

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4108110/2018**

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**Held in Edinburgh on 22<sup>nd</sup> October 2018**

**Employment Judge: Amanda Jones**

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**Mr Hugh Marshall**

**Claimant  
In person**

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**Bathgate Working Men's Institute**

**Respondent  
In person**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claimant was constructively and unfairly dismissed and the respondent is ordered to pay to the claimant a basic award of £2304 and a compensatory award of £7660.

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### **REASONS**

#### **Introduction**

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1. The claimant lodged a claim of unfair dismissal, alleging that he had been dismissed from his role as hall keeper. The respondent denied that he had been dismissed or that he was entitled to have treated himself as constructively dismissed.

2. The claimant represented himself before the Tribunal, and the respondent was represented by Mr McNally, who is the secretary of the respondent.

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3. Correspondence had been sent to the respondent by the administration in advance of the hearing to clarify the correct identity of the respondent. Mr McNally indicated that he had responded to confirm that the respondent was correctly identified but there was no such correspondence on file. The solicitors who were then acting for the claimant indicated that in their view, the respondent was correctly identified.

**E.T. Z4 (WR)**

4. The Tribunal therefore initially addressed the question of the identity of the respondent. The respondent is an unincorporated association which is non-profit making. Mr McNally indicated that it is not registered as a charity and is governed by a committee which is made up of himself as secretary, a Treasurer, Mr Strachan, and another committee member, Mr Wilson. The Institute produces accounts and has a bank account. It runs snooker tables and rents out other parts of the premises which were left to the Institute in trust. While the parties were agreed that the respondent had been correctly identified, the Tribunal still had concerns that given the respondent is not a legal entity, the claim ought to have been made against the individual members of the committee. In the event that the claimant has any difficulty in enforcing the award against the respondent, he may wish to make an application for reconsideration of the judgment to add the appropriate individuals to the claim.
5. The claimant sought to lodge a statement from a former colleague at the commencement of the proceedings. The claimant indicated that the statement had been prepared by his former solicitors and that his former colleague was very unwell and would not be able to attend the proceedings. However, the statement was neither signed nor dated, and it was not presented in the form of an affidavit. Mr McNally indicated that he was concerned that it was not signed or dated. In the circumstances, the Tribunal declined to take the terms of the statement into account in its deliberations.

**Issues to be determined**

6. The issue to be determined by the Tribunal was whether or not the claimant had been dismissed or had resigned, and if the latter was the claimant entitled to treat himself as having been constructively dismissed. The claimant maintained that he had been dismissed by Mr McNally, or that Mr McNally's actions in requiring him to return his keys were such that he had been constructively dismissed, as he would be unable to perform his duties. The respondent denied that the claimant had been dismissed or had been entitled to resign and treat himself as constructively dismissed.

**Findings in Fact**

7. The Tribunal, having heard evidence from the claimant and Mr McInally, made the following findings in fact:
8. The claimant had been employed by the respondent as a hallkeeper for 12 years until his employment terminated on 15 February 2018, when he was 5 75 years old.
9. The respondent is an unincorporated association, which is run by a committee of local business men. Mr McInally is employed as the manager and there are three other staff employed. All staff are responsible for looking after the snooker tables in the premises and dealing with other bookings for 10 the hall.
10. The claimant had worked the same 3 week shift pattern for the last 10 years, being a Monday, Tuesday and Wednesday day shift, for the first week, Thursday, Friday and Saturday day shift for the second week and Monday, Tuesday and Wednesday backshift on the third week.
- 15 11. For the first two years of his employment, the claimant had worked a different pattern but agreed with the then committee members, following changes in the staff, to change to his most recent pattern.
12. The claimant has never had a contract of employment or indeed anything in writing regarding his employment. None of the other employees had any 20 written contract of employment. The claimant was paid the minimum wage on an hourly basis and worked 18 hours a week, each shift being 6 hours.
13. Around the beginning of February 2018, Mr McInally spoke to the claimant and said that he was going to change the shift patterns to allow him to work a constant day shift to perform his management duties. Mr McInally, indicated 25 he should have changed the shift patterns years ago.
14. Mr McInally has been employed by the respondent for 5 years and in the capacity of manager for the last 2 years. He has always been a member of the committee which runs the respondent and has been Secretary for most of that time.
- 30 15. At some point before February 2018, the proposed changes to shift patterns were discussed amongst the committee and approved although no minute was taken of this decision or the discussion leading up to it.

16. At the meeting between Mr McNally and the claimant at the beginning of February, the claimant expressed concern that the proposed changes would require him to work more backshifts.
17. Mr McNally told the claimant to inform his colleague Mr Proudfoot of the proposed changes, which the claimant did.
18. The claimant continued to work his normal shift pattern.
19. Mr McNally was then absent for around two weeks due to a bereavement and the claimant did not discuss matters with him further until 14 February, when he called Mr McNally to check whether he was in the office.
20. The claimant then attended the respondent's premises and had a discussion with Mr McNally. The claimant indicated that he was not willing to change his shift patterns if that meant him doing extra backshifts.
21. Mr McNally advised the claimant that if he presented himself for his usual day shifts on the following Monday, Tuesday and Wednesday, then he would be sent home without pay as Mr McNally would be covering those shifts himself.
22. The claimant asked Mr McNally three times whether he was dismissing him, but Mr McNally refused to answer the question on each occasion.
23. The claimant then indicated that he was going to the Citizen's Advice Bureau to check his position.
24. At that point, Mr McNally asked the claimant to hand in his keys to the respondent's premises because he believed the position to be untenable.
25. The claimant left the premises, visited the Citizen's Advice Bureau and then returned to see Mr McNally. He then handed in his keys to Mr McNally.
26. The claimant was paid in lieu of his holiday entitlement.
27. The claimant then wrote to each member of the committee setting out his position, which he sent by recorded delivery, although the Tribunal did not see this letter.
28. Mr McNally responded on behalf of the committee by letter dated 14 March, reiterating his version of events and offering for the claimant to return to work on a changed shift pattern.
29. The claimant had instructed solicitors by this time who responded on his behalf.

30. Mr Proudfoot worked day shifts but no additional backshifts for a few weeks but resigned shortly thereafter.

**Observations on the evidence**

- 5 31. There was in fact little dispute on the evidence. It was suggested by the respondent that the claimant had said that he was not going to change his shifts whatever the proposals were. However, the Tribunal preferred the claimant's evidence that he did not say this explicitly, but instead made clear to Mr McNally that he did not wish to work additional backshifts. The Tribunal was of the view that if the respondent had sought to consult with the claimant about possible changes to his shifts, rather than present him with a fait accompli, then he would have been open to discussion about the issue.
- 10 32. Mr McNally conceded that it was not open to the claimant to continue working the shift pattern he had been working for 10 years.

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**Relevant law**

33. Section 95 of the Employment Rights Act 1996 addresses circumstances in which an employee is dismissed.
34. An employee will be dismissed if under section 95(1)(a) if the contract under which he is employed is terminated by the employer (whether with or without notice).
- 20 35. Section 95(1)(c) deals with circumstances of constructive dismissal and states that an employee will be dismissed for the purposes of that section if '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'.
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**Discussion and decision**

36. In making submissions, both parties simply restated their respective positions, which simply put, were that the claimant believed that by asking him to hand back his keys, he was being dismissed, or that by doing so, the respondent was making it impossible for him to do his job and that this amounted to a constructive dismissal. The respondent was of the view that
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the claimant had resigned voluntarily following his refusal to change his shift pattern.

37. The Tribunal found that the claimant had not been dismissed by the respondent and therefore section 95(1)(a) was not applicable.

5 38. However, the Tribunal found that the claimant had been constructively dismissed by the respondent in terms of section 95(1)(c) of the Employment Rights Act.

39. The respondent did not seek to argue that there was any potentially fair reason for the claimant's dismissal and therefore his dismissal was unfair in terms of section 98 of the Employment Rights Act, which deals with issues of fairness.

10 40. The Tribunal concluded that the respondent's actions in seeking to change the shift pattern the claimant had worked for 10 years, with no consultation and in the absence of any contractual authority to do so, amounted to a repudiatory breach of the employment contract.

15 41. In addition, requiring the claimant to hand back his keys which the respondent accepted would prevent him from carrying out his duties, together with the respondent's statement that if the claimant presented himself for work at his normal shifts, he would be sent home without pay, also amounted to repudiatory breaches of contract, which together made clear that the implied term of mutual trust and confidence, which forms part of every contract of employment, had been fundamentally breached.

20 42. While the Tribunal was mindful that the respondent was a very small organisation with only four employees, it also bore in mind that the claimant had been employed for 12 years, that there was no attempt to consult with the claimant (or the other employee affected) about how shift changes could be accommodated or any attempt to postpone changes until further discussion could take place.

25 43. In all of these circumstances, the Tribunal concluded that the claimant had been constructively, and unfairly, dismissed.

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**Remedy**

44. The Tribunal considered whether reinstatement was an appropriate remedy in the circumstances, but concluded that given the small nature of the respondent's organisation and that it was clear that relationships had been soured by the circumstances of the claimant's dismissal, that this would not be appropriate.
45. The claimant gave evidence that he had been seeking alternative work and had applied for a cleaning job unsuccessfully and another job at a local bowling club. He stated he was not in receipt of benefits.
46. As the claimant was 75 at the time of his dismissal and had completed 12 years' service, and was paid £128 per week (gross), he is entitled to a basic award of £2304 (being 18 weeks' pay).
47. The Tribunal then went on to consider what compensation the claimant should be awarded.
48. While the Tribunal was mindful of the claimant's age, it did not appear to the Tribunal that the claimant had any intention of retiring so long as he was able to work. The Tribunal also bore in mind the claimant's evidence that he had enjoyed his employment, that he got on well with customers and that his dismissal was a big blow to him.
49. However, the Tribunal also took into account the respondent's evidence that they were seeking to cut costs, which was being achieved by Mr McInally covering additional day shifts and that nature of the respondent's operations.
50. Finally, the Tribunal considered whether the claimant had failed to mitigate his losses by refusing the offer made by the respondent by letter on 14 March to recommence employment with the respondent on an altered shift pattern. The Tribunal was satisfied that this was not a failure on the part of the claimant to mitigate his losses, on the basis it took the respondent a month to get in contact with the claimant; that this proposal again did not seek to engage the claimant in any form of consultation, and that there was no effort to invite the claimant to meet in person. Indeed, given the foregoing, the Tribunal was not satisfied that this offer of re-employment was made by the respondent in good faith.
51. The claimant was paid £128 per week gross and £103 net. The claimant's dismissal was almost 36 weeks' before the hearing. Therefore, the claimant's

losses to 25 October 2018 were £3,708 net. The Tribunal found that it was unlikely that the claimant would secure alternative employment in the coming weeks and therefore thought it just and equitable to award him a total of 52 weeks' pay being £5,356 net.

- 5 52. The respondent is therefore ordered to make a payment to the claimant of a basic award of £2304 and a compensatory award of £5,356, being a total sum due of £7,660 (net).

10 Employment Judge: Jones  
Date of Judgment: 08 November 2018  
Entered Into the Register: 13 November 2018  
And Copied to Parties