CASE REF: 00160/09
INDUSTRIAL TRIBUNAL, NORTHERN IRELAND
DAVEY C
26 MAY 2009
The claimant did not appear but submitted written representations with accompanying documents.

The respondent appeared in person.

Cur adv vult

26 May 2009. The following judgment was delivered.

Davey C

DECISION

The unanimous decision of the tribunal was:-

(a) That the claimant was unfairly dismissed.

(b) That the respondent pay to the claimant the sum of £185.47 by way of compensation.

(c) That the claimant's claim for holiday pay be dismissed.

(d) That the claimant's claim for breach of contract be dismissed.

(e) That the respondent failed to give the claimant pay statements in accordance with Article 40 of the Employment Rights (Northern Ireland) Order 1996.

(f) That any claim raised by the claimant under the National Minimum Wage provisions be dismissed.

REASONS

[1] The claimant was originally employed by HFC Trading t/a Curves from 24 August 2005. The business was subsequently acquired by the respondent. The claimant's contract of employment did not provide for any particular basic number of hours though it did provide for an hourly rate for work carried out. The number of hours worked by the claimant in each week varied considerably depending on the claimant's availability and was arranged by agreement. The original contract provided for the claimant's normal place of work to be Newcastle, Co Down but over the course of time it became normal practice, by agreement, for the claimant to work, in addition, in Downpatrick, on a regular and frequent basis. During the course of the claimant's employment the respondent, from time to time, failed to provide payslips as required by the legislation. However, this deficiency was regularised by the eventual production of payslips and there was no actual shortfall in remuneration due. By November 2008 the respondent had decided to close the Newcastle premises due to the deteriorating financial situation and on 21 November she informed the claimant that the premises were closing and that her employment was being terminated. She indicated that the claimant should work out her period of notice at the Downpatrick premises. On 23 November the claimant's boyfriend telephoned the respondent to state starkly that the claimant would not be working at Downpatrick and the claimant did not present herself for work on Monday 24 November. At the time of the termination of the claimant's contract of employment the claimant was due outstanding holiday pay. Subsequent to the termination and subsequent to the claimant's originating application being lodged with the tribunal the matter of redundancy payment and holiday pay was discussed between the Labour Relations Agency and the respondent. The respondent accepted that a redundancy payment and holiday pay were due. The amount of

payment required was calculated by the Labour Relations Agency and notified to the respondent who paid accordingly.

The claimant obtained new employment on 10 December 2008. No details as to the nature of the employment or the remuneration involved were given by the claimant.

[2] The claimant suggested that her basic week was 37 hours. This was not defined in her original contract of employment though the respondent accepted that if the claimant was available for all required shifts she would have worked a 37 hour week. However, it was apparent, from examination of such payslips and other information as to the amount paid to the claimant from time to time, that the claimant's hours of work varied considerably from week to week. The tribunal accepted the respondent's evidence that the claimant made frequent requests for time off, most usually to enable her to attend hockey training or matches, but also for other reasons. The claimant also suggested, in her originating application, that Newcastle was her normal place of work. She further suggested that Downpatrick was unsuitable to work her notice and that travelling to Downpatrick was significantly inconvenient for her. It was apparent from the Downpatrick day book, produced by the respondent to the tribunal, that, from November 2007 onwards at least, the claimant had worked regularly and frequently in Downpatrick. The tribunal accepted the respondent's evidence that this was normal practice and that the claimant found no problem with it. Furthermore, although the claimant raised a series of grievances in August 2008 there was no mention at that time of any difficulty with working in Downpatrick.

One of the grievances raised at that time was that there was some outstanding sick pay. However, the respondent's letter in reply to the grievances indicated sick pay had been paid. No further mention was made of sick pay in correspondence or in the claimant's originating application. The tribunal did not, therefore, make any finding or order in relation to sick pay.

[3] The issues for the tribunal were:-

(a) whether the claimant had been unfairly dismissed;

(b) whether the statutory procedures in relation to the dismissal as set out in Part 1 of Schedule 1 to the Employment (Northern Ireland) Order 2003 were duly observed;

(c) whether any, and if so, what level of basic award should be paid; and

(d) whether any and if so how much compensation should be payable.

[4] The tribunal is satisfied that the claimant's dismissal was by reason of redundancy. This is a reason which falls within those reasons regarded by Article 130 of the Employment Rights (Northern Ireland) Order 1996 as being such as to justify an employee's dismissal. However, the procedure adopted by the respondent in which there was no prior discussion, no consultation, no warning, and no real consideration of the possibility of any kind of alternative employment, even of a part-time nature, could not be regarded as fair. Furthermore the failure to observe the requirements and "steps" set out in the Schedule to the Employment (Northern Ireland) Order 2003 render it automatically unfair. A basic award is accordingly payable. The standard basic award in this case, where the employee has three full years qualifying employment (including service with the respondent's predecessor) would be three week's gross pay. However, as the dismissal was unfair for failure to observe the statutory procedures the basic award, if it is less than four week's pay, is to be increased to four weeks. Accordingly the appropriate figure for the basic award is four week's gross pay. The tribunal accepts the respondent's evidence that a redundancy payment based on the claimant's service for three years was paid by the respondent to the claimant following discussions with the Labour Relations Agency. Accordingly the amount payable by the respondent to the claimant in respect of the enhanced basic award is one week's gross pay. The tribunal was provided with a list of payments made over the course of the summer

of 2008. This list was compiled by the respondent and put before the tribunal by the claimant in her written representational with no suggestion that it was in anyway inaccurate. The average gross pay for the claimant over the period was £185.47. Accordingly the tribunal directs that the respondent pay that sum to the claimant in respect of the basic award.

[5] As regards further compensation in relation to notice pay and loss of wages the tribunal accepts that the claimant was asked to work her notice and finds that she unreasonably failed to do so. Accordingly the claimant is not entitled to notice pay. The reason she gave for not working this period was that Downpatrick was inconvenient and that her original contract stated that her ordinary place of work was Newcastle. The tribunal has already found that over the course of time the contract of employment had been altered by agreement with Downpatrick becoming a normal and regular place of work for the claimant. It was not, therefore, open to her to refuse to work there when asked to do so. The tribunal notes that the claimant's notice period would have been three weeks and that before that time elapsed she had obtained alternative employment. If she had been working her notice, as she was requested to, she would have suffered no loss up to and including the obtaining of her new job. The tribunal has been given no evidence that subsequent to 10 December 2008, when the claimant got a new job, that the claimant suffered any loss of wages over and above her ordinary wage at all. It is for the claimant to establish her loss and as she has failed to establish any loss the tribunal makes no compensatory award.

[6] The claimant sought holiday pay. The tribunal accepted the evidence that holiday pay had already been paid following discussions with the Labour Relations Agency. Accordingly that claim is dismissed.

[7] There is provision for the enhancement of a compensatory award where a dismissal is found to be automatically unfair for failure to observe the statutory procedures. However, as there is no compensatory award in this case there can be no enhancement.

[8] he claimant raised the issue of a failure to provide payslips. The respondent accepted that she did so fail from time to time and the tribunal makes a declaration to that effect. The tribunal accepts the respondent's evidence that appropriate payslips were delivered subsequently and finds that there was no shortfall in remuneration. The claimant did not suggest that she had suffered a shortfall in respect of hours she had actually worked. Her claim seems to be based on the belief that she is entitled to be paid for 37 hours, being her basic week whether she worked them or not. The tribunal's understanding of this belief arises from the claimant's original letter of 27 August 2008 raising a number of grievances. The claimant stated there that if she was on a rota for less than 37 hours she was still entitled to be paid for 37 hours. This would not be the case if the reduction in hours was at the claimant's request as the tribunal finds it was. In her letter of grievance dated 22 November the claimant makes no mention of any shortfall in wages and her submission makes no claim of a shortfall for hours worked. As there has been no shortfall the tribunal does not consider it appropriate to make any order for any kind of payment in respect of payslips.

[9] Finally, the claimant raised two matters in her submissions namely the loss of some of her personal belongings and the non return of a deposit of £1,000 relating to the possible purchase of the business by the claimant and her partner. Neither of these matters were raised in the originating application and the tribunal would not be minded to allow the amendment of the originating application at this stage if such a request were made. Moreover the matters involved do not, in the tribunal's view fall within the ambit of the tribunal's jurisdiction. Personal belongings do not seem to the tribunal to be an employment issue. As regards the deposit, this would appear to be in relation to a possible contract for the purchase of the business. The tribunal's jurisdiction is confined to breaches of contract for breach of the contract of employment or another contract connected with employment. A contract for the purchase of the business would not, in the tribunal's view, fall within that definition.

RECOUPMENT

[10] The recoupment provisions do not apply.

INTEREST

[11] This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.