EMPLOYMENT TRIBUNALS

Claimant: Ms Malgorzata Babula

Respondents: 1. Holiday.com Hotels Limited
2. Mr M Pannu

HELD AT: Leeds **ON:** 11, 12, 13 and 14 September 2017

BEFORE: Employment Judge D N Jones
Ms N H Downey
Mr W G Appleyard

REPRESENTATION:

Claimant: Mrs M Inkin, lay representative
Respondent: Mr M Howson, consultant

JUDGMENT having been sent to the parties on 20 September 2017 and the claimant having made an application in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

Introduction

1. By a claim form presented to the Tribunal on 7 April 2017 the Claimant complained she had been unfairly dismissed, subjected to sexual harassment, not paid the national minimum and living wage or for her correct holiday entitlement under the Working Time Regulations.

Issues

2. The issues were identified at a Preliminary Hearing on 27 June 2017 and further refined at the commencement of this hearing. The complaint of unfair dismissal was withdrawn. It was agreed the claims for wages and holiday pay would be addressed as breach of contract claims and that no time issue would arise in those circumstances. The issues were:-

   Breach of contract

   2.1. What was the Claimant's entitlement to wages over the period from January 2016 to January 2017?

2.2. Was the Claimant paid for the hours she worked?

2.3. Was the Claimant entitled to receive further holiday pay than had been provided in the light of the hours she worked?

Constructive dismissal

2.4. Was there a fundamental breach of an express term of the contract of employment or a breach of the implied term of trust and confidence?

2.5. If so did the Claimant resign as a consequence?

Sexual harassment

2.6. Was there unwanted conduct of a sexual nature or related to the protected characteristic of sex? If so did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

2.7. Did the Second Respondent treat the Claimant less favourably than he would have treated her if she had not rejected unwanted conduct of a sexual nature?

Evidence

3. The Tribunal heard evidence from the Claimant, from Ms Izabela Rengel and Ms Elzbieta Walker, from the Second Respondent and from Mrs Kamaljot Kaur, also known as Singh. The Tribunal was provided with a bundle of 404 documents.

Findings of fact

4. The First Respondent is a company which owns and operates the Gilson Hotel in Anlaby Road, Hull. It employs approximately 20 staff, varying from time to time. Mrs Singh is a director of the First Respondent and lived on the premises of the hotel.

5. The Second Respondent was the hotel manager employed by the First Respondent.

6. The Claimant commenced employment with the First Respondent on 1 July 2015 as a housekeeper and food and beverage attendant. She was engaged on a fixed term contract from 1 July 2015 to 1 January 2016. The hours of work were defined as between 0 and 40 per week. She was to be paid at £6.50 per hour. An addendum to the written particulars which she had been supplied with included a breakdown of different duties. Each duty had a number of minutes allocated to it which was supposed to reflect the time required in respect of each. For example to clean a single bedroom was said to take 20 minutes. In respect of kitchen duties this was later said to require 3 hours albeit that was not included in the written particulars.

7. In December 2015 the Second Respondent suggested to the Claimant that she become a housekeeping supervisor. She agreed. It was envisaged that there would be a period of training for several months until May 2016 for the Claimant to achieve competence in that post. She was provided with additional duties: to ensure that the other cleaners had cleaned rooms properly, to ensure there was adequate bedding, towels and cleaning chemicals, to order bed sheets, obtain sufficient coffee, tea, paper, washing, mops and covers and to wash carpets and entire floors and common parts including the reception.

8. Up until May 2016 the Claimant was paid by reference to a spreadsheet which she had completed. This set out a number of duties, including those as described in the addendum to the written particulars. The Claimant recorded the number of rooms she had cleaned. Mrs Singh or the Second Respondent would calculate the hours worked by the formula set out in the addendum. Thus the calculation was what hours it was deemed the Claimant would have undertaken if working in accordance with that formula rather than what the Claimant may have, and in fact had, actually worked.

9. We are satisfied that throughout her employment the Claimant had been undertaking additional hours to those set out in the formula and we are also satisfied that they are fully set out in the Claimant's witness statement. We accept the analysis of the time undertaken for the first 4 months of 2016 as set out in paragraph 30 of the Claimant's witness statement. It was detailed and clear. In May 2016 the Second Respondent informed the Claimant that she was to be paid on a different basis. She was to be engaged for 150 hours per month and paid at the new rate of £7.20, the then current national living minimum wage.

10. According to the Respondents, although the Claimant was remunerated for 150 hours of work per month, she was not working that many hours. The Claimant contends that she was working in excess of that time and taking into account her holiday entitlement always in excess of the monthly allocation of 150 hours. She has particularised the period of time she had been working on a monthly basis between May 2016 and December 2016 in paragraph 31 of her witness statement. This includes holidays. We accepted that it reflects the work she had undertaken.

11. The analysis of the Respondent was based upon a continuation of the timesheet which had been used in the months before May 2016. Not only does the time sheet include fewer duties to those the Claimant was undertaking it also inaccurately assumes the Claimant's duties would be completed within the time frame stipulated. For example kitchen duties were always assumed to last 3 hours. This was an understatement of the time required. On some occasions those duties involved serving in excess of 40 breakfasts. The Claimant would have to attend an hour or more before they were served to prepare the food and clean up afterwards. This level of demand exceeded the assumed 3 hour period of work attributed to this activity. Whilst this was not a daily occurrence, it arose more frequently than the Second Respondent has suggested.

12. The provision of documentation in this case by the Respondent leaves much to be desired. Only 2 documents were provided in respect of breakfasts, for January and August 2016. We do not regard those selective records as indicative of the level of work the Claimant usually had to undertake. Other duties were not recorded at all in the timesheets, even by description of duties discharged, until December 2016. These were part and parcel of the supervisory duties which had increased the Claimant's workload significantly from December 2015.

13. The Second Respondent's evidence that the Claimant slowly was introduced to additional responsibilities, "a crescendo", was not only bereft of detail but failed to acknowledge the significant contribution the Claimant made from the outset to her new role.

14. In late August 2016 the Second Respondent travelled to Italy to address a number of personal issues. Mrs Singh took over many of the managerial duties in his absence. She became unhappy with the basis upon which the Claimant was being paid. Upon the Second Respondent's return she requested an analysis of the work done. This led to the introduction of a new timesheet from December 2016 to include a number of different supervisory duties. When the Claimant compiled this worksheet she set out the time spent on each task. Taking into account 4 days of leave the hours attributed to her in December were 163. Attributed, because this too relied upon the assumption of what each task would require save for the added supervisory duties in respect of which the claimant included some specific times of hours worked.

15. The December 2016 timesheet supported the contention of the Claiamnt that the earlier timesheets had been an inadequate measure of the time she had actually worked. She had been working regularly in excess of the 150 hours for which she had been paid. Mr Howson submitted that the timesheet of December was untypical because it included 2 periods of deep cleaning amounting to 5 hours. Whilst deep cleaning may not have been undertaken each month we are satisfied that there were other duties which the Claimant has described in her statement which were discharged in earlier months that took her well beyond the 150 hour allocation. The Second Respondent's calculation of hours worked in December (page 231) including holidays was 152.53. That was incorrect, on his own records, by in excess of 10 hours, as can be seen from the updated calculation undertaken by Mr Howson at the request of the Tribunal which records 162.39 hours. The Second Respondent's earlier record illustrates the continuing attempt to understate the Claimant's workload.

16. On a number of occasions the Claimant had asked for a contract of employment to reflect her new responsibilities. It is recorded in the WhatsApp communications between the Claimant and the Second Respondent and we accept the Claimant's evidence that she had made additional verbal requests. No such written particulars were ever provided to her. In his evidence the Second Respondent was reluctant to accept that the Claimant was acting as a supervisor but suggested that it was a long process she was working towards. This is to be contrasted with the document he created which included supervisory duties.

17. The Claimant was offended at the suggestion that she was working fewer hours than 150. On 11 January 2017 she resigned. This was because she had not been paid in accordance with the hours she had worked. The Claimant emailed the Second Respondent on 11 January 2017 and requested the records of her having logged in and out of work as electronically recorded. She also asked for her holiday request records. In response, the same day, the Second Respondent asked the Claimant the reasons for this request. She replied. She said she did not agree with her pay slips, nor the holiday pay. She said that she had been informed by him that she had not worked 150 hours each month and it was not true.

18. The Second Respondent accepted the Claimant's letter of resignation by letter of 12 January 2017. She was not provided with the documents she had requested. The records of the Claimant having logged in and out of work were not produced to the Tribunal. Inconsistent explanations were advanced as to why, in the evidence of the Second Respondent. The first was that there had been an

overwriting of the original record. The second was that they had been destroyed in an electronic outage problem. The Respondents' representative had previously written to the Tribunal to say that the machine was cleared on a monthly basis as a routine maintenance task. We did not regard these inconsistent explanations as satisfactory. The First Respondent failed to comply with its statutory duty to maintain and retain adequate records of the Claimant's work for the purpose of the national minimum wage legislation.

19. On a number of occasions between January 2016 and the Claimant's resignation the Claimant was referred to by the Second Respondent as "sweetie, baby and darling". These are recorded in WhatsApp text messages and it is accepted, on occasion, the Second Respondent used these terms at work.

20. On 10 July 2016 in a WhatsApp recorded conversation the Claimant and Second Respondent discussed her forthcoming holiday. In a light hearted discussion the Claimant remarked upon how much she ate and the Second Respondent concluded by saying he hoped she enjoyed it as much as she could, to come back fresh and ready to work, "see you later love you", "ciao".

21. In January 2016 the Second Respondent had a discussion with the Claimant and invited her to dinner. The Claimant's recollection is that the Second Respondent wanted him to visit his home to cook some Polish food for him at a time when his partner was away in Italy. She says she rejected this invitation and the Second Respondent said he would take revenge. The Second Respondent denied this.

22. The minority decision of the Tribunal, being the Employment Judge, accepted the Claimant's recollection was correct and accurate. He regarded the account as detailed, clear, credible and genuine in contrast to much of the evidence of the Second Respondent. The majority of the Tribunal was not satisfied on a balance of probability, that the events were as the Claimant described. The Claimant was reliant solely upon her recollection of a disputed discussion which took place over a short period of time, more than a year after it had occurred. No record was made of the events and the Claimant did not complain to anybody at the time.

23. Moreover the subsequent WhatsApp conversations from May to December 2016 indicated that on a series of occasions the Claimant initiated discussions, sometimes of personal matters, with the Second Respondent. She provided her home address and she would ask the Second Respondent to assist her. There was a friendship between the Claimant and Second Respondent, extending beyond that of manager and reporting employee. This degree of familiarity did not sit comfortably with the alleged oppressive conduct. The majority also reflected on the terms of the Claimant's resignation letter. The following year, on 10 January 2017, the Claimant wrote, "I would like to thank you for having us as part of your team. I am proud to have worked for Gilston Hotel and I appreciate the time and patience you have shown training me. I've learned a lot about new roles, co-operated with people, team leadership and this skills will serve me well in my career."

24. Unanimously the Tribunal was not satisfied, on a balance of probabilities, that the Second Respondent had touched the Claimant's hair and face or massaged her. The description in the claim form of accidental touching is not in similar terms to the further particulars which refer to attempts to touch the face or stroke the Claimant and give her a massage, events which are said to have happened in June 2016 and August 2016. The witness statement has not referred to any

attempt to massage the Claimant at all and paragraph 43 makes these allegations in general terms, not identifying any particular occasion when they occurred. It is understandable the Claimant was not keeping tally of such events, such as by diary records, but the lack of clarity as to what happened and when provides an unsound foundation for contested complaints of this type. We emphasise that we are saying that the evidence is not of sufficient cogency to establish such events, applying the standard of proof. The Second Respondent was far from an impressive witness himself and it should not be taken that our finding is that the Claimant was telling us lies.

25. On 25 November 2016 in the late afternoon the Second Respondent visited the Claimant at her home. They had a cup of coffee. The Claimant contends that the Second Respondent attempted to push his body against her and kiss him. She says that she asked him to stop, tried to break free but his grasp became stronger. He said they were both single and so there was nothing wrong. She said she did not wish to be with the Second Respondent and asked him to leave but he did not want to go. The claimant says he said he could cause problems at work and he tried to kiss her again. When he left the Claimant said she vomited.

26. The Second Respondent accepted he had visited and had a cup of coffee but otherwise denied this allegation. A minority of the Tribunal, again the Employment Judge, accepted the Claimant's account. In his view the detail of what happened and the claimant's description of her revulsion to the Second Respondent's behaviour was not invented by her nor likely to have been mis-recollected.

27. The majority of the Tribunal are not satisfied the events occurred as described, on a balance of probabilities. A short period thereafter, as recorded in the WhatsApp records, the Claimant invited the Second Respondent to purchase some milk for her and deliver it to her home on 10 December 2016. This was within a fortnight of the incident. The Claimant's explanation of this was that the WhatsApp record relating to that incident was inaccurate and that she went to purchase milk with the Second Respondent for the hotel. The Tribunal, unanimously, reject that interpretation. The visit to her house occurred at 7pm. A journey to purchase provisions for the hotel by way of the Second Respondent calling at her home after she had finished work, followed by an excursion to the wholesalers would be most unusual. We accepted the Second Respondent's account about the visit to deliver milk. The majority considered that this invitation does not sit consistently with someone who had been subjected to the repellent behaviour alleged some 2 weeks previously and it undermines the evidence of the Claimant about the incident. The minority considers that the Claimant was attempting to keep relations with her manager amicable because she needed the job and had to continue working with him. The minority believes the claimant was putting his offensive advances out of her mind.

28. The majority have also had regard to the friendly and amicable relations in the WhatsApp communications initiated at times when the Second Respondent was on holiday. Together with the other matters to which we have referred, such as the tone of the resignation letter and the content of a friendly poem cited by the Claimant on the birthday of the Second Respondent, the majority are not satisfied the events of this complaint are established.

29. On 11 December 2016 the Claimant and Second Respondent attended a Christmas event. The Second Respondent drove the Claimant home together with another employee. He dropped the Claimant off first. The Second Respondent telephoned the Claimant several times that evening. He said he had found her purse. The Claimant did not answer the calls.

30. When the Claimant was off work on New Year's Day the Second Respondent invited her to watch fireworks from the hotel roof.

The law

31. The definition of sexual harassment is contained in section 26 of the Equality Act 2010. Section 40 renders it unlawful for an employer to harass an employee. Section 136 sets out the provisions concerning the burden of proof. Section 109 provides for vicarious liability in respect of the actions of an employee. The National Minimum Wage Act 1998 and National Minimum Wage Regulations 2015 set out the obligations in respect of payment of the national minimum wage and the Working Time Regulations 1998 set out the relevant provisions relating to entitlement to holiday pay.

Conclusions

Constructive dismissal

32. Mr Howson conceded on behalf of the First Respondent that there had been an underpayment of wages having regard to the impact of the National Minimum Wage Act and the Claimant had resigned as a consequence. A failure to pay wages is a breach of a fundamental term of a contract of employment. The Claimant resigned as a consequence and so was constructively dismissal and the Claimant is entitled to what she would have been paid during her notice period. She was paid for one week and is entitled to a further week's wages of £310.

Breach of contract: underpayment of wages and holiday pay

33. The parties agreed that we should consider these claims as a breach of contract issue, rather than as complaints brought as unauthorised deductions or under the Working Time Regulations, although the holiday entitlement was determined by reference to that statutory instrument.

34. The Respondents' analysis of hours worked was wholly inadequate. It could not compatibly sit with minimum wage legislation in deeming the period of time the Claimant had to undertake a particular task. It was obliged to pay her for the hours she worked. If she was not completing the work within an adequate time then the Respondents could either have asked her to move on to a different task when she had undertaken the allotted period of time or it could have taken other action to address her performance.

35. We draw an adverse inference to the Respondents' failure to produce the logging in and logging out records. The explanations for this are several and inconsistent. We conclude the Respondent has chosen to conceal the records of when the Claimant clocked in and clocked out of work. Its own record indicates

that by December the more accurate record supported the Claimant's contentions that she had been working harder than they were giving her credit for and given she was being accused of working fewer hours her distress at this attitude leading to her resignation is understandable.

36. In the light of the inadequate record keeping and disclosure we have considered the Claimant's recollection and assessment of when she worked. Given the comprehensive description of the duties and what is to be expected in this type of working environment we are satisfied it reflected what she did between January and December 2016. We have calculated 716.15 hours including holidays which the Claimant refers to which were not remunerated and the Claimant is entitled to payment for that time at £7.50 an hour, the current rate of the national living minimum wage. That amounts to a sum in damages for breach of contract of £5,373.75.

Breach of the duty to provide written particulars

37. The Claimant was not provided with written particulars of employment. She requested them. There was simply no explanation, good or otherwise, advanced to justify this breach. If the employer had discharged this duty it would have avoided the subsequent disputes about whether she had taken up her role of housekeeping supervisor and the basis upon which she was entitled to be renumerated. It is just and equitable for the Claimant to receive the maximum award for this breach, namely 4 weeks' pay. The First Respondent shall pay the Claimant £1,440.

Sexual harassment

38. We have found by a majority that the events of January 2016 and November 2016 did not occur as contended. We should add that had the Tribunal found those facts arose there could be no doubt that such conduct would be harassment under section 26(2) and (3) of the EqA. In the light of our majority finding, however, applying Section 136 of the EqA there are not facts from which we could decide, in the absence of any other explanation, that the Respondents had contravened Sections 26 and 40 of the EqA.

39. Use of the terms sweetie, baby, darling and love you was unwanted conduct. This must be determined through the eyes of the recipient of the conduct. We accept the Claimant's evidence that she did not welcome such comments and nor did she regard them as endearments. They related to the protected characteristic of sex.

40. In determining whether they had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her we must take into account the perception of the Claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

41. The circumstances of the case include, critically, the context in which the Second Respondent used these terms. Within the WhatsApp records they form part of a routine exchange of work and personal information. The nature and tone is a mutually friendly and affectionate one. We find this was likely to have been replicated in other discussions at work. The Claimant encouraged the Second Respondent to share information about his life outside work and reciprocated with

discussing her own private circumstances. None of this is particularly uncommon.

42. The perception of the Claimant, in her evidence is that these were unwelcome and uninvited expressions of a personal nature which transgressed the proper boundary of her workplace conduct and which she found offensive. We accept that was her view, as is apparent from our finding that the conduct was unwanted. In evidence the Second Respondent said these were friendly and affectionate terms, common place in his native home of Italy.

43. We do not consider, in these circumstances, that the conduct had the 'purpose' defined in Section 26(1)(b) of the EqA. It was the Second Respondent's choice of what he regarded as friendly or affectionate endearments. He had no intention to cause any upset or offence.

44. Moreover we are not satisfied that it was 'reasonable for the conduct to have that effect'. We have had regard to the context of the use of these words, within an affectionate dialogue which expanded beyond work related activity. The Claimant continued to respond in friendly terms after such comments had been made and there was no intimation from her that this level of familiarity was unacceptable or a problem. Objectively these terms did not violate the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her.

45. In so far as the Christmas event is concerned we do not consider that the phone calls which were not answered had the purpose or effect set out in Section 26(1)(b) of the EqA. The claimant never answered the calls. She was not to know that they might have been to convey an important message, such as that she had forgotten her purse. As to the firework display that is not an allegation which is made in the claim form and not part of the claim.

46. The post employment activities did not assist us on the issues in this case.

Employment Judge Jones

Date 20 October 2017