EMPLOYMENT TRIBUNALS

Claimant: Miss K Narkevica

Respondent: La Rocca Ristorante Limited

HELD AT: Manchester **ON:** 9 March 2017

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person
Respondent: Mr P Celaj, Director

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unfair dismissal, wrongful dismissal and unpaid annual leave entitlement succeed. The claimant is awarded the sum of £4,454.67 in compensation, payable by the respondent.

2. This is comprised of the following sums:

   a. Six weeks' notice monies for wrongful dismissal of £777.60, subject to a 10% uplift for a failure by the employer to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total of £855.36;

   b. A basic award for unfair dismissal based on one week's pay for every year of the claimant's service, which is £907.20;

   c. A compensatory award of £1518.17 for the claimant's losses for the period after the expiry of her notice period until she secured equivalent work (16 November 2016 to 6 February 2017), subject to a 10% uplift for a failure

by the employer to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total of £1669.99;

d. An award for loss of her statutory rights of £450, subject to a 10% uplift for a failure by the employer to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total of £495; and

e. The claimant's unpaid annual leave of £479.19, subject to a 10% uplift for a failure by the employer to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total of £527.11.

REASONS

Issues for the Tribunal to Decide

1. The claimant brings claims of unfair dismissal, notice pay, unpaid wages and holiday pay.

2. Several preliminary matters were discussed at the outset of the hearing. The respondent was asked to comply with orders of the Tribunal dated 16 November 2016 in relation to exchange of witness statements and exchange of documents but failed to do so. The respondent was given a strike-out warning in a letter dated 10 February 2017 from the Tribunal and was given a deadline of 24 February 2017 to respond, but did not do so. Mr Celaj attended the hearing today with two witnesses. However, he brought with him no witness statements and the claimant has received no documentation from him apart from a letter dated 3 February 2017 which was also before me.

3. The respondent was asked at the outset of the hearing what the reasons were for non-compliance with the orders of the Tribunal and with the strike out warning. Mr Celaj said that he did not understand what was required of him. He explained that he is a new business owner, having taken over the respondent's business in June 2016. After a discussion with Mr Celaj, I informed him that this was not of itself an adequate explanation for non-compliance. However, the matters to be determined could be dealt with on the basis of the information already before the Tribunal, due to the claimant's careful preparation of a trial bundle. A fair examination of the issues would therefore be possible, particularly given that in his initial discussion with me, Mr Celaj conceded that the claimant had in fact been dismissed by the respondent by letter. Therefore, in the interests of justice the response would not be struck out under rule 37 of the Rules of Procedure 2013.

4. Subsequently, both parties were given the opportunity to request that the hearing be adjourned to allow them to gather additional documentation or to take further legal advice, but both parties indicated that they wished to proceed with the hearing. Both parties were also offered the services of an interpreter but chose to proceed without one.

5. It was agreed that dealing with the evidence would be dealt with by both Ms Narkevica and Mr Celaj being sworn in so that their evidence was given under oath and that the matter would proceed by way of questions from the Employment Judge with the parties being given the opportunity to make submissions to the Tribunal or challenge the submissions of the other side as they wished. Both parties agreed to this course of action.

Findings of Fact

6. The relevant facts in this matter are largely agreed by the parties. On the whole, they accept the version of events that each presents in evidence. The relevant facts are as follows.

7. The respondent took over the entire restaurant business in which the claimant worked from the previous owner in June 2016. From the information before me I find that the transfer from the previous owner to the current owners was one to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply, in that the transfer was of the entire business of the restaurant including the lease, the staff and the equipment, and the respondent's evidence was that they were supplied with a list of employees and the hours that the employees worked, and that they assured the staff at the time of the takeover that they would not change the business as a result. There was no evidence before me to indicate that the transfer of the business was such that the claimant would not enjoy continuity of service or be able to rely on the terms and conditions that she had previously. She told me that she had been informed by the previous owner that this would be the case. Both parties accepted that their understanding was that nothing would change for the staff as a result of the sale.

8. I explained to Mr Celaj during the hearing that as Ms Narkevica is able to count her period of service with the previous owner in her period of service with him, she had seven years' service in total at the time of her dismissal. She also is able to rely on all of the contractual rights that she had enjoyed previously, and this includes her agreed days and hours of work, which was an issue of dispute between the parties.

9. The parties agreed that once the respondent took over the restaurant business, they suffered the loss of several members of staff at the start of the period of their ownership and thereafter struggled to cover their staffing requirements, particularly at busy periods at the weekends.

10. The claimant was off sick at the time of the takeover, having had two hernia operations. She returned to work in early July 2016 and the business closed for ten days in mid-July, a period which overlapped with the claimant's four week holiday.

11. There was an issue with the non-payment of the claimant's wages for the period of closure but the claimant says this has now been resolved, although holiday pay is still outstanding.

12. On the claimant's return to work a dispute arose between the claimant and the respondent as to which days the claimant should work and how many hours she should work. The respondent tried to require the claimant to work the majority of her contracted hours (18 hours per week) at the weekend when they were at their busiest.

13. The claimant's evidence, which I accept, was that she had an agreement with the previous owner to work Monday to Friday only and that she would not and could not work at weekends for more than three hours because of her childcare responsibilities. This was something that she had agreed with the previous owner and because the TUPE Regulations apply the claimant carries that right forward to her period of employment with the new owners. These contractual rights were those the claimant relied on in her discussions with Mr Celaj.

14. The respondent's evidence to the Tribunal was that this caused him a problem. He felt that the previous owner had been "*too soft*" with the claimant in this regard, that he was struggling to cover weekend shifts and that he felt that it was unfair to other staff, especially their pizza chef Mrs Ciercierska who had to work weekends when she did not wish to either. In fact the problem was such that Mrs Ciercierska threatened to leave the respondent's employment if she was made to work weekends to the extent that she had been. Mrs Matusikova, the respondent's manager, and Mr Celaj, required Miss Narkevica to work a full shift at the weekends, which they felt was reasonable in the circumstances. Mr Celaj told me that it was inconceivable in his opinion that anyone could be employed in a restaurant and not have to work at the weekend.

15. The claimant raised a grievance with the respondent on 24 August 2016, asking for a formal meeting to discuss the problems that they were having between them, which she listed as being unpaid wages, unpaid holiday pay and the respondent's ongoing attempts to change her contracted hours. The letter refers to the ACAS Code of Practice on Disciplinary and Grievance Procedures. The claimant was not granted a meeting. The respondent explained to me that he was too busy running the restaurant at the time.

16. However, the issue of the claimant's hours and when she should work was not really the key issue in this case, and I explained this to the parties during the hearing. In fact, the key issue in the case was the way in which the respondent dealt with this disagreement over working hours, which was to give a letter to the claimant a letter dated 27 September 2016 in a brief meeting that they had on 28 September 2016, dismissing her with a week's notice. The letter is in the bundle before me and is clearly a letter of dismissal. It says "*we have no alternative but to cease your employment with ourselves*".

17. Mr Celaj submits that although the letter was given by him and Mrs Matusikova to the claimant at their meeting of 28 September, he did not mean to dismiss her and that she could have returned to work if she had wanted to. Whether or not this was his intention, the claimant chose not to return to work and as it was clearly a letter of dismissal, the claimant was entitled to treat it as such and consider herself dismissed.

18. The respondent accepts that the claimant was dismissed by that letter, although he says now that it was a mistake. He also acknowledges that no meeting was held to discuss her grievance and that also he did not reply to the claimant's letter of 10 October in which she reiterates her complaints and says she has referred the matter to ACAS. The respondent acknowledges that he did not use the offer of ACAS's conciliation services to try and resolve this dispute before it came to before the Tribunal.

The Law

19. Section 98(4) of the Employment Rights Act 1996 grants to employees with two years or more service the right not to be unfairly dismissed. A fair dismissal must be for one or more fair reasons as set out in s98 and an employer must have acted reasonably in treating this reason as sufficient reason for dismissing the employee. Furthermore, a fair procedure must have been followed as described in the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). This includes, *inter alia* in instances of disciplinary issues:

a. informing the employee of the problem, which includes sufficient information about the misconduct and its possible consequences, including the possibility of dismissal;

b. holding a meeting to discuss the problem;

c. allowing the employee to be accompanied at the meeting; and

d. providing the employee with an opportunity to appeal.

Application of the Law to the Facts Found

20. In this case the reason given in the letter for Miss Narkevica's dismissal was that the business had not been as successful as they had expected, although from the evidence before me the dismissal was in fact due to the claimant's insistence on working in accordance with her contract. The claimant was given no warning in advance of the meeting on 28 September that that meeting would result in her dismissal. She was not given the opportunity to put her side of the case forward and no right of appeal was given. No fair procedure was followed. The claimant's dismissal was an unfair dismissal in contravention of s98 of the Employment Rights Act 1996. The claimant also asserts that her award should be increased because of a failure to comply with the ACAS Code of Practice, and she has included this in her Schedule of Loss.

21. The respondent also acknowledges that the claimant was only paid for ten hours of her accrued annual leave. This contravenes the Working Time Regulations 1998. The statutory minimum holiday entitlement is four weeks plus eight Bank Holidays.

22. The claimant was only paid one week's notice following her dismissal. She has seven years' service following the transfer of the business, and she is entitled to a minimum of seven weeks' notice.

Assessment of Remedy

23. It is accepted that she earned £129.60 a week gross, and net, because she falls below the lower earnings limit both for tax and for national insurance. She is owed seven weeks' notice and she has been paid one week's notice so she is entitled to be paid six weeks' notice which comes to £777.60.

24. She has also been unfairly dismissed and unfair dismissal compensation entitles an employee to three aspects of compensation.

25. The first is a basic award. This is an award of one week's wages for every year that the employee has worked for the employer, so she is entitled to seven weeks' wages which is £907.20.

26. She is then also entitled to compensation for the length of time it took her to find a new job, and she has found a new job; she started work on 6 February 2017. In her Schedule of Loss the claimant asks for loss of wages from 4 October onwards, which is after the one week's notice period, but in fact she has already been compensated for seven weeks' notice up to 15 November 2016 because of the seven week notice period that would have run from the period of the dismissal. The compensatory award starts the day after, on 16 November 2016, and runs to 6 February 2017 when she started her new job. She is entitled to compensation for 11 weeks and five days at £129.60 a week, which is £1,518.17.

27. The claimant is entitled to claim for the loss of her statutory rights which is a nominal amount of £450. She has claimed compensation for a failure to provide a statement of terms and conditions, but in fact Ms Narkevica told me during the hearing that she had a contract of employment from the previous owner of the respondent and so is not entitled to any award.

28. In relation to her holiday pay, Ms Narkevica has provided correct calculations in her Schedule of Loss as to how much holiday she had accrued, how much holiday she had been paid for and how much holiday she had taken, and so I agree with the calculations in the Schedule of Loss that she is entitled to £479.19.

29. The final matter is the issue of the additional percentage uplift for a failure to follow the ACAS Code of Practice. It is quite clear that no procedures were followed whatsoever in relation to Ms Narkevica's dismissal. There was no proper meeting, there was no warning and no appeal. However, what the law requires me to take into account is not only the failure by employer but their size and their resources, and although there has been a wholesale failure by the respondent to follow any kind of fair procedure, I do accept that they are a small employer in difficult circumstances and short-staffed, at the start of their period of ownership. Instead of the maximum 25% uplift that can be awarded, it is just and equitable to award a rate of 10% to all heads of compensation except the basic award.

30. The respondent has, in accordance with Rule 66 of the Employment Tribunal Rules of Procedure 2013, 14 days from the date of the judgment to make payment to the claimant.

Request for Written Reasons

31. The parties were given an oral judgment and reasons at the hearing on 9th March 2017. Both parties asked for written reasons to be provided when informed of their ability to make such a request at the conclusion of the hearing.

Employment Judge Barker

10th March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 March 2017
FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2405133/2016

Name of case(s): Miss K Narkevica v La Rocca Ristorante Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 15 March 2017

"the calculation day" is: **16 March 2017**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office