



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112049/2019 (V)

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Held via Cloud Video Platform (CVP) on 16 October 2020

Employment Judge R Gall

10 **Mrs M Pavlova**

**Claimant  
In Person**

15 **BS64 Ltd (in Voluntary Liquidation)**

**Respondent  
No appearance and  
No representation**

20 **D53 Ltd**

**Second Respondent  
No appearance and  
No representation**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 1 The claims of discrimination brought are unsuccessful.

2 The claimant is due money in respect of leave accrued but untaken at time of termination of her employment. The sum due is £267.11 in respect of 32.52 hours.

30 3 The claimant worked 8 hours while attending training, those hours being unpaid. She is awarded £65.68 by way of payment, deduction of that amount being unauthorised.

4 The claimant is awarded the sum of £295.56 in respect of time worked but unpaid due to incorrect recording of her hours of work.

35 5 The claimant is awarded the sum of £20 in respect of tips due to her relative to her final month of employment.

These sums are to be paid by the second respondents as they are liabilities which have passed to them in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

5 Oral reasons were given at the hearing. This is a record of what was said at conclusion of the hearing, after adjournment. For the avoidance of doubt, these are not full reasons under Rule 62. Under that Rule, as confirmed when this Judgment was delivered orally, if written reasons are sought a request may be made by any party at the hearing itself or by written request presented within 14 days of the sending of the written record of the decision. No request was made at the hearing.

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### REASONS

1. In this case the claimant maintains that she was discriminated against, the protected characteristics being her nationality and her age. She also seeks payment of different elements of money said to be due to her.
2. The claimant is Bulgarian. She was born on 7 October 1972. That means she was 47 during the time she worked with the respondents.
3. She was engaged on a zero hours contract, the understanding being that she would work 16 hours per week. She could refuse to work on any particular day but did not do that.
4. The claimant's working relationship was with Hello Bishopbriggs Ltd initially. That then changed with the company providing her with work being BS64 Ltd. That was the company behind the trading name of "Cook and Indi" during the vast majority of the time of the claimant's time of working.
5. The same people were involved in ownership and management of "Hello" and BS64 Ltd. Those same people were also involved with a company named D53 Ltd. This was confirmed by Mr Roy who appeared at a Preliminary Hearing in this case in March 2020. That entity, from the information from Mr Roy, took over the lease of the premises from which the claimant had worked, the equipment used, the staff and traded under the same name. This occurred the day after BS64 ceased trading. Bs64 is now in liquidation. D53 Ltd was

brought into the claim as the second respondent. No defence has been submitted by D53 Limited.

6. There were about 10 employees of the first respondents during the claimant's time working there. She was a waitress. The understanding the claimant had with BS64 was that she was to work 16 hours per week, although she was on a zero hours contract. She always worked on a shift with one other waitress. The vast bulk of the time she worked with Alexandra, who is Polish. On occasion she worked with Susannah, who is Scottish. Susannah was over 40 at the time.
7. The claimant says that discrimination has taken place in that she was treated unfavourably because of her nationality and also because of her age.
8. In relation to her nationality, the claimant says the discriminatory conduct was:-
- (i) She was sent home early if work was quiet. It was always her who was sent home. Alexandra/Susannah were never sent home early.
  - (ii) She did not receive breaks. Alexandra was given time to go for a smoking break during shifts. The claimant did not smoke.
  - (iii) She did not get time to have lunch. Alexandra/Susannah had about 15 minutes for lunch.
  - (iv) She was told not to speak with kitchen staff. Alexandra could chat to them.
  - (v) She was, after a time, asked to have lunch apart from the kitchen staff. Alexandra/Susannah could sit with the kitchen staff for lunch.
9. The manager was a man named Mohammed. There had at one point in May been a different manager for about 2 weeks. He was Polish. The situation for the claimant had remained the same during his time as manager. The Polish manager and Alexandra had spoken Polish on occasion. Mohammed then returned. Things stayed the same for the claimant.

10. The claimant raised the situation with Mohammed on a few occasions. She did not mention any view on her part that the reason for the treatment she said she experienced was her nationality. She emailed head office. No reference was made by her to nationality lying behind the treatment. She did not receive a reply.
11. The claimant was upset by the way she was treated. When asked to leave early for the day due to lack of work, she sometimes cried.
12. Alexandra and Susannah are believed by the claimant to have been employees who worked around 22 hours or more each week. They had both been employed for some 4 or 5 years.
13. The claimant accepted that it was quite possible that the reason she was selected to leave early was as she was on a zero hours contract and so would not be paid if not at work. That contrasted with the situation of Alexandra and Susannah who would be paid for their contracted hours.
14. The claimant accepted that she received time for lunch the days when she worked till 5pm.
15. Other than what the claimant stated as to different treatment there was nothing which she could say which pointed to her nationality being the reason for her treatment.
16. In relation to age, the claimant said that her basis of claim came from one element. At a time when she was being sent home early due to insufficient work, a notice was put on the door seeking staff. As a result, four 16 year olds were taken on. This was in May 2019.
17. The claimant confirmed that she did not lose hours as a result of these additional people being taken on. She confirmed that the young people taken on might well work evenings and weekends.
18. In addition to discrimination, the claimant said that she was due holiday pay, money in respect of tips for one month, half an hour's wages for time spent on compulsory training each week for which she had not been paid and also

money in respect of underpayment which arose when Mohammed entered her start time in the diary as 1.30 when she had started work at 1pm.

19. I regarded the claim of holiday pay as being well founded. The claimant had leave accrued but untaken at time of termination of her employment of 32.52 hours. That results in payment due to her of £267.11.
20. The claimant was due to receive tips for the last month of her employment. The sum she received monthly was of the order of £20. She is awarded £20 in that regard.
21. The claimant was required to attend training, unpaid, during her employment for half an hour each week. That results in a payment due to her of £65.68.
22. The claimant was wrongly paid on some days of work. She appeared for work at 1pm but was entered in the diary by Mohammed as having appeared at 1.30. Payment was then made on the basis of her working time starting at 1.30. She is due £ 295.56 under this head of claim.
23. I am satisfied on what I read had been said at the earlier PH that there was a transfer to D53 Limited such that the TUPE Regulations apply (Transfer of Undertakings (Protection of Employment) Regulations 2006). Liability for sums awarded passes to the transferee, the second respondents.
24. In relation to discrimination, I accepted that the claimant had not been particularly well treated in some areas. The events she described, especially being asked to sit apart from the kitchen staff when eating lunch and when this did not happen with Alexandra, must have been upsetting.
25. I could not however find anything to lead me to the view that the burden of proof in relation to there having been discriminatory conduct had shifted to the respondents. There was unfavourable treatment and a protected characteristic. Something more is needed. It was not present. I appreciate that others were treated differently. In many instances, however there was a credible reason for that. The claimant was the logical person to be asked to stop work early. She was on a zero hours contract. Others were employees. In relation to breaks, others smoked. That was the reason they had a break

when the claimant did not. It was unfair, but not in my view connected to the claimant's nationality. Time for lunch was permitted if the claimant worked till 5pm. Alexandra and Susannah worked till 5pm each day when they worked.

- 5 26. The two unexplained elements were the claimant being asked to sit apart at lunch and the claimant being asked not to speak to kitchen staff. Those situations continued when the Polish manager was in place for 2 weeks. If nationality was the reason for these decisions the Polish manager would also have had to have been motivated by that factor. There was no reason suggested as to why that would be so.
- 10 27. The claimant had not raised nationality as being the reason for treatment she experienced when talking to Mohammed about the issues or when emailing head office to complain.
- 15 28. In relation to age, the claimant was not treated unfavourably. The young people taken on did not "take hours" from her. It was inconsistent at surface level in that the claimant was being sent home early while additional employees were being taken on. The claimant confirmed that the young people worked evenings and weekends as she understood it, when the respondents were busier. There was no reduction in her working time attributable to the hiring of those young people. She did not suggest that she could have worked evenings or weekends and was prevented from doing that due to younger workers being taken on. She had not worked evenings or weekends in the past.
- 20 29. I did not regard what happened as being unfavourable treatment because of age. In any event I did not regard there as being loss. The claimant did not describe any impact to her to justify an injury to feelings award.
- 25 30. The claims of discrimination are therefore unsuccessful.
31. In terms of the provisions which applied at the time relative to those on zero hours contracts there was no requirement to issue terms and conditions. That changed in April this year.

32. Although the claimant has not received her P45, I have no power to make any Order in that regard.

5 Employment Judge: Robert Gall  
Date of Judgment: 19 October 2020  
Entered in register: 28 October 2020  
and copied to parties