



EMPLOYMENT TRIBUNALS

Claimant: Miss S Holland

Respondent: Lumina Investments Limited

Heard: By video On: 27 and 28 January 2021

Before: Employment Judge S Jenkins (sitting alone)

Representation:

Claimant: In person

Respondent: Mr M Tudgay (Consultant)

JUDGMENT having been sent to the parties on 1 February 2021, and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to deal with the Claimant's claims for automatic unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 ("ERA"), on the basis that the reason or principal reason for her dismissal was that she had made a protected disclosure; unauthorised deductions from wages; and for payment in respect of accrued but untaken holidays.
2. I heard evidence from the Claimant and a former colleague, Charlene Evans, on the Claimant's behalf, and from Mr Gurgiet Jaswal, Director, and Mr Mark Tudgay, Consultant, on behalf of the Respondent. I considered the documents in the bundle spanning 192 pages to which my attention was drawn, which was by no means all of them.

Issues and Law

3. The issues were set out in a Preliminary Hearing Summary sent to the parties following a hearing before Employment Judge Harfield on 1 May 2020. In addition to those I noted that there was one additional factual point for me to determine, which was when dismissal actually occurred in this case, there being a dispute between the parties about that.
4. The list of issues encapsulated most of the applicable law. However, in relation to the claim of unfair dismissal pursuant to Section 103A ERA, I was conscious of a number of points of guidance provided by the appeal cases. The first of these was that, bearing in mind that the Claimant only had a matter of three or four months of employment, she had the burden of proof to demonstrate and satisfy me that her dismissal was on the ground of having made a protected disclosure. The second was that I needed to be satisfied that there had been a disclosure of information which tended to show a relevant failure as set out in Section 43B(1) ERA, the case of Kilraine -v- The London Borough of Wandsworth [2018] ICR 1850 confirming that, and confirming that what is disclosed must have sufficient factual content to be capable of tending to show one of the matters listed in Section 43B. I also noted that I did not need to be satisfied that what the Claimant had said was factually correct, only that she reasonably believed that it was. Finally, I needed to be satisfied that the Claimant had that reasonable belief both that what she said tended to show one of the relevant matters, and that what she said was in the public interest, and I would need to assess that by applying an objective standard to her individual circumstances.

Findings

5. I first make the overarching comment that making findings in this case was not a straightforward matter. The parties were very much at odds over factual matters, to the extent that, as far as they were concerned, if their particular version was to be accepted it effectively meant that the other party was lying; indeed both parties in their submissions referenced that the other had fabricated documents. However difficult making findings of fact may be, in the context of disputed evidence it was my role to assess the evidence and to make findings of fact. In doing that I needed to be satisfied on a balance of probabilities that matters had taken place in one manner or another. That balance meant that I had to consider whether it was more likely than not that things had happened in the way asserted. In other words, I had to be satisfied that there was a 51% chance that things had happened in the way described, but in doing that, if my view was as fine as that, it meant that equally there was a 49% chance that they had not taken place in the way they had described.

6. In this case the contrast between the evidence on both sides was stark. There were two witnesses on each side; a main witness, if I can describe them as that, on each side, the Claimant on her side and Mr Jaswal on the Respondent's side, with the other two witnesses, Ms Evans on the Claimant's side and Mr Tudgay on the Respondent's side, for different reasons being quite clearly in the camps of the particular party and therefore not in my view to be viewed as being particularly independent.
7. I therefore looked for support for my conclusions from the documentary evidence in the bundle, being mindful of the contention, principally on the Claimant's side but also on the Respondent's side, that certain documents had been fabricated, or at least had not been sent to the other party; from whether the evidence put before me was in line with the way matters had been put at the relevant times and in the claim form and the response; and from the overall plausibility of the cases advanced with reference to the events that I could be clear had in fact happened. That led me broadly to prefer the evidence on the Claimant's side on a balance of probabilities. On that basis my findings relevant to the issues in this case were as follows.
8. The Respondent operates the Ty Newydd Country Hotel. Mr Jaswal is a Director of the company and to all intents and purposes either the owner of the hotel or, if not the owner, the public face of the owner; the precise ownership was not put before me in evidence. The Claimant, having previously worked at the hotel, returned to work there in September 2019. This was at the instigation of the then General Manager, Charlene Evans; indeed it appears that the Claimant being appointed was one of the conditions imposed by Ms Evans in relation to the rescinding of her notice at that time. There was a difference in view regarding the Claimant's title; the Claimant contended that she had been appointed as the Assistant Manager whereas the Respondent contended she had been appointed as the Function Manager. The precise job title was not directly relevant to the issues, but it appeared to me that, regardless of the particular job title allocated, the Claimant effectively operated as Ms Evans's second-in-command.
9. Within the bundle and covered in Mr Jaswal's evidence were references to various matters of concern regarding the Claimant's performance, largely suggesting failures to respond by the Claimant to booking enquiries or a lack of information from the Claimant internally about bookings with diary entries recording, "see Sam". The Claimant disputed such matters and asserted that the entries had been fabricated. I noted that the references to "see Sam" in paper documents did seem to have been written in a different handwriting to that which recorded the rest of the entry.
10. Regardless of whether the issues of under-performance had occurred however, I was satisfied that they had not been raised with the Claimant at

any time. Mr Jaswal's evidence was that he had raised his concerns with Ms Evans expecting her to raise them with the Claimant, but I did not consider that the documentary evidence supported that, and Ms Evans's evidence was that no concerns were raised with her about the Claimant, and I accepted that on balance.

11. Mr Jaswal's evidence was that he met the Claimant at the hotel on 20 December 2019 and confirmed to her that her employment was due to end due to her not successfully completing her probation period. He indicated that he handed her a letter confirming that she was being given one week's notice, which she was expected to work. The letter concluded by confirming that the Claimant would be paid up to 27 December and that payment would include payment for four days' outstanding holiday.
12. The Claimant denied ever receiving that letter and pointed out that she was not in work on that day, a point supported by handwritten timesheets. The circumstantial evidence was that the Claimant attended at the hotel after 27 December, as she was signed in and out by other staff members albeit not on every occasion, and attended meetings, including with Mr Jaswal, in January. On balance I therefore preferred the Claimant's evidence and considered that the Claimant's employment had not ended on 27 December 2019.
13. The core of the Claimant's unfair dismissal claim was that she had made various protected disclosures to Mr Jaswal during fortnightly meetings that she and Ms Evans had had with him during the latter months of 2019 and again in a meeting on 3 January 2020. The concerns she said she raised was set out in an email she sent to the Respondent and the Tribunal on 15 May 2020, pursuant to an Order made by Judge Harfield, and were reiterated by her in her evidence.
14. The main source of the Claimant's concerns related to correspondence arriving at the hotel, for example from the electricity provider, recording a different company name to that of the Respondent. She was also concerned about a comment made by a visiting Environmental Health Officer, again referring to a different company and the name of a different contact person unknown to her or Ms Evans. She also referred to the fact that the hotel's premises licence recorded a different name, and that letters received from the local council regarding rates were in the name of a different company. When I asked the Claimant how she raised these points with Mr Jaswal in the meetings, she confirmed that she had asked him why different company names were appearing and that he had replied that everything was above board and that there was nothing to be concerned about. I asked the Claimant if she had put to Mr Jaswal that things were not in fact above board, and she confirmed that she had not at that point, only saying that she felt that various things did not "sit right".

15. From the end of December, the hotel closed for a month for some renovations and only a skeleton staff attended. It appears from the timesheets that this included the Claimant and Ms Evans on most days; in the Claimant's case a timesheet records her being at work on 28 December and on 2, 3, 4 and 6 January, although only five out of the ten arrival and departure times on those days were countersigned.
16. It was not in dispute that Mr Jaswal attended the hotel on 3 January 2020. Mr Jaswal, in his evidence, noted that he viewed recently decorated rooms with Ms Evans although he acknowledged that the Claimant was also present. Mr Jaswal confirmed that he then met with Ms Evans alone and informed her that she was to be made redundant and gave her a letter to that effect. Mr Jaswal then collected keys to the hotel from the Claimant who was at reception.
17. Mr Jaswal's explanation for the Claimant's attendance was that he had not thought anything of it and had assumed that she had just driven Ms Evans to the hotel. The Claimant's evidence supported by Ms Evans's evidence however was rather different. The evidence about the viewing of rooms coincided with Mr Jaswal's evidence, but the Claimant and Ms Evans both confirmed that they subsequently met with Mr Jaswal in the office at the hotel. They confirmed that during this meeting they raised the concerns that they had with Mr Jaswal about the various company names, together also with concerns over problems with safety doors and with the fact that the fire alarm was not working.
18. The Claimant also raised concerns about the boiler not working, although she accepted in evidence that that did not involve a safety issue, and she also confirmed that she and Ms Evans brought up concerns about problems with staff wages and the allocation of tips. The Claimant confirmed that she and Ms Evans were going to look into matters and take them further, and in fact Ms Evans in her evidence confirmed that they had already made an anonymous complaint to the Local Authority in December about the different company names.
19. On balance I again accepted the evidence about the events of 3 January on the Claimant's side. The points made by the Claimant and Ms Evans in their evidence were consistent with each other and were broadly consistent with the Claimant's pleaded case in her claim form in February 2020, whereas the Respondent had not provided any detail in its response. The Claimant's attendance and the fact that it was not commented upon by Mr Jaswal at any time also supported, in my view, her contention that her employment had not ended in December.

20. A meeting for all staff was arranged for 4 January 2020. The Claimant's evidence was that she had contacted staff to attend, having been asked to do so by Mr Jaswal, whereas Mr Jaswal said that he contacted staff. There was no evidence to support this either way, but on balance, in view of the content of the Claimant's claim form and the fact that she was in attendance at the premises on 3 January, my conclusion was that the Claimant had done that.
21. The meeting took place on 4 January, during which Mr and Mrs Tudgay were introduced as consultants to help run the hotel following the redundancy of Ms Evans. The Claimant was present at this meeting, although Mr Jaswal indicated he did not notice her. Later that evening it transpired that Mr Jaswal had to return to London to deal with a family emergency and then he effectively left Mr Tudgay in charge of the hotel.
22. There was evidence in the bundle of various text messages between the Claimant and Mr Tudgay on 5 January. These included a message from Mr Tudgay saying he had done the staff rota and that he had the Claimant down to work on 6th then not the 7th or 8th but again from 9th to 12th January. There was also a message from Mr Tudgay indicating that he and his wife were leading the hotel and asked if the Claimant as Assistant Manager could resolve staff confusion over various matters.
23. On Mr Tudgay's chain of messages, that was followed by a message from him saying that he had just spoken to Mr Jaswal who had confirmed that the Claimant did not actually work at the hotel any more, and asking what she was playing at and what she was trying to achieve. There was also in the bundle a text exchange between Mr Tudgay and Mr Jaswal on 5 January which seemed to support that exchange. The message chain in the bundle from the Claimant however did not contain that message, and she asserted that the Respondent's record of the text message referring to her prior dismissal had been fabricated. She also attempted to show me the chain of emails on her phone over the video link, but her phone could not be seen to that end.
24. On balance I again preferred the Claimant's version of events, principally due to the content of a recorded telephone conversation between the Claimant and Mr Tudgay on 6 January. That recording was done in two stages and Mr Tudgay contended that the section missing put the transcribed recording into a different context, although he did not specify quite how that would have occurred. Mr Tudgay confirmed however that the transcription of what was recorded was accurate.
25. In the transcription Mr Tudgay is noted as saying "*unfortunately they no longer want to continue your contract*" and, in response to a further question from the Claimant, "*they are going to terminate your contract due to your*

performance and behaviour over the last few days.” Later on, Mr Tudgay is recorded as having said, *“All I know is that a decision has been made unfortunately and they want me to follow it up in writing.”* A later recorded exchange recorded that Mr Tudgay had said that her dismissal was not personal, to which the Claimant had replied that it was personal, maybe not from Mr Tudgay’s point of view, but from theirs, which I took to be Mr Jaswal. To that Mr Tudgay responded, *“From their point of view it may well be, but I personally haven’t got a grudge against you.”*

26. There was no reference within this conversation to the Respondent’s position that the Claimant’s employment had been terminated previously in December, nor was there any reference by Mr Tudgay to the message that had purportedly been sent the day before regarding the knowledge on both sides’ parts of the fact of the prior termination. I also noted that Mr Tudgay in his evidence before me accepted that the Claimant had been present at the hotel on 6 January, where he had also been working to accommodate a funeral, and that they had not spoken individually on that day, but that he had not wished to embarrass the Claimant in front of others regarding the apparent text exchange which had confirmed the prior termination of the Claimant’s employment.
27. In my view these points supported my findings that the Claimant’s employment had not been ended in December. As I have mentioned, Mr Tudgay explained his lack of reference to the point that the Claimant’s employment had previously ended on 6 January as not wanting to embarrass her, and his explanation for not raising it in the conversation with her on the evening of 6 January was that it was simply not a conversation he wanted to have. However, I did not feel that it was credible that, had the Claimant’s employment ended in December, and had Mr Tudgay been informed of that by Mr Jaswal on 5 January, that he would not then have raised that point with the Claimant on 6 January when he saw her at the hotel, and would not have asked her what she was doing there, and also that he would not have referred to the prior dismissal, and indeed his text message, during the conversation on 6 January. Therefore, on balance I found that the Claimant’s employment was ended in that conversation on 6 January and not before.
28. The Claimant submitted an appeal letter to Mr Jaswal, it was not dated, but a covering letter in the bundle confirmed that it had been sent on 9 January. It referred to her dismissal during the call on 6 January. Mr Jaswal, whilst confirming that he received the letter, also confirmed that he had not responded to it. Again, in my view, had the position been that the Claimant was mistaken and that her employment had in fact ended in December then Mr Jaswal would have responded to her and would have confirmed that.

29. In terms of my other findings relevant to the issues; first, with regard to holidays, the Claimant's case was that she had not taken holidays at any time and the only days off she had taken were her rest days. The Respondent contended that the Claimant had taken three days off in September and that the balance of four days was paid to her in December, due to the fact the Claimant had been paid for the entire month when her employment had, as the Respondent contended, ended on 27 December. I noted however that in the ET3 Response the Respondent had referred to the Claimant having taken one day's holiday in September, two days in October and one day in December, which was inconsistent with its stated position and the documentary evidence in the bundle. I also noted the timesheets in the bundle and looked at the two complete months the Claimant worked, October and November, noting that she worked for 23 days in October and 24 days in November, which appeared, to my mind, to be consistent with her position that the only days off she had taken were her rest days. I therefore concluded, on balance, that the Claimant had not taken any holidays during the period of her employment.
30. With regard to wages, the Claimant contended in her Schedule of Loss that she was due payment in respect of 99.5 hours. However, in her evidence before me she accepted that she was paid a salary and not by reference to the hours worked and was not paid any overtime. She also confirmed that she had been paid in full for the month of December, and therefore that the only period for which she was not paid was the period of six days at the start of January 2020.
31. In terms of the Claimant's alternative work following the termination of her employment, she confirmed that she had started new employment on 20 January 2020, therefore precisely two weeks following the termination of her employment with the Respondent as I found. She is still employed in that employment, and in that works 37.5 hours per week at what she described as the National Minimum Wage, which, due to her age, I could see was the National Living Wage. That meant that, up to 31 March 2020, she was receiving £8.21 per hour, which equated to a gross annual salary of £16,009.50, and from 1 April 2020 she was receiving £8.72 per hour, which equated to a gross annual salary of £17,004.00. I was also conscious that the National Living Wage rate is due to increase from 1 April 2021 to £8.91 per hour, which will equate to a gross annual salary of £17,374.50. That contrasted with the Claimant's salary with the Respondent, which was £18,000 per year leading to payment of £1,500 per month gross, and, by reference to the Claimant's pay slip, £1,275.92 per month net.

Conclusions

32. Applying my findings to the issues identified at the outset, my conclusions were as follows.
33. Dealing first with the claims for payments, I concluded in my findings that the Claimant had not taken any holidays, she was due seven days' accrued but untaken holiday, and, at the gross rate of £69.23 per day, that led to a sum of £484.61 gross, which the Respondent is ordered to pay.
34. With regard to the claim for unauthorised deductions of wages, as I had found, the Claimant was not paid for the six days in January, and at a gross rate of £69.23 per day, that led to a gross sum of £415.38, and again the Respondent is ordered to pay that sum. In both cases they are gross payments so will need to be paid subject to the deduction of tax.
35. Turning to the unfair dismissal claim, the first issue for me to address was whether the Claimant had made a protected disclosure or disclosures. I was not, in fact, satisfied that the Claimant had made protected disclosures in the period prior to January. In her evidence before me the Claimant confirmed that she had asked Mr Jaswal why matters were as they were, particularly with regard to the names of the various companies, and had said to him that something did not sit right with her. I did not consider however that those statements involved sufficient factual content referable to a breach of legal obligation or a criminal offence to be capable of demonstrating a reasonable belief on the Claimant's part that what she was doing was asserting that one of the relevant matters in Section 43B ERA was being raised.
36. I was not satisfied overall that the Claimant's concerns over the various different companies were reasonably, or could reasonably have been, believed by her to amount to a criminal offence as she subsequently asserted. As noted above, I needed to view the Claimant's position here by reference to an objective standard but relevant to her particular personal circumstances, and on that basis I did not consider that she could reasonably have believed that what she was asserting amounted to fraud. At most, her comments demonstrated a sense of misgiving or unease on her part, but I did not consider that she had raised any issue that demonstrated that she felt that a criminal offence had been committed.
37. However, I did consider that the matters of health and safety, in particular fire safety relating to problems with fire doors and alarms, were raised by the Claimant and did amount to protected disclosures. These were specifically raised by the Claimant in the meeting on 3 January 2020, and did in my view provide sufficient factual content to demonstrate that the Claimant was disclosing to Mr Jaswal, her employer, her reasonable belief

that the health and safety of an individual had been or was being or was likely to be damaged. In my view it was self-evident that anyone raising concerns about fire safety would be raising those concerns in the public interest, and I was therefore satisfied that a protected disclosure in relation to health and safety had been made by the Claimant on 3 January 2020.

38. I then needed to consider whether the reason for dismissal of the Claimant had been, or the principal reason had been, that protected disclosure, and I was satisfied that it was. As I have noted, I was not satisfied that dismissal had taken place in December, or that concerns over the Claimant's performance had been the reason for her dismissal. There was no indication before me that the Claimant would have been dismissed if she had not raised the concerns that she had, and had not the Respondent been concerned about that. I noted in the context of Mr Tudgay's evidence that he was concerned at the constant text messages that the Claimant had raised with him on 5 January, and it could be viewed that some concerns were raised about the approach taken by the Claimant in that regard which may also have been a reason for the termination of her employment and may have contributed to it, but I was satisfied that the principal reason was the protected disclosure I have outlined. In that regard I noted Mr Tudgay's comments, in the conversation of 6 January, that the reason for dismissing the Claimant was due to her performance and behaviour over the last few days, and also his comment that, from their position, i.e. Mr Jaswal's position, the decision to dismiss may have been personal. I therefore concluded that the Claimant's claim of unfair dismissal pursuant to Section 103A ERA was made out.
39. In terms of the compensation to be awarded in respect of that unfair dismissal there was no basic award to order, bearing in mind that the Claimant had not been employed for at least two years.
40. With regard to the compensatory award, I noted that the Claimant's net weekly pay referable to the pay slip for December in the bundle was £294.45, she was without income during the two weeks immediately following her dismissal, and therefore in respect of that two-week period compensation of £588.90 arises. The Claimant then started work on 20 January and in respect of the period of ten weeks between that day and 31 March there was a weekly differential of £32.55 between the net sum that she would have received from the Respondent, as I have mentioned £294.45, and what I calculated as the net sum she would have been receiving from her new employer at that time. The Claimant did not put any direct written evidence before me of that, but my best estimate of that was a net weekly sum of £261.90 which left, as I have said, a net differential for the period between 20 January 2020 and 31 March 2020 of £32.55, which in respect of that period meant a sum of compensation of £325.50.

41. There remained a differential between the earnings that the Claimant was receiving from her new employer and those that she would have received from the Respondent after that, and in respect of the period April 2020 through to the end of March 2021 the differential on a net salary basis, this time looking at the Claimant's net weekly earning during this period as £278.16, was £16.29 per week. Applying that to a period of 52 weeks led to a further sum of compensation of £847.08.
42. Finally, even with the increase in April 2021 there will remain a differential and some loss to the Claimant during this period. I calculated the Claimant's net earnings from April 2021 onwards will be £284.22 leaving an ongoing differential of £10.23 which in relation to the period of 52 weeks through to the end of March 2022 will lead to a further sum of £531.96. I did not consider it appropriate to consider any further period, as I considered it likely, or certainly feasible, that the National Living Wage increase by then will mean that her gross pay, and consequently her net pay, will be at least equal to the pay that she was receiving from the Respondent at the time of her dismissal.
43. Adding those various sums together, covering the first two-week period of unemployment, then the period 1 to 31 March 2020, then to 31 March 2021, and finally to 31 March 2022, led to a total compensatory award, together with an addition of £500 for loss of statutory rights, of £2,793.44 from which tax does not need to be deducted.
44. I did not consider that there was any evidence to justify any reduction of compensation on the "Polkey" principle, i.e. on the basis that a fair dismissal would have happened regardless of any procedural deficiencies, or on the basis of contributory conduct.

Employment Judge S Jenkins
Dated: 9 March 2021

REASONS SENT TO THE PARTIES ON 10 March 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche