EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Bagwell**

Respondent: **Tower House Café (Sidmouth) Ltd**

Heard at: **Bristol (by video-VHS)** **On:** **17 December 2020**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Mr Tillott, solicitor

JUDGMENT having been sent to the parties on 13 January 2021 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a Claim Form dated 31 March 2020, the Claimant brought a complaint of unlawful deductions from wages.

2. The evidence

2.1 The Claimant gave evidence in support of her case and both Mr and Mrs Fraser gave evidence on behalf of the Respondent.

2.2 A hearing bundle was produced in two parts; relevant documentation between the parties (R1) and tribunal documentation (R2).

3. The issues

3.1 The Claimant alleged that she had a contract which entitled her to have been provided with work over 4 days per week and she claimed pay referrable to that alleged term on the basis that she had frequently been provided with fewer days and/or hours of work. The Respondent denied the exitance of such a term.

3.2 The primary issue which therefore fell to be determined was what the contractual terms between the parties were.

4. The facts

4.1 Factual findings were reached on a balance of probabilities on matters which were relevant to a resolution of the issues. Page numbers cited below are to pages within the hearing bundle R1 unless otherwise indicated.

4.2 The Respondent owns and runs a café which is situated within a 16th century lime kiln in Sidmouth's historic Connaught Gardens at the top of Jacob's Ladder. Its trade is somewhat seasonal and weather dependent. The café . Prior to 2017, Mr Fraser ran the business with a Ms Susan Sykes. Mr Fraser had originally worked for his father in the café. In August 2017, Mrs Justine Fraser took over running the business with her husband.

4.3 The Claimant has worked for the Respondent since 2001, initially as a waitress. Her employment is continuing.

4.4 The Claimant's original contract dated back to 2006 [1-3]; it specified a minimum 5 day week "*consisting of approximately 40 hrs*" together with additional hours if and/or as agreed.

4.5 The Claimant's case was that, on 5 April 2017, she asked if she could reduce her hours to 33 per week (4 days). She said that she asked Ms Sykes if that was possible and a contract variation to that effect was produced [4];

> "*I can confirm that, as from 5 April 2017, your hours of work will be four days, 9.45-6.00 pm. This represents a working week of 33 hours. As discussed, if mutually convenient then you may still do five days from time to time*".

4.6 Even before that change, the Respondent's case was that the Claimant's hours had varied considerably, depending upon the café's needs. By way of example, it demonstrated that she had only worked 2, 3 or 4 days in some weeks up to that point [71-2].

4.7 After the contractual variation, the Claimant's pattern of work remained extremely variable; some weeks she only worked for 1, 2 or 3 days ([52] & [68]). Some weeks, she did work 4 days [52] and, on others, she worked 5 or 6 days [53]. That remained the case through 2017 and 2018 [55]. Some of the hours worked in some of the weeks were also very short. Flexibility was frequently requested by the Claimant and often catered for by the Respondent (see, further, [9] and [13-4]).

4.8 As to start and finish times, although the contractual variation referred to hours of work between 9.45 and 6.00 pm, the Claimant stated in cross examination that those hours "*were quite irrelevant really*" compared to what she actually worked. She also said that she "*wasn't strict about the 33 hours but, when it was three short days, I became unhappy*".

4.9 In late 2018, the Respondent's case was that "*it was becoming clear that Jan was struggling with the amount of work she was doing*" (paragraph 5 of Mrs Fraser's witness statement). The issue was also reflected in some of their emails at the time and other documentation ([10-12] and [39]). Mrs Fraser said this in paragraph 6 of her witness statement;

"*Jan had a number of conversations with myself and the Manager, Gill McPhee about the number of hours and days she was working and asked if she could reduce her working week to 3 days.*"

The Claimant, however, denied that she made that request.

4.10 Having heard the evidence on that issue, I concluded that the documentation certainly reflected a drop off in the Claimant's hours of work. A 2, 3 or 4 day week became more typical [59], and that reflected the contemporary documents at the time which clearly reflected concerns about her continuing to work for 4 days. The conversation claimed by the Respondent probably had taken place.

4.11 In 2019, the Kitchen Porter's job became vacant in the café. The Claimant said that Mrs Fraser asked her to do it. Mrs Fraser said that the Claimant asked to do it. Either way, she certainly agreed to do it and received training for the role. She started in the job sometime around the middle of March.

4.12 Importantly, the Claimant accepted that she was told that it was 3 day per week role at the outset. She said that Mrs Fraser met her protestations (that she still wanted to work for 4 days per week) with the assertion that all staff were "*now on a three-day week*", which she did not challenge (page 1 of her witness statement).

4.13 The Claimant considered that the role was temporary, until the Frasers had appointed a new permanent Kitchen Porter. However, as time went by, she found that she liked the work and that she was happy with the hours. She told her supervisor, Mrs McPhee, that she did not want to go back to her old role and that was where she therefore stayed.

4.14 As a consequence, a pattern of work emerged which was even more regular than before; the diary entries showed that she worked between 2 and 4 days much more often than she had done previously, although there continued to be some flexibility and exceptions (see, for example, [15] and [17], the latter of which showed that working as many as 4 days was unusual and out of the ordinary).

4.15 In August 2019, the Frasers decided that it was time to refresh the contracts of employment across the workforce as a whole. Every employee was issued with a new contract on 13 August. In the Claimant's case, it was to have been for 16 hours per month [83]. The Claimant was then given one which referred to 32 hours per week [28], as the first draft had included a typographical error. The Respondent considered that that reflected what the Claimant had been working since March 2019 as a Kitchen Porter and, largely, since late 2018 in any event.

4.16 On 26 August, the Claimant rejected the contract [20]. She sought reliance upon her 2006 contract, as varied in April 2017. Various discussions followed and, on 15 November, the Respondent set out its position again [25]; it suggested that the Claimant's contract was outdated and did not reflect the reality and the changes which had occurred over time. Further, it asserted that the new contract reflected what the Claimant was doing as a Kitchen Porter, but that everybody in the café had to take a 'hit' when it was quiet and when fewer hours were required.

4.17 Nevertheless, on 16 January 2020, the Respondent issued her with a contract for 4 days per week [27] which specified a minimum working week of 32 hours [28], despite that not reflecting the reality of the situation according to Mrs Fraser. The Claimant refused to sign it unless she received compensation for the backpay which she considered that she was owed.

4.18 On 13 February, the Claimant issued a grievance [32] which was rejected a little while later [41-2]. The parties' positions then became more entrenched and this claim followed.

5. Legal framework

5.1 It was unlawful to make deductions from a worker's pay unless they were authorised by statute, by "*a relevant provision of the workers contract*" or the worker had given prior written consent to them. Section 13 (2) was important;

> "*In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised-*
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, all combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*"

5.2 Parties were free to vary the terms of the contract that they operated under. The IDS Brief on *Contracts of Employment*, at paragraph 9.12, contained useful guidance in that respect;

> "*Although the rule requiring agreement to changes in terms and conditions may appear to reflect sound notions of industrial relations practice and equity, the drawback is that its strict application may at times appear to ignore the fact that employment relationships evolve over time and it may be difficult to establish in retrospect what has and what has not been agreed. Where a variation of contract is shown to have been expressly agreed by employer and employee, it will clearly be enforceable. Just like the contract itself, an express variation may be made either orally or in writing. However, the question most likely to arise where an express agreement is contested is whether there is sufficient evidence of the agreement. Therefore, it is always preferable that the agreement should be committed to writing, as oral agreements are more likely to be contested at a later date. This does not mean that what is written down takes precedence over what has been said and done.*"

5.3 Even if express variation could not have been demonstrated, implied variation may have been possible by inference from the actions of the parties.

6. Conclusions

6.1 The Claimant's contract changed over time. In 2006, she had the benefit of one which required her to work for 5 days per week minimum [2]. In 2017, it was for 4 days per week, but that was not specified as a minimum [4].

6.2 In 2018, there was a further, express agreement for the Claimant to work 3 days per week. Even if that agreement had not been achieved expressly, which I found was the case, it could readily have been implied from the following circumstances;

- By and large, she actually worked an average of 3 days per week from August 2018 [58 and following], which she accepted in her evidence;
- She did not complain then. Whilst it was true that she alleged that she had complained in evidence, that did not feature in her witness statement or in any other documentation;
- She continued to work for 3 days per week in the Kitchen Porter role, having been told that it was a job which carried those hours;
- Again, she did not complain;
- She only complained when she was asked to sign a contract which reflected the reality;
- The Claimant herself accepted that features of her written contract were "*irrelevant really*" (the start and finish times [4]). It was only when she was working three *short* days in 2018 that she became unhappy. She certainly never worked the hours specified in the contract;

6.3 The best evidence of the contractual situation now was that which prevailed from March 2019; the Claimant working as a Kitchen Porter, largely for 3 days per week on hours reflected in the calendar. On that basis, the Claimant was not in a position to claim that she had been underpaid for her work and she had not suffered unlawful deductions from her wages.

Employment Judge Livesey

Date: 8 February 2021

Reasons sent to the parties: 17 February 2021

FOR THE TRIBUNAL OFFICE