EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: S/4117047/2018**

Hearing Held at Lerwick on 19 November 2018

Employment Judge: Mr A Kemp

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Mrs Mary Gifford	**Claimant** **Represented by:** **Mr B Nichol** **Solicitor**
Shetland Care Attendant Scheme	**Respondents** **Represented by:** **Mr A Miller** **Vice-Chairman**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Claimant was not dismissed by the Respondents and this Claim is dismissed.

REASONS

35 **Introduction**

1. The Claimant made a claim of unfair dismissal against the Respondents on the basis that they had terminated her contract of employment. The Claim was

denied. The Claimant remains in the employment of the Respondents, but is off work ill currently.

Issues

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2. The Tribunal had identified the following as the issue it required to consider: had the Respondents dismissed the Claimant under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")?

10 **Evidence**

3. The Tribunal heard from the Claimant, and from Mr Alex Miller the Vice Chairman of the Respondents. Documents were spoken to from a single bundle the Claimant had prepared.

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Facts

4. The Claimant was employed by the Respondents, then called Crossroads (Shetland) Care Attendant Scheme, as a Manager/Co-ordinator on 4 August 2003.

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5. The Claimant is a registered nurse, and a nursing qualification was required for the role, which was one to manage the organisation.

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6. The Respondents are a charity, run by a board of directors. It provides respite care for those who themselves care for others. It has about 35 employees, with two in a managerial and administrative role being the Claimant and her colleague Mrs Kate Fraser.

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7. The Claimant received a Statement of Terms and Conditions dated 11 August 2003, which confirmed her role as Manager/Co-ordinator. Clause 2 stated:

"You are required to carry out the duties set out in the attached Job Description and any other related duties as required by the Management Committee and which is deemed to form part of this Statement."

5 8. A Job Description was provided, which set out the overall purpose of the post as being "To be responsible for the day to day management of the scheme, including service delivery, recruitment, training and management of staff and volunteers, operation of administration and finance systems." It set out more detailed duties and responsibilities for the management of the business of the
10 Respondents. In practice the Claimant did manage the business of the Respondents, and managed all of the other staff.

9. Mrs Fraser held the title of Office Manager/Assistant Co-ordinator. A Job Description for that post was provided. The role was "to report to and assist the
15 Co-ordinator on all matters relative to the administrative aspects of the Scheme and also provide a back-up to the Co-ordinator to cover annual holidays and sick leave, and will provide regular weekly work duties as delegated by the Co-ordinator". She also prepared the payroll for the Respondents, and had primary responsibility for financial matters. The reference to "Co-ordinator"
20 was to the role of the Claimant., whose full title was as above.

10. Mrs Fraser covered the work of the Claimant when the Claimant was on annual leave or off sick so far as she was able to. Not all of the Claimant's duties were performed during her absence. When Mrs Fraser was off sick, the Claimant
25 covered her work so far as she could, but financial aspects including payroll were provided externally.

11. The Claimant was the Registered Manager with the Scottish Social Services Council. The Claimant had both the professional and managerial qualifications
30 necessary for that.

12. Mrs Fraser passed a managerial qualification known as SVQ4 and sought a pay rise in light of that. The precise date of that qualification was not provided

in evidence. The Claimant was informed by Mrs Fraser of the intention to raise that issue at a meeting to be held on 17 April 2018. The Claimant did not have any opposition to the request by Mrs Fraser for a pay rise. At that point, the relationship between them was good, with the Claimant being Mrs Fraser's line manager.

13. That meeting on 17 April 2018 was a meeting of the Directors of the Respondents, which had assumed the role of the Management Committee. Under "Any other competent business" of the agenda, Mrs Fraser raised the issue of her wages, and sought an increase. She said that she was six increments behind the Claimant but could cover all of the Claimant's work in her absence, including doing her own duties. The Chairman Mr Henderson asked whether the Claimant and Mrs Fraser were willing to work as joint managers. That had not been something that had been raised with the Claimant before. She was taken aback by it and said something like "I suppose so". Mr Henderson proposed that the job titles of both posts be changed to "Joint Co-ordinator", with effect from 1 April 2018. It was unanimously agreed by the Directors.

14. The Claimant was unhappy with the changes proposed. She had until that point been the sole manager. Mrs Fraser had not covered all of her role when she was on annual leave, or when she had a period of about four weeks of absence through sickness. The Claimant remained the Responsible Manager for the SSSC and Mrs Fraser was not in possession of all the qualifications required for such a role.

15. The Claimant was not aware of what changes would be proposed to her own duties and responsibilities. She did not know how the joint role with Mrs Fraser was intended to work. She was not happy with the proposal, which had been raised with her at the meeting with no fore-warning. She had not been prepared to address the issue at that stage.

16. She discussed matters initially with Mr Miller, the Vice-Chairman, on 10 May 2018. He had not been aware prior to the meeting on 17 April 2018 that a change to the Claimant's title and Job Description might be proposed.

5 17. He sought advice from Voluntary Action Scotland, an umbrella organisation of which the Respondents were a member, and after doing so, on 24 May 2018 met the Claimant again and suggested in accordance with the advice that he had received that if she was unhappy she raise a formal grievance.

10 18. The Claimant then raised a grievance, by letter which is undated but which was delivered on or about 29 May 2018. She did so under the Grievance Procedure of the Respondents, which had been provided in evidence. It had stages, 1 being providing a written grievance, 2 being a meeting with a manager, and 3 being an appeal. Her grievance was that the change had been proposed
15 without consultation with her, and amounted to a breach of contract.

19. There was no stage 2 meeting but Mr Henderson wrote on 7 June 2018 to reject the grievance. It stated "It is not for a member of staff to dictate how a board should conduct its business……I am disappointed you feel so
20 aggrieved." There was an offer of having a matter in relation to her concerns on the next agenda for a Directors' meeting.

20. The Claimant appealed by letter of 13 June 2018. It was heard by most of the board, less two members, on 26 June 2018. The decision of the appeal was
25 intimated by letter of 8 July 2018, which rejected the appeal, and added "After a review and joint agreement on relevant/shared duties and responsibilities, new contracts of employment will be issued to the joint co-ordinators as soon as possible."

30 21. In the period from 17 April 2018 to 30 July 2018, when the Claimant commenced a period of sick leave, her duties did not in fact change. She continued as the sole manager of the business of the Respondents. The

Respondents did not introduce any new role, nor provide any new contract of employment or job description, in light of the Claimant's position and appeal.

22. The Claimant commenced a period of sick leave, which continues, as a result of the stress she felt from the proposed changes, on 30 July 2018. She remains in the employment of the Respondents.

Submissions for Claimant

23. The following is a summary of the submission made. At the meeting on 17 April 2018 the Claimant was dismissed from her role as sole manager. It was a significant demotion. The change of title was significant to her. It was clear that parts of her Job Description would be removed. She did not agree. She made her position clear.

24. Reference was made to the cases of ***Marriott, Hogg*** and ***Alcan***, referred to further below, and particularly the first of those. It was a question of fact and degree as to whether there was a dismissal under section 95(1)(a) of the Employment Rights Act 1996. If it was significant enough, it could amount to a dismissal. Whilst there was no reduction in pay, the changes were significant with a fundamental change of role. It was significant that new contracts were to be provided.

Submissions for Respondents

25. The following is a summary of the submission made. The actions had been taken for the benefit of the organisation. The Respondents were trying to ensure that the charity was run efficiently, and that there was more flexibility in that, such that succession was planned for. There had been no intention to terminate the contract of employment.

Law

26. Section 95 of the Act provides, so far as material for this case, as follows:

"**95 Circumstances in which an employee is dismissed**

5 (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) The contract under which he is employed is terminated by the employer (with or without notice)…."

10 **Discussion**

(i) Observations on the evidence

27. Both witnesses who gave evidence were clearly seeking to be honest. There was little real dispute over the facts.

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28. The Claimant's solicitor founded particularly on the case of ***Marriott v Oxford and District Co-operative Society Ltd (No. 2) [1970] ICR 186***. It is a Court of Appeal authority in which the issue was whether or not there had been a dismissal. The Claimant there had argued that "The question of acceptance [of 20 a proposal for variation] only arises if the employee has a genuine choice." Whilst overall the Claimant's argument had succeeded, the court did not in fact endorse that argument. The letter in question had a reduced grading for the employee, such that his status was reduced, and pay was also reduced. That was held to be a repudiatory breach. Lord Denning stated that "It evinced an 25 intention no longer to be bound by the contract." The Claimant had protested them, and worked for four weeks before finding another job. That was not sufficient to avoid the conclusion that there had been a dismissal.

29. In the case of ***Mostyn v S and P Casuals Ltd UKEAT/00158/2017*** the 30 employer proposed a reduction in basic pay by 45% and an increase in commission for a salesman, who had not received a written contract or statement of terms. At paragraph 3 the comments of the then President of the EAT on the sift were noted, which included the following:

> "Whether a breach is repudiatory breach or not does not depend on whether it is fair to change the terms of the contract, but whether the contract is broken in a sufficiently serious way. Langstaff J then referred to the decision of the Court of Appeal in ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, [2011] 1 QB 323***, in particular at paragraph 28. He said that a reduction in pay is almost always, if not always, repudiatory unless it is consented to."

30. That means that the reason for the change is not the point. There may or may not be a good reason in the present case, but the argument for the Respondents is not one that is material in law, at least at this stage and for the issue that is currently before the Tribunal. Even if there is a good reason that does not mean that there is no dismissal. The focus for the present issue is on whether the extent of the proposed change was sufficiently great to be regarded as repudiatory of the then existing contract.

31. In ***Hogg v Dover College [1990] ICR 39*** it was held that a court might legitimately treat as dismissal and re-engagement a situation where the employer ostensibly is merely seeking to vary the contract without effecting any dismissal. In that case a teacher was told that his full-time employment as head of history would be replaced by a part-time post which did not include that role, and reduced his pay and teaching load by 50% at least. He objected to this but nevertheless accepted the new job in order to mitigate his loss, working under protest. The EAT held that the imposition of the new terms was a dismissal, and in any event that the change was sufficiently fundamental to constitute a constructive dismissal. That was a dismissal even where the employment itself continued, as the statutory test refers to the termination of the contract of employment.

32. In ***Alcan Extrusions Ltd v Yates [1996] IRLR 327*** the employers unilaterally introduced a rolling shift system to replace a fixed shift system. The tribunal held that that was a repudiation of the contract which constituted a dismissal.

The EAT held that the tribunal was entitled to reach this conclusion. It expressed the position as follows:

> "We entirely agree with counsel for the appellants that it is only where, on an objective construction of the relevant letters or other conduct on the part of an employer, it is plain that an employer must be taken to be saying, 'Your former contract has, from this moment, gone' or 'Your former contract is being wholly withdrawn from you' that there can be a dismissal under [s 95(1)(a)] other than, of course, in simple cases of direct termination of the contract of employment by such words as 'You are sacked'. Otherwise, we agree with him the case must stand or fall within [s 95(1)(c)].
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> However, in our judgment, it does not follow from that that very substantial departures by an employer from the terms of an existing contract can only qualify as a potential dismissal under [s 95(1)(c)]. In our judgment, the departure may, in a given case, be so substantial as to amount to the withdrawal of the whole contract. In our judgment, with respect to him, the learned judge in Hogg was quite correct in saying that whether a letter or letters or other conduct of an employer has such an effect is a matter of degree and, we would hold accordingly, a question of fact for the [employment] tribunal to decide."

33. As Mr Nicol correctly submitted, whether or not there was a dismissal is a question of fact and degree that must be considered in light of all the circumstances.

34. What I consider happened in the present case was that the employer, without any advance notice, sought to introduce a variation of contract such that firstly the title would be amended for the Claimant to "Joint Co-ordinator" and secondly that the description of that role would change from the then current one to one where the role as manager would be shared with the person who hitherto had reported to the Claimant. That would mean a division of roles and responsibilities between the Claimant and Mrs Fraser.

35. But that division of the two roles did not then take place. No revised Statement of Terms and Conditions or Job description was given to the Claimant. Her role in fact continued as it had been prior to the meeting on 17 April 2018 and that remained the case until she went off sick. The Respondents did not follow through with their proposal in light of the challenge to it made by the Claimant.

36. The language used by Mr Henderson in his decision following stage 2 of the grievance was not the most apposite. The absence of a meeting was also a breach of the Respondents' own procedure. These matters are not however directly relevant to the issue of whether or not there had been a dismissal. The Claimant might have resigned, and claimed constructive dismissal, but that is not what she did, and her claim is against the background that she remains employed. Whilst the changes that initially were sought to be imposed upon her may well have been an anticipatory breach, that does not mean that there was a dismissal in the absence of resignation.

37. The appeal decision referred to the need for agreement to any such changes. That indicated a softening of approach, in that there is specific reference to seeking an agreement which had not been the case in the decision by Mr Henderson. That agreement was not in reality sought to any meaningful extent, as no draft or proposal for a new contract or job description was sent to her. Whilst there may have been steps taken to seek to progress matters, they have not, at least yet, been attempted. A draft of a new contract has been prepared, it is understood from Mr Miller, but not issued in light of the dispute that arose.

38. The decision on 17 April 2018 was therefore only effective, at best, as to title, but even that is something that is not clear from the terms of the Response Form, which indicates at paragraph 4.1 that the Claimant continues in her role as Manager/Co-ordinator.

39. Against that background, I consider that there has not been a termination of the contract by the Respondents to the extent required to lead to a finding that

there had been a dismissal. Whilst the meeting on 17 April 2018 may have amounted to an anticipatory breach, the Claimant did not resign in response to it, but importantly nor did the Respondents take the actions to implement the original decision, and since then they have referred to the need for agreement to be reached on any changes. The contract of employment that was in existence prior to the meeting on 17 April 2018 remains, to all intents and purposes. I have concluded that there was no dismissal.

40. For the avoidance of doubt, I must make it clear that that does not mean that the Respondents can simply introduce the new role and its related responsibilities without further issue. My decision is based primarily on the fact that for all practical purposes the Claimant has not had any change to her role imposed on her. If there was either an imposed change of role, or a proposal to do so, then depending on the full facts and circumstances, including the extent of any change, that might either amount to a dismissal, or be a basis on which the Claimant could argue that there had been a repudiatory breach and pursue after resignation a claim of constructive dismissal. The Respondents could argue that there had not been a dismissal, or that if there was a dismissal it was fair, which would then depend on factors such as the reasons for the change, the extent of any consultation, and whether other consultation might have led to a fair dismissal, as well as other factors. The issues that arose would require to be considered against all the material facts at that time, and these comments are not exhaustive of the issues that may arise.

41. It is to be hoped that the parties can find a way to resolve matters without further recourse to the Tribunal. If however that cannot be achieved and a further Claim is made, nothing in this Judgment should be taken to indicate that there would or would not be a dismissal, or that any dismissal would be fair or unfair. Those matters would then require to be considered afresh by the Tribunal deciding such issues, which would be very different from such issues before me.

Conclusion

42. There has not been a dismissal and I require to dismiss the Claim.

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Employment Judge: **Alexander Kemp**
Date of Judgment: **18 December 2018**
Entered in Register: **20 December 2018**
Copied to Parties