EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107287/2020

Hearing held by CVP on 14 July 2021

Employment Judge: Ronald Mackay (sitting alone)

Miss Adrienne Mackie	**Claimant** **Represented by** **Mr F Lefevre** **Solicitor**
Parker & Sons Ltd	**Respondent** **Represented by** **Mrs L Parker,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Employment Tribunal is that the Claimant was unfairly dismissed by the Respondent and the Respondent is ordered to pay the Claimant the sum of £723.15 as compensation.

2. The Respondent shall, in addition, pay the Claimant the sum of £255 in respect of the failure to provide a statement of particulars of employment.

3. The Claimant's claims for notice pay and holiday pay having been satisfied by the Respondent, and withdrawn by the Claimant, are dismissed.

REASONS

Introduction

1. This case came before the Tribunal as one for unfair dismissal. The Claimant sought compensation only. During the course of the Hearing, the Claimant's solicitor confirmed that she was no longer insisting upon her claims for notice pay and holiday pay.

2. The Claimant also claimed that she had never received a statement of particulars in accordance with s1 of the Employment Rights Act ("ERA"), and sought compensation for that failure if successful in her unfair dismissal claim.

3. In response to the claim for unfair dismissal, the Respondent argued that the dismissal was fair by reason of redundancy.

4. For the Respondent, the Tribunal heard from Mrs Lesley Parker, a director of the Respondent. As she was also representing the Respondent, her evidence was taken principally by questioning from the Employment Judge followed by cross-examination.

5. The Claimant gave evidence on her own behalf.

6. The Tribunal found Mrs Parker to be credible and reliable. She candidly accepted that she had made mistakes in the processes leading to the Claimant's dismissal (as set out more fully in the findings in fact section which follows). She had prepared helpful chronologies relating to the Claimant's history with the Respondent which were referred to in her evidence.

7. The Claimant was on the whole credible and reliable. She did, however, have a tendency to avoid direct answers to certain questions and to embellish certain pieces of evidence. In material areas of conflict, therefore, the evidence of Mrs Parker was preferred. Relevant conflicts are highlighted in the context of the findings in fact.

8. At a late stage of the Hearing, in making submissions, Mrs Parker sought to introduce a jurisdictional point, putting forward the proposition that the

Claimant was not an employee in accordance with the ERA definition being instead a "worker". Such an argument was not set out in the pleadings and did not form the basis of any of the evidence before the Tribunal. Mr Lefevre on behalf of the Claimant objected to this line of argument. The Tribunal upheld that objection and proceeded on the basis that the Claimant had the status of employee. There was, in any event, nothing in the material before the Tribunal to suggest otherwise

Findings in Fact

9. The Respondent operates a bar and, more recently, a restaurant based in Inverurie. It is owned jointly by Mrs Parker and her husband.

10. The Claimant commenced employment on 14 May 2018. Her role at that time was Bartender. She reported to Mrs Parker.

11. Initially she worked principally at weekends (being defined as Friday and Saturday in the hospitality sector). During the course of her employment she also worked elsewhere and operated her own events management business.

12. Her experience in events management led to her being appointed as Event Manager for the Respondent on 8 October 2018. She continued to act as a Bartender from time to time in addition.

13. She continued in this role until May 2019. At that time, her role changed to that of Bar Manager. She stepped down from this role in November 2019. A conflict of evidence arose as to the reason for this change.

14. Mrs Parker gave evidence that the Claimant no longer wished to work at weekends (which was a necessary part of the Bar Manager role). Moreover, she was heavily involved in her own events business in December of that year. She offered the Claimant the role of Bartender once again, but working principally on weekdays rather than weekend shifts.

15. The Claimant's evidence was that she requested that she work every second weekend but that this was refused leading to her stepping down to the role of Bartender.

16. Mrs Parker gave evidence that another colleague was present at this meeting. The Claimant disputed that.

17. Whether or not another person was present is immaterial to the issues before the Tribunal. What is clear is that, whatever the origins of the discussion, it was agreed that the Claimant's role would change and that she would become a Bartender operating principally during the week. That pattern is reflected in the rotas of shifts undertaken by her subsequently.

18. On 23 March 2020, the Respondent's premises were closed as a result of COVID 19 restrictions. The Claimant, along with other employees, was placed on furlough. Mrs Parker met the salary costs personally before receiving the furlough payments from HMRC.

19. At that time, the Respondent had six other Bartenders. Two were full time and the rest worked on an ad hoc basis like the claimant, but doing weekend shifts only. The Claimant was the only Bartender who worked solely during weekday shifts.

20. The Respondent reopened in August 2020 at which time the Claimant resumed work. The Respondent has significantly fewer customers than normal as a result of social distancing and other measures required.

21. After working two shifts, the Claimant was placed back on furlough. The Claimant's evidence was that she had requested a change to her shift pattern which led to her being placed back on furlough, and that Mrs Parker indicated that she would be in contact within two weeks to discuss shifts. Mrs Parker's evidence was that the Claimant had sought a change in shifts due to personal circumstances which she agreed to accommodate. She also gave evidence that she concluded at that stage that there was no need for a Bartender during the week.

22. Considering the evidence, the Tribunal was satisfied that there was no express commitment to return to the Claimant in two weeks. Rather, there was a more general commitment that the Respondent would come back to her if and when there was an opportunity for further shifts.

23. Ultimately, there was no further requirement for the Claimant to provide work during weekdays. Mrs Parker and family members covered the weekday shifts with weekend staff coming in to cover the busier weekend shifts.

24. The Respondent first contemplated the question of redundancies in September 2020. At that time, the expectation was that the furlough scheme would end at the end of October that year. Whilst weekends were busy, the Respondent was able to operate with reduced staffing. There was no requirement for a Bartender during the week.

25. The Respondent therefore decided that there was no continuing need for the Claimant's role. Without any advance warning or consultation, the Respondent wrote to the Claimant by letter dated 25 September 2020 advising that she was being dismissed by reason of redundancy. A subsequent letter was sent dated 26 September 2020, outlining the Claimant's final payments and correcting an error in notice entitlement.

26. The Claimant denied having received the second letter. The Tribunal had no cause to believe, however, that it had not been sent. The payments set out in the letter reflect the payments received by the Claimant, being unpaid wages, a redundancy payment and accrued holiday pay.

27. The Claimant was given notice that her employment would end on 9 October 2020. On that date, the premises was closed due to COVID restrictions once again.

28. On being questioned about the failure to provide any advance notification or consultation, Mrs Parker stated that she had researched the matter on-line and was under the misapprehension that individual consultation was not a requirement, having been confused by the thresholds for collective redundancy consultation.

29. No other employees were ultimately made redundant.

30. The Claimant gave evidence that she had challenged the Respondent's compliance with COVID related health & safety requirements. She suggested

that this might be a reason for her having been dismissed. Mrs Parker disputed that any such concerns were raised.

31. Whilst the Tribunal accepted that there may have been a conversation around the appropriateness of having a pool table on the premises, it was not accepted this had any bearing on the Respondent's decision to dismiss the Claimant. Moreover, the Tribunal accepted Mrs Parker's evidence that the premises had received the necessary approvals from the relevant authorities before reopening and continued to operate appropriately thereafter.

32. The Claimant also gave evidence, which was not foreshadowed in the pleadings and which was not put to Mrs Parker, that she had been told by a third party that she would be dismissed "on her birthday". Her evidence on this point was not accepted by the Tribunal. As stated, it was not foreshadowed in the pleadings and was not put to Mrs Parker. Had the Claimant's account been correct, the Tribunal would have expected it form part of her case. There was no reason to believe that the Respondent had any malice in taking the decision to dismiss.

33. The Claimant's earnings were £10 per hour. She produced a schedule of loss which was not disputed in any material way by Mrs Parker, although she stated that the earnings varied according to the number of shifts worked.

34. Following the termination of her employment, the Claimant secured alternative employment with effect from 6 April 2021. She does not claim losses beyond that date.

35. On being questioned as to whether she applied for any other jobs, the Claimant initially replied no although she later stated that she had applied for one position at a Tesco supermarket in December 2020.

Relevant Law

36. S94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if

more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(2)(c) ERA). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

37. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).

38. In ***Safeway Stores plc v Burrell [1997] IRLR 200*** the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

(a) Whether the employee was dismissed?

(b) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

(c) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

39. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

40. The House of Lords in ***Polkey v A E Dayton Services Ltd 1988 ICR 142*** held that: "**In the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation**".

41. Where there is a finding (or as here an acceptance) of procedural unfairness, the Tribunal is required to conduct an assessment as to whether dismissal might have taken place in any event. The principles to be followed are summarised in ***Software 2000 Ltd v Andrews & Others [2007] ICR 825*** at Paragraph 54:

"**The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss owing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might**

assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role. (6) The section 98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. (7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

Submissions

42. On behalf of the Respondent, Mrs Parker initially sought (for the first time) to put forward an argument that the Claimant did not have the necessary employment status in order to claim unfair dismissal. As outlined above, Mr Lefevre objected to the submission and it was not pursued by Mrs Parker. She went on to make submissions as to the fairness of the dismissal.

43. She readily conceded that no procedures were used and that there had been no advance notice of the dismissal. She went on to submit that those failures would have made no difference given the fundamental economic uncertainty and the ad hoc nature of the Claimant's role. She went on to submit that the Respondent's concerns were justified given that the premises closed again on 9 October 2020. Had it remained open at that time, all that would have been required were Friday and Saturday shifts which the Claimant did not do.

44. Those staff who remained were either full time or worked on Fridays and Saturdays only. All had done so for more than a year. On that basis, she submitted that the Claimant's selection was fair and was within the band of reasonable responses.

45. Mrs Parker went on to submit that the Claimant had contributed to her dismissal by not working at weekends and that she had failed to mitigate her losses.

46. On behalf of the Claimant, Mr Lefevre submitted that the Claimant was a trusted employee and that she had been happy to join the Respondent's business.

47. He highlighted, as Mrs Parker accepted, that there had been a complete failure to consult with the Claimant prior to her dismissal. He also submitted that her selection had been unfair and that she was penalised for raising concerns that the Respondent was not following health & safety requirements.

48. He referred to the gap in time between the Claimant being placed on furlough and her being dismissed. He characterised the lack of communication as inexcusable.

49. He highlighted the absence of a contract of employment and suggested that this may have in some part contributed to the deficiencies in the Respondent's procedures.

50. He invited the Employment Tribunal to make an award in accordance with the schedule of loss produced. On being questioned about Polkey and mitigation, he indicated that he did not consider any Polkey reduction was appropriate and that the Claimant had done what she could in terms of mitigation given the very difficult prevailing circumstances

Decision

51. The Tribunal first considered what the reason for the Claimant's dismissal was and had no hesitation in concluding that a redundancy situation affected the Respondent's business. There was a significant reduction in custom such that fewer staff were required. This was particularly so outwith weekends.

52. The Tribunal was also satisfied that that state of affairs was the reason for the Claimant's dismissal. It was not accepted that the real reason was connected to any concerns raised by the Claimant, nor was it accepted that there was any plan to dismiss the Claimant on her birthday. As such, the Respondent has met the burden of proof in demonstrating that the Claimant was dismissed for a potentially fair reason.

53. The Tribunal went on to consider whether a dismissal for that reason was fair and had no hesitation in concluding that it was not. Although the Respondent is a small employer and has no dedicated HR support, to dismiss without any advance warning or consultation is clearly unfair. Mrs Parker had done some research and accepted that she misinterpreted the position. That said, any reasonable employer would be expected to have at least some consultation with an employee before, by letter, intimating her dismissal.

54. No basic award is due, the Claimant having received a redundancy payment. In looking at the compensatory award, the Claimant's past losses are £3,465.77. There is no future loss. £150 is claimed for loss of employment rights.

55. The Tribunal went on to consider ***Polkey***, and whether the dismissal might have taken place in any event.

56. In this regard, the key consideration for the Tribunal was the Respondent's selection of the Claimant. Mrs Parker was clear that it was the Claimant's specific pattern of work during the week (which was unique and was the time of the week where the decline in business was most acute) that led to her being selected.

57. Whilst it is true that the Claimant's working pattern was unique, the Claimant was clear in her evidence that she would have considered alternatives to dismissal. Had there been a consultation process, that might well have led to a pooling situation in which case the Claimant might well have been retained. The absence of any evidence as to the skills or qualifications of the other individuals is such that the Tribunal is not able to carry out a meaningful analysis. On that basis, the Tribunal concludes that, there being five ad hoc bartenders engaged at the time, there is only a 20% chance that the Claimant would have been dismissed in any event.

58. The Tribunal was satisfied that the Claimant did not contribute to her dismissal in any way. On the question of mitigation, however, the Claimant's failure to apply for alternative work prior April 2021 does not satisfy the obligation to mitigate her losses. The Tribunal considered it appropriate, therefore, to apply a reduction of 75% in respect of this failure.

59. The total compensatory award is, therefore, £723.15.

60. It being accepted that the Claimant was not provided with a written statement of employment particulars, the Tribunal awards compensation of two weeks' pay in respect of that failure. In deciding not to award the four weeks claimed, the Tribunal had regard to the size of the Respondent, its relatively recent establishment and its limited administrative resources.

Employment Judge: Ronald Mackay
Date of Judgment: 20 August 2021
Entered in register: 20 August 2021
and copied to parties

5