



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102579/2020

Final Hearing Held by CVP on 26 February 2020

Employment Judge Eleanor Mannion

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Mrs Catherine Henderson

**Claimant
In attendance in person**

AccountsNet Ltd

**Respondent
In attendance and
represented by Mrs
Charissa Gracie**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is as follows:

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- The Claimant's claim for automatic unfair dismissal under Section 99 of the Employment Rights Act 1996 is successful;
- The Claimant's claim for automatic unfair dismissal under Section 103 of the Employment Rights Act 1996 is dismissed;

E.T. Z4 (WR)

- The Respondent shall pay the claimant the total sum of £13,080.55 in compensation.

REASONS

Introduction

- 5 1. This was the final hearing of claims contained in an ET1 presented on 14 May 2020. The Claimant was not represented and appeared on her own behalf. An ET3 and Grounds of Resistance were lodged by the Respondent who were in attendance and represented by Mrs Charissa Gracie, Practice Manager within the Respondent organisation.
- 10 2. In advance of the final hearing, the Respondent lodged documentation including the employment contract, copies of text messages between the parties, an email sent from the Respondent on 25 January 2020, a letter sent by the Respondent on the 2 March 2020 in respect of her hours of work, termination letter, sickness record and leave record. A copy of these
15 documents were made available to the Claimant in advance of the hearing. The Claimant also provided a copy of a letter sent to the Respondent after her dismissal appealing this.
3. During the course of the hearing, the Respondent provided additional copies of text messages as between the parties and referred to in evidence.
- 20 4. The issues for determination were:-
 - a. Whether the principle reason for the claimant's dismissal was that had taken time off to care for dependants and if so, whether her dismissal amounted to an automatic unfair dismissal;
 - b. Whether the principle reason for the claimant's dismissal was that she
25 was intending to seek a flexible working pattern and if so, whether her dismissal amounted to an automatic unfair dismissal;
 - c. Whether her dismissal was for reasons other than at items a and b above were and so amounted to a fair dismissal.

5. During the course of her evidence, the Claimant stated that she felt she was discriminated against by the Respondent organisation. Discrimination was not pleaded in the ET1 and so the tribunal spoke to the Claimant about whether she intended to raise a legal claim of discrimination, explaining that she was entitled to do so if she wished, time bar issues notwithstanding, but that the Respondent is entitled to have full detail of the claim against them so that they could respond fully to all aspects of the claims against them. The Claimant stated that she understood and that she was not making a discrimination claim, and confirmed that her claim was for the automatic unfair dismissal on the above grounds.

Evidence

6. The tribunal heard evidence from Ms Gracie on behalf of the Respondent and from the Claimant. Neither party called any witnesses to give evidence.

Findings in fact

7. The tribunal found the following facts admitted or proved.
8. The Respondent is an accounting practice providing accounting services primarily to small businesses. The Claimant was employed by the Respondent as a trainee accountant. Her continuous start date is 2 October 2019.
9. The Claimant was employed on a full time basis and her normal hours of work were 35 hours per week, working from 9 to 5. She received £1,541 gross pay per month. Her annual salary was £18,492.
10. The Claimant's contract of employment included a clause on sickness absence which sets out the notification requirements for employees.
11. On 25 January 2020, Mrs Gracie emailed the Claimant providing answers to queries the Claimant had following the acquisition of the company by the JSA group in September 2019. This email included details of the holiday allowance, bank holidays, employee benefits, annual appraisals, salary reviews, training and sick pay. Under the paragraph on sick pay, the email

included the following “when you are off sick, you must call and speak to a manager before 9.15 am. If you are unable to call due to your illness, please arrange for someone to call on your behalf before the aforementioned time.”

- 5 12. Mrs Gracie was the practice manager in the Respondent organisation and began working for them on 27 October 2019.
13. The Claimant’s line manager was an employee called Steven Sims but the Claimant also spoke directly with Mrs Gracie in respect of her hours of work and absence.
- 10 14. One of the Claimant’s children has an underlying health condition and from December 2019 onwards, required medical attention as well as additional support and care from the Claimant. On the 23 December 2019, the Claimant informed the Respondent of her child’s condition.
- 15 15. On 8 January 2020, the Claimant contacted Mr Sims and advised him that her child was unwell and that she required to stay at home to care for them. The Claimant was absent from work on the 8, 9 and 10 January 2020. This was recorded by the Respondent as compassionate leave for the first day and unpaid leave for the subsequent 2 days.
- 20 16. Mrs Gracie contacted the Claimant during this absence to discuss her child’s health and what support the Respondent could provide. There was a discussion about the Claimant’s hours as she felt it would be better for her child if she was at home after school finished. A flexible working pattern of 9-3 where the Claimant would not take a lunch break was discussed and agreed. Mrs Gracie sent a text message to the Claimant on 10 January 2020 confirming the changed hours of work which would be reviewed in February.
- 25 17. The Claimant and Mrs Gracie had a meeting on the 24 January 2020 where the Claimant’s flexible working pattern was discussed and it was agreed that it would continue until March when it would be reviewed again.
18. On 2 March 2020, Mrs Gracie arranged a meeting with the Claimant and Mr Sims. The Claimant had returned from a week of annual leave and this was

her first day back in the office. The meeting took place in the Respondent's boardroom and was more formal than previous meetings that had taken place between the Claimant and Mrs Gracie or Mr Sims. At this meeting, Mrs Gracie informed the Claimant that it was not possible for her to continue to work the reduced hours flexible working pattern that had been in place since January 5 2020. The months January and February were very busy for the business because it aligned with self-assessment period for their clients and Mrs Gracie informed the Claimant that her reduced hours were having a detrimental effect on the business. During the course of the meeting, the Claimant stated that 10 she was unable to work full time hours because of the support she required to provide her child and that she had rights in respect of flexible working.

19. At the time of the meeting, the Claimant had been working for the Respondent for 5 months.
20. Mrs Gracie was unaware of the flexible working rights that the Claimant referred to and indicated that she would need to look into this which she did 15 after the meeting and noted that at 6 months an employee is entitled to request a flexible working pattern.
21. The meeting ended and the Claimant returned to her desk. Mrs Gracie and Mr Sims remained in the boardroom as they were interviewing a job applicant 20 at 9.30. The meeting with the Claimant took place prior to this and was relatively short.
22. Shortly after the Claimant returned to her desk, she received a text message relating to her child who was unwell and required to attend at school to take them home. She discussed this with her colleagues, none of whom were in 25 managerial roles. There were no managers available for the Claimant to speak to. The Claimant was unsure what to do in an emergency situation and informed her colleagues that had to leave to collect her child from school and that she would not be back in the office that day.
23. Mrs Gracie finished with the interview at 10.30 and was informed by the Claimant's colleagues that her child was unwell and that she required to 30

collect them from school. Her colleagues informed Mrs Gracie that the Claimant would telephone Mrs Gracie. The Claimant sent a text message to Mrs Gracie at 10.49 advising her that her child was unwell and had to leave work to collect them from school. There was no further contact between the parties on that day although Mrs Gracie expected a telephone call from the Claimant. Mrs Gracie declined to call the Claimant as she did not want to disturb her and felt it was best to leave it to the Claimant to contact Mrs Gracie when she was ready.

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24. Mrs Gracie sent a letter to the Claimant on 2 March 2020 stating that she was required to work full time hours as per her contract of employment and that this would begin from Monday 9 March 2020.

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25. On 3 March 2020 at 9.07am the Claimant sent a text message to Mrs Gracie stating that she was unwell due to stress and that she had an appointment with her GP at 2.30 that afternoon. This was followed by a message at 16.31 confirming that the Claimant's GP signed her off for 2 weeks. The Claimant indicated that she would post her sick line the following day.

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26. On 6 March 2020, the Respondent wrote to the Claimant terminating her employment. The letter set out the reasons for dismissal. The first reason related to her attendance since her employment began in October 2019, noting that she had taken 5 days unpaid leave and 12 days sickness absence. The sickness absences included the ongoing absence which was noted as 3 March – 17 March 2020. The letter stated that the Claimant failed to follow the absence notification procedure, sending text messages rather than telephoning the Respondent. It also stated that the business was concerned that the Claimant was not acting in good faith as her absence from the 8-10 Jan which was unpaid was originally reported by the Claimant as sickness absence, when in fact it was her child who was unwell. Finally the letter outlined that the Claimant left the business without authorisation on 2 March 2020 and that leaving the site without authorisation was gross misconduct. It noted that it followed a meeting where the Claimant was informed that she

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was required to return to full time hours and described her response to this as “abrasive and disappointing”.

27. The Respondent came to the decision to dismiss the Claimant on 5 March 2020 and informed her of such in their letter the following day.

5 28. The Claimant was dismissed and her last day of employment with the Respondent was 6 March 2020. She received payment in lieu of her two week notice period.

29. The Claimant was not provided with a right of appeal. She wrote to the Respondent on 13 March 2020 advising that she felt her dismissal was unfair.

10 30. Since her dismissal, the Claimant obtained work on a part time basis with a family business. She took up this role at the end of June 2020 and was paid on an hourly basis of £10 per hour. She was employed initially to work 20 hours per week and this was the case from end June to the end of September 2020. From the start of October to the start of December, her hours were
15 reduced to 16 hours per week. From the start of December to the Christmas break, her hours were reduced further to 12 hours per week and since Christmas she has been furloughed, receiving 80% of her salary based on working 12 hours per week.

20 **The law**

Automatic Unfair Dismissal – Time off for Dependents

31. Section 99 of the Employment Rights Act 1996 provides that “*as employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if-*

25 a. *The reason or principal reason for the dismissal is of a prescribed kind,*
or

b. *The dismissal takes place in prescribed circumstances”.*

32. Dismissals of a prescribed kind are set out at Section 99(3) and include time off for dependants leave under Section 57A of the Employment Rights Act 1996.
33. Section 57A of the Employment Rights Act 1996 provides that “*an employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee’s working hours in order to take action which is necessary –*
- a. *To provide assistance on an occasion when a dependant falls ill, gives birth, or is injured or assaulted.*”
34. There is no continuous service requirement in order to make a claim of automatic unfair dismissal under Section 99.
35. Sections 99 and 57A of the Employment Rights Act 1999 was considered in the case of *Qua v John Morrison Solicitors [2003] IRLR 184* where the Claimant, who was employed as a legal secretary, asserted that she was dismissed for taking time off to care for her son when he was taken ill. Her employer contended that her dismissal was a result of a high level of absence from work, some of which they contended was unauthorised and that this impacted on the ability to provide consistent secretarial support. The case was considered by the Employment Appeals Tribunal who confirmed that under Section 57A, an employee has the right to a reasonable amount of time off work in order to deal with an immediate crises. It did not create a right to time off to care generally for a dependant, but instead applied in an emergency or unexpected situation. In considering the reasonableness of the time off, the EAT suggested that while there is no limit under the legislation to the amount of time an employee can take off under Section 57A, in the majority of cases, it would be “a few hours or at most one or possibly two days”. What amounts to reasonable time off would depend on the nature of the incident and the employee’s individual circumstances but the disruption to the employer’s business is irrelevant to this consideration.

36. The employee's obligations under 57A to inform their employer as soon as reasonably practicable of the reason and length of their absence was considered by the Employment Appeal Tribunal in *Ellis v Ratcliff Palfinger Ltd UKEAT/0438/13*. In that particular case, the Claimant had two occasions
5 where he was absent from work; the first when taking his pregnant wife to the hospital due to illness and the second when she gave birth. On both occasions the Claimant did not attend work. On the first occasion, the Claimant's father telephoned his employer in the afternoon to inform them of his son's whereabouts and on the second occasion, neither the Claimant nor someone
10 on his behalf informed his employer of his absence or the reason for it. He did not contact his employer until the following evening after his employer contacted him by text message asking him to get in touch. The Employment Appeal Tribunal confirmed the tribunal's decision that having considered the particular facts which led to the Claimant not attending work and the timing of
15 the contact made by the Claimant to his employer, he had failed to inform them of the reason of his absence as soon as reasonably practicable.
37. In the case being heard, the termination letter from the Respondent confirmed that they viewed the fact that the Claimant had left work on 2 March 2020 as gross misconduct, classifying it as an absence without authority. Mrs Gracie
20 in evidence confirmed that this action, the Claimant leaving her place of work on 2 March 2020 was the principal reason for the dismissal, although the Respondent also had concerns about the amount of leave the Claimant had taken over the previous 5 months. The Claimant stated that she was required to take time off work on an urgent basis on the 2 March 2020 as her child was
25 unwell. This was not challenged by the Respondent. Instead, they had an issue in the manner in which she left her place of work as she did not speak to a manager in advance of this.
38. At the date of dismissal, the Claimant had taken 5 days as sickness absence over three occasions and 5 days unpaid leave to care for her child who had
30 fallen ill, again over three occasions. These latter absences occurred on 8-10 January 2020 and 6 February 2020 and related to providing immediate care to her child. The absence on 20 February 2020 was due to a medical

appointment the Claimant attended with her child and so does not come within the provisions of Section 57A of the Employment Rights Act 1996.

39. In the case of the 2 March 2020, the Claimant became aware via text message that her child was unwell and needed to be collected from school. This happened at some point between 9.30 and 10.30. She in turn informed her colleagues of same and that she would not be returning to work that day. She followed this up with a text message to Mrs Gracie at 10.49. This was as soon as reasonably practicable as she was unwilling to interrupt Mrs Gracie's meeting which began at 9.30. The text message was sent either at the time of or after collecting her child from school. As the Claimant's flexible working pattern was arranged so that her child would not be left alone after school, there was an indication that she would not return to work that day. The Claimant informed the Respondent the following day (3 March) that she would not be at work, but that this was related to her own ill health as she was feeling "even more stressed" by the meeting that had taken place on the morning 2 March 2020. Her absence from 3 March 2020 was therefore sickness absence rather than time off for dependants. This series of events was not challenged by the Respondent who understood that the Claimant had left work to care for her child. Their evidence was that the Claimant should have interrupted the job interview that Mrs Gracie and Mr Sims were undertaking to inform them of what had occurred and because she failed to do so, it was an unauthorised absence.

40. The Claimant asserted that the time taken off work on 2 March 2020 falls within the parameters of Section 57A of the Employment Rights Act 1996, namely time off for dependants. Again, this was not a point which was challenged by the Respondent. The medical condition the Claimant's child is suffering from is a serious one and at that particular point in time was especially serious and it required that they were not left alone for prolonged periods of time.

41. The Respondent confirmed that of the reasons provided in the termination letter, the principal reason for the dismissal was that the Claimant took time

off work on 2 March 2020, albeit they classified this as an unauthorised absence.

42. Having considered the evidence both in terms of the documents relied upon and the oral evidence at the hearing, it is clear that the Claimant's absence from work on 2 March 2020 under Section 57A of the Employment Rights Act 1996. It was necessary for the Claimant to take time off work on 2 March 2020 to provide assistance to her child who was ill given her medical condition. The Respondent was made aware why the Claimant required to leave her place of work and the likely length of the absence as the Claimant informed her colleagues of this and sent a text message to Mrs Gracie. This was done as soon as reasonably practicable. Further, given the leave amounted to one day, it is a reasonable period of time.

Automatic Unfair Dismissal – intention to make a flexible working request

43. Given the above findings, that the principal reason for the Claimant's dismissal was taking time off work to care for dependants, which is prohibited under Section 99 of the Employment Rights Act 1999, it is not necessary to make a finding in respect of the claim that the principal reason for the Claimant's dismissal was due to her intention to make a flexible working request. This claim is therefore unsuccessful and is dismissed.

Remedy

44. The tribunal finds that the appropriate remedy in the circumstances is compensation.
45. A basic award cannot be made as the Claimant did not have one years' service with the Respondent to allow for calculation of same.
46. The Claimant is awarded a compensatory award as follows:

a. £5,689.85 for loss of earnings from date of termination on 6 March 2020 to the 29 June 2020, date of new employment, 16 weeks at £355.62 loss per week; plus

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b. £6,990.70 for loss of earnings from 29 June 2020 the date of the hearing on 26 February 2021 representing the shortfall in income as between her old employment and new employment, calculated as follows: 14 weeks at £155.62 loss per week from 29 June to 2 October 2020, 9 weeks at £195.62 loss per week from 5 October to 4 December 2020, 3 weeks at £235.62 loss per week from 7 December to 25 December 2020, and 9 weeks at £259.62 loss per week from 28 December 2020 to 26 February 2021; plus

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c. £400 for claimant's loss of statutory rights

Giving a total amount that the Respondent is order to pay the claimant of £13,080.55

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Employment Judge: Eleanor Mannion

Date of Judgment: 26 August 2021

Entered in register: 30 August 2021

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and copied to parties