



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4108031/2020**

**Final Hearing Held by CVP on Thursday 3 March 2022 at 10.00am**

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**Employment Judge Russell Bradley**

**Maria Reina Lopez**

**Claimant  
Represented by  
Ms L Campbell  
Solicitor**

**Occasions Leisure Limited**

**Respondent  
Not present or represented**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

15 The Judgment of the Tribunal is that: -

1. The claimant was unfairly dismissed
2. The respondent is ordered to pay to the claimant a basic award of NINE HUNDRED AND FORTY FIVE POUNDS (£945.00)
3. The respondent is ordered to pay to the claimant a compensatory award  
20 of FOUR THOUSAND FIVE HUNDRED AND SIXTY EIGHT POUNDS  
AND SEVENTY TWO PENCE (£4,568.72)
4. The dismissal of the claimant was a breach of her contract of employment
5. The respondent is ordered to pay to the claimant EIGHT HUNDRED AND  
FIFTY FIVE POUNDS AND NINE PENCE (£855.09) as damages to  
25 compensate her for that breach

6. The claim for accrued and untaken holiday pay succeeds; the respondent is ordered to pay to the claimant the sum of FIVE HUNDRED AND SEVENTY POUNDS AND SIXTY PENCE (£570.60)
7. The claim in terms of section 38 of the Employment Act 2002 succeeds;  
5 the respondent is ordered to pay the claimant the sum of ONE THOUSAND TWO HUNDRED AND SIXTY POUNDS (£1,260.00).

## REASONS

### 10 Introduction

1. On 30 December 2020 the claimant presented an ET1 in which she made a claim of unfair dismissal and for; a statutory redundancy payment; notice pay; holiday pay and in respect of an alleged failure to provide her with a written statement of her terms and conditions of employment. All were  
15 maintained in this hearing except for a redundancy payment.
2. A question previously arose as to whether the ET1 had been presented in time. My judgment with reasons sent to the parties on 8 December 2021 was that it had. I directed that this hearing should be fixed.
3. The claimant was represented by Ms L Campbell who has done so  
20 throughout the claim and before it. Prior to the hearing she lodged an inventory of productions comprising 51 pages.
4. No ET3 was lodged. The respondent was neither present nor represented at this hearing.
5. I heard evidence from the claimant with the assistance of a translator, from  
25 her first language, Spanish.
6. I indicated that I would reserve my judgment which would follow in writing with reasons.
7. The issues are clear from the discussion, decision and remedies noted below.

**Findings in Fact**

8. Based on the ET1 and various papers within the hearing bundle I found the following facts proved.
9. The claimant is Maria Reina.
- 5 10. On 2 September 2018 and as per an unsigned contract of employment the claimant began employment with N & C Pubs Limited (**pages 39 to 45**). That contract set out that; she was employed as a Kitchen Assistant; her place of employment was 172 At The Caird, 172 Nethergate, Dundee; her normal working hours were 37.5 hours per week; her continuous service began on 12 March 2017; the holiday year ran from 1 April to 31 March; she was entitled to 28 days paid leave per year and; she was entitled to pay in lieu of any unused holiday entitlement.
- 10 11. By letter dated 28 July 2019 the respondent wrote to the claimant (**page 38**). It advised of the transfer of her employment to the respondent on 2 June 2019. It referred to the Transfer of Undertakings Protection of Employment (TUPE) Regulations 2006. It confirmed that a new contract of employment would be issued by the respondent. It is headed "*Occasions Leisure Ltd 172 at the Caird*". The letter refers to prior employment with Park Leisure Ltd. The inference is that the claimant's employer immediately prior to the transfer was Park Leisure Ltd. The further inference is that in her time in this employment the claimant had been employed by at least three entities.
- 15 12. While working for the respondent the claimant's hours varied. On average she worked 35 hours per week.
- 20 13. On or about 17 March 2020 the claimant was furloughed. **Pages 32 to 37** show payments to the claimant by the respondent of furlough pay.
- 25 14. In that time, the claimant had several conversations with Martin Tippet. The claimant regarded him as "*the boss*". He is the sole director of the respondent. In that time, the respondent told the claimant that in order to be paid and notwithstanding the fact that she was furloughed, she required to return to work. The claimant was threatened that if she did not return to
- 30

work, she would not be paid and would be dismissed. The dialogue between the claimant and Mr Tippett was in the main by text message.

15. On or about 22 August 2020 the respondent dismissed the claimant. It did so by email. It did so without giving any period of notice or payment in lieu of it. It made no payment to her in lieu of accrued and untaken holidays. The claimant's effective date of termination was 22 August 2020. By that date, she was 39 years of age. In the holiday year from 1 April to 22 August 2020 the claimant took no paid leave.
16. At no time between 28 July 2019 and 22 August 2020 did the respondent issue to the claimant a statement of terms and conditions of employment.
17. By 22 August 2020, the claimant was paid at the rate of £9.00 per hour.
18. The claimant was unemployed until about 29 September 2020. Around that time, she began employment with Fox Taverns Ltd. Since then she has worked for them at The Barrelman in Dundee. In the period between November 2020 and April 2021 the claimant was furloughed by Fox Taverns Ltd. Between 10 November 2020 and 27 April 2021 she received furlough pay at the rate of £171.54 per week (**pages 47 and 48**). Prior to November 2020 and after April 2021 her pay varied. By August 2021 her pay from Fox Taverns Ltd was higher than her pay from the respondent.

#### 20 **Comment on the evidence**

19. The claimant's evidence was both credible and reliable. She was able to explain via the interpreter and without recourse to the bundle the relevant background. She did not exaggerate. She accepted, where appropriate, when she could not recall certain matters.
20. It was unfortunate that the bundle did not include any material vouching her exchanges with Mr Tippett or the email dismissing her. But the absence of it did not detract from my findings or decision on the claims.

#### **Submission**

21. Ms Campbell made a short oral submission. I summarise it here. On the claim of unfair dismissal, she said that the respondent had failed to provide

a justifiable reason for the claimant's dismissal. On the claim for a failure to provide a written statement of terms, she sought 4 weeks' pay. In support, she said that; there had been a clear breach of the obligation despite a statement to the contrary and that other previous employers had honoured it. On the claim for notice pay, she sought a payment representing 4 weeks' pay albeit accepting that the claimant could not benefit from a payment for that period "twice" as part of any compensatory award.

22. She explained that by her calculation, the claimant had accrued 10 holiday days which were untaken by 22 August 2020. She explained the arithmetical basis on which she arrived at the sum sought, £570.60.

23. Ms Campbell also explained that her calculation of gross weekly pay was based on the claimant's evidence that she worked on average 35 hours per week at £9.00 per hour (£315.00). She also explained that she had used a Government website to calculate a weekly net amount, £285.03.

## Law

24. Section 98(1) of the Employment Rights Act 1996 sets out that it is for the employer to show the reason for an employee's dismissal and that it must be for either a reason falling within section 98(2) or for some other substantial reason.

25. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that "*Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if — (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine; (b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on the termination of the employee's employment.*"

26. Section 1(1) and (2) of the Employment Rights Act 1996 provides  
“(1) *Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.*”  
“(2) *Subject to sections 2(2) to (4) — (a) the particulars required by  
5 subsections (3) and (4) must be included in a single document; and (b) the statement must be given not later than the beginning of the employment.*”
27. Section 38(3) and (4) of the Employment Act 2002 provides “*If in the case of proceedings to which this section applies — (a) the employment tribunal makes an award to the worker in respect of the claim to which the  
10 proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (in the case of a claim by an worker) under section 41B or 41C of that Act, 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  
15 by the higher amount instead. (4) In subsections (2) and (3) — (a) references to the minimum amount are to an amount equal to two weeks' pay, and (b) references to the higher amount are to an amount equal to four weeks' pay.*”
28. Regulation 13(1) of the Working Time Regulations 1998 provides that  
20 “*Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.*”
29. Regulation 13(5) provides that “*Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant  
25 agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.*”
30. Regulation 13A(1) and (2)(e) provide “*Subject to regulation 26A and  
30 paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2)*”.  
“(2)(e) *The period of additional leave to which a worker is entitled under*

*paragraph (1) is in any leave year beginning on or after 1st April 2009, 1.6 weeks.”*

31. Regulation 13A(3) provides “*The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.*”
- 5 32. Regulation 13A(5) provides “*Where the date on which a worker’s employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his*  
10 *employment begins.*”
33. Regulation 14(2) provides “*Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*”
- 15 34. Regulation 14(3)(b) provides “*The payment due under paragraph (2) shall be – where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—(A × B) – C where – A is the period of leave to which the worker*  
20 *is entitled under regulation 1 and regulation 13A; B is the proportion of the worker’s leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date.*”

### **Discussion and decision**

- 25 35. The respondent has not shown the reason for the claimant’s dismissal. It has not discharged the burden on it which section 98 creates. The claimant has therefore been unfairly dismissed.
36. On the claim for notice pay, I accept the claimant’s evidence that she was dismissed by email on 22 August 2020 with no prior notice. Her claim for  
30 payment in lieu of notice succeeds, but not to the full extent sought.

37. On the claim for holiday pay, I accept that in the holiday year in which her contract ended she had taken no paid leave. Her claim for accrued and untaken holiday pay succeeds under the Working Time Regulations.

5 38. There is no evidence that the respondent issued to the claimant a statement which conformed to section 1 of the 1996 Act. Given my decision on other claims, this claim succeeds and I award compensation as detailed below.

### Remedy

10 39. Reflecting my finding on her start date, the claimant was entitled to notice of termination of 3 weeks. On the basis of net weekly pay of £285.03 the damages due to her for the respondent's failure to provide notice of termination is therefore £855.09. I do not have evidence to support a finding that the claimant's employment began on the date asserted in her ET1 form, 10 August 2016. Reflecting the period of continuous service  
15 derived from the contract with N&C Pubs Limited, her employment began on 12 March 2017.

40. Again taking account of my conclusion on her start date, the claimant had 3 years' service by her effective date of termination. That being so, her basic award is £945.00.

20 41. On the question of a compensatory award, the claimant was unemployed for about one month after 22 August 2020. The first three of those weeks have been compensated by way of damages at paragraph 39 above. She therefore suffered the loss of one week's pay (£285.03) prior to taking up alternative employment. I accepted what is set out in the schedule of loss  
25 as regards loss from that date, reflecting as it does the fact that from August 2021 there has been no loss. The total loss of earnings is therefore £4,068.72. I saw no compelling reason to depart from the suggested £500 representing loss of statutory rights. The total compensatory award is therefore £4,568.72. There was no evidence that the claimant received  
30 any State benefits in the period of loss.



42. On the claim for holiday pay, I agree that by 22 August 2020 the claimant had 4 complete months in the relevant holiday year. I accept the arithmetic explained by Ms Campbell. The respondent is liable to pay £570.60 for accrued and untaken paid leave which sum it is ordered to pay.

5 43. On the claim of the failure to provide a section 1 statement, in my view it is just and equitable to award 4 weeks' pay. In 2019, the claimant transferred under TUPE to the respondent, which confirmed at the time of the transfer that it would issue a new contract. It did not do so. That failure could therefore not have been because of a lack of understanding of its  
10 obligation to do so. There was (obviously) no reason or excuse offered in this case. The letter refers to prior employment with Park Leisure Ltd. It should have been obvious to the respondent that the claimant had been employed by a number of entities since her employment began. In my view, it is all the more important that a transferee issues a new contract  
15 following a TUPE transfer so that the employee can ensure that all prior terms are being honoured. The respondent in this case failed to do so. It is just and equitable to award four weeks' pay, being £1,260.00.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**R Bradley**  
**04 March 2022**  
**08 March 2022**

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