EMPLOYMENT TRIBUNALS

Claimant: Miss D Obi

Respondents: 1. Mr Menoj Verma
2. Rice Shack Limited

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

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person
Respondents: Mr T Fuller, Consultant

REASONS

1. These are the written reasons for the judgment sent to the parties after the hearing on 9 February 2017.

2. By a claim presented to the Tribunal on 25 July 2016 Miss Obi alleged unfair dismissal and discrimination and made a claim for other payments.

3. There was a preliminary hearing before Employment Judge Feeney in which the claimant indicated that she would withdraw the complaint for unfair dismissal and she has confirmed today that she has done so, and although she then gave particulars in relation to her discrimination claims she has in the meantime withdrawn those, and the only claim before me is one in respect of wages.

4. Unless otherwise identified references in these written reasons to the "respondent" should be understood to be a reference to the second respondent.

5. The claimant's contract of employment, of which she says she was not given at the outset but which the respondents say she was given but did not sign, but a copy of which has been provided to me, indicates that she was on a zero hours' contract for such work as may be available at the sum of £6.70 per hour.

6. Her job was that of a front of house assistant in one of the respondent's restaurant premises in the Trafford Centre in Manchester.

7. It is not in dispute that the claimant began in December 2015 and her work continued until 6 March 2016. It is also common ground that in that period she averaged 15¼ hours a week and received gross payments of £1,428.79. On that basis her average weekly pay was £102.50.

8. On 5 March 2016 the claimant was involved in some kind of altercation as a result of which she told to go home early on the shift. Within a few days she had a conversation with her manager, Tony Minshall, and her evidence is that pending a disciplinary she was told not to attend work.

9. The normal arrangement was that the claimant would notify her availability, she was then a college student, and she would have shifts allocated, and the respondents did this by getting their workers to subscribe to a WhatsApp group and then shifts were allocated.

10. After this no shifts were allocated to the claimant. There is no power to suspend in the contract of employment but if an employer, and Mr Fuller does not dispute this, does in fact suspend then there is no basis on which the claimant can be suspended without pay unless the contract expressly provides for it.

11. The claimant told Mr Minshall on 11 March 2016, according to the ET3, that because of complaints about her in her performance generally she was advised to go home and the respondents would contact her.

12. The claimant was requested to attend a disciplinary hearing on 24 March. She asked for that to be rescheduled because of her college commitments. A letter was written to her on 24 March, not sent as other letters were by email, and although the respondents say it was posted, I have not had any evidence as to the person who posted it. It is said it was my sent by first class post. I am aware of the presumption of delivery, but the claimant's evidence is that she did not receive it and I so find.

13. The scheduled hearing should have taken place on 29 March 2016. Mr Targe who has given evidence before me for the respondent was unable to tell me what happened as he was not there. When I asked him directly why it was that the disciplinary hearing was never reconvened nor any outcome given he was unable to answer. He said "no comment".

14. I do not know what happened on 29 March 2016, save that I know that the claimant did not attend the hearing. She did not receive a letter asking her to come to a follow-up meeting or telling her that if she did not come to another meeting she would be dismissed in her absence. The matter was simply left fallow.

15. What then happened was that the claimant did not hear anything from the respondent nor vice versa until 23 May 2016 when she wrote a letter of grievance, or rather copied a letter of grievance that she said she had written earlier, to the Managing Director, Mr Verma (pages 58-61). The letter, the claimant explained to me, was a copy of a letter that she had already sent on 24 March 2016. The respondents deny having received that. It was a letter of grievance. It made

allegations of discrimination. It also referred to the fact that she had been suspended without pay, not received employment particulars and had not been offered work since 5 March 2016, and, at least by implication, that she was willing to perform that work if it were offered. She asked for the matter to be investigated and she explained that she had not received notice of the adjourned disciplinary hearing.

16. The letter was passed to Mr Targe who I think had probably not been involved before this. He corresponded with the claimant and there was a meeting on 2 June 2016 in the afternoon with Mr Targe, a note taker and the claimant.

17. There was a discussion about her grievance and indeed the fact that the disciplinary allegations were raised. At the end of the meeting Mr Targe said that he would be in touch with her having done an investigation. He wrote to her on 3 June 2016 (page 78) saying: "I now need to conduct further investigations". Whether he intended to refer to the disciplinary investigation or not I am not sure; that has not been clarified in evidence, it may just be an infelicity of expression. I accept he intended to respond to the grievance. He said that he would endeavour to conclude the investigation as soon as possible and communicate an outcome to the claimant in writing. He said he had enclosed meeting notes but the claimant said they were not enclosed, and indeed in her reply of 6 June 2016 she is still asking for the minutes of the grievance meeting.

18. Be that as it may, Mr Targe did not send the claimant an outcome to the grievance but he did speak in June to another employee, Joanne Nitchura, who provided a statement (page 83), and to Madoka Suzuki, who I think had a supervisory position at the shop, and he responded by an email of 9 August 2016 (page 84).

19. The next event, as I understand it, was that the claimant received a letter from Mr Targe dated 13 December 2016 (page 111) in which he said that she had been absent from work since 7 March:

> "As you know, we have been investigating a grievance. Ever since the hearing on 2 June we have not received any form of communication from you to explain the reasons for your absence. We have attempted to contact you on numerous occasions and left you voicemails … We are concerned about you and otherwise request you return to work. I scheduled a shift for you commencing on 16 and 17 December and the time is 3.00pm till close. If you do not attend or get in contact we will have no alternative but to conclude you are absent without authorisation"."

20. The claimant quite often worked a shift beginning at about t of day hat time because of her student obligations. The same email appears to have been sent in an amended form on 14 December by an email (page 112) and on 16 December the claimant replied:

> "I am willing to return back to work only if I am paid the outstanding amount owed from 7 March till date. In regards to your first paragraph to your letter stating there was no communication since 2 June 2016, should I remind you that after our meeting as regards to the grievance I contacted you on 6 June to which I received no reply of any form of communication."

21. That is the position as far as the respondent is concerned. Mr Targe, was able to give me no explanation at all as to why a grievance outcome had not been sent to the claimant. Again he replied “no comment” in answer to my question.

22. The claimant had in the meantime, as I say, started these proceedings, and in September 2016 she attended a preliminary hearing before Employment Judge Feeney and she was asked to provide a Schedule of Loss, which is in the bundle and which merely claims the wages from March through to the date of the schedule, and in addition she was ordered to enclose mitigation documents in the bundle. She did not do so.

23. More significantly, in my judgment, the claimant did not notify the respondent that she had not only been looking for work from early as May 2016 but that she had obtained work on 22 August, full-time work with a company I understand called Intelling, a call centre, and earning significantly more in that position than she did with the respondent. It is clear as well from documents latterly disclosed by the claimant to Mr Fuller that she had also made an application for a job, I think, at the Zara shop in the Trafford Centre, and indeed had had one other appointment with Adecco, an agency, in November, whether that is for the same job or not I do not know, but that was the only evidence that she submitted in response to the respondent’s enquiry.

24. What had happened was that the company, as I understand it, for whom she now works, or was working then, also had been a client of Mr Fuller’s organisation and it was through them, apparently, that he had discovered she had obtained employment. He makes strongly the point that the claimant has not been fully frank with the Tribunal, because, until he made an application for specific disclosure as recently as 31 January 2017, he did not know, and his client did not know, that the claimant in bringing these proceedings had been working for another employer. She did not tell the Tribunal in September; she did not put it in her Schedule of Loss; and she did not update and provide any mitigation documents until pressed to do so by that recent application.

25. A letter was sent by Employment Judge Slater on 2 February 2017 declining a specific disclosure order, but referring to the fact that the claimant was specifically advised by the Employment Judge at the preliminary hearing that mitigation documents should go in the bundle; if the claimant had any documents of the description sought she should send the respondent copies without further delay, and any failure to comply with the existing management orders may be considered at the final hearing and adverse inferences could be drawn against the claimant if she has not fully complied with this obligation.

26. The documents the claimant has provided are a pay advice for January 2017 from Intelling showing gross pay of £1,129.37, net pay £913.05, and a one page printout from a Halifax Building Society account showing that she had received sums from 8 September 2016, which supports a start date of August 2016 for Intelling, each month up until December. I notice from the most recent payslip that the claimant's earnings in that period to date were in gross terms just short of £4,700.

27. The parties had agreed at the outset before me that the claimant’s employment has still not been determined. She has not resigned, she has not been

dismissed, the contract has not been frustrated. Were it not for the existence of the disciplinary proceedings that the respondent elected to start I would have had to conclude that the claimant had, after a reasonable period after the grievance was submitted when she heard nothing, not been tendering herself for work. She certainly had not put herself forward for any hours for work at any stage after that.

28. The claimant tells me that she had said she was willing to work in the grievance meeting on 2 June. It seems to me that the notes, though in manuscript and not neatly written, are likely to be an accurate record, and insofar as she asked me to accept her evidence I have to say I prefer the notes. I found her evidence vague in some respects, and I am concerned at what I see as a lack of candour in putting matters properly before the Tribunal. For those reasons I do not accept her evidence on that point.

29. However, I do not accept the respondent's submission that the claimant must have received the letter for the 29 March hearing. It seems to me that the fact that she continued to raise things was much more likely to be indicative of the fact that she simply had not received it. She is somebody who clearly is willing to argue her corner. This is not the first proceedings in which she tells me she has been engaged, and I suspect that had she received the letter she would have attended the hearing and argued the point there and then. What would have been the outcome I do not know, and it is not relevant.

30. It is suggested by Mr Fuller in submissions that this claimant was not suspended. I reject that argument. It seems to me that the conversations the claimant had on 5 March and thereafter with Tony Minshall amount to a suspension in everything but name and the respondent cannot avoid liability on that basis.

31. The difficulty then for the respondent in my judgment is that not having concluded either set of processes, i.e. disciplinary or grievance nor offered her further work, the claimant effectively remained suspended, far too long on any normal measure. As Mr Fuller accepts the conduct of the disciplinary process lay wholly in the hands of the respondent. I do not for a moment suggest that they delayed this for any adverse purpose, but simply I suspect due to oversight or lack of comprehension, but the reality is that the claimant's suspension, however long it should have lasted for, went on far too long.

32. The claimant, in my judgment, is right to say that until such time as it was brought to an end she was entitled to be paid her wages based upon the averages that I have identified, and in my judgment the claimant's position is that until 13 December, some 40 weeks after 5 March, she was entitled to be paid her weekly pay. The fact that she was not putting herself forward for rotas might have been relevant had she not been suspended, but once she had been suspended, as in my judgment she was, that is nothing to the point.

33. The reality is that when the claimant was invited back to work she refused the shifts. I do not accept the claimant's evidence, for reasons similar to those which I have given, that she refused them simply because she had not been paid; there is absolutely no reason why she should not have taken those shifts and carried on demanding the money that she had sought in these proceedings. I reject that argument. In my judgment the claimant, as evidenced by having got a new job, did

not wish to return to work for the respondent. Had that been brought to the respondent's attention before then, as indeed in candour it should have been at least by 25 September when both parties appeared before the Tribunal, I suspect the claimant's contract of employment would have been determined before. Regrettably that has not happened, and in my judgment the claimant is entitled to her pay as being unlawfully withheld for the period of 40 weeks at the rates I have identified as given rise to the total that I have awarded in the judgment.

34. The claimant indicated that she sought what she called "expenses" but in fact it amounted to a costs order, which under rule 78(1) of the Employment Tribunals Rules of Procedure 2013 can include an order that the paying party pay to the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party. The claimant in fact told me that she had not paid either an issue fee or a hearing fee, and in those circumstances I do not consider that I have the power to make the order that the claimant asks.

35. Were it the case that she had paid those fees it would still be a matter of my discretion because the words are a costs order "may" order the reimbursement of a fee. I would not make the order for the following reasons. This was not just a claim for unpaid wages, it was a claim for unfair dismissal which the Tribunal never had jurisdiction to determine. It was also a claim for discrimination which the claimant did pursue but then withdrew. The comments I have made before in relation to the claimant's lack of frankness and candour in bringing matters to the attention either of the Tribunal or the respondent in my judgment is relevant also. Had the claimant been frank with the Tribunal and the respondent in my judgment it is highly unlikely that this case would ever have come to hearing. In those circumstances I refuse the application for any form of costs order.

36. I conclude by offering an apology to the parties for the length of time that is taken to produce these reasons in written form, although they were pronounced orally at the hearing and recorded. This has been entirely due to the pressure of other judicial work.

Employment Judge T Ryan

6 June 2017

REASONS SENT TO THE PARTIES ON

13 June 2017

FOR THE TRIBUNAL OFFICE