

# THE INDUSTRIAL TRIBUNALS

CASE REF: 7382/17

**CLAIMANT:** Geraldine Ann O'Hanlon

**RESPONDENT:** Leann Nicholson, t/a Sheer Glamour

## DECISION

The unanimous decision of the tribunal is that the claimant was unfairly constructively dismissed and awards her compensation of £7,046.88. The claimant's claims for notice pay, holiday pay and compensation for failure to provide her with written particulars of employment are all dismissed.

### Constitution of Tribunal:

**Employment Judge:** Employment Judge Knight

**Members:** Mrs F Cummins  
Mrs C Stewart

### Appearances:

The claimant was represented by Mr Kevin Neary of Donnelly, Neary & Donnelly Solicitors.

The respondent was represented by Ms Rosemary Connolly of Rosemary Connolly Solicitors Limited.

## ISSUES

1. The issues to be determined by the tribunal were:
  - 1.1 Whether the claimant had been unfairly constructively dismissed by the respondent.
  - 1.2 Whether the claimant was entitled to a redundancy payment.
  - 1.3 Whether the claimant was entitled to holiday pay.
  - 1.4 Whether the claimant was entitled to receive notice pay.

- 1.5 Whether the claimant was provided with written terms and conditions of her employment.

## FINDINGS OF FACT

2. Having considered the written and oral evidence of both the claimant and the respondent and considered documentation to which it was referred, the tribunal found the following facts to be proven on a balance of probabilities:
  - 2.1 The claimant was employed by the respondent as a hair stylist in her salon in Greencastle Street Kilkeel from 1 April 1995 until 9 September 2017. The claimant was not provided with a written statement of her terms and conditions of employment until 8 September 2017. At the effective date of termination the claimant was 54 years old and had 22 full years' service. She worked 24 hours a week from 9.00am until 5.00pm on Wednesdays and Fridays and from 9.00am until 1.00pm on Thursdays and 9.00am until 3.30pm on Saturdays. The claimant's gross and net weekly wages were £265.92 and £221.60 respectively. She was not provided with payslips. The claimant and respondent enjoyed a good working and personal relationship until in or around August 2017.
  - 2.2 From in or about 2016 the respondent occasionally sent the claimant home early when the salon was quiet. On these occasions the claimant's wages were reduced accordingly. The claimant was aggrieved by this and sought advice from the Labour Relations Agency. She spoke to the respondent and objected to being sent home without pay. The claimant did not take any formal action against the respondent on these occasions but the tribunal is satisfied that the claimant made it clear that she disagreed with the respondent's actions.
  - 2.3 At the beginning of August 2017 the respondent informed the claimant that she had decided to relocate her salon to a converted garage at her own home as after 26 years in Kilkeel, for family reasons and to reduce business overheads, she wanted to slow things down and work a few days a week. The claimant responded that that she knew where her employer "was coming from" and if that was what she needed to do, it was fine with her. She assumed that the respondent intended to "pay her off."
  - 2.4 A couple of weeks later the respondent asked the claimant if she had thought any more about coming out and working a few mornings a week for her at the house. As was confirmed by the respondent at the Hearing, she clarified to the claimant that her hours would be changed to 16 hours to be worked on Thursday, Friday and Saturday mornings. The claimant asked the respondent if she was paying her off and the respondent replied that "I've no intention of paying you off, I'm offering you employment".
  - 2.5 The claimant was unhappy with this and sought legal advice. Her solicitor drafted a letter for the claimant which was dated 17 August 2017. The draft letter was given to the claimant and was not immediately sent to the respondent. The tribunal was satisfied that this letter accurately reflected the discussions which had taken place between the claimant and the respondent. It referred to a "notification the previous week" that the respondent intended to make "*a very substantial cut to my hours and salary and also to move my place of employment from the hair saloon (sic) to your garage*". It pointed out

that the respondent had not at any stage provided her with a written statement of her main terms and conditions of employment and further stated that the claimant was not prepared to consent to a unilateral alteration to her contract of employment resulting in a substantial loss of earnings for her. She pointed out that in their discussions that the respondent had alleged that her employment was still open and that she was not terminating the claimant's employment but that *"this ignores the very substantial reduction in my hours and salary for which there is no provision in my contract of employment"*. She requested that the respondent either reinstate her full contractual entitlements or offer her redundancy. She stated her intention to pursue a claim of unfair dismissal in the event of actual or constructive dismissal. The claimant gave the letter to the respondent on 30 August 2017 upon her return from a week's holiday.

2.6 The claimant then went on a week's holiday returning to work on 8 September 2017. While she was away, the respondent sought advice from Peninsula who drafted a contract of employment for the claimant. The respondent gave the claimant a copy of statement of her main terms and conditions of employment on 8 September 2017. The respondent asked the claimant to sign the contract. She told the claimant that she was "giving her the full 24 hours" and she would update the Facebook page and the claimant would be able to put up her pictures on it. The respondent said that the claimant seemed to be happy with this. However the claimant said that she would take the contract home and read it first before signing it.

2.7 The contract stated the claimant's place of work be 13 Greencastle Street, Newry, BT34 4BH and confirmed that the claimant's *"normal hours are 24 hours per week, as per the weekly roster, which may vary on occasion due to the requirements of the business"* and that she may be required to work *"additional hours when authorised and as necessitated by the needs of the business"*. In addition the contract included a further clause:

*"Shortage of Work.*

*If there is a temporary shortage of work for any reason, we will try to maintain your continuity of employment even if this necessitates placing you on a reduced working week, short time working, or alternatively, lay off. If you are placed on a reduced working week, or short time working your pay will be reduced according to the time actually worked. If you are placed on lay off no payments will be made to you other than statutory guarantee pay"*.

2.8 The respondent's case was that this contract was intended to address the claimant's concerns and reassure her that there was to be no change to her terms and conditions of employment. However the claimant was not happy with the terms of the written contract. Primarily she was concerned that the introduction of the shortage of work clause would contractually enable the respondent to send her home without pay. Some of her customers had already indicated to her that that the new location did not suit them and that they would be going elsewhere. This clause was not acceptable to the claimant. She felt that her employment was no longer secure and that she had lost faith in the respondent. In cross examination, the respondent confirmed that if she had been in similar circumstances to the claimant she probably would not have accepted this term of employment.

- 2.9 The business relocated on 9 September 2017.
- 2.10 The claimant wrote to the respondent on 11 September 2017 advising her that she had not signed the contract as she did not believe that this was a true reflection of her terms and conditions of employment. She stated that she believed that her employment had ended on 9 September 2017. She stated that a reduction in hours, change of location and reduced wages represented a fundamental breach of her contract of employment and that it constituted constructive dismissal. The claimant expressed doubt that the respondent would be in a position to provide her with work for her contracted hours. She invited the respondent to resolve the matter amicably by making payments to her of statutory redundancy payment, 12 weeks' payment in lieu of notice and holiday pay for untaken leave.
- 2.11 The claimant enrolled with a full time Access Diploma course at the Southern Regional College on 11 September 2017. She was still on this course at the date of the Hearing.
- 2.12 The respondent replied to the claimant by letter of 20 September 2017 stating that she had not terminated the claimant's employment at any stage and that she had provided the claimant with a contract of employment offering the claimant the same number of hours and same rate of pay as before and that she was accepting the claimant's resignation, "if you so wish to resign". She further stated that "I am under no obligation to fulfil any of your requests" and that she had not terminated the claimant's employment "at any point". She also suggested that she had heard from customers that the claimant had been discouraging customers by telling them that there was poor parking and a poor bus service and that she had given customers her mobile phone number to make appointments with the claimant for hairdressing services. She stated that she hoped that they could both move on with their "new business ventures".
- 2.13 The claimant wrote back and confirmed that although the respondent had offered her a contract of employment on 8 September 2017 with the same hours and pay before the move, she considered that this did not reflect her contractual terms because it stated that if she did not have clients she would be sent home and would not receive any payment. She denied that she had discouraged clients from attending at the respondent's new premises and advised that if her statutory payments were not forthcoming that she would be forced to take legal action.
- 2.14 The claimant lodged her originating claim to the industrial tribunal on 9 November 2017 claiming that she had been unfairly constructively dismissed, seeking a redundancy payment, notice pay, unpaid holiday pay and compensation for the failure to provide a written statement of her main terms and conditions of employment.
- 2.15 The respondent lodged her response dated 18 December 2017 disputing that the claimant's employment had been terminated by the respondent but rather that she had resigned. The respondent denied that the claimant's position was redundant but rather that she had confirmed that the claimant's terms of employment would remain unchanged and that her job was available.

2.16 The respondent told the tribunal that since moving to her current premises she was “busier than ever” and that her clients included all of her customers and some of the claimant’s customers. She still employs Barbara, who comes in on Friday and has been with her for approximately 2 years and a “young girl who comes in on a Saturday and washes hair and makes the tea”. The respondent has not replaced the claimant.

## THE LAW

### 3. Constructive dismissal

3.1 Article 127 of the Employment Rights (NI) Order 1996 as amended provides that:

*“127 (1) For the purposes of this Part an employee is dismissed by his employer if*

*...*

*(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.”*

3.2 Harvey on Industrial Relations and Employment Law (“Harvey”) states at Division 1 Paragraph 403 as follows:

*“In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

*(1) There must be a breach of contract by the employer. This may be either 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 in 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 a 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 employer’s breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.”*

3.3 If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.

3.4 If the claimant proves the fact of dismissal, the tribunal must then consider whether the dismissal is fair or unfair.

### 4. Failure to provide a written statement of the main terms of employment

4.1 Article 27 (3) of the Employment (NI) Order 2003 provides:

*“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.”*

4.1 Article 33(1) and 36(1) of the Employment Rights Order respectively make provision for an employer to give an employee written statements of the initial and any subsequent amended particulars of employment.

## CONCLUSIONS

5. Applying the relevant law to the facts found the tribunal concludes as follows:

- 5.1 The tribunal is satisfied that the claimant has shown that there was a breach of contract by the respondent in accordance with the test set out in the leading case of ***Western Excavating (ECC) Ltd v Sharp [1978] QB 761, [1978] IRLR 27, CA***. The written statement of terms and conditions provided by the respondent did not accurately reflect the contract of employment between the claimant and the respondent. Rather, in the view of the tribunal, it constituted a unilateral variation of the contract by the respondent by the insertion of the shortage of work clause. The tribunal did not accept the respondent’s contention that the contract of employment was unchanged and that the claimant’s job was available. The introduction of the shortage of work clause was a new feature which effectively permitted the respondent to reduce the claimant’s hours of work and reduce her pay accordingly.
- 5.2 The tribunal is of the view that the respondent sought to introduce the shortage of work clause because she anticipated that as a consequence of the relocation she would not be able to maintain the claimant’s contractual hours. The tribunal considered that the claimant had proven on a balance of probabilities that the respondent intended significantly to reduce her hours of work and consequently her pay and that the shortage of work clause was the mechanism to achieve this aim. In reaching this view the tribunal took into account that the respondent has not replaced the claimant.
- 5.3 Further the tribunal was of the view that there had been a breach of the implied duty on the part of the respondent not to conduct herself without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of trust and confidence in her dealings with the claimant. The respondent was aware that a reduction in hours was unacceptable to the claimant and the tribunal noted that she herself would not have found the altered terms and conditions acceptable had she been in the claimant’s position.

- 5.4 The tribunal is satisfied that these breaches by the respondent were sufficiently serious to justify the claimant leaving her employment and those breaches did in fact precipitate her resignation, which she tendered without delay.
- 5.5 The tribunal is therefore satisfied that the claimant was constructively dismissed in accordance with Article 127 of the 1996 Order. The tribunal further considers that the dismissal was unfair, as the respondent in this case, having denied that the claimant was dismissed did not discharge her burden under Article 130 to establish that the principal reason for the dismissal fell within one of the potentially fair reasons set out in Article 130(2) of the Order. The tribunal therefore finds that the claimant was unfairly dismissed.
- 5.6 The claimant's claims for unpaid holiday pay and notice pay are dismissed as the claimant did not adduce any evidence in relation to these claims.
- 5.7 The tribunal does not uphold the claimant's claim under Article 27 (3) of the Employment (NI) Order 2003 as it considers that technically the respondent was not in breach of this provision having provided the claimant with a written statement of the amended particulars of employment prior to the termination of her employment.

## **6. Remedy**

- 6.1 The parties had agreed a Schedule of Loss subject to liability, which states the basic award to be £7,046.88. The tribunal is satisfied that this is correctly calculated and awards this sum to the claimant.
- 6.2 The tribunal did not consider it was just and equitable to award any further compensatory award as the claimant decided to undertake a training course and had not sought any further employment since her dismissal.
- 6.3 This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

**Employment Judge:**

**Date and place of hearing: 17 May 2018, Belfast.**

**Date decision recorded in register and issued to parties:**