EMPLOYMENT TRIBUNALS

Claimant: Mrs D Murray

Respondent: Harbourside Marina Limited

HELD AT: Liverpool **ON:** 13 February 2017

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person
Respondent: Mr Masheder, Consultant

JUDGMENT having been sent to the parties on 21 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues for the Tribunal to decide

1. The issues for the Tribunal to decide are those of unpaid wages, unpaid bonuses and breach of contract for notice monies. Mrs Murray had also brought a claim of unfair dismissal. However, that claim was struck out on the basis that she did not have the required length of service to bring an unfair dismissal claim.

Findings of Fact

2. During the hearing, the Tribunal heard evidence from Mrs Murray, from Mr Beard who is the director of the respondent and from Mr Wilkes whose title is "Catering Consultant" for the respondent. The Tribunal understands that Mr Wilkes, is involved in the management and supervision of the bar and restaurant at the marina complex.

3. None of the witnesses had prepared formal witness statements of their evidence in chief. There was very little documentation before the Tribunal to assist in making findings of fact, and evidence was often given by way of answers to questions from the judge. Key documents, such as the claimant's time sheets from

November 2016 to March 2017, or the respondent's final accounts for 2016 and 2017, were not available. The findings of fact in this case and the decisions by the Tribunal are therefore made on the basis of what little relevant documentary evidence was before me and careful consideration of the oral evidence given at the hearing and the credibility and consistency of the witnesses' testimony.

4. The respondent, Harbourside Marina Limited, manages a marina complex in Liverpool and as well as providing berths for yachts it also runs a bar and restaurant. Prior to Mrs Murray taking over as bar manager, the respondent's bar and restaurant operation had been outsourced to a third party contractor. Both Mr Beard and Mr Wilkes gave evidence to the Tribunal that the third party had not done a very good job and that the bar and restaurant had been neglected during this period and had made a loss. Initially, the parties' intention was that Mrs Murray, in partnership possibly with either Mr Wilkes and/or Mr Beard, would have taken over the running of the bar and restaurant as an outsourced contractor herself, and she gave evidence to the Tribunal that she had set up a separate limited liability company on that basis.

5. However, as the discussions continued in September and October 2016 and as the claimant's start date drew nearer, Mr Wilkes and Mr Beard changed the terms of the offer to Mrs Murray so that by the time she took over as manager of the bar and restaurant function, she was hired as an employee. Mrs Murray told the Tribunal that she ran the bar in "partnership" with the respondent, in that she was told she would be able to keep 50% of the profits of the bar. However, the terms of her offer letter were before the Tribunal, dated 14 November 2016. Her title is given in that letter as "*bar operations manager*" and the date of commencement of employment is 14 November 2016.

6. It is clear from the letter that the parties had agreed that Mrs Murray would be employed by the respondent, and neither party contested her employment status. Mrs Murray's offer letter contained a long and thorough list of responsibilities and states that she would be paid £15,600 per annum and be expected to work five out of seven days per week. It was clear from the parties' evidence to the Tribunal that the claimant's expected basic working hours were 40 hours per week. The Tribunal notes that the basic salary amounts to not much more than the national minimum wage for a 40 hour week. Mrs Murray told the Tribunal that the market rate for a bar manager's salary in Liverpool city centre was £26,000-£32,000.

7. In addition to the basic salary, the claimant's job offer letter states:

> *"You will also be entitled to 50% of the trading net profit of the bar operation. This figure will be calculated and paid on an aggregated quarterly basis."*

8. The phrase "*trading net profit of the bar operation*" is, I find, unclear and was unclear to the claimant. In order to determine whether the claimant is entitled to any bonus under the terms of her contract, it will be necessary to try to construe what was meant by "*trading net profit*". The term "*trading net profit*" is not a commonly used term in accounting. There is "*trading profit*" which equates to gross profit, which is the sales minus the cost of the good sold. There is also "*net profit*", which is the "bottom line" profit left after all relevant overheads and the cost of sale have been deducted from profit, and they are two separate things. The term "trading net profit" appears to conflate the two.

9. The claimant's case was that she should be entitled to her share of the "trading profit/gross profit", which would be 50% of approximately £36,000 for the November 2016-March 2017 quarter. In support of this, the Tribunal was given a letter from Mrs Murray's accountants, Herriot Hughes, who assert that the terms of the contract should be construed as though the phrase "*trading net profit*" means gross profit after issues such as direct costs and bar wages have been taken out, meaning that for the first quarter of her employment, Mrs Hughes should be entitled to more than £18,000 by way of bonus and further similar sums for the second quarter.

10. In a letter from the respondent's accountant, which was before the Tribunal in evidence, they assert that this was not what the respondent intended, because the bar function at the time made a "bottom line" loss once all overheads were deducted. The respondent's case before the Tribunal was that no reasonable business person would have agreed to give somebody a large bonus if the overall business was making a loss. It was understood in their evidence that "*trading net profit*" meant whatever was left after all the overheads had been taken out, that is, the bottom line net profit. In relation to all financial periods during Mrs Murray's employment at the respondent, the bar function had never made an overall profit, but ran at a loss.

11. In construing the terms of the contract agreed between the parties, I take the following facts into account. The original proposal made by Mrs Murray to Mr Beard was that she would run the bar as a separate business in the way that the previous contractor did. This was the basis of the parties' original negotiations. Had this remained the arrangement between them, Mrs Murray would have been able to take whatever profit was left over after all overheads had been taken out. This was the basis on which she originally thought she was going to take over the role.

12. Mr Beard told the Tribunal that as negotiations progressed, he was concerned that Mrs Murray had not produced a proper business plan and did not appear to have a proper grasp of the needs of the business. For that reason, he considered that it would be "*safer*" for her and for the respondent if she worked in partnership with him or Mr Wilkes. Eventually and shortly before her start date, he changed the terms further so that instead of being in partnership, Mrs Murray was an employee. However, the terms of the profit-sharing themselves did not change from the original proposal.

13. I therefore find that that was what was in fact agreed was that Mrs Murray would share any "net profit", that is, the bottom line profit, after all overheads were taken out. It became clear during Mrs Murray's evidence in chief that the problem was that she did not know, and the respondent did not tell her, exactly what overheads would be coming out in the assessment of whether the bar had made a profit or a loss.

14. Furthermore, I find that Mrs Murray did not establish prior to taking on the role how the bar was integrated within the business. For example, she did not appear to appreciate that all utilities bills were split 80/20 between the bar and the rest of the site. She also did not have control over the spend of many of the overheads that the respondent included in the bar's accounting figures. Therefore, I conclude that without this information, it would have been very difficult, if not impossible, for Mrs Murray to have full control of business decisions and financial planning so as to run the bar business in such a way as to make a profit. She would in all likelihood never

have been able to make a profit on this basis, and in fact Mr Beard told the Tribunal that since Mrs Murray had left, the bar function had never made a profit and was currently running at a loss of £18,000.

15. Furthermore, the Tribunal heard evidence from Mr Wilkes and Mr Beard that the previous contractors had not left the bar in a good state. Mr Wilkes told me that repairs needed to be done to equipment in the bar because of, in effect, neglect by the previous contractor. Mr Beard told me that no real advertising or publicity or marketing had been done by the previous contractor so when Mrs Murray took over they needed to spend more on that.

16. I was also given late in the day, but it was useful nonetheless, a breakdown as to what the bar overheads were comprised of from the draft profit and loss accounts of the respondent's business. I queried why the final accounts were not available, but was told by Mr Beard that there were no material differences between these draft accounts and the final accounts.

17. I note that there are substantial amounts for overheads for bar advertising and publicity, repairs to the bar premises, repairs to bar equipment; and there is a very large sum taken out in the first quarter of almost £19,000 for "*bar depreciation*". These were all sums of money that Mrs Murray did not realise would be taken out as overheads. The respondent, in reaching the bargain that they did with Mrs Murray, must have known that it would be exceptionally difficult, if not impossible, for her to turn a profit, certainly in those first quarters, when those additional overheads were being incurred. Maybe they did not turn their minds to it; Mrs Murray certainly did not ask what all the overheads would be, and she did not find out the extent to which she would be in control of the finances; she did not, she told me, ask to see for example a breakdown of the accounts, and not even after the first quarter when no profit was payable to her. I find that Mrs Murray entered into the arrangement on trust and on the basis of the way in which she had run her bar businesses before, when in fact the respondent's business was completely different.

18. As stated earlier, the respondent told the Tribunal that the bar still makes a loss. The respondent attributed that to the fact that the bar is open for a very long period each day and serves food for approximately 12-13 hours a day because it has to service the needs of the berth owners, and so any profits are very much spread out over the course of a long day and staffing costs are higher and so on.

19. However, that was the bargain that was entered into. Perhaps Mrs Murray was optimistic that she could turn it around despite the circumstances; perhaps Mr Beard and Mr Wilkes either thought Mrs Murray was exceptionally capable or they did not turn their minds to it, or they just thought they had made a very good bargain for themselves; but either way it was a bad bargain from Mrs Murray's perspective.

20. The question may then be asked as to what is the Tribunal's power in terms of this contract, to look behind a bad bargain and possibly overturn the terms of the contract? Unless there is some illegality or unlawful act done, or unless one of the parties has been misled, the Tribunal does not have any ability to look behind the terms of a bad bargain. I find that Mrs Murray was not misled. The terms of the profit share did not change from the first negotiations with the respondent, but Mrs Murray did not make enough enquiries to find out what the terms of the role were,

and therefore did not appreciate the lack of control that she would have over the bar's finances before she took over.

21. However, Mrs Murray has clearly worked extremely hard for the respondent for very little pay, and the Tribunal must turn to the issue of what Mrs Murray may be entitled to recover given that she was an employee of the business.

22. I find that Mrs Murray was paid for a week "in hand" at the start of her employment. This is clear from the payslips before the Tribunal in evidence.

Payment for social media management

23. Mrs Murray claims payment for hours worked maintaining the respondent's social media presence. The respondent's case is that Mrs Murray should have been able to find time to do this within the 40 hours per week that she was running the bar function. The Tribunal accepts the claimant's evidence that she took over the role of social media manager as an extra job from their previous consultant, Jenna. I accept that when the claimant did that, she was already very busy. I accept her evidence that she was often called out when not at work to address problems in the bar. Mr Wilkes and Mr Beard have already indicated that the bar equipment had been neglected by the previous contractor, and so on the balance of probabilities I find that Mrs Murray did have to come out, for example, to repair the glass machine and so on, when otherwise she would have been off work. She was also clearly trying to make a success of the bar business and trying to turn a profit. So although Mr Wilkes indicated that he thought that Mrs Murray should have been able to do this extra job on top of her existing job, I find that that was unreasonable.

24. I accept that Mrs Murray did spend time over and above her contracted hours of 40 hours a week dealing with the social media accounts and she is therefore entitled to payment for that time spent working. This was not part of her original role or part of her original contract of employment. She expected to be paid and there is extensive email correspondence in the bundle as to what she has done and how many hours she has spent on it. The hours themselves were not disputed at the time, and in fact the indication that Mrs Murray took from Mr Wilkes was that she would be paid for these. She therefore carried on working in fulfilment of those extra duties.

25. In terms of the extra hours worked for social media management, they are already set out in the ET1 and also in the correspondence between the parties. Mrs Murray worked approximately 200 extra hours on social media duties over the period of her employment at the respondent. Given that this was previously a separate role allocated to a consultant, this sum is, I find, not excessive and Mrs Murray is entitled to recover these sums worked.

Overtime monies owed

26. Mrs Murray claims underpayment of wages from January to May 2017. Her complaint to the Tribunal is that she worked a large amount of overtime, for which she was not paid. Mr Wilkes told the Tribunal that Mrs Murray was a member of management and so her hours of work should be "as and when required". However, because of her low basic salary and because she was already obliged to work for 40

hours per week, the respondent is potentially in breach of the National Minimum Wage Regulations in the event that Mrs Murray did work overtime.

27. There was limited contemporaneous documentary evidence available to the Tribunal in this respect. Mrs Murray had brought rotas with her to the Tribunal, but these were of limited use as her evidence was that overtime she worked was partly ad hoc and unplanned. However, timesheets were available for the period from the end of March to the end of May 2017, which I accept are an accurate reflection of the hours worked for that period. In the absence of valid contemporaneous records of all the overtime worked by the claimant, and with the intention of dealing with the case in a way that is proportionate to the complexity and importance of the issues, I have calculated the total average weekly hours of work for the claimant based on the timesheets available.

28. Mrs Murray worked an average of 51.72 hours a week from the last week in March until the end of May 2017. This means that on average she worked 11.72 hours of overtime per week. 51.72 hours a week for £300 a week means that her average hourly wage was £5.80 per hour. Taking into account the timesheets before me and Mrs Murray's evidence of her weekly working pattern, and the respondent's evidence of the work that needed to be done in relation to the bar, and considering the list of duties in the claimant's contract of employment, I find that on the balance of probabilities 51.72 hours per week is a reasonable reflection of the claimant's regular working pattern for the period during which unpaid overtime is claimed, that is, from January to May 2017.

Notice pay – did the claimant commit an act of gross misconduct?

29. Mrs Murray's contract provides for one month's written notice to be given in the event that the respondent wished to dismiss her. However, as a matter of contract law it is possible to dismiss an employee without notice in the event that they commit an act of gross misconduct. It is the respondent's case that the claimant did commit such an act of gross misconduct and that she is not entitled to her notice pay.

30. The respondent contends that the claimant's non-attendance at work for two days at the end of May was an act of gross misconduct, in that she did not attend on Friday 26th and Saturday 27th May 2017 when she had been rostered to do so. The parties agree that the claimant returned to work on Monday 29th May and worked a full day, although Mr Wilkes told the Tribunal that she had not been rostered to work on that day. The letter of dismissal was written on 29th May but not sent to the claimant until the following day because, according to Mr Wilkes, they could not send it to her until she was no longer on shift.

31. At the time of the claimant's non-attendance, the respondent knew that the claimant was in dispute with them over payment of wages and bonus. I find that the respondent knew that there had been a temporary cessation of attendance by Mrs Murray because she was distressed and angry over non-payment of wages, but that she came back into work and had worked a full shift on the Bank Holiday Monday. I also find that there was no destruction in the employment relationship between the parties on Bank Holiday Monday 29th May, because if there had been, the respondent would not have allowed the claimant to work the whole day as they did.

The Law

32. Where a term of a contract is ambiguous, a Tribunal may take into account the surrounding circumstances when construing the terms of an employee's contract of employment. It is proper to have regard to the factual setting in which the agreement was made. (***Adams v British Airways plc 1996 IRLR 574 CA, Carmichael & anor v National Power plc 1999 ICR 1226 HL***)

33. The National Minimum Wage Act 1998 provides at section 1 that all workers are entitled to be paid the national minimum wage provided they have ceased to be of compulsory school age and ordinarily work in the United Kingdom. The national minimum wage is stated at section 1(3) to be that set by the Secretary of State from time to time.

34. The National Minimum Wage Regulations 2015, regulation 4 prescribe the hourly rate of £7.50 per hour for a worker who is aged 25 years or over from 1 April 2017. The rate of £7.20 per hour applied to such workers from 1 April 2016 until 31 March 2017.

35. The entitlement of an employee to notice pay or payment in lieu of notice worked is that set out in the terms of their contract of employment (save for statutory minimum notice periods set out in s86 of the Employment Rights Act 1996, with the employee being entitled to whichever is greater).

36. Where an employee is found by a Tribunal to have committed an act or acts of gross misconduct, such as to constitute a fundamental breach of contract, the employer is entitled to treat the employee as summarily dismissed and the employee has no entitlement to notice pay.

37. The degree of misconduct necessary for the employee's behaviour to amount to gross misconduct is a question of fact for the Tribunal to decide.

38. In deciding whether an act of misconduct amounts to gross misconduct the Tribunal must consider whether it has so undermined the trust and confidence which is inherent in that contract of employment that the employer should no longer be required to retain the employee in his employment.

Application of the law to the facts found

The claimant's entitlement to notice monies

39. The question for the Tribunal is whether non-attendance at work by the claimant for two days at the end of May was an act of gross misconduct.

40. The Tribunal finds that the respondent knew that Mrs Murray was working long hours at the bar and was extremely busy. They also knew that she had taken on extra duties when Jenna no longer worked for them. They knew that she was unhappy with the fact that she had received no payments for extra social media work and no profit shares so far. They also knew that she had worked a full day for them on Monday 29th May 2017, in fact, the respondent waited until after the working day had finished to email the dismissal letter to her. Had the relationship between the parties been destroyed by Mrs Murray's non-attendance on the previous Friday and

Saturday, the respondent would not have waited until the end of the working day on Monday to dismiss; they would have sent her home during the day.

41. Having considered all the evidence before the Tribunal, I accept that the respondent was entitled to dismiss Mrs Murray on notice in accordance with the terms of her contract, in that she committed an act of misconduct by failing to attend work on two occasions, however I do not find that Mrs Murray committed an act of gross misconduct.

42. The remedy for a breach of contract is to put the claimant in the position that they would have been in had the contract been complied with and a month's notice been given. Mrs Murray is therefore entitled to net wages for that month, that is £1,151.06.

The claimant entitlement to a 50% share of the gross profit

43. Is the claimant entitled to a 50% profit share of the profits of the business? In very broad terms, although the terms of Mrs Murray's contract states "*trading net profits*" there was disagreement between the parties as whether this meant in accounting terms "gross profit" before general overheads had been deducted, or whether it meant "bottom line net profit" after all overheads had been deducted, which was the respondent's case.

44. I find that Mrs Murray is not entitled to shares of the profits because the agreement between the parties was that she would receive a share of "bottom line" net profit after all overheads had been deducted. The bar operation made a loss for the periods that Mrs Murray was employed there, and so she is not entitled to a share of those profits.

The claimant's entitlement to a week in hand

45. Was the claimant entitled to a week's pay in hand that she says she was owed from the start of her employment? I was taken to payslips that show that in fact the pay in hand had been paid, which evidence I accept as accurate. Mrs Murray is therefore not entitled to further payment for that period.

The claimant's entitlement to overtime pay for social media duties

46. The final issue is whether Mrs Murray was entitled to extra hours over and above the 40 hours that she was contracted to work. She took over a role managing the respondent's social media from Jenna, who had been the respondent's social media consultant, half-way through her contract.

47. I accept her evidence that when she took this on, it was on the basis that this would be extra duties over and above her contractual duties. I accept that this involved a great deal of extra work. I find that she is entitled to recover that extra payment for social media overtime that she did, at her contractual rate of £7.50 an hour.

48. The claimant was paid an hourly wage of £7.50 an hour, and so she would be entitled to 200 hours at £7.50 an hour, that is £1,500 for the extra social media work.

49. However, the respondent's representative brought to the Tribunal's attention a document that was at page 16 in the bundle of documents but that the Tribunal had not been taken to during the course of the hearing. This shows that Mrs Murray, on 25 May 2017, was given a "goodwill" payment of 40 hours' pay, therefore £300, in part-settlement of her claim for extra hours worked for social media duties. Mrs Murray accepts that this payslip is correct and that was paid to her at the end of May, and therefore the Tribunal will revise the figure awarded from 200 hours down to 160 hours for social media duties, and therefore the sum payable is £1,200 and not £1,500 because £300 of that has already been paid by the respondent.

The respondent's compliance with the National Minimum Wage Act

50. During the course of the proceedings, it became apparent that the respondent had potentially breached the National Minimum Wage regulations due to the claimant having worked over and above 40 hours per week from the period January 2017 until the termination of her contract in May 2017 at a weekly wage of £300 gross, such that she was paid below the National Minimum Wage for each hour worked.

51. I find that she was paid below the National Minimum Wage. She is entitled to recover the difference between what the National Minimum Wage was during that time and what she was actually paid on an hourly basis. ,

52. Mrs Murray worked an average of 51.72 hours a week from the last week in March until the end of May 2017. This means that on average she worked 11.72 hours of overtime per week. 51.72 hours a week for £300 a week means that her hourly wage was only £5.80 per hour. I have already extrapolated this figure to cover the period January to March 2017 due to the lack of contemporaneous records available to calculate average weekly working hours for that period.

53. Taking into account the fact that the National Minimum Wage was lower in January to March 2017 at £7.20 and £7.50 in April and May, there is a shortfall per hour in the National Minimum Wage that Mrs Murray should have been paid, so a shortfall of £1.40 per hour for a period of 13 weeks from January to March, and a shortfall of £1.70 per hour in the nine week period in April and May.

54. Taking an hourly overtime of 11.72 hours per week multiplied by the shortfall for January to March Mrs Murray is owed an extra payment owed of £941.30 and for April and May an extra payment of £791.32, so a total extra payment owed of £1,732.62.

Employment Judge Barker

Date 26th February 2018

REASONS SENT TO THE PARTIES ON

28 February 2018

FOR THE TRIBUNAL OFFICE