EMPLOYMENT RIGHTS TRIBUNAL

CASE: ERT/2014/047

Rosalind Patrick **Claimant**

and

Rendezvous Retreat Homes Incorporated **Respondent**

Before: **Mr. Hal Gollop, Q.C., Chairman**
Mr. Edward S. Bushell, Employer Representative
Mr. Ulric E. Sealy, Employee Representative

Dates of Hearing: 27th and 28th March 2017

The Decision

Hal McL. Gollop, Q.C.

Neither the Claimant nor the Respondent was represented in this matter.

Facts as revealed by the Evidence

The Claimant commenced employment with the Respondent on 10 December 2007 and ceased employment on 19 December 2013.

The Claimant was employed as a caretaker and her post was subsequently changed to Auxiliary Nurse. The number of hours she worked varied from day to day, but in answer to the Chairman, she said she worked a twelve hour shift.

The Claimant was paid weekly at the rate of ninety-six Barbados dollars (BDS$96.00) per day. Her job was to bathe patients, make their beds and ensure that the rooms were clean; it being an old people's home, the management expected that all areas would be sanitary and comfortable for the occupants.

On 19 December 2013, Mr. Ronald Nicholls, the Managing Director of the company, held a meeting with the staff and, among other things discussed was the enhancement of nursing skills of the employees.

The Claimant said in her evidence that while the other nurses pursued various courses at the Samuel Jackman Prescod Polytechnic, she applied to the Barbados Community College and was accepted to pursue the one year nursing programme; her acceptance was communicated to Mrs. Collymore the Nursing Manager of the company and she was congratulated. She was also congratulated by Mr. Nicholls, the Managing Director.

Her evidence also revealed that Mrs. Collymore adjusted her work schedule so that she could be able to attend college; she was required to call the office every Wednesday for the work schedule.

On 18 December 2013, Mrs. Patrick called the office for the work schedule and was told by Mrs. Collymore that the roster was not ready and she should call the next day. It must be borne in mind that the roster and schedule contained the periods which Mrs. Patrick was expected to work.

At about 6:30 p.m. on 19 December 2013, the Claimant received a telephone call from Mrs. Collymore advising her not to come to work on the following weekend because her duties were being taken away, as management was making nurses redundant.

Upon receipt of this information from Mrs. Collymore, the Claimant asked for her unemployment form, no doubt thinking that she too would be made redundant. Her evidence further revealed that Mrs. Collymore told her:

"This is not a lay off or anything like that but we are not taking you back."

The Claimant in our opinion came to a reasonable conclusion that she was being terminated when she said to Mrs. Collymore,

"It sound like I am fired… I should have my unemployment form."

The Claimant had some difficulties receiving her unemployment form from the company; Mrs. Collymore told her they do not have to give her an unemployment form. In the meantime, the Claimant sought advice from the National Insurance Department and an officer told her to register her claim, otherwise she would lose benefits. The Claimant followed the advice and registered her claim with the department.

In answer to a question from the Chairman concerning her understanding of the meaning of the term redundancy, the Claimant's reply was:

"You are fired and no longer required by the company to work."

The Claimant was cross examined by Mrs. Collymore. She insisted that she was congratulated by Mrs. Collymore after having been accepted at the Community College. However, the Respondent made it known that two auxiliary nurses who did a similar course offered their

resignation from the company. The Tribunal viewed this suggestion to mean that the Claimant was well within her right to resign also, and was expected so to do.

In Mrs. Collymore's evidence in chief, she said Mrs. Patrick was employed as a Nursing Auxiliary; Mrs. Patrick denied this and said she was employed as a Caregiver. The Respondent clarified the distinction, stating that the Nursing Council changed the name Caregiver to Nursing Auxiliary. In answer to a question from the Chairman concerning the titles, the Respondent's reply was that the core function was to look after the elderly.

During the period that the Claimant was at the Barbados Community College she was rostered to work on Friday and Saturday night during the month of August to December 2013. However, owing to the death of a number of patients at the institution, the Respondent told the Claimant she would no longer be rostered.

Concerns were expressed by the Respondent and Mr. Nicholls, Managing Director, over the alleged resignation of the Claimant; the Respondent thought the Claimant had submitted her resignation later at the end of August 2013, and there was some confusion as to who should have received the resignation letter, whether it should have been Mrs. Collymore or Mr. Nicholls.

On the question of redundancy, the Respondent in her evidence said she would not say the Claimant was made redundant or was terminated because she was not a full time employee.

Mr. Ronald Nicholls gave evidence as a witness for the Respondent; he is the owner and Managing Director of Rendezvous Homes Incorporated; he was also the author of the termination of services/lay off certificate belonging to the Claimant. According to the document, the Claimant was on study leave without pay. This suggested she was still an employee of the company.

Having found herself in financial difficulties, the Claimant asked Mr. Nicholls if she could work two (2) nights per week in order to meet personal expenses. This in itself was not an unreasonable request bearing in mind she was on study leave with no pay and was still an employee of the company.

The issue of the Claimant's resignation was put to the witness by the Chairman. The witness stated that the Claimant indicated to him and Mrs. Collymore that she had resigned and would be leaving at the end of August 2013; but he maintained that the Claimant voluntarily left the employment and in the details column of the certificate, he stated that the Claimant requested leave to study and it was granted without pay. Also in the same certificate it was stated that the Claimant was not terminated but left to pursue studies.

The Tribunal is satisfied that the statements on the certificate were very conflicting and the evidence of Mr. Nicholls was not reliable.

The evidence of Mr. Nicholls relates to the customary practice at the company when employees resign their jobs; they would give to management their resignation letter; but it was rather strange that the Claimant did not submit a letter, yet management insisted that she told them she was resigning her job.

What she was alleged to have told them however was not recorded on the National Insurance Termination Certificate. The question therefore to be considered is, was the Claimant treated differently from the other employees in relation to the submission of a letter of resignation?

Analysis of the Evidence

The test faced by the Tribunal was simply, which one of the witnesses could be believed?

The evidence by the Claimant of being told by Mrs. Collymore that she would not be taking her back to work and she was going to make nurses redundant, was not challenged by Mrs. Collymore when she was examined by the Claimant and Mrs. Collymore in her evidence also made reference to redundancy and lay off of nurses due to the number of deaths of patients at the nursing home.

The issues for the Tribunal therefore are whether Mrs. Patrick resigned from her post to study at the Barbados Community College, whether she was given study leave without pay, or whether she was constructively dismissed.

On the first issue there is no clear evidence that the Claimant had resigned her job; an examination of the evidence of Mrs. Collymore reveals at P.31 of the Transcript:

> *"I took it for granted, which I should not assume, that since she had told me that she was going to be working until the ending of August that she would have submitted her resignation at the end of August."*

Mrs. Collymore further stated in her evidence:

> *"I went along thinking that she had done that, and we thought that she had submitted it. When I came back I took it for granted that she had given him her resignation, that is what others had done."*

The Tribunal is satisfied that the reference to 'he' in this portion of her evidence, relates to Mr. Ronald Nicholls, the Managing Director of the Company.

With regard to the evidence of Mr. Nicholls on this issue, he said,:

> *"She did indicate to both of us that she had resigned and that she was leaving at the end of August."*

Irrespective of what the Claimant, according to Mr. Nicholls, told him and Mrs. Collymore, the claim of resignation was never recorded on the National Insurance Certificate of Termination.

The Tribunal had further doubts about the resignation of Mrs. Patrick and the credibility of Mr. Nicholls' evidence in respect of the same. At P.47 of the Transcript he states:

> *"I think that the confusion was that I assumed that Mrs. Collymore had received her letter of resignation and never asked for it when the time came because Mrs. Collymore was away and I never even pursued it and I never even thought of it."*

The issue of whether she was granted study leave without pay seems difficult to resolve. However, where an employee requests from his/her employer study leave without pay, this is a sure indication that the employee considers he/she is still employed by the employer. But the

evidence of Mr. Nicholls on this point as stated earlier is, in itself, contradictory. The question is, was the Claimant on leave without pay or did she resign? The evidence of Mr. Nicholls reveals that:

> *"The employee requested leave to study and was granted leave without pay; the employee subsequently asked to work two (2) nights where possible to assist with meeting personal expenses; this was granted. The employee was, however, not terminated under the contract of services, but left to pursue studies:"*

But the question must be posed: since the study leave was granted as requested, why should she leave the employment thinking that she was terminated?

The language used by Mrs. Collymore in relation to redundancy and lay off of nurses and her telling Mrs. Patrick she would not be taken back, must have left her in a state of confusion as to whether or not she would be dismissed. In this situation the Tribunal must examine the conduct of the employer in the circumstances and determine whether the Claimant was left in any doubt that she would no longer be employed with the Respondent.

In **J & J Stern v Simpson [1983] IRLR 52** the Employment Appeal Tribunal (EAT) held that words must not be viewed in isolation, but the surrounding circumstances are relevant where it might be thought that the words were ambiguous.

The Tribunal holds that there is nothing in the words of Mrs. Collymore which may be viewed as being ambiguous; Mrs. Patrick acted promptly and wasted no time after receiving the advice of her employer and requested her unemployment form to take to the National Insurance Department in order to receive her unemployment benefits.

Although the Claimant was rostered to work on a limited basis while at the College the question for the Tribunal to determine is whether the Claimant affirmed or repudiated the contract in light of what was said to her by Mrs. Collymore even though she asked for her unemployment form.

In **W E Cox Toner (International) Ltd. V Crook [1981] IRLR 443 @ 446** Lord Browne-Wilkinson said:

> *"If one party (the guilty party)* commits a repudiatory breach of the contract, the other party (the innocent party) can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any expressed or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation.
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> *Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing as to allow the guilty party to remedy the breach, such further performance does prejudice his right subsequently to accept the repudiation."*

In our view, the Claimant, by requesting the Termination of Services/Lay-off Certificate form, accepted the repudiation of her contract of employment.

In **Ogilvie Construction Ltd. v Brown UKEATS/0003/16/JW** the issue was whether the letter meant that the Claimant was resigning from his employment with the Respondent or whether he wanted to return to his position of general manager. The Court said at paragraph 19:

> *"Where a notice of resignation is unambiguous the recipient is entitled to assume that the decision behind it was conscious and rational and accept its terms."*

The Court went on to indicate that the real test is how the notice would have been understood by

the reasonable recipient.

In the present case we must ask what did Mrs. Patrick understand the statement to mean when the Respondent told her she would not be taking her back to work and that nurses would be made redundant? The Tribunal holds that the statement by the Respondent to the Claimant was unambiguous and the conduct of the employer left the Claimant in no doubt that she was dismissed.

Under S 26 (1) (c) of the Employment Rights Act 2012 the positon is stated as follows:

> *"The employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled so to terminate it by reason of the conduct of the employer."*

Based on the evidence, a number of conflicting reasons were stated by the parties with regard to the termination of the employment. In these circumstances therefore it is left to the Tribunal to decide which party's evidence is more credible. In **Ryta Kuzel v Roche Products Ltd. [2008] EWCA CIV 380 paragraphs 57 to 59 Lord Justice Mummery** said.

> *57. "I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case … This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*
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> *58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*
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> *59. The Employment Tribunal must then decide what was the reason or principal*

reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Employment Tribunal that the reason was what he asserted it was, it is open to the Employment Tribunal to find that the reason was what the employee asserted it was."

We are satisfied that the evidence of the Respondent has led the Tribunal to find that the Claimant was unfairly dismissed. In this regard it must be noted that neither Mrs. Collymore nor Mr. Nicholls was consistent in their account of the events that took place leading up to the termination of the Claimant. The evidence given by the witnesses for the Respondent related to redundancy on the one hand and resignation on the other of the Claimant; the Claimant however was adamant that she was unfairly dismissed.

An unfair dismissal of an employee tends to have a serious impact on his or her livelihood. This observation was noted by The House of Lords in **Johnson v Unisys Limited (2001) UKHL 13** where at paragraph 35 Lord Hoffmann states:

"Freedom of Contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker…. It has been recognized that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognize this social reality."

The Tribunal having seen the demeanor of the Claimant and based on her evidence, concluded that the Respondent was somewhat reluctant to inform the Claimant that her employment was being terminated, but instead used language, though not specific, to indicate to the Claimant that she was being dismissed. An example of this was the statement given in evidence that:

"This is not a lay off or anything like that but we are not taking you back."

In Gisda CYF v Barratt (2010) UKSC 4 at paragraph 41 Lord Kerr observed:

"An employee is entitled either to be informed or at least to have the reasonable chance

of finding out that he has been dismissed."

Further at paragraph 43 Lord Kerr went on to state:

> *"An employer who wishes to be certain that his employee is aware of the dismissal can resort to the prosaic expedient of informing the employee in a face-to-face interview that he or she has been dismissed."*

In the premises, the Tribunal finds that the Respondent's evidence cannot be accepted and holds, based on the evidence before it, that the Claimant was unfairly dismissed.

Compensation

The Employment Rights Act 2012-9, s 37 provides for an order to be made for re-instatement or re-engagement. Where neither order can be made the Tribunal is entitled to award compensation to the employee for being unfairly dismissed. In answer to the Tribunal concerning re-instatement, the Claimant expressed no desire of being re-instated; in relation to re-engagement, the Claimant's answer was equally emphatic: she was not willing to work again with the Respondent.

The Claimant was employed with the employer for six (6) years. In light of this period she is entitled to an award based on the fifth schedule of the Act which is 2.5 weeks' wages for each year of the period. She is therefore entitled to an award of seven thousand, two hundred dollars (BDS) ($7,200.00)

It is also left to the Tribunal to consider an award to the Claimant in lieu of the unavailability of the remedy of re-instatement or re-engagement.

The Claimant, because of the unfair dismissal was left without a job or earnings for an extended period. In light of this, the Tribunal considers it appropriate to award her, in accordance with the statute, the sum of $5.000.00 (BDS) as compensation for the hardship suffered during the period.

Order accordingly.