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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Ndiweni  
**Respondent:** Christ Embassy  
**Heard at:** East London Hearing Centre  
**On:** 21 November 2019 and (in chambers) 14 January 2020  
**Before:** Employment Judge Burgher

## Representation

**Claimant:** Mr N Clarke (Counsel)  
**Respondent:** Ms K Anderson (Counsel)

# JUDGMENT

- 1. The Claimant was unfairly dismissed by the Respondent.**
- 2. The Claimant's claim for wrongful dismissal succeeds.**
- 3. The Respondent is ordered to pay the Claimant £3521.75 in respect of her claims**

# REASONS

## Issues

1 At the outset of the hearing the following issues were identified as relevant for determination.

Unfair dismissal

2 Was there a dismissal by the Respondent? The Respondent denies that it dismissed the Claimant.

3 If there was a dismissal has the Respondent established a potentially fair reason for dismissal. The Respondent contends that it had some other substantial reason in that

the Claimant wanted to work part-time and the Respondent was not able to accommodate it.

4 If the Respondent has established a potentially fair reason for dismissal, was dismissal fair and reasonable in all the circumstances.

Wrongful dismissal

5 Whether the Claimant is entitled to pay for notice period pay in respect of termination of employment. The respondent's position is the Claimant was not dismissed in employment was continuing as the Claimant is on unpaid leave of absence.

6 Following hearing the evidence the hearing was adjourned for the parties to make written submissions and consider whether they wished to make oral submissions. I invited submission specifically in respect of the following matters:

7 Whether the email of 23 January 2019 from Deaconess Kilsy to the Claimant amounted to a termination of contract. This included consideration of

8 What the operative terms of the Claimant's contract were as at 23 January 2019, in particular

9 Whether there was a variation of contract for the Claimant to have two days off each week to study and if so

10 Whether the email of 23 January 2019 terminated that agreement and if so

11 Whether such termination amounted to a dismissal.

12 The Tribunal considered the cases of Sandle v Adecco UKEAT/0028/16 (at paragraphs 30 and 40) and Kelly v Riveroak Associates Ltd UKEAT/0290/05 and Hogg v Dover College [1990] ICR 39. The parties were invited to make any submissions on these and any other relevant cases they considered appropriate.

## Evidence

13 The Claimant gave evidence on her own behalf.

14 The Respondent called Deaconess Kilsy , HR/Administration Manager and Pastor Kay Adesina, Regional Head of the organisation.

15 All witnesses gave sworn evidence by way of witness statements and were subject to cross examination and questions from the Tribunal. The Respondent's witnesses were permitted to rely on amended witness statements where the differences with their previous statements were clearly identified in track changes. The main amendments related to their knowledge about the Claimant starting a university course.

16 The Claimant's counsel sought to invite the Tribunal to draw adverse inferences from the fact that the Respondent's witnesses chose to affirm their evidence rather than give sworn evidence on a holy book. I declined to make any adverse inference, witnesses are entitled to give evidence in the way they choose and there was no basis for me to conclude that their evidence should be undermined by their election to affirm. Pastor Adesina stated that *'based on his faith it is better to give an affirmation'*. The enquiry was

taken no further and the fact that they both accept that they are Christian does not affect this. In any event there was limited factual dispute in this case and the amendments made by the Respondent's witnesses narrowed the scope for dispute further. It was clear that the issue was not what had happened but the interpretation of events.

17 I was also referred to relevant pages of an agreed bundle consisting of 98 pages.

## **Facts**

18 I have found the following facts from the evidence.

19 The Respondent is a registered charity of Christian denomination. In the UK it employs 31 people with 12 employees based at the Barking offices.

20 The Claimant commenced employment with the Respondent as an administrative assistant on 1 August 2016. She is also a Pastor in the church run by the Respondent. Her gross annual salary, based on 40 hours a week work, was £20,040. Whilst she worked predominantly with the regional director her line manager was Deaconess Kilsy. The Claimant's job description reflects this. Deaconess Kilsy reported to Pastor Adesina who was required to sign off high-level and strategic decisions that have financial implications for the organisation.

21 In March 2018 the Claimant was involved in a disagreement with Pastor Nkem that escalated and the Claimant reported the matter to the police.

22 The Claimant also presented a grievance in respect of the incident with Pastor Nkem. This was considered by a panel on 17 April 2018. The Claimant subsequently raised her concerns at the international head office on 18 April 2018 but did not get a response. The Claimant stated that she felt ostracised from her working community.

23 Much of the Claimant's evidence relating to this incident was irrelevant to the matters that I needed to consider as she was not alleging constructive dismissal. However, the above incident and her grievance formed part of the background to her desire to request flexible working and a start university course.

24 On 7 August 2018 the Claimant met with Pastor Adesina to discuss work issues and the possibility of the Claimant taking time out of work to do a course was alluded to. At this stage the Claimant had not confirmed any course or method of doing a course. I do not find that there was any mention of the Claimant attending University at this meeting.

25 However, on 19 September 2018 the Claimant met with Pastor Adesina and informed him of her admission to university. Pastor Adesina congratulated the Claimant and asked her to provide him with a copy of her university timetable as soon as this was received so that he could see how this would impact on her work schedule. The Claimant did not have these details at the time as she was in the process of organising her finances and applying for relevant funding to pay for the course.

26 On 29 October 2018 the Claimant received her timetable for university and she met with Pastor Adesina and informed him that her university timetable required her to be out of the office two days a week. In accordance with her university timetable the Claimant asked for Tuesdays and Thursdays off work to attend university each week and for her contract to be amended to a three day a week pattern. During evidence Pastor Adesina stated that he confirmed that two days was okay and that it was fine. Pastor Adesina was

very busy at this time as he was planning to travel to Nigeria for organisation events during November 2018. Pastor Adesina stated that he expected Deaconess Kilsy to be informed by the Claimant of the details of her university course for arrangements to be implemented but this was not done.

27 Based on the agreement the Claimant's annual salary would have been reduced to £12,024 based on working three days a week.

28 From November 2018, the Claimant commenced working three days a week in order to undertake university studies. However, she did not receive written confirmation of her amended changed contract nor did she inform Deaconess Kilsy that she was only working three days a week in accordance with the agreement with Pastor Adesina. Pastor Adesina had not conveyed the changes to the Claimant's contract to Deaconess Kilsy either.

29 Deaconess Kilsy was overseas attending work events in early November 2018. When she returned on 22 November 2018 she could not locate the Claimant at work. Deaconess Kelsey telephoned the Claimant to query why she was not at work and the Claimant informed her that she had been successful in her admission to university to study human resources. This was the first time Deaconess Kilsy was made aware that it had been agreed by Pastor Adesina that the Claimant would be permitted to attend university two days per week to undertake a course.

30 Deaconess Kilsy made enquiries with Pastor Adesina and he informed her that there was no agreement made that the Claimant could have two days off each week and there was no discussion as to when this would start or what the Claimant's plans were. I find that Pastor Adesina was mistaken in his response to Deaconess Kilsy during this call.

31 The Claimant was paid salary on full time pay during November 2018 and she did not indicate to the Respondent that she had been overpaid. When questioned why she did not point out the error she stated that she needed the money.

32 On 5 December 2018 Deaconess Kilsy emailed the Claimant the following:

*"warm greetings to you and congratulations on your recent admission to further your studies at the University. We understand that it is a full-time course and we would love to know your plans as regards to your job with the organisation.*

*We look forward to hearing from you before the close of work on Friday 7 December 2018."*

33 The claimant responded to this email on 7 December 2018 stating:

*"I had a brief discussion with Pastor Kay on Wednesday September 19 when I first received notification of admission to uni and I met with him briefly again on Monday 29 October to discuss my work timetable once I had received my timetable from University; during this, I kindly informed Pastor that I am required to be in university two days a week (Tuesdays and Thursdays) and I also confirmed the times. To this, Pastor had said that is fine and he wishes me all the best with my course and will communicate any concerns to me.*

*I did not know that I had to make further plans for the organisation, but I am willing to continue to apply myself as best as I can. Please may you indicate what is expected of me to help me plan going forward."*

34 This email was copied to Pastor Adesina. It is apparent that the Claimant's email is consistent with the chronology of events I have found in the facts outlined above. There

was no response from Pastor Adesina or Deaconess Kelsey to this email disagreeing with the contents.

35 The Claimant continued to work part-time and was paid full pay for December 2018.

36 There was no further communication concerning the matter until 15 January 2019 when Deaconess Kelsey wrote an email to the claimant stating, amongst other things;

*"We are in receipt of your response to the email sent to you on 5 December 2018 regarding your studies. Your explanation has been considered and a decision reached. We are willing to grant you a leave of absence for the duration of your studies, at the end of which you can let us know if you are willing to return to work."*

37 The email also referred to the implication that the claimant had not been attending church services which was a criteria for staff in the ministry.

38 The Claimant responded to the email on 16 January 2019 and stated:

*"Further to your email below please advise on the change of decision. I would firstly like to clearly state that I did not and have not requested any form of leave from work in relation to my studies. As previously discussed with yourself, I advised that I spoke to Pastor Kay and he approved me working on a part-time basis (Mondays, Wednesdays and Fridays) to accommodate my studies on Tuesdays and Thursdays. As this was approved, I made some changes to accommodate my new work and university balance i.e. relocating from my family home into rented accommodation. It appears there may have been a miscommunication somewhere hence the email below. Please advise. Also please confirm if other options have been considered i.e. a part-time option or swapping the two days in the week for weekends, if so, could it be explained why these options were not explored. Additionally, please specify what the terms of the proposed leave of absence will be, specifically, will it be paid or unpaid and any other conditions."*

39 The Claimant also explained why she was not attending church frequently and referred back to the incident with Pastor Nkem.

40 No response was received to this email and the claimant chased a response on 18 January 2019 enquiring whether or not she is expected to be in the office.

41 Deaconess Kelsey responded on 23 January 2019 stating:

*"the organisation would like to inform you that you did not officially request for approval before embarking on a full-time studies. The decision was made by you alone. It has been decided that based on your ongoing full-time studies, you are granted a leave of absence without pay starting from first of February 2019. However, and upon completion of your studies, you can notify us if you would still return to work."*

42 The Claimant was paid full pay for January 2019.

43 The Claimant responded to the email of 23 January 2019 on 4 February 2019 stating:

*"I would like to appeal the decision agreed upon. I feel that the organisation has not explored all possible options and a fair chance has not been given to me to defend this decision. In light of this, I kindly request that the decision of unpaid leave is reconsidered."*

44 The Claimant requested a response by 11 February, considering her financial constraints. The Claimant made several requests for meetings but no response was provided to her.

45 On 21 February 2019 the Claimant was sent a P45 that stated that her employment with the Respondent ended on 31 January 2019.

46 The Respondent asserted that the issuance of a P45 was not a termination and was not intended to be such as it was standard procedure for the payroll company to automatically issue this in respect of any staff member who is not going to be paid in subsequent months. I find that the issuing of the P45 reflected the respondent's unilateral decision to put the Claimant on unpaid leave without her agreement.

47 On 15 April 2019 the Claimant commenced new employment as a field sales executive earning £18,600 per annum.

## Law

48 Section 95 of the Employment Rights Act 1996 (ERA) states:

*"Circumstances in which an employee is dismissed.*

*(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),*

*(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.*

*(2)An employee shall be taken to be dismissed by his employer for the purposes of this Part if—*

*(a)the employer gives notice to the employee to terminate his contract of employment, and*

*(b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."*

49 The relevant parts of section 98 ERA are as follows:

*"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a)the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b)that it is either a reason falling within 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—*

*(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*

*(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.*

*(3) In subsection (2)(a)—*

*(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(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*

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

50 In the case of Sandle v Adecco UKEAT/0028/16 HHJ Eady QC as she then was provided a helpful summary of the considerations of dismissal. She stated at paragraph 40

*"A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee (Kirklees), by the issuing of the P45 (Kelly) or by the ending of the employee's present job and offer of a new position (Hogg)."*

51 In the case of Hogg v Dover College [1990] ICR 39, EAT a school sought to alter the terms of a teacher's contract by reducing his working hours to less than 50% of his previous agreement with a change to his pay. It was held by Garland J at page 42:

*"It seems to us, both as a matter of law and common sense, that he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. It is suggested, on behalf of the respondents, that there was a variation, but again, it seems to us quite elementary, that you can vary by consent terms of a contract, but you simply cannot hold a pistol to somebody's head and say henceforth "you are to be employed on wholly different terms which are in fact less than 50% of your previous contract". We, unhesitatingly, come to the conclusion that there was a dismissal on 31st July; the appellant's previous contract having been wholly withdrawn from him."*

## Conclusions

### *Dismissal*

52 Having considered the facts and law, I have no difficulty in concluding that the Respondent dismissed the Claimant in this case. The Respondent unilaterally decided refuse to pay the Claimant from 1 February 2019 by putting her on unpaid leave even though she had at no stage requested this. The Respondent sent the Claimant an email on 23 January 2019 and refused to engage with the Claimant's objections to this decision or arrange a meeting to discuss. She was subsequently issued with a P45 identifying a termination date of 31 January 2019. This underlined the decision not to pay her. I conclude that these words and actions are sufficient for an objective observer to consider

that there was a dismissal from 31 January 2019 whether or not there was a variation to her contract for her to work part time.

53 In any event, I conclude that there was an agreement between the Claimant and Pastor Adesina made on 29 October 2019 for the Claimant to work on a part time basis, Monday, Wednesday and Friday. I was not persuaded by Ms Anderson's submissions that the failure of the Claimant to follow the statutory procedure for flexible working impacted on the agreement made for her to work part-time. There was clear communication and agreement between the Claimant and Pastor Adesina concerning the days the Claimant was to work from November 2018. Pastor Adesina could not reasonably be said to have been uncertain or vague about what he was agreeing to especially in view of the discussion on 19 September 2018 asked the Claimant to provide him with a copy of her university timetable.

54 The Claimant started working part time from November 2018 and Deaconess Kilsy's email of 23 January 2019 terminated the agreement for the Claimant to work part time. The Claimant was required to take unpaid leave if she was to continue with her university course. This ended the Claimant's part-time job and I conclude that this amounted to a dismissal in accordance with Hogg guidance.

#### *Wrongful dismissal*

55 It was agreed that the Claimant was entitled to be provided with 4 weeks notice of termination of employment. The Claimant was dismissed on 23 January 2019 and her P45 indicates that she was only paid to 31 January 2019. The Claimant's claim for wrongful dismissal therefore succeeds. The Claimant is entitled to the remainder of her notice amounting to 3 weeks pay.

#### *Unfair dismissal*

56 The Respondent maintains that if there was a dismissal it has established a potentially fair reason for dismissal. The Respondent contends that it had some other substantial reason in that the Claimant wanted to work part-time and the Respondent not accommodate it. The Respondent gave limited evidence on this. Pastor Adesina stated in his witness statement that unpaid leave of absence was decided on as an alternative to commencing disciplinary proceedings against the Claimant for unauthorised absence in commencing her studies without approval. In oral evidence Pastor Adesina stated that the Claimant's job was not suitable for part time. I was unable to accept this. The Claimant had been working part-time since November 2018 and Pastor Adesina had agreed to this. I therefore do not conclude that the Respondent has established a potentially fair reason for dismissal.

57 Had I decided that the Respondent did establish a potentially fair reason, I would have concluded that the dismissal was not fair and reasonable in all the circumstances. The Claimant was asking for other options to be considered such as a part-time option or swapping the two days in the week for weekends, and she sought to appeal the decision but the Respondent failed to engage with her at all and subsequently sent her the P45. This was unfair and unreasonable in the circumstances.

58 The Claimant's claim for unfair dismissal therefore succeeds.



Remedy

59 When considering remedy I considered the terms of the Claimant's contract at the date of dismissal. The Claimant was working part time and had been overpaid by the Respondent for November, December and January. Her net weekly pay was £198.06 based on 3 days a week instead of £330.06. No counter claim for the overpayment was made.

*Wrongful dismissal*

60 In respect of the Claimant's wrongful dismissal the Claimant was entitled to

4 weeks x £198.06 = £792.24.

61 However, the Claimant was paid for one week until 31 January 2019 on full time salary amounting to £330.06. This sum must be deducted from the Claimant's entitlements. The Claimant is therefore entitled to **£462.18** in respect of her wrongful dismissal claim.

*Unfair dismissal*

Basic award

62 The Claimant's gross weekly pay on a part time basis was £231.23. She worked for 2 full years. She is therefore entitled to a basic award of 2 weeks x £231.2 = **£462.46**

*Compensatory award*

63 The Claimant's net loss from 20 February 2019 (the expiry notice accounted for in the wrongful dismissal calculation above) is £198.06 per week.

64 The Claimant fully mitigated her losses on 15 April 2019 a period of 7.6 weeks. The Claimant is therefore entitled to **£1505.26** in respect of loss of earnings.

65 I award **£37.50** in respect of loss of pension contributions based on a pro rata reduction of the full-time contributions for the period.

66 I award **£350.00** for loss of statutory rights.

67 The total compensatory award is therefore **£1892.76**

68 The total award for unfair dismissal (excluding the wrongful dismissal sum) before adjustments is therefore **£2355.22**

69 I do not accept the Respondent's submission that the Claimant caused or contributed to her dismissal. There was an agreement for a change in contract hours, the Respondent sought to resile from it but did not seek to properly discuss it with the Claimant.

70 The total award for wrongful dismissal and unfair dismissal is therefore **£2817.40**. I increase this sum by 25% to reflect the complete failure to engage with the Claimant or offer her an appeal which amounts to an unreasonable failure to follow the ACAS code of practice on dismissals and grievances. A further **£704.35** is therefore added.

71 The total amount that the Respondent is ordered to pay the Claimant in respect of her successful claims is therefore **£3521.75**.

Employment Judge Burgher  
Dated: 15 January 2020