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THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Bogdan	**v**	**Hospital of St John & St Elizabeth**

Heard at: London Central **On**: 1-2 February 2018

Before: Employment Judge Okafor-Jones

Members: Ms K A Church
Mr S Soskin

Representation:

Claimant: In person
Respondent: Mr P Livingston, Counsel

REASONS

for Judgment sent to the parties on 14 February 2018

1. By a claim form lodged on 2 July 2017, the Claimant made claims of unfair dismissal and breach of contract following the termination of her employment as a waitress at the Hospital of St John and St Elizabeth on 9 April 2017. The Claimant worked in that role as a waitress from 9 July 2016 and left her employment of her own accord by giving notice in March 2017.

2. The nature of her claim initially was that she had been unfairly dismissed. Unfortunately, that claim failed in its early stages as it transpired she did not have 2 years' service and the Tribunal could not proceed to hear such a complaint. The claim for breach of contract, however, proceeded and was scheduled for hearing over 2 days on 1 and 2 February 2018.

3. In the interim, there was a Pre Hearing Review (Case Management) before Employment Judge Grewal on 10 October 2017. That was prompted by the Claimant's request to amend her claim to add a complaint of race discrimination. The Employment Judge at the Pre-Hearing Review allowed

the Claimant to proceed with one aspect only of her claim of race discrimination, the rest of her proposed complaints being out of time. The complaint of race discrimination that the Claimant was allowed to add related closely to her claim of breach of contract.

4. In summary, the Claimant's complaint was that, when she worked overtime for the Respondent (being hours in excess of her contracted 20 hours a week), she believed that she was not paid at the correct hourly rate for those hours. Furthermore, she said that the reason that she believed she had not been paid correctly was because of her nationality as a Hungarian woman. The supervisor who the Claimant criticised for her unlawful treatment was Ms Florrie Asuncion and Ms Asuncion is Filipino. The Claimant's claim of race discrimination was that her pay was wrong and this was because Ms Asuncion treated her less favourably because she is Hungarian.

The Issues and the Respondent's emerging concessions

5. The issues in the case were determined and clarified between the parties over a lengthy period at the outset of the hearing, involving calculations and discussions of pay periods and rates of pay. It transpired during that discussion that the Claimant's specific allegations of underpayment meant that her claim was that she was owed £293.69 by the Respondent. This followed a series of concessions having been made by the Respondent since her Claim Form was issued about the amount of pay she was due to be paid.

6. On 30 September 2017, the Respondents accepted that the Claimant was owed wages for August 2016 and they made a payment to her of £649.54 gross. Secondly, on 29 January 2018, the Respondents conceded that there were 2 days of holiday pay that had been due to her and that accordingly they ought to pay her a further £153.10, which they were happy to do. Thirdly, for reasons which will become clear, on the second day of the Hearing the Respondents accepted that in fact they had calculated the Claimant's pay rates incorrectly in line with her contract of employment and they owed her a further £190.73. In total therefore, since the claim was issued, the Respondents conceded a further £993.37 that was owing to the Claimant under her contract of employment and that had not been paid to her before or upon its termination.

7. It is necessary to set out the background to the wages claims as, albeit they were resolved without the need for a judicial determination, they form the factual backdrop to the race discrimination case, which in the end was the only matter that the Tribunal was required to determine. In order to do, the Tribunal made a series of findings of fact which are as follows.

The facts

8. As already indicated, the Claimant started work for the Respondents on 9 July 2016. She was a member of the waiting staff and her 20 hours per week were routinely worked on Saturday and Sunday. She was issued with a contract of employment which provided that she would be entitled to be

paid a salary for her 20 hours per week of £10,725 per annum. That contract of employment appeared in the bundle of documents at page 144. The crucial clause in the contract of employment was 8.8. This had the heading "Bank Working" and read as follows:-

"8.8.1. Should you agree to work bank shifts outside of your contractual hours you would do so at the standard contracted hourly rate up to the substantive hours required of the post.

8.8.2 Bank rates will apply for any hours worked over and above the substantive post hours. Bank work will not accrue additional holiday entitlement …"

9. The Claimant commenced work and in addition to her 20 hours per week, from time to time would perform additional hours known as bank shifts. This was another word for overtime as it is traditionally understood.

10. The Claimant's contention in evidence was as follows. She said that her contract indicated that when she did hours in excess of her 20 contracted hours, but less than the substantive full-time hours of the post (which the Tribunal was told by the Respondent were 37½ hours a week) she should receive her contracted hourly rate of pay (not the bank rate). There was some dispute between the parties as to how that should be calculated but that resolved itself during the proceedings.

11. The Respondents throughout the claim, until the 59th minute of the eleventh hour, pursued the argument that it should be the bank rate that was paid in such circumstances. However, during her evidence, Ms Polke, the Head of Facilities, agreed that on its face the wording of paragraph 8.8.1 of the Claimant's contract did not say that this is what should happen. In fact, Ms Polke decided, the contract did say on its face that the Claimant should be paid her standard hourly rate up to the substantive hours required *of the post* and that only after that should the bank rates be applied.

12. Following a shift the procedure was that Ms Asuncion would fill in a form explaining what additional or bank hours the waiting staff she managed had carried out. She would then apply a rate of pay known as a bank rate for the particular shifts or hours in question. The bank rates were set centrally and Ms Asuncion had no influence over them. The relevant bank rates for the period in question were found in the Tribunal's bundle at page 264. In simple terms these were variable hourly rates that reflected the seniority of the individual member of staff and the time or day of the week when they carried out the shift. The rates that were drawn to the Tribunal's attention were these. During 2017 for example, the bank rate for a member of waiting staff, such as the Claimant, was £8.18 per hour when hours were worked during Monday to Friday. Hours worked on a Saturday were to be paid at £8.44 per hour and on a Sunday £10.23 per hour.

13. The instruction that Ms Asuncion had received and the one she applied was that, whenever her waiting staff did overtime, she wrote it down, got out the

relevant bank rates, cross referenced the hourly rate to the time they did the shift and their seniority and filled in the form accordingly. Having heard all the evidence, the Tribunal found that Ms Asuncion followed that instruction without fear or favour for all staff regardless of their national origin or race.

14. At page 202 of the bundle was a catering department form which set out a summary of the additional hours that had been worked by staff during December 2016. The national origin of the staff was summarised on the form for the benefit of the Tribunal, although their identity had been redacted. What the document showed the Tribunal, and neither party disputed this, was that there were a range of waiting staff working for Ms Asuncion a number of whom were Filipino but they also included, as well as the Claimant, a Portuguese member of staff, a British member of staff, a Bulgarian member of staff and an Irish member of staff, plus others.

15. It was clear from the form that when additional hours were worked during Monday to Friday, waiting staff were given £8.18 per hour and this included the Claimant. On this document the Claimant was recorded as having done an additional 6 hours for which it was said she should be paid £8.18 x 6.

16. The Tribunal considered the evidence of Ms Asuncion herself very carefully. The points that were put to her included the fact that on a particular day a comparator, another member of waiting staff the Claimant did not name, had been paid more than her and he was of a different nationality. The example the Claimant gave of this occurring was from January 2017 and the relevant document was at page 208. The Claimant said her comparator, a Filipino waiter, had been paid at a higher rate of £10.23 per hour by Ms Asuncion compared to her £8.18 per hour. The Respondent's evidence was that there had been one reason and one reason only for this particular disparity, namely that the Claimant's comparator had worked 2 hours on Sunday, whereas the Claimant worked hours on a Monday to Friday. The reason for the differential pay was the day of the week and the application, albeit erroneously, of the bank rates.

17. The Respondents calculated everybody's pay in the same way, regardless of race or nationality. The Tribunal does not know whether the same contractual provisions were in the contracts of all the other waiting staff. However, what is clear is that the same policy was applied to everybody by Ms Asuncion. It was wrong, it was mistaken, but it was consistent.

18. The Claimant asserted that her pay had not been calculated in accordance with her contract and that this was because Ms Asuncion was discriminating against her.

The law and the conclusions

19. Because of the Respondent's burgeoning concessions on the issue of pay, the Tribunal did not in the end need to determine the breach of contract claim. The Claimant accepted the concessions made by the Respondents

and by consent received more in pay at the end of the hearing than she had set out to achieve at the beginning.

20. The definition of direct discrimination in employment because of a prohibited characteristic, here race, is set out in sections 13 and 39 of the Equality Act 2010. In summary, the Claimant had to show that she had received less favourable treatment because of the protected characteristic of race (including nationality) in order to make out her claim.

21. The Tribunal reminded itself that the starting point was to establish whether there were facts from which the Tribunal could conclude, in the absence of a credible alternative explanation, that there had been less favourable treatment of the Claimant because of her nationality. In the event that the answer to that question was yes, the Tribunal would have looked to the Respondent for an explanation of that differential.

22. The Tribunal concluded, based on its findings of fact, that there had in fact been no different treatment of the Claimant. The treatment as to pay rates for bank shifts had been the same across the group. In other words, everybody got bank rates regardless of nationality. The Tribunal could find no evidence from which it could conclude that the Respondent's treatment of the Claimant, had anything to do with race or nationality. The evidence was clear that what Ms Asuncion did was to apply the bank rates; she did that because she had been told to. In this case, therefore, the burden of proof did not shift to the Respondent to explain a difference in treatment. If the Tribunal had needed to look to the Respondents for a non-discriminatory explanation, it would have found and accepted this one. The Respondents had misinterpreted the contract terms, or failed to correctly record their intended pay policy in the contract, and had as a consequence been calculating pay incorrectly. That is not an attractive position for an employer to be in, but equally it is not unlawful discrimination. In the circumstances, the Tribunal concluded that there had been mistakes made, that the Claimant had been paid wrongly, that the Respondents had reluctantly accepted the position, but there had not been race discrimination.

23. In reaching these conclusions, the Tribunal considered the submissions of both parties and in particular wishes to record its view of the following submission made by the Respondents. Mr Livingstone submitted that the Claimant had made a cynical attempt to improve the value of her claim by introducing a race discrimination claim when she had failed to be able to get an unfair dismissal claim off the ground. The Tribunal did not accept this assertion. It was clear to the Tribunal from the evidence of the Claimant that she had a very genuine sense of grievance. She felt treated incorrectly and she was right about that. She felt treated unfairly and she was right about that too. She had concluded that she was treated differently to others and whilst that was not right, it was understandable why she had come to that conclusion. She was completely confused about what she had been paid and why and the Tribunal shared that sentiment itself for much of the hearing. In all the circumstances, the Tribunal was not of the view that this

was an inappropriate or cynically brought claim albeit one that on the evidence was not made out.

Employment Judge Okafor-Jones

Dated: 1 November 2018

Reasons sent to the parties on:

1 November 2018

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For the Tribunal Office