EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4104264/2020 (P)

Held at Edinburgh on 12 and 13 January 2021

Employment Judge: W A Meiklejohn

Mrs J Rosiczka	**Claimant** **Represented by:** **Ms A Kozlowska - friend** **Interpreter – Ms M Karwacka**
Mrs A Tadysz t/a Cappadocia	**Respondent** **In person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant the sum of **TWO HUNDRED AND FIFTY POUNDS AND FIFTY SIX PENCE (£250.56)**;

(b) The respondent is ordered to pay to the claimant holiday pay in the sum of **NINE HUNDRED AND TWO POUNDS AND TWO PENCE (£902.02)**;

(c) The claim for unlawful deduction of wages fails and is dismissed; and

(d) In respect that the respondent has failed to give the claimant a written statement of employment particulars, the respondent is ordered to pay to the claimant the sum of **TWO HUNDRED AND FIFTY POUNDS AND FIFTY SIX PENCE (£250.56)**.

REASONS

1. This case came before me for a final hearing to determine both liability and remedy. Ms Kozlowska represented the claimant. The respondent appeared in person. Ms Karwacka acted as Polish interpreter for both parties and for the respondent's witnesses.

Nature of claims

2. The claimant brought complaints of unfair dismissal, holiday pay and unlawful deduction of wages. The unlawful deduction complaint related to non-payment of furlough pay. The respondent accepted that she had dismissed the claimant but denied that the dismissal had been unfair. The respondent resisted the claimant's other complaints.

Evidence

3. I heard evidence from the respondent and, on her behalf, from her employees Mr P Tadysz and Ms S Krasa. I also heard evidence from the claimant. I was provided with a number of documents by Ms Kozlowska on behalf of the claimant.

Findings in fact

4. The respondent operates the café/bistro business of Cappadocia in Bathgate. She is a sole trader. The business was established on 20 October 2016.

5. The claimant was employed by the respondent from 1 August 2017 as a kitchen assistant. She described herself as a chef in her ET1 claim form. She did

undertake food preparation and other duties from time to time but I was satisfied that kitchen assistant was a fair description of her role.

6. The claimant worked 16 hours per week spread across three or four days, according to a rota. She was paid £542.88 per month. From time to time she would work additional hours, but I did not have any further details of these. The respondent did not provide the claimant with a statement of her initial employment particulars, nor a statement of any changes to those particulars.

7. The claimant had one or two periods of absence from work due to health issues. The first of these was between October 2017 and January 2018 when she was absent due to a surgical procedure. These absences did not interrupt her continuity of employment.

8. At the start of her employment the respondent told the claimant that her holiday entitlement was 16 hours (ie one week) per year. In fact the respondent allowed the claimant 32 hours (ie two weeks) of holiday in 2018 and 2019. The claimant accepted that she had been paid in respect of these holidays.

9. On 21 March 2020 the respondent had to close her business to comply with regulations introduced by the Scottish Government because of the coronavirus pandemic. She might have been able to continue to operate on a takeaway basis but decided that it made more sense to close.

10. The respondent telephoned the claimant on 21 March 2020 to tell her that the business was having to close. She spoke to her other employees, Mr Tadysz and Ms Krasa, and told them the same thing. The respondent's position was that she told the claimant that she would receive furlough pay only if her (the respondent's) application to the Government was successful. This was a reference to the Coronavirus Job Retention Scheme ("CJRS").

11. The evidence of Mr Tadysz and Ms Krasa supported the respondent. Both said they were told that they would be paid (i.e. receive furlough pay representing 80% of their normal pay) only if the respondent's application for furlough pay was

successful. When I asked the claimant about this, ie whether she had been told the same about furlough pay, the claimant said that it was "*difficult to answer that question"* and suggested that Mr Tadysz and Ms Krasa were being untruthful because they still worked for the respondent. However, I was satisfied, on the balance of probability, that the respondent did tell the claimant that she would get furlough pay if the respondent's application under the CJRS was successful.

12. The respondent, through her accountant, submitted an application under the CJRS but this was unsuccessful. No documentation was provided to support this (whereas the respondent did provide documentation in respect of a second, successful CJRS application she made in November 2020). Both Mr Tadysz and Ms Krasa said that they had been told that the respondent's first application for furlough pay had been unsuccessful. Mr Tadysz said that he had seen the document which stated this.

13. I was satisfied that the claimant was told by the respondent on or around 21 March 2020 that the business had to close and that she would be paid thereafter (i.e. while the business remained closed) only if the respondent's application for furlough pay was successful. I was also satisfied that the claimant was told by the respondent at the same time that she would be taken back if the business was able to reopen.

14. Around 28 April 2020 the claimant contacted the respondent to ask about her furlough pay. The respondent told the claimant that she (the respondent) "*would have to wait and see".*

15. On 21 May 2020 the respondent telephoned the claimant and told her that she was planning to reopen the business and asked the claimant if she intended to return. The claimant told the respondent that her circumstances had changed and that she was not sure if she would be able to go back to work. The respondent told the claimant that she (the respondent) would give her (the claimant) two days to think about it.

16. There was a conflict in the evidence as to whether, during their telephone conversation on 21 May 2020, the claimant told the respondent that her father had suffered a stroke. My view was that the claimant probably had done so as this was the change of circumstances, i.e. the claimant's need to provide care for the father.

17. There was then contact between the respondent and the claimant on 23 May 2020 but there was a further conflict in the evidence as to how this took place. The respondent said that she had telephoned the claimant and told her that *"further co-operation would not make much sense".* The respondent said that the claimant had ignored her question about going back to work so she (the respondent) decided to end the relationship. The respondent said that she had given the claimant two weeks' notice of termination of employment but had not paid her in respect of that notice period.

18. The claimant's evidence was that the contact on 23 May 2020 had been by text message from the respondent. This was the first in a series of text messages exchanged between the claimant and the respondent, which were produced by the claimant. These were in Polish but were translated by Ms Karwacka. The first message read as follows –

"*Because you have not called me back my understanding is that you don't want to go back to work. Thanks for working for me and good luck in your new job."*

19. I formed the view that the respondent's reference to the claimant's "*new job"* was her interpretation of the change of circumstances, indicating that the respondent did not know that the claimant intended to become her father's carer. The point was not material as both parties agreed that the respondent had dismissed the claimant on 23 May 2020.

20. I preferred the evidence of the claimant that the dismissal had been in terms of the respondent's text message rather than by telephone. It made no sense that the respondent should start her text message "*Because you have not called me back…."* if she and the claimant had spoken on the telephone.

21. There followed the exchange of text messages between the claimant and the respondent. In the course of this exchange, the claimant asked about her furlough pay and asserted that she was entitled to 28 days' annual holiday. The respondent's answer on furlough pay was that her accountant had *"cancelled the papers from HMRC due to the dismissal"* which was a strange choice of words. Her answer on holiday pay was to the effect that the claimant would only have been entitled to 28 days if she had worked 40 hours per week and her actual entitlement was based on the 16 hours per week that she worked.

22. The claimant's view of her holiday entitlement was coloured by the statement on her payslips "*Annual leave remaining -28 days".* The respondent's explanation for this was that it might have been her accountant's error. It seemed to me more likely that this was something generated by the payroll software used by the respondent's accountant.

23. Since her dismissal the claimant had become her father's full time carer and was in receipt of carer's allowance in respect of this. She had not sought alternative employment. She indicated that her requirement to care for her father was likely to continue for the rest of his life.

Comments on evidence

24. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have focussed on those parts of the evidence which had the closest bearing to the issues I had to decide.

25. I considered that all of the witnesses attempted to tell the truth as they believed it to be. Where there were inconsistencies between their versions of events, this was more a matter of recollection and perception rather than credibility.

Submissions - respondent

26. In respect of the unfair dismissal claim, the respondent said that she had contacted the claimant and had offered her the opportunity to return to work. She believed that the claimant had ignored her by failing to get back to her and that was why she had dismissed the claimant. The respondent denied that she had not followed correct procedure. She had given the claimant time to consider her offer to return but the claimant *"ignored me".* The respondent accepted that no right of appeal had been offered.

27. In respect of the holiday pay claim, the respondent said that she had set out the arrangements when she employed the claimant (and her other staff). She could not afford more. Everyone had been happy with that. The respondent did however accept that it was not possible to contract out of the minimum holiday entitlement prescribed by law.

28. In respect of unlawful deduction from wages – the furlough pay claim – the respondent said that she had treated all of her employees in the same way. They would receive furlough pay only if her claim under the CJRS was successful. They had agreed to their employment continuing without pay (and without work) unless her claim was accepted, which it was not. She attributed this to her former accountant.

Submissions – claimant

29. Ms Kozlowska challenged the respondent's reason for dismissal. She queried why the claimant had been given only two days to answer the respondent's offer to return to work. There had been no need for a decision within two days as the respondent's business had not actually reopened until September 2020. She argued that the two weeks' notice given by the respondent should have been in writing.

30. In respect of holiday pay, Ms Kozlowska said the that claimant was seeking the difference between the minimum holiday entitlement of 5.6 weeks and the 2 weeks for which she had been paid.

31. In respect of unlawful deduction from wages, Ms Kozlowska argued that no evidence had been presented that the respondent's application under the CJRS had been declined. This was not credible when her second application in November 2020 had been accepted. Ms Kozlowska urged me not to accept the evidence of the respondent and her witnesses about the first application being unsuccessful.

Applicable law

32. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 ("ERA") –

"(1) An employee has the right not to be unfairly dismissed by his employer."

33. Whether or not a dismissal is fair is covered in section 98 ERA which provides as follows –

"(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,

(c) is that the employee was redundant,

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under an enactment.

(3)….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

34. Entitlement to holidays and holiday pay is covered by (a) the terms of the contract of employment and (b) the provisions found in Regulations 13-17 of the Working Time Regulations 1998 ("WTR"). I will not set these out in full but summarise them as follows –

- The minimum holiday entitlement of a worker is 5.6 weeks in each leave year.

- In the absence of provision in a relevant agreement (usually the contract of employment) the leave year runs from the date of commencement of employment.

- Where employment ends during a leave year, the worker is entitled to the proportion of leave accrued to the termination date less the amount of leave actually taken.

- Payment in lieu of leave entitlement can only be made on termination of employment.

35. The right not to suffer an unlawful deduction of wages is found in section 13 ERA –

"(1) 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….

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated….as a deduction made by the employer from the worker's wages on that occasion."

Discussion and decision

36. I deal first with the claim of unfair dismissal. The reason for dismissal in this case was because the claimant failed to respond to the respondent's offer to return to work. I did not consider that this fell under any of the potentially fair reasons for dismissal set out in section 98(2) ERA, i.e. it did not relate to capability, conduct, redundancy or statutory contravention. However I found that it was *"some other substantial reason"* for the purpose of section 98(1) ERA.

37. As at 21 May 2020 the respondent was planning to reopen her business. She approached the claimant and asked if she intended to return. The claimant did not immediately agree. She said her circumstances had changed and that she was not sure if she would be able to return to work. The respondent gave the claimant two days to think about it. When the respondent had not heard from the claimant, she dismissed her in terms of the text message sent on 23 May 2020.

The respondent needed to know for the purpose of planning to reopen her business whether the claimant was going to return. The lack of response from the claimant was a substantial reason for the dismissal.

38. That took me to section 98(4) ERA. Had the respondent acted reasonably or unreasonably in treating this as a sufficient reason to dismiss the claimant? I decided that question in favour of the claimant for these reasons –

(a) The respondent did not tell the claimant that her employment was at risk if she did not respond within two days.

(b) The respondent made no enquiry into the claimant's changed circumstances and how these affected her ability to return to work.

(c) The respondent did not allow the claimant to make any representations about her dismissal.

(d) No right of appeal was offered.

39. I found that the respondent's dismissal of the claimant was unfair because of the lack of fair procedure. I recognised that a lack of fair procedure is not conclusive evidence of unfairness, but rather one of the factors to be considered when assessing whether the employer acted reasonably or unreasonably. However, in this case, the procedural failings were significant and were in my view sufficient to render the dismissal unfair.

40. Turning to the claim for holiday pay, I found that this was bound to succeed as the respondent accepted that it was not possible to contract out of the minimum entitlement prescribed by law. In terms of the WTR, that was 5.6 weeks. The claimant had been allowed only 2 weeks' paid holiday in each of her two complete years of service.

41. Moving on to the unlawful deduction of wages claim, I considered that I had to decide what wages were *"properly payable"* by the respondent in the period

between the closure of the business on 21 March 2020 and the termination of the claimant's employment on 23 May 2020.

42. The respondent had no choice but to close her business when required to do so by order of the Scottish Government. None of her employees was dismissed on 21 March 2020 and I was satisfied that their contracts of employment continued. I was also satisfied that those contracts were varied by mutual agreement to the effect that while the respondent's business remained closed (a) no work would be provided and (b) there would be no pay unless the respondent's claim under the CJRS was successful.

43. In theory, the respondent could have told the claimant and her other employees that they were being placed on furlough and would receive 80% of their pay while on furlough. In those circumstances the risk of her claim under the CJRS being unsuccessful would have been borne by the respondent. However, that was not what happened.

44. Accordingly, I found that no wages had been "*properly payable"* by the respondent to the claimant between 21 March 2020 and 23 May 2020 and the claim of unlawful deduction of wages did not succeed.

Remedy

45. In relation to the unfair dismissal claim, the claimant was entitled to a basic award under section 119 ERA. As an employee with two years' service at a time when she was aged between 22 and 41 (meaning that the appropriate multiplier was 1) the basic award was two weeks' pay. Based on her monthly pay of £542.88 her weekly pay was £125.28 (being £542.88 multiplied by 12 then divided by 52). The basic award was therefore £250.56.

46. Turning to the matter of whether there should be a compensatory award I reminded myself that, in terms of section 123(1) ERA, *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the*

complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

47. I also reminded myself of the case of ***Polkey v A E Dayton Services Ltd 1987 IRLR 503*** – what was the likelihood that the claimant would have still been dismissed if the respondent had followed a fair procedure? I decided that this was a case where dismissal was inevitable if the claimant was not in a position to return to work for the respondent. The change of circumstances for the claimant was that she became her father's full time carer, and so could not return to work. That meant that the likelihood of dismissal, had a fair procedure been followed, was 100%.

48. Accordingly I decided that it would not be just and equitable to make a compensatory award in this case. Any future loss of earnings suffered by the claimant was not *"attributable to action taken by the employer"* but was because the claimant, by reason of her changed circumstances, was not able to return to work for the respondent.

49. In relation to holiday pay, I dealt with this on the basis of the information with which I had been provided. I did not have details of when the claimant had actually taken holidays but it was common ground that she had been paid for 32 hours, being 2 weeks based on her normal hours of work, in each of her two complete years of service. She was seeking to be paid for the difference between the 2 weeks of paid holiday in each of those years which she had received and the 5.6 weeks to which she was entitled.

50. This claim was well founded and I decided to award the claimant a total of 7.2 weeks' holiday pay (being 5.6 minus 2 equals 3.6, multiplied by 2). Based on the claimant's weekly pay of £125.28, this equates to £902.02.

51. As the claimant's claims had succeeded in part, and has she had not been given a statement of terms and conditions of employment as required under Part 1 ERA, section 38 of the Employment Act 2002 ("EA") was engaged. This provides, so far as relevant, as follows –

"*(3) If in the case of proceedings to which this section applies –*

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996….

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead….

(5) The duty under subsection….(3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

52. The claims which succeeded in this case were ones of a type to which section 38 EA applies. That meant that I had to increase the award unless there were exceptional circumstances. The respondent operated a small business with limited resources and, while she spoke some English, was certainly not fluent. While I had some sympathy with the respondent in terms of being able to understand all of her legal obligations as an employer, ignorance of the law was not in my view an exceptional circumstance.

53. The "*minimum amount"* was two weeks' pay and the *"higher amount"* was four weeks' pay. While there had been no compliance with the relevant sections of ERA, I felt that it would not be just and equitable to award the higher amount in this case. In so deciding, I took into account the respondent's limited resources and that English was not her native language. I therefore decided to award the lower amount.

54. Based on the claimant's weekly pay of £125.28, two weeks' pay equals £250.56 and I decided that the award to the claimant under section 38 EA should be in that amount.

55. For the sake of completeness I should add that in the course of her submissions Ms Kozlowska invited me to find that the claimant was entitled to two weeks' notice pay. I have not done so because the claimant did not bring a complaint relating to notice pay in her ET1 claim form.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 14 January 2021
Entered in register: 21 January 2021
and copied to parties

I confirm that this is my Judgment in the case of Rosiczka v Mrs A Tadysz t/a Cappadocia and that I have signed the Judgment by electronic signature.