



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Miss E Tsoutsa

Charles Otter, Curzon House Hotel

Heard at: London Central Employment Tribunal

On: 2 March 2020

Before: Employment Judge Palca

Appearances

For the Claimant: In person

For the Respondent: In person

JUDGMENT

The claimant's claim for breach of contract fails.

The Claimant's claim for a payment in lieu of untaken holiday entitlement succeeds. The claimant is due £332.78, uplifted by 15% because of the respondent's failure to comply with the ACAS Code on Discipline and Grievance at Work.

The Respondent is therefore ordered to pay the claimant the sum of £382.70 forthwith.

REASONS

Parties

1. The Claimant worked as a receptionist for the respondent, beginning on 29 March 2019. On 20 July 2019 she began proceedings in the employment tribunal claiming unlawful deductions from wages, holiday pay, breach of contract (unpaid notice pay) and a breach by the respondent of its obligations to provide 11 hour breaks between shifts. The claimant withdrew her claims for unlawful deductions from wages and in relation to shift breaks. The tribunal was therefore only

concerned with determining whether the claimant was entitled to notice pay and holiday pay.

2. Both parties gave evidence orally. Neither had produced a witness statement.

Facts

3. The claimant worked as a receptionist for the respondent, which runs a hotel in Kensington, from 29 March 2019. She was contracted to work 37.5 hours per week, divided into 5 shifts, at £8.50 per hour. Her daily pay rate was therefore £63.75. The Claimant's contract of employment provided that she would report to the General Manager and would be entitled to 28 days' paid holiday per year (including bank holidays). It also contained the following termination provisions:

8.1 Either of us can terminate your employment in the first two years of continuous employment by giving two week's notice in writing....

8.3 Nothing in these terms and conditions prevents us from terminating your employment summarily without notice or payment in lieu in the event of gross misconduct or if you commit a serious breach of your obligations as an employee.

4. The respondent alleges that the claimant frequently arrived late for work, and took breaks at unreasonable times. The claimant denies this. The respondent produced no direct evidence on this, but stated that other staff, for example room attendants, had complained about the claimant's absences.
5. The hotel employed three full time receptionists, who generally worked out the shifts they were to work between them. The manager of the reception desk was Alexandra. The claimant was scheduled to work during the day shift on 5 and 6 June 2019.
6. On 3 June 2019 the claimant WhatsApp'ed Alexandra saying that she would like to swap her day shifts of 5 and 6 June for late shifts if it was possible. She gave no reason. Alexandra replied that she was sorry, she couldn't change as she had already changed shifts with the third receptionist. The Claimant replied "*OK, maybe you'll need to find someone for those two morning shifts as I really cannot come to work*". The claimant told the tribunal that she could not attend because her brother would be visiting from Greece and she needed the time to arrange for hospital appointments with him. However, she did not at the time give the respondent any reason for not attending.
7. The following day, 4 June, Alexandra replied "*Hello, as you know, this is not possible. You will need to come to work*". The claimant's response was "*If you are a good manager, then you will find a solution. I have tried to swap with you, but you didn't like it. I don't know what*

else can I do. Please find a solution ASAP". Alexandra replied "Call your Manager (the respondent) to tell him you don't come tomorrow" to which the claimant replied "That's great, I can tell him the truth that you are discriminating me. Thanks!". The respondent regarded this as a refusal by the claimant to come to work for the day shifts of 5 and 6 June 2019, and the tribunal found that this was a reasonable interpretation.

8. The respondent later telephoned the claimant and told her that she was being dismissed without notice. There was some dispute over when this had occurred. On balance, the tribunal concluded that this took place on 4 June 2019, because that day was the last day of the message exchange between the claimant and Alexandra, and because either that evening or early the following morning, the claimant returned her reception desk keys to the hotel.
9. The tribunal accepted the respondent's evidence that he terminated the claimant's contract because she had refused to work shifts she was due to work. He added that he could not continue to employ the claimant because her absences and latenesses were causing huge staff disruption.
10. The claimant was not paid notice or untaken holiday pay. She lodged a grievance and the response was that she was not entitled to any holiday pay.

Conclusion

11. The respondent argued that the claimant's serious breaches of her contract of employment entitled him to terminate her contract without notice and holiday pay. The claimant claims she was dismissed simply for asking to move her shifts, and claims 2 weeks' notice pay and holiday pay.
12. The employment tribunal found that the claimant had told the reception manager in effect that she would not attend for the day shifts on 5 and 6 June to which she had previously been allocated. This is a serious breach of contract, and of the claimant's obligations as an employee, namely to attend work for the shifts which had been allocated to her. The tribunal found that in those circumstances the respondent was entitled to terminate the claimant's contract summarily. The claimant's claim that she was wrongfully dismissed, and therefore entitled to notice pay, fails.
13. However, Regulations 13 and 13A of the Working Time Regulations 1998 still apply, whether or not there has been a breach of contract. They provide that, in the absence of an agreement to the contrary, a worker's leave year begins on the date their employment commences, Annual holiday entitlement is 5.6 weeks. Regulation 14 provides that where employment is terminated during the course of a leave year, a

worker is entitled to be compensated for the amount of leave due to her for the relevant proportion of her contract, less any leave already taken.

14. Having found that the claimant's employment was terminated on 4 June 2019, it follows that she had been employed by the respondent for 68 days. She was therefore entitled to have taken 5.22 days' holiday (365/68). She had not taken any holiday while employed, and is therefore entitled to be compensated fully. Total holiday pay due is therefore £332.78.
15. S207A of the Trade Union and Labour Relations (Consolidation) Act 1982 provides that if the respondent unreasonably fails to comply with the ACAS Code on Discipline and Grievance at Work, the tribunal has a discretion, if it thinks it just and equitable, to uplift an award made under the Working Time Regulations by up to 25%. Here, contrary to the Code, the respondent did not invite the claimant in for a formal meeting to discuss her grievance, nor did he offer her the right to appeal his decision. However, the grievance was considered and responded to, and the tribunal considers on balance that an appropriate uplift in these circumstances is 15%.
16. The respondent is therefore ordered to pay the claimant the amount due for untaken holiday entitlement, uplifted by 15%, making a total of £382.70. This sum should be paid forthwith.

Employment Judge Palca

02 March 2020

Judgment sent to the parties on:

03/03/2020

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For the Tribunal: