EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102768/2020 (A)

Held on 15 April 2021

Employment Judge N M Hosie

Mrs A Duncan	**Claimant** **In Person**
Midbrae Inn Limited	**Respondent** **Represented by** **Ms A Manson,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(i) the claim under s.23 of the Employment Rights Act 1996 is well-founded and the respondent shall pay to the claimant the sum of Ten Thousand, Nine Hundred and Twenty Pounds (£10,920), subject to the appropriate deductions for income and national insurance as unlawful deductions from wages;

(ii) the respondent shall pay to the claimant the sum of One Thousand and Forty-One Pounds and Fifty-One Pence (£1,041.51) subject to the appropriate deductions for income tax and national insurance, in respect of unpaid holiday pay; and

(iii) the claimant was unfairly dismissed by the respondent and the respondent shall pay to the claimant the sum of Two Thousand Pounds (£2,000).

REASONS

Introduction

1. The claimant brought complaints unfair dismissal, breach of contract, for unpaid holiday pay and unlawful deductions from wages. The claim was denied in its entirety by the respondent.

The Evidence

2. On behalf of the respondent I heard evidence from:-

- Catherine Davies, Director and Joint Owner of the respondent Company and a "working Manager" at the Midbrae Inn ("the Inn");
- Andrea Manson, Director and Joint Owner of the respondent Company.

I then heard evidence from the claimant.

3. A bundle of documentary productions was lodged by the claimant ("P").

The facts

4. Having heard the evidence and considered the documentary productions, I was able to make the following material findings in fact. In addition to being a Director of the respondent Company, Andrea Manson is also a Director and Owner of the St. Magnus Bay Hotel in Shetland ("the Hotel").

5. The claimant started her employment at the Hotel in July 2017. She was appointed Manager. She was guaranteed a 40 hour week and a rate of pay of £12.50 per hour. She was not provided with a written statement of her terms and conditions of employment. Prior to starting work at the Hotel the claimant had been in full-time employment as a Manager at Tesco.

Move to the Midbrae Inn

6. As the Hotel was quiet Ms Manson and Ms Davies suggested to the claimant that she go to work at the Midbrae Inn ("the Inn") to cover for a sickness absence. This was accepted by the claimant and she started to work there in mid-November 2017. Although she was not provided with a written statement of her terms and conditions of employment it was agreed that her rate of pay would continue to be £12.50 per hour and that she would be guaranteed a 40-hour week. As Ms Davies was the "working Manager" at the Inn I was not persuaded as the claimant alleged, that she was to be the Manager there and that her rate of pay and guaranteed hours remained the same.

7. Although the move was only meant to be a temporary one, the claimant continued to work continuously at the Inn until her employment ended in April 2020 and although her hours varied, due to business demands, by and large she average 40 hours per week.

Change in the claimant's terms and conditions of employment

8. In September 2018 Ms Davies advised the claimant that due to a "dramatic drop in trade" she was only able to offer her "a barmaid job at barmaid's rates on zero hours". Although the claimant complained and maintained that she would still be paid at the rate of £12.50 per hour. The claimant was unhappy at this reduction and sent the following message to Ms Manson (P.27):-

"*Wages reduction of hourly rate by £3.50 per hour since September 2018 and no discussion regarding this, nor any payslips and P60 as I have asked on many occasions.*"

9. By 2020 the claimant's hours of work were becoming less and less and in mid-January the claimant advised Ms Davies that if she didn't get more work she would have to look for work elsewhere.

10. She was able to get work on a temporary basis for a few days at the end of January at the Douglas Arms in Lerwick. As no work was being offered at the Inn the claimant also worked at the Douglas Arms for a few nights at the end of February and March. The claimant was then "furloughed" by the owner of the Douglas Arms due to the "lockdown" due to the Covid-19 Pandemic.

11. Around 21 March 2020 the claimant had sent an e-mail to Ms Davies inquiring if she was eligible for furlough from the Inn (P.33). However, she received no response.

Dismissal

12. The claimant had made it clear to Ms Davies and Ms Manson sometime around the time of January 2020 that she would not return to work at the Inn until her hourly rate of £12.50 was reinstated.

13. On or about 2 April 2020 Alan Carter, the Payroll Administrator, for the Hotel and the Inn asked Ms Davies if she had any work for the claimant. Ms Davies advised him that she did not and that she was "working at another pub". In light of this, Mr Carter advised Ms Davies that he would arrange to send the claimant her P45. On 2 April 2020, therefore, Mr Carter sent an e-mail to the claimant with her P45 attached (P.95). He said this in his e-mail:-

"*Please find attached your P45 from Mid Brae (usual password) as I'm told you've now moved on.*"

14. A copy of the P45 was included with the documentary productions (P.200). The leaving date for the P45 was 29 February 2020.

15. The claimant questioned why she had received a P45 and on or about 23 April she received the following message from Ms Davies (P.34):-

"*Hi Angela*

I have totally f'd up, I phoned in the hours on 1.4.20 Alan asked if you had no hours. I said no you were working somewhere else so he said in that case you would probably need your P45 and I said probably would, I wasn't thinking straight. I didn't do it out of badness. I just assumed you would need it for Anna Hepburn, I've never done the wages. I depend on other people for that, I didn't mean you were dismissed. If Alan hadn't asked it wouldn't ever have crossed my mind, with all that's going on I'm sorry my head's up my backside. It's a very trying time at the moment. The future's very bleak for everyone with small businesses and upsetting you and anybody else was not my intention, so please accept my apology for the upset I've caused."

Note for NMH

(This paragraph needs to be inserted above at the place where I say that the claimant had made it clear that she was not prepared to return to work at the Inn until such time as her hourly rate of £12.50 was reinstated.)

16. On 19 February 2020 at 15:33 the claimant sent the following e-mail to Ms Davies and Ms Manson:-

"*Ref: Reduction in hourly rate and withholding payslips and P60 (dating from September 2018 to present)*

I refer to my facebook message to you both dated October and December 2019. I have discussed this with you both on numerous occasions and neither of you have responded to my comments nor made any effort to resolve this issue only the promise from Diane to speak to Andrea.

I worked at St. Magnus Bay at first for Andrea herself and then transferred over to Mid Brae Inn with both of you as joint equal employers and both jointly

liable to ensure that wages, tax, NI and pensions the same as those I received as a Manager at the St. Magnus Bay. There was no discussion of a change in my terms of employment i.e. reduction in pay when I moved over. My hourly rate was £12.50 and was paid to me at the same hourly rate in Mid Brae Inn from November 2017 until September 2018, which should have continued to the present.

In September 2018 my wages were dropped to £9ph and my "status" dropped to "bar staff", without my knowledge or consent or even discussion. Between September 2018 and October 2019 you withheld my payslips and my P60 which prevented me from noticing the reduction earlier. I first noticed the change when I requested my payslips and P60 direct from Alan Carter at the Accountants, copies of which were e-mailed to me and backdated to 2017.

I write to advise that I am giving you both 7 days' notice to come to an arrangement to repay monies owed.

If I have not heard from you by 25 February 2020 I will be left with no alternative, but to take my case forward, as advised, through ACAS and the Employment Tribunal route. Although this is not the route I would wish to follow non-payment would leave me with no option.

I look forward to hearing from you at your earliest convenience."

Discussion and decision

Unlawful deduction from wages

17. Although the claimant was not provided with a written statement of her terms and conditions of employment at the Inn (as she should have been within two months of the start of employment there) it was agreed that she would have the same rate of pay (£12.50 per hour) and guaranteed hours (40) as she enjoyed when she was employed at the Hotel.

18. While there was a reduction in business at the Inn Ms Davies simply announced a change in these contractual terms without any discussion with the claimant, she reduced her hourly rate of pay and told her there was no guarantee of a 40 hour week. That was a breach of contract.

19. Faced with the claimant refusing to agree the change the respondent could have terminated the existing contract with due notice and offered new terms and conditions. There would be no breach of contract in these circumstances, the reason for the dismissal will be "some other substantial one" and it will be fair if the respondent had acted reasonably. However, that did not happen in the present case.

20. A breach of contract complaint cannot be brought in an Employment Tribunal as the Tribunal's jurisdiction only extends to the claims arising on termination of employment. However, where the variation relates to pay the employee may be able to bring an unlawful deduction from wages claim. This was confirmed by the House of Lords in ***Rigby v. Ferodo Ltd*** [1998] ICR 29.

21. That was the nature of the claim in the present case. The claimant sought to rely on their agreed terms and conditions of employment. She claimed the shortfall in her contractual wages.

Affirmation

22. The claimant, of course, continued to accept her wages at the reduced rate of pay for some considerable period of time. This gave rise to the issue of whether by continuing to do so she had accepted the variation and affirmed the contract.

23. However, it was clear that the claimant had only continued to work under protest. She made it quite clear that she was not agreeing to the reduction in wages. She complained regularly about the reduction in wages before foisted

upon her unilaterally and requested that she be paid at the rate of £12.50 per hour in terms of her contract.

24. It is well established, in case, that provided an employee has made it clear that he or she is not agreeing to the reduction in wages, he or she cannot, by continuing to work, be bound by an agreement to accept a reduction. He or she can stand on the contract of employment and bring a claim for unlawful deduction from wages (***Arthur H Wilton Ltd v. Peebles & Ors*** EAT/835/93, for example).

25. I was satisfied, therefore, that there had been an unlawful deduction from the claimant's wages and I shall make a declaration to that effect.

26. The calculation of the sum due was more problematical given the period of time involved and the uncertainty as to the effective date of termination of the claimant's employment. Helpfully, with the benefit of legal advice, the claimant had sent to the claimant by e-mail on 14 April 2021 a catalyst Schedule of Loss.

27. So far as the effective date of termination was concerned the claimant did not work for the respondent from the end of February 2020 and had made it clear that she would not be returning until her hourly rate of pay was made at the agreed rate. However, in my view, had employment still subsisted. It had not been brought to an end by the respondent and the claimant still considered herself to be an employee. For example, on 21 March 2020 she sent a message to Ms Davies in which she said: "*I am still on your books*" (P.33).

28. Her employment was not brought to an end until she received the P45 on 2 April 2020 (P.200). It gave the "leaving date" as 29 February 2020 but the claimant's employment had not been brought to an end on that date.

29. I arrived at the view, therefore, that the effective date of termination of the claimant's employment was 2 April 2020 when the P45 was issued.

30. I decided, therefore, that there had been an unlawful deduction from the claimant's wages at the rate of £3.50 per hour for a 40 hour week for the 78 week period from October 2018 to 2 April 2020 and that the claim for unlawful deduction from wages in the sum of **£10,920** as detailed in the Schedule of Loss was well-founded. Accordingly, I shall issue a Judgment to that effect. As this is a gross figure it will be subject to the appropriate deductions for income tax and national insurance contributions.

Holiday pay

31. The respondent paid holiday pay monthly by way of an amount which represented 10% of monthly salary. It follows from my finding that the claimant was not paid wages in full that there was an underpayment of holiday pay.

32. I was satisfied that the calculation in the Schedule of Loss, based on the following narrative was well-founded:-

"*Holiday pay should have been paid on 40 hours per week over a 52 week period. My average working days per week were predominantly 3 or 4 therefore my yearly hours of holiday would be substantially increased to 224* hours @ £12.50*. Based on the recommendations on the Gov.UK site (Holiday Entitlement) I should have received £2,800.*"

33. The claimant received in that period by way of holiday pay the sum of £1758.49. There is a shortfall, therefore, of **£1041.51**. This sum requires to be paid to the claimant by the respondent under deduction of the appropriate amounts for income tax and national insurance.

Unfair dismissal

34. As I recorded above, I was satisfied, that in all the circumstances, that the claimant was dismissed when she received her P45 on 2 April 2020. This

meant that in terms of s.98(1) of the Employment Rights Act of the 1996 ("the 1996 Act") the respondent was required to show the reason for the dismissal and that it was an admissible reason in terms of s.98(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. The respondent failed to establish the reason for the claimant's dismissal. None was advanced at the hearing. Accordingly, the claimant was unfairly dismissed.

35. In any event, even if the respondent established that the claimant was dismissed for an admissible reason the Tribunal would still require to be satisfied that the respondent had acted reasonably in treating that reason for dismissing the claimant as a reason under s.98(4) of the 1996 Act.

36. There was no consultation whatsoever with the claimant prior to her dismissal. She was presented with a *fait accompli*. Those were not the actings of a reasonable employer. In those circumstances the dismissal would still have been unfair.

Remedy

37. It was not disputed, with reference to the Schedule of Loss that the claimant's gross weekly basic pay was £500 and her net pay was £410.

Basic award

38. As the claimant had been employed by the respondent for two complete years at the date of her dismissal and was 55 years of age. She is entitled to a basic award of **£1500** (3 x £500).

Compensatory award

39. Unlike the basic award which is calculated by reference to a statutory formula the compensatory award is intended to reflect the actual losses that the employee suffers as a consequence of being unfairly dismissed. However,

the award requires to be "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" (s.123(1) of the 1996 Act).

40. At the time of the claimant's dismissal she had started to work for another employer and she had made it clear prior to that that she was not prepared to return to work for the respondent until such time as her hourly rate of pay was increased.

41. The circumstances surrounding the claimant's dismissal were unusual. Unique in my experience and I arrived at the view that in all the circumstances that it would not be just and equitable to make any award of compensation. As I recorded above, it would have been open to the respondent to dismiss the claimant with notice and offer her new terms and conditions of employment had they been minded to do so. However, the claimant had made it clear she was not prepared to work for the respondent for less than £12.50 per hour.

Loss of statutory rights

42. However, I am satisfied that the claim for so-called "loss of statutory rights" is well-founded. In all the circumstances I decided that an award of **£400** would be appropriate.

Employment Judge **Nick Hosie**

Date of Judgement **3 May 2021**

Date sent to parties **4 May 2021**