.
56. Mr Moore submitted that the claimant had no entitlement to redundancy pay. Nor was she is entitled either to compensation for loss of statutory rights as she obtained new employment on 17 December 2018 notwithstanding that it was temporary.

Reply to Respondent's Submissions

57. Mrs Cullen in reply submitted that in relation to the time point she was working on the basis that the claimant resigned on 3 January 2019. The claimant was not sure what was going on and the respondent's actions led to her resignation on 3 January 2019. The claimant was constructively dismissed because she was not happy with the reduced hours. As to the need to act speedily Mrs Cullen submitted that the claimant did act speedily. She sought an explanation but none was forthcoming. Mrs Cullen accepted that she could not prove that Mrs Lennon received the letter of objection. The claimant did not want to bring a tribunal case and Mrs Cullen rejected the suggestion that it was malicious to send a letter to the respondent about the matter on St. Valentine's Day. Mrs Cullen also contended that it was possible to have two jobs and that taking up a second job did not mean that the claimant was resigning from her first job. It was possible to do both if money was needed. This submission prompted Mr Moore to interject and remind the tribunal of the claimant's evidence that she was not going to do two jobs. Mrs Cullen nonetheless continued to pursue this submission and pointed out that the other job was Monday to Friday and the claimant could therefore have kept both jobs. In relation to loss Mrs Cullen informed the tribunal that the claimant was now working 40 hours per week and was being paid £305. They did not think that she would get a job as good as that and just wanted holiday pay that she was entitled to. Mrs Cullen submitted that the claimant was entitled to 25 days holiday on a pro rata basis. An entitlement of 28 days at 5.6 hours per day at £44.80 per day

produces a total of £582.00. Mrs Cullen went on to state that the claimant was not interested in minimal loss of employment rights and did not want to bleed Mrs Lennon dry. She therefore only sought £100 under this heading and just wanted her legal entitlement to holiday pay when she resigned.

Discussion

58. There is a conflict in the evidence given by the respective parties as to when the claimant resigned. It is not in dispute that in early November 2018 the claimant informed Mrs Lennon that she had been offered a job by the Trust. We do not accept however that the claimant resigned on 13 November 2018 as alleged by Mrs Lennon. This makes no sense at all given that the claimant knew that there was a problem with her job application as a result of her telephone conversation with Mr Byrne on 8 November 2018 even though the position was not confirmed to the claimant until she received Ms O'Brien's letter on 17 November 2018. We therefore proceed to consider the claim of constructive dismissal on the basis that the claimant did not resign on 13 November 2018.
59. There is no dispute that on 13 December 2018 Mrs Lennon informed the claimant that her hours were being drastically reduced due to downturn in business. No evidence was adduced to substantiate the downturn in business. Mrs Lennon claimed not have received the claimant's email of 18 December 2018 objecting to the proposed change. While Mr Moore drew attention to the absence of the original emails he did not seek to suggest that either this email or the email of 3 January 2019 were concocted. However, that this occurred at a time when the claimant had obtained a new job raises an issue as to its legal and factual significance given that the claimant was already working for new employer with no likelihood of a return to the florist especially as the new job was in the field in which she saw her future career. The claimant was clearly unhappy about the reduction of hours and in consequence sought out a new job almost immediately because she needed the money. There was no suggestion that this was to make up for a drop in her income due to a reduction in hours but rather it was a replacement job. This is borne out by the claimant's evidence that she had no intention of doing two jobs. While Mrs Cullen is clearly correct in submitting that there was nothing to prevent the claimant from doing both jobs this flies in the face of the claimant's evidence to the tribunal. There is no evidence that the claimant's decision to seek work via Grafton Recruitment was pre-planned and we are satisfied that the claimant left her employment with the respondent because of the reduction in her hours and not for an ulterior reason. Having considered all of the evidence we are satisfied that the claimant resigned on 14 December 2018 without giving notice to the respondent.
60. Looking at the matter on the basis of the four conditions set out in *Harvey* we conclude as follows:
- (1) There was a breach of contract by the respondent namely a substantial reduction in hours with a consequent drop in wages. As the reduction in hours had not been implemented when the claimant left her employment without notice, it should properly be regarded as an anticipatory breach rather than an actual breach, although in this case it makes no difference which type it is.
 - (2) The breach was sufficiently important to justify the claimant resigning.

- (3) The claimant resigned in response to the breach and not for some other, unconnected reason.
- (4) On the basis that the claimant left her employment almost immediately it could not be said that she delayed too long in terminating the contract in response to the respondent's breach.

Time Limit

61. On the basis that the claimant's employment with the respondent ended on 14 December 2018 the question arises as to whether the claim was presented within the requisite time-limit. As the claimant's claim form was not lodged until 20 March 2019 the claim is clearly outside the 3 month time limit. Even on a more benevolent approach which would tie the claimant's resignation to the date on which she took up her new job on 17 December 2018, the claim would still be outside the 3 month time limit. The claimant presented no evidence as to why it would not have been reasonably practicable to have presented her claim within time and instead relied on a later resignation date namely 3 January 2019. In view of our findings as to the EDT this alternative is not sustainable. Accordingly, there is no basis upon which to exercise the tribunal's discretion to extend time. Such evidence as there is points towards the claimant obtaining advice from the CAB in December/January before the expiry of the time limit and not issuing proceedings until 20 March 2019. We do not know what advice was given, if any, about time limits and the advice appears to have focussed on writing a letter of objection. There is no suggestion of any failing in the CAB's advice and we suspect that it was predicated on a resignation date of 3 January 2019. No basis has therefore been established for granting an extension of time and the claim of constructive dismissal therefore falls on this jurisdictional issue.
62. In view of our findings as to the date and circumstances of the claimant's resignation, the claim in respect of notice pay must also fail and as there is no finding of dismissal no award may be made in respect of the failure to provide the claimant with a Statement of Main Terms and Conditions of Employment. Nor can the claim for sick pay succeed as the claimant had effectively walked out at that point.
63. The claimant's entitlement, if any, to accrued holiday pay is dependent on a calculation using the statutory formula contained in Regulation 17 of the Working Time Regulations as follows:

$$(28 \times 345/365) = 26.47 \text{ (27 days when rounded up).}$$

On pro rata basis this reduces to 4 days and on the basis of a daily rate of pay this would result in an entitlement to £224.00. As the respondent business was closed in the first week of January 2018, Easter week and two July weeks in respect of which the claimant received her full pay, this equates to 20 days paid holiday. In the normal course of events the claimant would have benefitted from paid leave at Christmas 2018 but at this stage she had a new job elsewhere. However, the claim for holiday pay also falls foul of the time limit, this time under the 1994 Order, and accordingly, the claim for holiday pay also fails as it was not brought within 3 months of the claimant's dismissal and there no evidence that it would not have

been reasonably practicable for the claim to have been brought within time.

CONCLUSIONS

64. (1) What is the proper identity of the respondent? Was the respondent a sole trader or an extant limited company at the time of her dismissal?

The respondent is Maoliosa Lennon, t/a Lukas Blooms. Ms Lennon was a sole trader and not a limited company at the time of the claimant's dismissal.

- (2) Did the claimant resign of her own volition in November 2018 or was constructively unfairly dismissed at a later date?

The claimant was constructively dismissed on 13 December 2018.

- (3) If the claimant was constructively unfairly dismissed, what was the date of termination?

The date of termination is 14 December 2018.

- (4) What is the breach of contract relied upon by the claimant? Was it a fundamental breach of contract and did the claimant resign in response to that alleged breach of contract in a timely fashion?

The claimant relied upon a substantial reduction in her hours of work which she assessed as a reduction by 75%. This was a fundamental breach of contract and the claimant resigned in a timely manner in response to this breach.

- (5) What (if any) is the significance of the claimant's schedule of loss and supporting documents to the issues set out above?

It is not necessary to address this issue in view of our overall conclusions.

- (6) Is the claimant owed holiday money in the sum of £448.00? Is the claimant owed notice pay?

The claimant's holiday pay claim amounts to £224.00 but this claim was not made within time and there is no evidence that it would not have been reasonably practicable for her to have done so.

- (7) Subject to any finding of unfair dismissal, what was the claimant's loss?

In view of our overall conclusions it is not necessary to address loss but we note that it was accepted by the claimant that any loss would be minimal given that she acquired a new job almost immediately.

- (8) Should there be an adjustment to the award made to the claimant (if any)?

This does not arise.

- (9) Was the claimant a willing participant in any arrangement which amounted to

illegality of contract?

It is not necessary to address this issue.

- (10) Has the claim been presented within the requisite time-limit contained in the Employment Rights (Northern Ireland) Order 1996? If not, was it reasonably practicable for the claimant to have done so?

The claim was not presented in time and there is no evidence that it would not have been reasonably practicable to do so.

65. The claimant's claim of constructive dismissal is therefore dismissed along with all of the heads of claim that are dependent on it. The claim for holiday pay was made out but was not brought within time. The claims in respect of redundancy, notice pay and sick pay are also dismissed.

Employment Judge:

Date and place of hearing: 29-30 October 2019, Belfast.

Date decision recorded in register and issued to parties:

Closing Statement

It was my intention to prove as far as possible during these proceedings that Mrs Lennon advised Saoirse of a 75% reduction in hours on 13th December because she felt slighted by Saoirse seeking employment elsewhere. By imposing the 75% reduction (conservative estimate) in working hours without following procedures and the resulting significant reduction in pay the respondent's conduct seriously damaged/destroyed the mutual trust and confidence between her and the claimant and amounted to a fundamental breach of contract. With the claimant in fact believing that she had been dismissed. The claimant made the respondent aware that she found the changes unacceptable, but the respondent did not engage with the claimant. On Christmas day the respondent bullied and harassed the claimant and made unfounded allegations of poor performance to a third party, which added to the claimant's belief that she had been dismissed and she resigned shortly afterward.

Mrs Lennon failed to follow basic procedures when informing Saoirse of the change in hours. I texted Mrs Lennon on 14th December to ask for clarification on why Saoirse was dismissed. She didn't correct me to say that Saoirse had resigned nor did she dispute that she had been dismissed. Instead she said that Saoirse had been informed of a reduction in her hours and was in fact in agreement with the change. Saoirse also texted Mrs Lennon to say that she wouldn't be in that day because she had been up all night. This was not a normal employer/ employee relationship Mrs Lennon was part of the family she had a close relationship with Saoirse and me as you can see by the texts in evidence. If there had been any confusion it would have been easily cleared up. Saoirse let Mrs Lennon know that she was not in agreement through the letter of objection posted on 18th December. Mrs Lennon again failed in her duty as an employer as outlined in the Labour Relations Agency's Code of Practice on Discipline and Grievances by not responding to Saoirse's objection. Following Mrs Lennon's failure to engage with Saoirse and her damaging comments at a family gathering Saoirse had no option but to resign. When Saoirse resigned Mrs Lennon did not forward Saoirse's outstanding holiday pay or her P45 as requested. We later learned that Mrs Lennon had also failed to register Saoirse's name with the Inland Revenue for four years. Saoirse took advice and sent a letter of grievance by recorded delivery; this was also ignored. Mrs Lennon has accepted that she did not issue Saoirse with written terms and conditions or payslips. However there remains outstanding holiday pay and sick pay (unlawful deduction in wages), plus compensation for constructive dismissal

Mrs Lennon's disregard for procedures in the workplace has been mirrored in her Tribunal case. From late submissions to requests for extensions for documents that never turned up and even a witness who went AWOL. Not to mention the late submission of evidence two working days before the date of the Tribunal. Although it didn't amount to much, it was yet another breach of procedures. She has provided no proof to substantiate her assertion that Saoirse resigned on 13th November for a new job "working in the hospital." Saoirse actually attended an open day for a Domiciliary care worker post but that minor fact doesn't fit with Mrs Lennon's version of events well not all the time! Mrs Lennon claims that Saoirse resigned without knowing when the start date of her new job was. I certainly wouldn't have

advised her to do this. She apparently then offered to work a few weeks up until Christmas but abandoned Mrs Lennon on her busiest week after telling her that she hadn't got the job a couple of days before. Mrs Lennon also failed to pay Saoirse that week. She has stated that Saoirse was paid cash in hand repeatedly because she wanted to be, then admitted later after submission of evidence that she was paid by bank transfer. She went to great lengths to list the various holidays that Saoirse took with tenuous links to busy periods stating initially that all leave was unauthorised for a four-year period without recourse. Eventually admitting after a few contradictory statements that all the leave was requested, authorised and unpaid outside of the documented five week paid leave. Her only motivation could be an attempt to create a negative impression of Saoirse because there was absolutely no relevance to this information. As Mr Moore rightly said in the CMD "So what?!!" She has stated that Saoirse at a certain point in the year would have exhausted all leave entitlement and then outlined a procedure of annual leave accrual over a period of 12 weeks. Her powers of recall can only be described as supernatural because she claims to have no written record of hours worked or holidays taken and yet has details of both dating back to 2017. Her response as to why Saoirse wasn't given written terms and conditions was because she didn't ask for them is frankly extraordinary. Mrs Lennon has also referred to a downturn in business many times throughout this process and yet fails to produce any evidence. Apparently, all her order forms are shredded and neither her previous accountant nor present accountant can produce anything. (*Letter from the Accountant*)

When questioned how Mrs Lennon came to this conclusion, she said it "was based on many years of working in the Floral industry, naturally after the Christmas rush there is a decrease in the January period." Does it not follow then that there had been a downturn in business in previous years? So, the shop was closed for two weeks after Christmas during this downturn and Mrs Lennon pointed out that Saoirse taking leave on 29th January was during a busy period in the run up to Valentines day. So I can only deduce that the downturn in business that was so important and crucial to her evidence lasted approximately 2 weeks.

And on top of all that her representative said at the CMD on 25th October that Saoirse did Mrs Lennon a favour because she was intending to lay her off after Christmas anyway. What an amazing coincidence! As far as I can see the only thing that Mrs Lennon has proved throughout this process is her creative prowess and her disrespect for the law.

To conclude, I can only hope to have a tiny insight into the beautiful mind that is Mrs Lennon but this is how I see it from her perspective. In the beginning Mrs Lennon made up the story about the downturn in business, a drastic reduction in hours was needed. She wasn't really dismissing Saoirse because she could still work on Saturday, no hard feelings!.. but more importantly no cost to herself. When my sister questioned her Mrs Lennon already had an answer prepared that she wasn't included because she was admin. I honestly don't know how she kept a straight face. By Christmas day probably due to my sister's challenge she decided to throw in another fact - Saoirse was a bad employee she left her in the lurch on busy periods taking holidays without permission. All along she didn't feel the need to respond to Saoirse's objections, not even her resignation but when the correspondence came from the Tribunal that was different. They couldn't be ignored like

Saoirse was. She had to come up with another story. This time it was that Saoirse had resigned on 13th November and therefore her claim was out of time.

And so here we are I have certainly tried my best to follow rules and procedures and put forward a clear and concise case and can only hope that the truth will prevail. Thank you for your time and patience.