EMPLOYMENT TRIBUNALS

Claimant
Miss C. Reid

Respondent
Kattz Limited

v

Heard at: Watford

On: 10 and 11 September 2018

Before: Employment Judge Heal

Appearances
For the Claimant: Miss Meekings, 'non-legal'
For the Respondent: Mrs K. Ibitoye, director

RESERVED JUDGMENT

1. The complaint of breach of contract is well founded. The respondent shall pay to the claimant as compensation the sum of **£1736.45** (one month's net pay).

2. The complaint of unpaid accrued holiday pay is well founded. The respondent shall pay to the claimant the sum of **£546.25**

3. The complaint of 'health and safety' is dismissed upon withdrawal.

REASONS

1. By a claim form presented on 29 November 2017 the claimant made complaints of wrongful dismissal and accrued but unpaid holiday pay.

2. She also made reference to a complaint of 'health and safety'. That has now been withdrawn.

3. I have had the benefit of an agreed bundle running to 204 pages.

4. I have also evidence from:

Miss Chantelle Reid, the claimant,

Ms Nicole Thomas, senior residential worker,

Mr Elliot Doughty, self-employed IT consultant,

Mrs Kofo Ibitoye, Head of Care

5. The claimant and Ms Ibitoye gave evidence in chief by means of rather sparse witness statements. The claimant's contained substantial information which was not relevant to these proceedings and which I have not taken into account. Miss Thomas was interposed by consent during the claimant's evidence because she had other commitments. Here were no witness statements from Miss Thomas or Mr Doughty: they gave evidence in chief by being asked questions. Each witness was then cross examined and re-examined in the usual way.

Issues

6. The issues were identified at an earlier hearing on 2 May 2018. They are:

7. Was the respondent entitled to dismiss the claimant without notice by reason of her alleged gross misconduct? The respondent says that she falsified a rota for her own benefit.

8. If not, the parties agree that the claimant is entitled to one month's notice.

9. As I clarified the issues in this hearing, it gradually became apparent that the issue about holiday pay was more complex than that set out in the preliminary hearing, which was:

'*Did the claimant have any outstanding accrued holiday entitlement as of the date of dismissal? If so, to what sum is she entitled*?'

10. In fact, the issue was this:

10.1 Given that the claimant worked variable hours, some of which were on day shifts at £9.00 per hour and some of which were night shifts at an allowance of £50 per shift, how should the following be calculated for the purposes of calculating any unpaid accrued holiday pay?

10.2 In particular:

1. What was the leave year? (The parties agree that it was the calendar year starting on 1 January.)

2. How should the period of leave to which the claimant is entitled be calculated in hours in order to answer the question, to what period of leave is the claimant entitled under regulations 13 and 13A? (Both parties agree that the hourly approach is appropriate.)

3. What is the proportion of the leave year that had expired before the termination date? (1 January to 2 October is 275 days or 0.75 of a year).

4. What was the period of leave taken by the worker between the start of the leave year and the termination date? (The wage slips show 84 hours actually taken, and 71 hours pay in lieu of leave taken, on termination of employment.)

5. Should the claimant's rate of pay be calculated on the basis of a £50 night allowance or on the basis of a national minimum wage and if the latter, for how many hours per night does the NMW apply? I.e., do the 12 hours on night shift come within the 'sleep in exception' in regulation 15 (1A)/32 (2) of the National Minimum Wage Regulations 1999? If so, how many hours come within that exception? For which hours was the claimant required to be available and awake for the purposes of working?

Facts

11. I have made findings of fact on the balance of probability. This has been a challenging exercise in this case. Much of the evidence in chief had not been reduced to writing in advance. The representatives were not experienced at cross examination and the witnesses and Miss Meekings were not always skilled at waiting while someone else was speaking. The evidence of the different witnesses is not reconcilable one with the other, but it depends on memories of events which have not been recorded contemporaneously and which, at the time they took place, almost certainly meant little to the witnesses: matters of rotas and changes to them being routine events. So, where there are differences between the evidence of different witnesses I consider it unlikely that anyone has been dishonest: honest witnesses very often have different memories in these circumstances.

Background

12. The respondent is a limited company which runs a residential children's home in North London. The residents in the home are up to 4 children aged between 11 and 17. At the relevant time they were two or three 14-year-old girls.

13. The claimant began work for the respondent as a support worker on 19 August 2016.

14. I find that the claimant was given a job description and an opt out agreement for working time early in her employment and also a written statement of terms and conditions. The respondent does not have a signed copy of that document on file, however the respondent's other documents shows that care was taken with such matters. On balance, I consider it unlikely that this respondent, having gone to the trouble of producing a job description and an opt out agreement would not also go to the trouble of giving to the claimant the contract in the bundle. I find that the claimant was given a copy of the contract at the start of her employment.

15. Although I consider Mrs Ibitoye reached a hasty and mistaken conclusion about the rota issue in relation to the claimant, I find Mrs Ibitoye to be careful and ordered with her administration. It is consistent with her overall approach that she would produce a written contract and give it to the claimant. I note too that the parties have in fact worked to the terms of the written contract: they agreed that the leave year began on 1 January, which is as the written agreement provides. The pay and core hours all worked in fact as per the written contract. This gives some additional support to the finding that the claimant was in fact given the contract.

16. It was an express term of that contract that for day shifts the claimant was paid £9.00 an hour, payable monthly. Overtime was payable as an addition as per the

hourly wage and the claimant would be paid a £50 allowance for night work completed between the hours of 8pm and 8am.

17. The claimant was contracted to work 36 hours a week. In practice this worked out as 3 day shifts per week, each of 12 hours. The contract also required two night shifts, each of 12 hours, called 'sleep ins'. For this the contract provided an allowance of £50 per shift.

18. In reality the precise number of hours worked on both days and nights varied by arrangement from week to week.

19. During the first five years of employment the claimant was contractually entitled to one month's notice. (Her statutory entitlement would have been one week.)

Night shifts

20. For the night shifts, the claimant would start work at 8pm. There is a handover of 15 minutes. Staff leaving will hand over any information to staff coming on shift. They might also handover uncompleted tasks or any tasks which management had given and which they expected to be completed. There might be reports that needed writing or new documents or wall charts to be created. At 8 o'clock the children in the home would still be awake and the night staff might need to cook dinner.

21. On weekdays the children have a 9.30 pm bedtime and at weekends they go to bed at 10.00 or 11.00 pm. A nightshift worker would be expected to stay up after bedtime to finish off their own work. Furthermore, if the children were displaying challenging behaviour then the nightshift worker was expected to stay awake. It was not unusual for a child to refuse to go to bed at 9:30 pm or to be still up at 10:30 pm.

22. There have been occasions when children have been still up at 4.00 am but also other occasions when they have been in bed at 7.00 pm. Some support workers are better at getting the children into bed than others. The support workers generally had an expectation that they would stay up for about an hour after the children went to bed. This was not the respondent's formal policy, however the hour provided an opportunity for duties, such as quiet cleaning, to be completed when it had not been possible to complete them during the day. Normally however a support worker could expect to be in bed at about midnight.

23. A sleeping room was provided for the support workers, of whom there would be two on duty per night.

24. The support worker can expect to be woken up frequently - not for the whole night - but there will regularly be a disturbance. The disturbance might be a child asking for paracetamol or for a telephone, or she might want to go to the kitchen for a snack. If the request is simply one for paracetamol the support worker can expect to be back in bed in minutes, however if the disturbance is that the children are arguing then the support worker will stay awake until the children settle down.

25. The children typically have to get up at 7.00 am, although there has been a child in the home who needed to get up at 6.00 am for school. Being sensible, a support worker will get up before the children so as to be dressed and ready for 7.00

am. The support worker will therefore be available while the children are getting up and having breakfast.

26. There was then a handover for 15 minutes with the day shift during 7.45 and 8.00 am.

27. There was inevitably a great deal of variation between the hours spent awake and working on each shift. I have been shown no records of these hours: all the evidence has been oral and general as set out above. Doing the best I can on the evidence before me, a night support worker was required to be available and awake for the purposes of actually working, for four hours each evening and one hour each morning.

28. During the remainder of the night shift the support worker was asleep at the place of work by arrangement, but available for work.

The rota

29. The claimant was responsible for drafting the rota each month. This would be a four-page document which when finalised would be fixed to the wall in the office.

30. In June 2017 the respondent changed its computer system. The old system had a single user name and password. The new system used a different user name and password for each member of staff. Staff were trained in the new system by Mr Doughty. A signed list was kept of who received the training, but the list has not been produced for this hearing. Mr Doughty does not have an independent memory of training the claimant. The claimant says that she did not receive the training: the date of the training is obscure, and the she may have been away. I find that she was told about the new system by Shenice Edwards or another member of staff, who gave her a new password and user name, but the claimant did not receive the training. She knew of no reason why she should not log into the old system in the manner she was used to.

31. In September the claimant created the new 4-page rota for October as a Word document. This was stored in Word in the old system. When she completed it, she asked Shenice Edwards to approve it. It was then printed out and put on the wall of the office by Ms Edwards.

32. The electronic version was stored in the new computer system as a pdf document by Shenice Edwards; however, the Word document was accessible through the old system where anyone who knew how to log into that system could log in and change it. The claimant was not aware of the pdf document stored in the new system.

33. If staff wanted to change the shifts set out in the rota, they could agree those changes with each other. If Shenice Edwards agreed the changes, she would initial them.

34. I have not heard evidence from Shenice Edwards.

35. On Friday 29 September, Nicole Thomas made some careful changes to the 4-page rota which Shenice Edwards initialled as agreed. The 4-page rota was still on the wall at about 4.00pm on Friday.

36. The claimant and Sharon Hunt came on shift at 8.00pm.

37. Chantelle Melhado was present on Friday 29 September when the claimant arrived for her night shift. The claimant was annoyed to find that the rota she had created had been changed. The claimant said to Chantelle Melhado that she had appointments to attend and asked if they could swap shifts. Ms Melhado agreed. They photocopied a separate single page and marked the changes to record them. The claimant said that she would ask the managers on Monday if the changes could be agreed. Ms Thomas saw the claimant and Ms Melhado in the kitchen making amendments.

38. Nicole Thomas left for the evening.

39. On 1 October 2017 Nicole Thomas arrived at work for a day shift. She is a senior residential worker. She was working together with Chantelle Melhado. Ms Melhado was complaining that she was working every Sunday. Ms Thomas looked at the rota and noticed that it had changed.

40. Ms Thomas knew that the rota had been changed because, as set out above, she had herself made some careful changes with Shenice Edwards and Ms Edwards had initialled them.

41. Ms Thomas saw that a new and different, single page, rota had appeared on the wall. The changes that Ms Thomas had agreed with Ms Edwards were not on it. I find on the balance of probability that this was the page that the claimant and Ms Melhado had photocopied to record their changes. How it got onto the wall is unclear. No witness admits to having put it up.

42. Ms Thomas asked the claimant if she knew where the rota was because it had gone missing. The claimant said that she did not know anything about it. Indeed: she knew about the changes she had made on a separate copy page, but she did not know about the missing 4-page document.

43. Ms Thomas was confident that her colleague Ms Hunt could not have changed the rota because Ms Hunt is unskilled with computers. However, this assumes that the ‘change’ was a single event caused by one person. It assumes that the person who removed the 4-page rota was the same person who accessed the computer system. It assumes too that the person who put up the new single page was the same person who created it. Such reasoning is based on a further assumption that the motivation must have been to secure beneficial shift changes for the culprit. I consider that reasoning to be flawed.

44. On Sunday 1 October 2017 the claimant sent an email around the staff attaching October’s rota. She had logged in to the old system and accessed the Word rota document. She had not been told that she should not access the old document, and access was not restricted. She did not understand the difference between the two systems.

45. On that evidence, I find that the claimant did produce the one-page rota, with Ms Melhado on the Friday. In an office used by several different people there are many

possibilities about what might have happened to the old rota or about who might have put up the single page. This remains obscure.

46. The 4-page rota amended by Ms Thomas has gone missing altogether and cannot now be found. The office is small, and the rota has not been located anywhere in that office.

47. If the claimant had wished to alter her shifts in secret, I do not think she would or could successfully have done so by taking down and disposing of the 4-page rota and then replacing it with a single page with amendments that benefited her. If she disposed of the old rota, with all its changes, she would have known that it would cause 'uproar' amongst staff (as indeed happened.) The rota had been made public and changes had been made and agreed on it. To dispose of such a rota deliberately and simply replace it with something different would be highly unwise: it would be impossible to retain the benefit of the changes for oneself, given that others had invested in other changes and were likely to depend on them. This theory seems to me to be highly implausible.

48. It is not possible now to find what happened to the old rota. However, the claimant had made changes on her sheet openly with Chantelle Melhado. This seems to be inconsistent with an attempt to make changes in secret.

49. I have not heard from Chantelle Melhado although she stills works for the respondent and was at work yesterday, although a written statement from her appears in the bundle.

50. The problem with the rota had come to Mrs Ibitoye's attention at about 3pm on Saturday 30 September. Nicole Thomas raised the matter with her, explaining that the rota now up in the office was incomplete, in a draft form and different from the version which had been agreed on Friday.

51. Mrs Ibitoye began to investigate. This was not a formal investigation and no record of it has been disclosed. Shenice Edwards spoke to those who had been on shift between Friday and Saturday: Ms Thomas, Ms Melhado, the claimant and Sharon Hunt. However, Ms Edwards simply asked people if they knew about the rota. She did not ask precise questions about whether they knew what had happened to the old rota, or how it came that the new one had been put up. Ms Melhado therefore simply answered 'no' because she was confused.

52. I consider that it genuinely appeared to Mrs Ibitoye as the result of the investigation that the claimant had deliberately falsified the rota. A more careful investigation may well have made matters appear differently to her. Whether the investigation or decision was reasonable or unfair however is outside my jurisdiction in this case.

53. Genuinely believing that the claimant had falsified an important document, Mrs Ibitoye dismissed her without notice.

54. Having had the benefit of more evidence (albeit that evidence is still incomplete because I have not heard from all the witnesses), I find that Mrs Ibitoye was mistaken, albeit wholly honestly. Ms Reid did make changes on a single page printed off from

the old computer system and send round a rota on 1 October. She did so openly. She did not know about the disappearance of the original 4-page rota. That disappeared in unexplained circumstances. I do not consider that the evidence shows that the claimant disposed of it or that she did anything dishonest.

55. Just because she was demonstrably the person who entered the old system (as she admits), does not mean that she disposed of the old rota or that she did anything underhand to secure benefits for herself.

Analysis

56. My findings of fact dispose of the claim for wrongful dismissal. On the balance of probabilities, the claimant was not guilty of gross misconduct as alleged or at all. Therefore, the respondent was not entitled to dismiss her without notice. It did dismiss her without notice and is therefore in breach of contract.

57. The parties agree that the claimant was entitled to one month's notice.

58. The purpose of compensation for breach of contract is to put the injured party back into the position she would have been in, had the contract been performed.

59. The claimant was out of work for three months. However, that does not mean that she is entitled to three month's pay as compensation.

60. Had the contract been performed, Mrs Ibitoye would have given her one month's notice. That is the limit therefore of the claimant's compensation for breach of contract.

61. How much that compensation should be however will depend on how much she is entitled to be paid for night shifts. I set out the calculations below.

Holiday pay.

62. As at the date of this hearing the judgment of the Court of Appeal in *Royal Mencap Society v Tomlinson-Blake* A2/2017/1469 was available although not reported, and is, as the respondent points out, binding on me. However, my own enquiries of counsel involved in that case (about which I told the parties) revealed that although the Court of Appeal had refused permission to appeal, both Royal Mencap Society and Ms Shannon had applied to the Supreme Court for permission to appeal.

63. There is therefore a risk that if I reach a final decision on this case, and turn out to be wrong, I expose the parties to the work and expense of an appeal, over some fairly modest sums. I have considered staying such part of the remedy proceedings as is affected by Mencap. On reflection this seems to create too much complexity. I have therefore made the calculations on the basis of Mencap. In the event that the Supreme Court changes the legal position the party affected may apply to the tribunal (promptly) for a reconsideration.

65. A worker is entitled, during her annual leave, not only to the maintenance of her basic salary, but also to all the components intrinsically linked to the performance of the tasks which she is required to carry out under her contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided (*British Airways plc v Williams* [2011] IRLR 948). A worker is entitled to be paid for annual leave at a rate equating to the average of her normal remuneration, so far as that comprises payment for doing the job (as distinct from payment of expenses).

66. Therefore, when I answer question 1 above, I consider that on the facts of this case simply to use 28 days would not represent the claimant's true position.

67. The parties both approached this issue using a calculation of hours. I think that is the right approach.

68. To how many hours/weeks was the claimant entitled?

69. The claimant's last 3 payslips are unrepresentative: they include holidays and sick absence. It is unhelpful to use the last 12 weeks of employment because they do not help me identify the average hours accurately. It seems to me more reliable to annualise her actual hours over the leave year.

70. From 1 January to 2 October 2017 the claimant worked, as she herself claims, 2011 hours on day and night shifts together over 275 days.

71. Annualised that becomes 2669.15.

72. That is then 51.33 hours per week.

X 5.6 weeks = 287.45 per year.

73. [The claimant says that she arrived at her figure of 243 hours per year by using a holiday calculator. She cannot explain the method used. I suspect she has inputted 2011 hours as an annual figure.]

74. For a 28-day entitlement therefore the claimant would have been entitled to 287.45 hours.

75. Therefore **A** is 287.45 hours.

76. The proportion of the leave year that had expired at the date of termination is 0.75 (275/365). That is **B.**

77. What is the period of leave actually taken by the claimant between the start of the leave year and the termination date?

78. The claimant took 48 hours holiday in August 2017, and 36 hours in September 2017, according to her pay slips. That totals 84 hours taken. This is **C.**

79. I apply the formula set out in regulation 14 of the 1998 regulations:

(A x B) -C

(287.45 x 0.75) – 84 or,

215.6 – 84 = 131.60 hours

80. On 31 October 2017 the respondent paid the claimant for 71 hours accrued holiday pay at 9.00 per hour.

81. This leaves 60.6 hours unpaid.

82. However not all those hours will be paid at £9.00, or even £7.50 per hour, if Mencap is correct. What I propose to do is to work out what proportion of the annual hours apply to day shift, what proportion to night hours when the claimant was required to be awake and available for work and what to sleeping in hours.

83. Of the original 2011 hours worked 1315 hours were day shift hours.

84. 696 hours were nights. For 5/12 of each night the claimant was required to be required to be available and awake for the purposes of actually working.

85. So, on the basis of Mencap the claimant was entitled to be paid holiday pay at the rate of £7.50 per hour for 5/12 of her night hours. Night hours represent 0.34 of the total 2011 hours (696/2011).

86. 60.6 hours were accrued but unpaid. Of those 0.34 of 60.6 is 20.60 hours. Those are the night holiday hours accrued but unpaid. For 5/12 of those the claimant was entitled to be paid £7.50 per hour.

5/12 of 20.60 = 8.59

8.59 hours x £7.50 = **£64.43.**

87. The remainder of the hours were paid by night allowance at £50 per night.

88. That is £50 for 7 hours ‘sleep in duty’ which is £7.14 per hour.

7/12 of 20.60 = 12.02

12.02 x £7.14 = **£85.82**

89. 0.66 of the hours were day hours:

0.66 of 60.6 hours = 40.

40 x £9.90 = **£396.**

90. Therefore, the sum owing for accrued unpaid holiday pay on termination was **£546.25**

Wrongful dismissal

Wrongful dismissal calculations

91. One month's notice:

If £50 for a night shift only, the claimant is entitled to:

Gross per week:

36 x 9.00 = £324.00 +

2 x £50.00 = £100.

X52= £22,048

/12 = 1,837.33

92. The parties have not agreed a net figure. The claimant had a tax code of 1105L. Doing the best I can on the information available, on those figures I would award a figure of £1515.45 net.

93. Assuming Mencap to be correct, however, 5 hours of each 12 hour night shift should also be paid at the then NMW of £7.50 per hour.

5 x £7.50 = £37.50 per night.

x 2 per week = £75.00

x52 = £3,900 p.a

/12 = £325.00 per month gross

94. Gross per month would then be £325 + £1837.33 = per month and £25,947.96

Net per month: **£1736.45**.

95. That is what I award as compensation for breach of contract.

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Employment Judge Heal

20 September 2018

Date: ……..
26 September 2018
Sent to the parties on: .....

.....
For the Tribunal Office