



EMPLOYMENT TRIBUNALS

Claimant:

Miss Maria Dos Santos Correia

v

Respondent:

Whitbread Group Plc

Heard at:

Reading

On: 17 September 2019

Before:

Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant:

Mr M Klaptocz (Friend of claimant)

Assisted by:

Mr P Dias-Ramos (Interpreter in the Portuguese language)

For the Respondent:

Mr M Foster (Solicitor)

JUDGMENT having been sent to the parties on **25 September 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form that was presented on 5 July 2018, the claimant, Miss Maria Dos Santos Correia, made a complaint that she was entitled to an award of compensation for unpaid wages. The respondent denied her complaints and having heard the evidence of Miss Santos Correia and Mr Timothy Costello and considered the documents which have been presented, I have come to the conclusion that the claimant's complaint is not well-founded and that her claim is dismissed.
2. Because there is an interpreter involved, I am going to try and speak at a rate that will allow the interpreter to follow what I say and translate to the claimant. The judgment is being recorded, it will be transcribed and sent to the parties.
3. In an order that was made by Employment Judge Vowles on 26 April 2019, he identified three issues:
 - 3.1 Whether the claimant's employment has been terminated and if so, by whom and when;
 - 3.2 Whether the tribunal has jurisdiction to consider the claim for unpaid wages in view of the three-month time limit; and

- 3.3 If the tribunal has jurisdiction, whether the claim is well-founded and if so, what compensation should be awarded.
4. The claimant gave evidence in support of her own case and the effect of her evidence can be stated quite shortly.
5. The claimant commenced employment with the respondent on 9 June 2012. The contract under which she was employed (p36) provided that the hotel at which she worked was Guildford Central. Her job title was that of housekeeper. Clause 3 of the statement of terms and conditions of employment provided that:
- “The company reserves the right to require you to work at other locations, either temporarily or permanently from time to time. You will not normally be required to work outside the United Kingdom.”*
6. In relation to hours of work, the contract provided that:
- “The company reserves the right to increase or decrease your normal hours of work from time to time.”*
7. Under the heading “Times of Work”, it stated that:
- “Your actual hours of work will be notified to you by your line manager from time to time and may vary from day to day and week to week.”*
8. Dealing with absences, the contract provided that:
- “If you are unable to attend work for any reason, you must notify your manager as soon as possible and before your scheduled start time on the day of absence”*
- And importantly, it says:
- “No payment is made for unauthorised absences and in appropriate circumstances, disciplinary action may be taken in accordance with the company’s disciplinary procedures.”*
9. The claimant describes her employment with the respondent in this way.
- “I have worked very hard for Premier Inn, sometimes working long hours when required. My Rooms have always been scored very highly and they have been some of the best in the hotel. I believe I am an honest, hardworking person.”*
10. Mr Timothy Costello, who was the manager at the Guildford Premier Inn at the relevant time, agrees with that. He refers to the claimant as committed and diligent.
11. The claimant describes how, in July 2017, after discussions with persons at Woking, she asked for a transfer from Guildford to Woking. This was agreed. The claimant wanted to transfer because she wanted to work more hours than were available at Guildford. However, after her transfer,

she found that not to be the case and found that she was working less hours at Woking.

12. The claimant explained that she needed to work more hours to meet her living expenses. The claimant says she contacted the supervisor at Guildford, and she says that she was only too pleased to have her back. The supervisor was called Camellia. This evidence from the claimant is contested by the respondent.
13. What the claimant says is that Camellia gave her work, and after a few days working, Mr Costello (the Hotel Manager) asked the claimant to come see him at 10 am. The claimant says she attended as requested and during the meeting that followed she was told her that he had enough staff at Guildford Hotel at that time and he sent her home, telling her that she would be contacted when she was required.
14. The claimant says that a second meeting took place a few days later when the claimant went back to meet Mr Costello enquiring about the availability of work and was told that there was no work available for her and that she was to wait at home.
15. The claimant's account of these two meetings taking place is contested by the respondent and Mr Costello.
16. What Mr Costello says is that he was approached by the claimant and she told him that she knew their housekeeper, called Cece, who worked at the Premier Inn in Woking; that Cece had offered her more hours and more money. Mr Costello says that he did not think that would be the case and told the claimant that. Mr Costello says that he knew the manager at Woking and was aware of the staffing profile and the size of that hotel in contrast to Guildford. It was a similar size and he did not believe that there could be more work available for the claimant at Woking than at Guildford. However, he says that claimant wanted to work there and so he agreed the transfer. The transfer involves the claimant's electronic file being sent to Woking. This meant that from the moment of transfer, the claimant's rota and her personnel HR details were no longer accessible to Mr Costello at Guildford.
17. An issue of dispute arose between the parties concerning whether the claimant informed Mr Costello that she had moved address in about June of 2017. Mr Costello says she did not, but had she done so, he would have actioned it because it is a simple task. The claimant says she placed a note on his desk informing him of the change of address.
18. The reason this becomes of interest is the fact that the respondent was to subsequently correspond with the claimant at the address on their system which was the old address and not new address. The claimant accepted that she never told the Woking Premier Inn of any change of address.
19. Mr Costello says that after about a week following the transfer, the claimant contacted him to ask if she could transfer back to Guildford because she was not getting any more hours or pay at Woking than she had been at Guildford. Mr Costello says that he told the claimant that she

could not transfer back because he had a full complement of staff, having already replaced the claimant.

20. There is a clear conflict between the claimant's account and the respondent's account.
21. The claimant accepted during the course of cross-examination that she wanted to transfer back to Guildford; and she "told her manager" at Woking that was what she was going to do. She does not say that she asked for a transfer, or that it was agreed, she says that she told her that is what she was going to do.
22. The claimant accepted that she contacted the housekeeper at the Guildford Premier Inn, Camellia. She claims that Camellia gave her some shifts. But when she spoke with the manager at Guildford, he told her that there was not any work available for her.
23. The accepted evidence was that the authority to hire and fire is vested in the manager (Mr Costello) and not the housekeeper (Camellia). The transfer of an employee from one hotel to another for the manager of one hotel to agree with the manager of another hotel. The claimant agrees that she was not transferred to Woking this way but was not transferred back.
24. Mr Costello made it clear that he never agreed to the claimant transferring back from Woking to Guildford and he says that he was never asked by the manager at Woking, to transfer the claimant back to Guildford. This evidence given by Mr Costello was not contested by the claimant.
25. The offer of employment and agreement to transfer can only come from the manager. The housekeeper cannot recruit or offer employment. The housekeeper can and does at times carry out a role in the recruitment process, by assessing potential recruits by giving them trial shifts, and then expressing a view to the manager on the applicant for employment, but it is the manager who interviews and decides whether to offer employment.
26. Talking about the relevant time that we are concerned with when the claimant wanted to transfer back to Guildford from Woking, Mr Costello said: *"I wouldn't have agreed to her return at the time because I had too many cleaners."* This chimes with what the claimant says Mr Costello told her. Mr Costello stated that there is little movement in staff, his hotel had 12 housekeepers, and in the course of a year, there might be two that move on to other work and must be replaced.
27. Mr Costello was adamant that he did not remember seeing the claimant at the end of August 2017 or September 2017 when the claimant is supposed to have requested a return to Guildford. He says that he was aware that the claimant's work at Woking had not turned out as she wanted because the claimant had stopped turning up for work at Woking. Mr Costello became aware of this from discussions with the Woking Hotel Manager at managers' meetings. Mr Costello was not surprised that the claimant had left because he knew that the claimant wanted more hours and so she would not stay somewhere where there were less hours

available. Mr Costello stated that he believed that if the claimant was not turning up for work it was because she must have found herself another job. Mr Costello stated, and the claimant did not disagree, that the claimant's name was never on any of the Guildford rotas after her transfer to Woking.

28. The claimant in her evidence agreed that only managers can agree to transfer from one hotel to another. She agreed what was said by Mr Costello about transferring her data from one hotel to another. She did not challenge the fact that her name never appeared on the rota at Guildford after her transfer to Woking and she agreed that Mr Costello never agreed to her transferring back to Guildford from Woking. The claimant explained that she never spoke to Mr Costello about her return to Guildford.
29. What the claimant said was: *"I do remember Tim said in the meeting there was not enough work for me because they had taken on two people."* The claimant believes however that that was not true.
30. The claimant did not receive the correspondence which was sent to her by the respondent in October 2017. Initially, making enquiries about her absence from work since 25 August, then requiring her to attend an investigation interview on 14 October, and then, following her failure to attend the investigation meeting, inviting her to attend a disciplinary hearing to face an allegation of gross misconduct on 20 October, and then subsequently on 22 October, a letter dismissing her from employment with the respondent. The dismissal letter read:

"I am writing to confirm my decision to dismiss you for gross misconduct. The reason for this is unauthorised absence. You were previously warned in letters that this may happen if further instances of misconduct occurred. Your last day of employment with the company is 23 August 2017 and you will be paid up to that date. You are not entitled to pay in lieu of notice and are also entitled to any outstanding holiday entitlement due."
31. The letter went on to explain that if the claimant had exceeded her holiday entitlement that there would be a deduction from her final pay.
32. The claimant in April 2018 approached the Citizens Advice Bureau and although she appears to have had no knowledge of it, a letter was written on her behalf of 9 April setting out a claim for unpaid wages. The claim was for holiday pay and unpaid wages going back to August 2017.
33. Section 13 (1) of the Employment Rights Act 1996 provides that-

"An employer shall not make a deduction from wages of a worker employed by him unless-

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."
34. Section 23 sets out the procedure for making complaints to the

employment tribunal. Subsections 2 and 3 deal with the time within such complaints have to be made. Section 27 sets out the meaning of wages.

35. Was the claimant's employment terminated, and if so, when and by whom? I am satisfied that in October 2017, the respondent wrote to the claimant informing her of her dismissal. I am also satisfied that the claimant did not see that letter at the time because she had moved address and the respondent did not have her current address. I am also satisfied that it was not until September 2018 that the claimant became aware of the fact that the respondent was saying that she had been dismissed.
36. It is possible that in fact the claimant knew prior to that date but there is no clear indication to me from the evidence that I have heard what it was that transpired between the respondent and the claimant or the claimant's representatives following a letter which was written by the Citizens Advice Bureau on 9 April. I am satisfied that the claimant was dismissed at the latest by September 2018 and for the purposes of my decision in this case, I need not be concerned with trying to be more precise than that.
37. The claimant complains that she is entitled to unpaid wages for the period from August 2017 until the presentation of her complaint which was on 5 July 2018. Section 23(2) of the Employment Rights Act says that:
- "Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-*
- (a) In the case of a complaint relating to a deduction by the employer the date of payment of the wages from which the deduction was made, or*
 - (b) In the case of a complaint relating to a payment received by the employer, the date when the payment was received."*
38. Subsection 3 reads that-
- "Where a complaint is brought under this section in respect of –*
- (a) a series of deductions or payments, or*
 - (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment to the same limit under section 21(1) but received by the employer on different dates,*
- the references in subsection (2) to the deduction on payment are to the last deduction or payment in the series or the last of the payments so received."*
39. The effect of those provisions is that where a complaint is made, as the claimant makes in this case where she says that she should have been paid her salary and was not paid over a period of time and there are a series of deductions, if the last of that series of deductions is within three months, then the complaint is in time. I am satisfied that the claimant's complaint has been presented in time and that the tribunal has the jurisdiction to consider her complaint.

40. Is the claim is well-founded, and if so, what compensation should be awarded?
41. The question as I see it in this case whether there were any sums lawfully due to the claimant which she had not been paid. Another way perhaps of putting the same point is has the claimant been able to show in the relevant period that she was ready and willing to work but was not provided with work by the employer and therefore entitled to payment of wages by the respondent.
42. The claimant, up until September 2017, wanted to work. The letter written in April 2018 was expressing again a desire to work for the respondent. However, in my view, it is clear that after about September 2017, the claimant was not ready, willing and able to work for the respondent.
43. The reason I come to that conclusion is because firstly clause 3 of the claimant's contract of employment deals with the claimant's place of work. It reserves the right on the employer to require the claimant to work at a location in the United Kingdom. The location which it had been agreed between the claimant and the respondent that that claimant would be required to work at was at Woking. The claimant did not have the ability to decide or determine where she worked. She could only transfer to Guildford if her managers transferred her to Guildford and in this case, they did not. The claimant stopped going to work at the hotel in Woking. She was not ready willing and able to work where she was required to work.
44. Clause 5 of the contract of employment provided that the claimant's actual hours of work will be notified to her by her line manager from time to time. They may vary from day to day or week to week. It was also made clear that there could be an increase or decrease of normal hours from time to time. It appears to have been the fact that the hours were decreasing rather than increasing that led to the claimant deciding not to attend work at Woking. Her own evidence was that she took herself away from Woking and went back to Guildford but when she got to Guildford, she was told that there was no work for her there. On the basis of the claimant's own evidence she was not offered work at Guildford. Her place of work was not changed by the respondent back to Guildford. Her own evidence shows that there was no transfer back to Guildford.
45. The claimant's contract also makes it clear that the claimant is not entitled to be paid for unauthorised absences and the claimant's absence according to the respondent after August 2017 was unauthorised. I am satisfied that on a proper construction of the claimant's own account about her absence after August 2017 that her absence was unauthorised because the claimant was required to work at Woking not at Guildford and she did not return to work at Woking at all after August 2017. She absented herself from Woking in the hope, which does not arise out of any contractual entitlement, that work would become available at Guildford.
46. It is important to bear in mind that Camellia had no actual or ostensible authority to employ the claimant. The claimant knew that because she accepted in her own evidence that the transfer is something that is done

by the managers and she knew that Camellia was not a manager. She had not approached the manager and she may well have been hoping that the manager would go along with the situation but she had been clearly told before the transfer that there would not be work available for her once her position was replaced and when she approached Mr Costello whether it was over the telephone or in person, it is not in dispute between the parties that it was clearly communicated to the claimant that there was not a position for her at Guildford. The claimant cannot say that by presenting herself at Guildford she was making herself ready and willing to work under her contract of employment. She was doing something expressly to the contrary.

47. For all those reasons, it seems to me that the claimant is not able to show that she was ready, willing and able to work in accordance with the terms of her contract of employment and therefore there was no unlawful deduction from wages because there were no sums lawfully due to the claimant and in those circumstances the claimant's complaint should be dismissed.
48. The correct date for the claimant's dismissal is in fact a date in September 2018 rather than a date around October 2017. There may be due to the claimant a sum in respect of holiday pay accruing in the period between August 2017 and September 2018.

Holiday Pay claim

49. Having heard further submissions from the parties I went on to decide as follows.
50. The claimant's claim form included the following passage:

"I now am asking for the following: the pay that I am owed for approximately 47 weeks since August 2017 until now 28 June 2018. I estimate that at £8.05 per hour (the rate I was most recently paid) this amounts to approximately £11,350. My holiday pay for the period would amount to a further £1,222. The company is also liable for corresponding employer contributions to my pension scheme for this period."
51. This passage makes clear that the claimant's complaint included a claim for holiday pay. On the basis of my findings of fact set out above, the claimant is entitled by virtue of regulation 14 of the Working Time Regulations to compensation related to entitlement to leave. Subsection 2 provides that where the proportion of leave taken by the worker is less than the proportion of leave year which has expired, his employer shall make him a payment in lieu of the leave in accordance with paragraph 3.
52. The effect of the provision is that the claimant on termination of his employment is entitled to pay in compensation for any entitlement to leave not taken. For the purposes of this judgment, that period is from 1 March until 5 July 2018. The claimant did not consider herself employed by the respondent after 5 July 2018.

53. The figure arrived at in consultation with the respondent's representative is that holiday pay in respect of the period mentioned is an amount in the sum of £450.80. The judgment is therefore that the claimant is entitled to an award in respect of £450.80 in relation to compensation for annual leave not taken.

Employment Judge Gumbiti-Zimuto

Date: 30 September 2019

Reasons sent to the parties on
8 October 2019

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For the Tribunal office

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