



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4123813/2018

Held in Aberdeen on 4 March & 3 July 2019

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**Employment Judge N M Hosie
Tribunal Member S L McCabe
Tribunal Member V Lockhart**

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Miss M Hernandez

**Claimant
Represented by
Ms J Redpath
Solicitor**

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Little Malaya Restaurant Limited

**1st Respondent
No Appearance**

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Asiana Kitchen Limited

**2nd Respondent
No Appearance**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL
E.T. Z4 (WR)**

The unanimous Judgment of the Tribunal is that: -

1. the claimant was employed by the first respondent, Little Malaya Restaurant
5 Limited;
2. the claim, in so far as directed against the second respondent, Asiana Kitchen
Limited, is dismissed;
3. the claimant was unfairly dismissed by the first respondent and the first
respondent shall pay to her by way of compensation the sum of Five Hundred
10 and Eight Pounds (£508);
4. the claim under s.23 of the Employment Rights Act 1996 is well-founded and
the first respondent shall pay to the claimant the sum of Sixty-Seven Pounds
and Fifty Pence (£67.50) in respect of unlawful deductions from wages;
5. the claim under Regulation 30(1)(b) of the Working Time Regulations 1998 is
15 well-founded and the first respondent shall pay to the claimant the sum of
Five Hundred and Seventy-Four Pounds and Forty-Three Pence (£574.43) in
respect of accrued holiday pay; and
6. the first respondent shall pay to the claimant the sum of Two Hundred and
Fifty-Four Pounds (£254) in respect of its failure to provide the claimant with
20 a written statement of her terms and conditions of employment.

Introduction

1. Ms Hernandez brought various complaints following her resignation from her employment on 4 November 2018. Although the claim was properly intimated, neither respondent defended the case and a Final Hearing was fixed for 4 March 2019 in Aberdeen. However, at that Hearing it emerged that the claimant might have a complaint of automatic unfair dismissal for the assertion of a statutory right, in terms of s.104 of the Employment Rights Act 1996 (“the 1996 Act”). In light of this, the claimant’s solicitor intimated that she wished to amend her claim form and the Hearing was continued to enable her to do so.
2. The claimant’s application to amend was submitted on 18 March 2019. It was intimated to the respondents by the Tribunal, by post, on 9 April 2019. There was no response from the respondents. The application was granted, and the claim form was amended accordingly.
3. There was no response from the respondents to further letters sent to them on 24 April intimating that it was proposed to fix a further date for the Hearing. The case continued to proceed, therefore, on an undefended basis.
4. Notices of the Hearing, which had been fixed for 3 July 2019 were sent by post to all the parties on 7 June 2019.
5. The claimant’s solicitor appeared at the Aberdeen Tribunal office on 3 July along with the claimant at the appointed time. There was no appearance by or on behalf of the respondent. In all the circumstances, the Tribunal decided to proceed with the Hearing.

The evidence

6. The Tribunal heard evidence from the claimant. She gave her evidence in a measured, consistent and convincing manner. She presented as credible and reliable.

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7. The claimant's solicitor also lodged a bundle of documentary productions ("P").

The facts

10 8. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following material findings in fact.

9. The claimant commenced her employment at the Little Malaya Restaurant ("LM") on 13 January 2018. She was 16 years of age on 4 February 2018. She was engaged by "Christine" who she understood to be the owner of the restaurant.

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10. She did not receive a written contract of employment. She requested one on a number of occasions. She was advised by Christine that she would receive one, but she never did.

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11. Initially, she was engaged in answering the telephone for the take-away business of LM. She then worked as a waitress in the restaurant.

12. She was paid "cash in hand", but the payments were inconsistent. Initially her rate of pay was £4 an hour but it increased to £4.50 per hour.

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13. Around February 2018, the claimant was seconded to work at Asian Kitchen Limited ("AK"), a "take-away" business not far from LM. The claimant understood that AK was associated with LM.

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14. When she moved to work at AK, she asked “Jeff”, who she understood to be the owner of the business, to speak to Christine about a contract of employment. Jeff did speak to Christine, but the claimant got the same answer from her: “she would get it at some point”.
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15. The employment relationship deteriorated around the middle of 2018 when the claimant raised certain health and safety concerns and also raised concerns about her rest breaks.
- 10 16. The claimant continued to work primarily at AK but from time to time she would also be directed to work at LM.
17. In August 2018, the claimant took up further employment as an apprentice in business and administration. When working there, she learned about her working rights and she again requested a contract of employment from Christine, but none was forthcoming. She also raised her concerns about proper rest breaks, that she shouldn't be required to work when she was off work due to ill-health and that she should not be serving alcohol because of her age. She also raised concerns about Christine not paying her a share of the tips. Christine retained all the tips to cover alleged shortfalls in the till reconciliation, although no specifics were ever provided.
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Resignation

- 25 18. The claimant continued to work primarily at AK. As “Jeff” was on holiday for a period of three weeks she worked a six day week. Christine continued to withhold the tips and when Jeff returned from holiday he told the claimant that a further sum had “gone missing” from the till. The claimant advised him that was not possible as she had carried out the till reconciliations along with the Chef each day and he had confirmed, in writing, that they were in order.
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19. The last shift which the claimant worked was on 22 October 2018. After that, the claimant sent text messages to Christine requesting yet again her contract of employment and wages which were due to her (P5-9). At first, Christine denied that the claimant had ever worked for her. She then only offered to
5 pay the claimant one day's outstanding wages, whereas the claimant was due two days (P8/9). She also continued to refuse to provide the claimant with her contract of employment.

20. In view of Christine's response, the claimant felt that she had no option other than to resign. On or about 4 November 2018, therefore, she advised
10 Christine that she no longer wanted to work for her as she hadn't given her a contract of employment and paid the wages due. Christine responded saying, "*that's fine because your fired. You no longer work for us*".

15 **The issues and the tribunal's decision**

Claimant's employer

21. This was not straightforward. Although she was engaged to work at LM she
20 also worked at AK. However, she was engaged by "Christine", who she understood to be the owner of LM and understood that her wages, which were paid in cash (there were no payslips) were paid by her. Indeed, the claimant's bank statement records a payment from LM on 5 October of £20 (P5b).

22. We decided, therefore, that the claimant was employed by LM and, as we
25 recorded above that she was seconded by LM to work, from time to time at AK. The claim against AK, therefore, requires to be dismissed.

The claim

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23. The claimant's solicitor advanced a number of complaints but, on the evidence, we arrived at the view that it was only the complaints of unfair

dismissal, failure to provide a written contract of employment, a failure to pay wages and a failure to pay holiday pay which merited consideration.

24. There were complaints of race and age discrimination but in the unanimous
5 view of the Tribunal there was insufficient evidence to establish a *prima facie* case which the claimant was required to do, in the first instance.

25. Further, as the claimant resigned the Tribunal was of the unanimous view that
10 she did not have a claim for “notice”.

26. We deal, therefore, with the complaints which, on the evidence, merited
consideration.

Unfair dismissal

15 27. As the claimant did not have the required two years’ continuous service to bring a complaint of “ordinary” unfair dismissal, this was a complaint of so-called automatic unfair dismissal for asserting a statutory right, in terms of s.104 of the Employment Rights Act 1996. This was not straightforward as it
20 can be particularly difficult for a Tribunal to determine whether an allegation of infringement of a statutory right is the reason for dismissal in cases where the employee has resigned.

28. However, we found some guidance in an ET case: **McMahon & anor v. Millington t/a Poppy ET Case No. 2901530/99.**
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29. Albeit with some hesitation, we decided, unanimously, that the claimant resigned in response to her employer’s repudiatory breach of contract and actions related to her assertion of a statutory right. The reason for her
30 resignation was the respondent’s failure to respond to her request for a written contract of employment, to pay the wages due to her and to address her concerns about rest breaks.

30. We decided, therefore, that the claimant was unfairly dismissed and that she should be awarded compensation to reflect her financial loss.

31. There is no Basic Award as the claimant was employed for less than a year.

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32. So far as the Compensatory Award is concerned, when she was employed by LM, she earned on average £127 per week. She was able to secure alternative employment four weeks after her employment with LM came to an end. In that employment her earnings were equivalent to what she earned when she was employed by LM.

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33. We decided, therefore, that it would be just and equitable to award the claimant compensation to reflect her four weeks' loss of earnings, a total of **£508** (4 x £127).

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Unpaid wages

34. We were satisfied, on the evidence, that the claimant was due two days' wages. The respondent had offered to pay one day, but this was rejected by the claimant (P8). On the basis of daily earnings of £33.75 the total sum due to her is **£67.50** (2 x £33.75).

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Failure to provide the claimant with written employment particulars

35. Despite several requests, the claimant was never provided with a written statement of her terms and conditions of employment. This is not a stand-alone claim but is dependent on the claimant succeeding with certain other claims. She has done so. We decided, in all the circumstances, that she should be awarded two weeks' pay in respect of this failure, a total of **£254** (2 x £127).

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Holiday pay

36. The claimant did not take any holidays during her employment. She worked for LM for a total of 42 weeks from 13 January 2018 to 4 November 2018. On the basis of weekly earnings of £127, she is entitled to accrued holiday pay of **£574.43** (5.6 weeks x £127 x 42 ÷ 52).

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Employment Judge:**Nicol Hosie****Date of Judgment:****11 July 2019****Date Sent to Parties****15 July 2019**

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