



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. B. Johnson

**Respondent:** Merlin Inns Limited

**Heard at:** London South, Croydon

**On:** 26 September and the 22 November 2017

**Before:** Employment Judge Sage (sitting alone)

## Representation

Claimant: In person

Respondent: Ms. Travis HR consultant

# REASONS

*Requested by the Claimant*

1. There are two matters before the Tribunal, firstly whether the Claimant was an employee and if the Tribunal conclude that the Claimant was an employee, does she have two years continuous service in order to pursue a claim for unfair dismissal.

## **The parties pleaded cases**

2. It was the Respondent's pleaded case that the Claimant was not an employee. The Respondent accepted that the Claimant attended the premises but only to "assist" her twin sister Shirley Johnson to carry out her duties. The Respondent denied that the Claimant was paid directly by the Respondent. The Respondent accepted that from the 15 November 2015 Ms. S. Johnson asked if the Claimant could help her carry out her duties and from that date, Ms. S Johnson's weekly wage increased from £250 to £500. The Respondent presumed that this was the date that the Claimant started to provide assistance to her sister on a regular basis. The Respondent denied that the Claimant was an employee.
3. In the alternative the Respondent stated that should the Tribunal find the Claimant to be an employee, her employment began on the 15 November 2015 and she does not have two years' service in order to

pursue a claim for unfair dismissal. The Respondent stated that there was no record of the Claimant working in any form at the pub prior to the 15 November and no record of her receiving remuneration in any form, directly or indirectly.

4. It was the Claimant's case that she commenced employment for the Respondent on the 14 December 2014 until her contract was terminated on the grounds of redundancy on the 10 February 2017. She stated she was employed as a Housekeeper and Cleaner.

### **Witnesses**

The Claimant called the following witnesses:

Ms. Amey

Mr Amey

Ms. Jones

Ms. Poulter, Mr Hall and Ms. Knight provided statements but did not give evidence to the Tribunal.

The Respondent called the following witnesses:

Ms. Jones the manager of the Pub at the relevant time and

Mr Friswell Operations Director

### **Findings of Fact.**

5. The Claimant told the Tribunal that she met Ms. Jones, the manager of the pub called the Sir Douglas Haig in September or October 2014 after her sister became employed as a cleaner in September 2014. Although the Claimant was employed elsewhere in October 2014, Ms. Jones asked the Claimant if she would consider doing her ironing for her, which she agreed.
6. The Claimant told the Tribunal that in December 2014 her previous employment ended and she approached Ms. Jones to ask if there was any work available at the pub, even on a temporary basis. It was the Claimant's evidence that Ms. Jones offered her a part time position as a cleaner joining her sister and another employee, Louise Wishart, who were all employed on the same duties. The Claimant told the Tribunal that her sister worked Sunday, Tuesday and Thursday and Ms. Wishart worked on the alternate days. The Claimant told the Tribunal that she accepted the position on 14 December 2014 to work alongside her sister, but to also cover Ms. Wishart if she were absent. The Claimant was not provided with a written contract and no paperwork existed to record the terms of this engagement.
7. It was Ms. Jones' evidence at paragraph 6 of her statement that the Claimant occasionally helped out her sister from May 2015 to November 2015 but she denied that she employed the Claimant and she had no need for an additional cleaner in 2014. However, Ms. Jones conceded in cross examination that at Christmas time in 2014 it was "all hands-on deck" and accepted that the Claimant came to help with the cleaning on the 22 and the 24 December 2014. The Claimant also told the Tribunal that she worked at the pub on New Year's Eve 2014.

8. The Claimant was asked in cross examination for evidence that she was employed in 2014 and she stated that she was authorized to be on the premises outside of opening hours. The Claimant also referred to a statement provided by Ms. Poulter, who worked as a bar maid at the time, who corroborated that the Claimant started working with her sister at the pub shortly after she commenced work in November 2014. Ms. Poulter did not attend to give evidence therefore this evidence was given less weight than those who attended the hearing. Ms. Poulter's statement was put to Ms. Jones in cross examination and she confirmed that the Claimant attended the premises "to help her sister" but could not assist with the dates when this occurred. The Tribunal preferred the evidence of the Claimant to that of Ms. Jones, that the Claimant commenced work as a cleaner in December 2014; although the working relationship was not evidenced in writing and no records of the terms of the Claimant's employment, Ms. Jones confirmed that the Claimant worked for at least two days in December.
9. The Claimant at paragraph 8 of her statement referred to her covering for Shirley Johnson when she took annual leave on the 5 February 2015; this was put to Ms. Jones in cross examination but she could not recall whether the Claimant was on the premises cleaning that day but did not deny that it was possible that she was on the premises cleaning.
10. In March 2015 the pub was undergoing refurbishment and it was the Claimant's evidence that Ms. Jones suggested to her and her sister that they could take over the cleaning the hotel rooms. The Claimant told the Tribunal that they both accepted the offer to work as chambermaids in March 2015. Ms. Jones confirmed in cross examination that the Claimant and her sister "took over upstairs" whilst refurbishments were underway however it was Ms. Jones recollection that this was in May 2015. The additional duties included ensuring the requirements of each guest were met and to ensure the linen was changed depending on the guest requirements. This also included all cleaning services and making the rooms presentable and ensuring toiletries, towels and coffee and tea trays were adequately stocked. The Claimant also told the Tribunal that part of her role was to pack used linen and fill out the laundry forms for laundry collection and to ensure orders were met.
11. The Respondent did not dispute that the Claimant was present and working on 29 April 2015 when the pub was reopened after refurbishments had completed. Mr Friswell and Mr Matthews, Managing Director of the Respondent company attended the reopening and the Claimant met them for the first time.
12. The Claimant told the Tribunal that her role was extended to covering the beer deliveries and as a result she was given the keys to the pub as well as the security code to the alarm system. The Claimant also had the pass key to the hotel rooms. Although it was put to the Claimant in cross examination that the keys and the security code were given to her sister, the consistent evidence before the Tribunal showed that this was not the case. Shirley Johnson confirmed in cross examination that the Claimant had the keys to the pub and had the security code which in her view "showed she was an employee and trusted with the keys and the codes". Ms Shirley Johnson told the Tribunal that at no stage was the Claimant

treated differently to her. She also denied that she gave the Claimant instructions she told the Tribunal *"I think you could say that I assisted Barbara, she did the laundry, the forms, she calculated what had been used and she handed the paperwork over to [Ms. Jones]. [The Claimant] took the more dominant role"*. The Tribunal find as a fact on all the evidence that the Claimant's duties had increased in March 2015 with the agreement of Ms. Jones to extend to chambermaid duties as well as cleaning the pub and receiving deliveries.

13. The Claimant was taken to page 95 of the bundle which was a payslip dated the 29 July 2015 in her sister's name and she was asked about the annotations on the pay slip and she stated that *"the notation shows I negotiated a pay rise with Ms. Jones and the pay rate per our increase and what the rise increased to. It did not appear on the pay slip, which is why there are 17 hours times two"*. The evidence given in cross examination was entirely consistent with the Claimant's evidence in chief at paragraph 18 of her statement. She confirmed that the pay slip covered the hours of both herself and her sister, which was corroborated by the evidence of Ms Shirley Johnson. The Claimant was asked in cross examination whether she raised a concern about the way she was paid and she stated that she raised this with Ms. Jones but felt she could do nothing else because there was no one else she could raise it with; she felt the responsibility was with her employer and the licensee of the pub. The Claimant told the Tribunal that she had no access to any written procedures and did not know how they operated; she and did not raise this with Mr Friswell because she did not know who he was. The Claimant stated that she needed a job and she was getting paid, so she did not raise any concerns and felt that she had no reason to do so.
14. The Claimant's evidence was that due to the expansion of duties and hours they were offered a regular weekly wage of £250 each. The Claimant was asked in cross examination who assigned the duties and the Claimant replied that Ms. Jones told her what the work needed to be done and she carried the work out in the manner that was required. Ms. Jones accepted that at this time the wages doubled (see her statement at paragraph 9) but it was her evidence that the wage increase was offered only to Shirley Johnson and not to the Claimant. The Tribunal conclude on all the evidence that the Respondent was aware from December 2014 that the Claimant was on the premises and working and the wages paid to Shirley Johnson was paid for the hours that they both worked.
15. From November 2015 the Claimant was paid a regular wage but did not receive a pay slip. The Tribunal saw pay slips in the bundle at page 23 showing the total number of hours worked of 32 and 40 and bore the name of Shirley Johnson only. It was put to Shirley Johnson that the total sum on the pay slip represented the wages due to her and she replied *"no half of the pay slip was for [the Claimant], [Ms. Jones] knew exactly what we were doing and was aware of the situation. She used to put cash in an envelope knowing full well [the Claimant] was employed and [the Claimant] negotiated the pay rise. I received no instructions to pass on, it was a hands-on environment"*.
16. The description of the working practices adopted by the Claimant and Ms. Shirley Johnson appeared to be corroborated by Ms. Jones who at

paragraph 12 of her statement confirmed that by the end of 2016 the Claimant “did rather take over” and she appeared to have taken over the conduct of negotiations on behalf of them both.

17. Ms. Jones confirmed in cross examination that the Claimant became “more regular” in November 2015 and she conceded in cross examination that from November 2015 she accepted that the Claimant was “on the payroll”. In re-examination Ms. Jones confirmed that in November 2015 *“the job was there and the Claimant was doing it more frequently so I could set her up on the payroll”*. Ms. Jones’ evidence was not found to be consistent on the issue of whether she was paid by the Respondent and on the issue of pay slips. The Respondent’s pleaded case set out above at paragraph 2-3 was that the Claimant was never an employee and only assisted Shirley Johnson. However, in answers given in re-examination told the Tribunal that the Claimant could be put on the payroll; this evidence appeared contradictory and inconsistent with the pleaded case and her evidence in chief (where she stated that it was not possible to put the Claimant on the payroll as she was not contracted to the Respondent paragraph 11). Ms. Jones evidence was internally inconsistent on this point.
18. In relation to Ms. Jones’ evidence on the issue of pay slips, she stated that the Claimant was happy to be paid wages via her sister’s pay slip but in her own statement at paragraph 11 she confirmed that the Claimant asked her a couple of times if she could have her own pay slips; this strongly suggested that the Claimant was not happy with this arrangement. Again, Ms. Jones evidence lacked credibility on this point.
19. Mr Friswell confirmed in answer to the Tribunal’s questions that on the 15 November 2015 there was an “intention” to employ the Claimant but she “never appeared on the payroll”. He confirmed that it was his view that the Claimant was employed from the 15 November but he could not explain why no contract had been provided and why this view was contradicted by his evidence in chief where he stated that there was no record of the Claimant ever being an employee. Mr Friswell’s evidence was inconsistent and lacked credibility on this point.
20. The parties evidence was consistent that Ms. Jones produced a contract for the Claimant to sign in January 2016, which she signed and returned to Ms. Jones together with her passport details for her records. The Claimant was asked about this in cross examination and she confirmed that she signed this contract but it had since gone missing (which was also agreed).
21. The Tribunal saw a letter from Ms. Jones to both the Claimant and her sister Shirley dated 15 July 2016 regarding sick pay and pay for working Saturdays pay at page 28 of the bundle. The first sentence of the letter confirmed that “as per your contract Merlin Inns do not offer sick pay..”. It was noted that Ms. Jones clarified that *“as per our agreement you’re currently contracted to work a 35 hour week for the pay of £250 each”* and this equated to 7 hours a day Monday to Friday with a number of Saturdays. The letter went on to confirm that Ms. Jones was prepared to be very flexible about their current hours. Ms. Jones was asked about this letter in cross examination and she confirmed that the letter set out the

terms of their employment contract. The Tribunal therefore find as a fact that the Claimant and Ms. S. Johnson were employed under a contract of employment (working a job share) to work as a Chambermaid/Cleaner at the rate of £250 per week each. This was entirely consistent with the manner in which the timesheets were completed and also consistent with the way in which Mr Friswell explained the manner in which the pay was calculated and paid to the Claimant and her sister. This was also consistent with pages 75-7 of the bundle where documents described as “weekly pay returns” were exhibited showing the pay of £250 times two but under the name of only Ms. S. Johnson; it was the evidence of Mr Friswell that this calculation was a “way of arriving at £500”.

22. The Claimant stated that her employment continued until 13 January 2017 when Ms. Jones called the Claimant and Ms. Shirley Jonson to a meeting when they were informed that Ms. Jones would be relinquishing her role as General Manager. Ms. Jones would take over the duties currently undertaken by the Claimant and her sister and as a result would be making them redundant.
23. The Claimant stated that during this meeting Ms. Jones said to them that “*as we both had worked at the Haig over two years we would qualify for redundancy payment*”. The Claimant referred the Tribunal to pages 30 to 32 of the bundle which were minutes taken of the meeting by the Claimant at the request of Ms. Jones. These minutes were not agreed.
24. At page 33 of the bundle, the Tribunal saw a letter that was purportedly sent after the meeting on 13 January by Ms. Jones. It confirmed that at that meeting they had been informed that the “*job you share with your sister Barbara will no longer be available and you will be made redundant. You were however offered the opportunity to transfer to another Merlin Inns site..*” The letter went on to state “*therefore, your employment will be terminated on Friday, 10 February 2017 and a redundancy payment due will be two weeks x £479 x 1.5, which came to a total of £1437*”.
25. Ms. Jones’ evidence in chief at paragraph 16 was that she allowed the Claimant to attend the meeting because she knew she helped her sister but she denied that the Claimant was in attendance because she was an employee. This was considered to be a further contradiction in her evidence. Ms. Jones had conceded that the Claimant was working on the terms identified above at paragraph 21. The minutes of the redundancy meeting were consistent with the letter sent to both parties referred to above at paragraph 24. The Tribunal conclude on the balance of probabilities that the minutes were an accurate reflection of the meeting. Ms. Jones’ evidence in her statement about the conduct of the meeting and of the Claimant’s status at the date of the meeting was inconsistent and contradicted her oral witness testimony given to the Tribunal and with the documents in the bundle. On the other hand, the Claimant’s evidence on this point was found to be credible and consistent.
26. The Claimant replied to this letter on the 27 January 2017, clarifying her understanding of her entitlement and asserting her claim for unpaid holiday accrued over her employment. It also requested that they be paid notice pay and wages for when they were required not to attend work.

27. The Claimant then received a letter dated 31 January 2017 from Peter Frisky, Ms. Jones' brother but signed from the manager of the pub at page 36 of the bundle. The letter stated that she had not been offered a redundancy payment and did not qualify for any benefits on termination of her employment. It was stated in this letter that he was aware that Shirley Jonson was the only one employed by the Respondent company. This was the first time the Respondent had alleged that the Claimant was not an employee of the Respondent.

### **Oral Submissions – by the Respondent**

28. The Claimant claims she was employed from December 2014, and Ms Poulter confirmed that the Claimant assisted her sister. It is accepted Claimant assisted her sister, but on an irregular basis. The Claimant says that the first time she was offered a contract was in January 2016. However, this was never received and she didn't follow it up. The Claimant provided evidence of pay slips showing split of wages since July 2015, but this was only known by hearsay. Ms. Jones gave evidence that the Claimant was not required to do work prior to November 2015 and any work she did was simply to help her sister. It is not disputed that she helped, but it was not initiated or controlled by the Respondent. The Respondent will say that the Claimant was not an employee any time prior to November due to the lack of mutuality of obligation, the lack of consideration and the lack of control.

### **Oral submissions-by the Claimant**

29. I refute the Respondent's claim I was not an employee until November 2015 and I refute that I was an assistant to Shirley. I started work in October 2014 and I was there on the 4<sup>th</sup> to 6 February 2015. The issue with my start date never arose or became an issue till after the redundancy. I never contested I wasn't paid, I was. I always received payment. Even if I was not recognised to be an employee. The contract issued when the tasks were extended. I worked and I was an employee. I was directed and under the supervision of Ms. Jones, I performed work personally and had no right of substitution and did not provide my own tool. The tools I used were the property of the pub. I was remunerated weekly but received no pay slips. They should not invalidate my start date of the 14 December 2014.

### **The Respondent's response**

30. Ms. Jones said she did not supervise and instruct, but the work was given to her by her sister, the evidence of Shirley was they both turned up and got on with it. Barbara Johnson said raised the issue of pay slips but she didn't raise it with anyone else. She could have raised it with Merlin Inns, who she knew from April 2015 after the refurbishment. She did not raise this with anyone else

### **Decision**

31. The Respondent's witnesses conceded in cross examination that the Claimant was an employee from 15 November 2015, therefore the only issue for the Tribunal is whether the Claimant has two years continuous

service as an employee in order to pursue a claim for unfair dismissal. The effective date of termination was 10 February 2017, the Claimant must show that she was employed from 11 January 2015 in order to claim unfair dismissal.

32. I would like to make some initial observations about the quality of evidence in this case. The Claimant's evidence has been consistent throughout that she and her sister worked at the Respondent public house as cleaners/chambermaids from October 2014 in the case of Shirley Johnson and from December 2014 in the case of the Claimant. The evidence provided by the Claimant was supported by the statement produced by Ms. Poulter, that the Claimant started working at the pub "shortly after her sister" and the Claimant's job was to clean the pub and hotel rooms.
33. The evidence given by Ms. Jones for the Respondent was found to be vague inconsistent and often contradictory. She contradicted herself about the Claimant's employment status and about the issues regarding whether the Claimant was paid, and why pay slips had not been provided. Ms. Jones failed to keep accurate records of payments made to the Claimant and her sister and failed to produce details of the hours worked by the Claimant at any time during her employment. She could not explain what happened to the contract of employment signed by the Claimant or why the standard terms and conditions of the Respondent were not in the bundle. Mr Friswell's evidence was also found to be contradictory in relation to his understanding of the Claimant's status and the issue of pay slips. The Tribunal have concluded that the Claimant being a consistent witness would be preferred in the event of a dispute in evidence, where it is appropriate to do so.
34. It was of considerable concern that there were no records kept of the Claimant's employment relationship with the Respondent either before or after the 15 November 2015; this date was important because it was when both the Respondent's witnesses conceded that the Claimant was working more frequently so she could be "put on the payroll" and from that date was accepted to be an employee. Ms. Jones conceded in her evidence that she was aware that the Claimant was an employee after the date of 15 November and she "recognised" her status as an employee. However, this concession was only made in re-examination. The admission that the Claimant had been provided with a contract of employment came days before the first hearing by Ms. Jones and resulted in an amendment to her statement. Despite the amendment confirming that a contract of employment had been provided to the Claimant, no concession was made by the Respondent as to employment status until during the hearing.
35. Ms. Jones accepted that the Claimant was never placed on the payroll. It was her evidence that the Claimant was "happy to be paid via Shirley's wages" however this evidence was also found to be contradictory. The Claimant's evidence was that she had asked Ms. Jones for a pay slip many times but could not escalate matters because firstly she did not have access to any of the Respondents policies or procedures, and secondly, she assumed that Ms. Jones was the employer and had complete authority. The Respondent accepted that they paid the Claimant's wages to Shirley Johnson, a practice Mr Friswell admitted was unusual. It was not



only highly unusual, it was also a breach of the Employment Rights Act. It was also of concern that even after the Claimant was accepted by both the Respondent's witnesses to be an employee in November 2015 and even after a contract was signed by the Claimant, this unusual practice continued until termination of the Claimant's employment relationship.

36. The Claimant was accepted to be an employee working under a contract employment from 15 November and therefore she was entitled under section 1 of the Employment Rights Act to receive a written statement of terms and conditions and a pay slip to accompany her wages, she received neither. The Respondents kept no documentary evidence of the hours worked by the Claimant or the payments made to her. An adverse inference is raised from the paucity of documentary evidence in the possession of the Respondent. The Tribunal conclude that on all the evidence the Claimant was an employee during the entire working relationship.
37. The next issue for the Tribunal is when did the Claimant commence working as an employee the Respondent? There is a dispute in the evidence between the Respondent (saying that the Claimant commenced employment on the 15 November 2015) and the Claimant (saying she commenced employment on the 14 December 2014). If the Claimant is correct then she has accrued sufficient continuous employment to pursue a claim for unfair dismissal.
38. So, what are the facts before the Tribunal? Ms. Jones conceded in cross examination that the Claimant worked on the 22<sup>nd</sup> and 24 December 2014 with her sister as it was "all hands-on deck". The Tribunal took that phrase to mean that all the staff employed at the pub were required to work. Secondly, the Claimant provided evidence to show that she covered for her sister when she went on leave on the 4<sup>th</sup> to 6 February 2015. Ms. Jones could not recall whether this was the case, but conceded that it "was possible". The Claimant's evidence was corroborated by Ms. Poulter that the Claimant was working at the pub from December 2014 onwards. Although witness testimony carries little weight if not tested in Tribunal, due to concerns about the credibility of Ms. Jones' evidence, the Tribunal preferred the evidence of the Claimant on this factual dispute which was corroborated by Ms. Poulter. The Tribunal conclude that the Claimant worked for the Respondent from December 2014 onwards.
39. Thirdly, the Claimant provided detailed evidence to the Tribunal of the extension of their duties in March 2015 when they took on the role of Chambermaids commencing in April. There was sufficient evidence before the Tribunal to conclude that the Claimant's employment commenced in December 2014 and the Claimant could show that she worked continuously from that date.
40. The Respondent's evidence that the Claimant's employment only commenced in November 2015 was rejected. It was rejected on two grounds, firstly because the Tribunal saw consistent and credible evidence that the Claimant was regularly working for the Respondent prior to that date. The second reason was that Ms. Jones accepted in evidence that the Claimant was working "more frequently" in November which Tribunal took to corroborate the Claimant's evidence that she had been working

continually for many months prior to this date and her hours, duties and responsibilities had increased.

41. The Respondent suggested in closing submissions that there was no mutuality of obligation prior to November 2015 and therefore there was no contract of employment. This submission appeared to be inconsistent with the evidence before the Tribunal. The Tribunal noted that there were specific hours set down for the Claimant and her sister to work. When work was provided, there was an expectation it would be completed by the Claimant and her sister. It was not disputed that the Claimant received a wage for carrying out those duties. The consistent evidence of the Claimant was that they were employed at the same time as Ms. Poulter and they all covered for each other, there appeared to be an expectation that if the work was there to be done, they were obliged to do it according to the terms of their contract as a job share.
42. The Respondent also referred in closing submissions to a lack of control but the clear evidence given by the Claimant and Shirley Johnson was that Ms. Jones discussed with them what work should be carried out. This evidence reflected that the duties were assigned on a daily basis after an assessment had been carried out of what work needed to be done. The work to be completed was dependent on the needs of the Respondent and changed according to the number of guests staying at the hotel and the trade in the bar and restaurant. The consistent evidence was that the Claimant had a number of duties that had been assigned to her by Ms. Jones including ordering the laundry and being present to receive the beer deliveries. The Claimant was also a key holder, held the security codes and the master keys to the bedrooms which suggested a high degree of trust and a requirement for the Claimant to attend the premises at set hours to undertake these duties. I conclude on all the evidence that the Claimant was subject to the control and direction of Ms. Jones on a daily basis.
43. Having concluded that the Claimant was subject to control and was under the direction of Ms. Jones as the Licensee, there was sufficient mutuality of obligation present from December 2014 to show that the Claimant worked under a contract of employment. From all the evidence before me I conclude that the role began in December 2014 with the Claimant performing duties as a cleaner under a job share with her sister, the role was then extended to Chambermaid/cleaner from April 2015. The terms of that contract being confirmed in the two letters from the Respondent dated the 15 July 2016 and the 13 January 2017.
44. I conclude therefore that the Claimant was continually employed from 14 December 2014 until the effective date of termination and she was employed under a contract of employment. The Claimant has therefore been employed for more than two years, her claim for unfair dismissal can therefore proceed to a full hearing.

Employment Judge **Sage**

---

Date 28 March 2018