

EMPLOYMENT TRIBUNALS

Claimant: Ms R Ilieva

Respondent: The Real Hellenic Taste T/A Great Grill House

Heard at: London Central (by video) **On:** 25 March 2022

Before: Employment Judge S Connolly

Appearances

For the claimant: In Person

For the respondent: Mr Alexandrou (representative)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The Respondent does not defend the claim that it made an unlawful deduction from the Claimant's wages in respect of payment for the final two weeks of her employment in January 2021. The Respondent is ordered to pay to the Claimant the sum of £902.04, being the gross sum deducted. The Respondent is entitled make deductions for tax and national insurance before payment.
3. The Claimant's holiday pay claim is not well founded and is dismissed.
4. The Claimant's claim for Statutory Redundancy Pay is not well founded and is dismissed.

REASONS

The claim

5. The Claimant was employed by the Respondent as a chef from 30 October 2018 until her dismissal in January 2021. By a claim form presented on 14 June 2021 the Claimant brought complaints of unfair dismissal, for a statutory redundancy

payment, an unauthorised deduction from wages and accrued holiday entitlement.

The issues

6. The issues between the parties are as follows:

Unfair dismissal

- 6.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The Respondent asserts that it was *a reason relating to the Claimant’s conduct*. C says she was dismissed because she was redundant.
- 6.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and did the Respondent in all respects act within the so-called ‘band of reasonable responses’?

Unpaid annual leave – Working Time Regulations

- 6.3 When the Claimant’s employment came to an end, was she paid all the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998? The Claimant’s schedule of loss states that that she is entitled to £3,661.50. This is disputed by the Respondent who states that the Claimant has been paid for all accrued annual leave.
- 6.4 What was the Claimant’s leave year?
- 6.5 How much of the leave year had elapsed at the effective date of termination?
- 6.6 In consequence, how much leave had accrued for the year under regulations 13 and 13A?
- 6.7 How much paid leave had the Claimant taken in the year?
- 6.8 How many days remain unpaid?
- 6.9 What is the relevant net daily rate of pay?
- 6.10 How much pay is outstanding to be paid to the Claimant?

Unauthorised deductions

6.11 Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with the Employment Rights Act 1996 section 13 by £902.04 in January 2021?

Other claims

6.12 Was the claimant's employment terminated on the grounds of the redundancy and if so what she entitled to a statutory redundancy payment in the sum of £950?

Remedy

6.13 If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

6.14 If the Claimant was unfairly dismissed and the remedy is compensation:

6.14.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;

6.14.2 would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

6.14.3 did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

6.14.4 if it is possible that the Claimant would still have been dismissed at some later stage, what reduction, if any, should be made to any award as a result?

6.14.5 did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

6.14.6 did the Claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Procedure, documents and evidence heard

7. The hearing was conducted via video. There were no technical issues during the hearing. A Bulgarian interpreter was present to assist the Tribunal. The Claimant conducted the hearing in Bulgarian.
8. The Claimant appeared in person and gave evidence. Ms Giagoumi, owner of the Respondent, gave evidence. The Tribunal had the benefit of a bundle of documents provided by the Respondent. The Respondent initially did not disclose relevant CCTV footage as it understood that the Claimant did not dispute that the events covered by the footage had taken place. However, during the course of the hearing, the Claimant clarified that she only accepted that one of the relevant incidents had taken place. Therefore, the Respondent disclosed two videos to the Claimant during the hearing and provided these to the Tribunal via email.
9. The hearing had originally been listed to take place on 11 February 2022. However, it was established as a preliminary issue in the hearing on that day that the Claimant was in Bulgaria so she was unable to give evidence. The Tribunal relisted the hearing for 25 March 2022 when the Claimant confirmed she would be present in the UK.

Findings of Fact

10. The Claimant was employed by the Respondent as a chef from 30 October 2018 until she was dismissed in January 2021. She mainly worked behind the counter in an area visible to customers.
11. The reason for the Claimant's dismissal was disputed. It was the Claimant's position that she was dismissed following a meeting in mid-January 2021 involving all of the Respondent's employees. The Claimant's evidence was that the staff were told that the restaurant was closing due to Covid-19 and that they should all go home. The Claimant's position was that she was effectively made redundant on this day.
12. The Respondent accepted that there had been a meeting with all employees in relation to Covid-19. However, it was Ms Giagoumi's evidence was that this meeting took place in December 2020 and that the Claimant was not present as she was in Bulgaria. Ms Giagoumi stated that this meeting was to update the staff on Government restrictions in relation to Covid-19 as these were causing issues for the business and could lead to redundancies. She said that in the end, the restaurant did not close for a single day due to Covid-19 and remained open for takeaway and delivery services.
13. The Respondent's position was that the Claimant was dismissed for gross misconduct. It was Ms Giagoumi's position that this was following the discovery that the Claimant and one of the waiters employed by the Respondent had on a number of occasions during work time engaged in sexual intimacy behind the counter, in a customer-facing area. Ms Giagoumi stated that one incident had been witnessed by a Deliveroo driver at the

restaurant on 16 January 2021. Ms Giagoumi stated that she then checked CCTV footage covering the preceding weeks and this confirmed that there had been other, similar incidents.

14. The Respondent submitted that the most serious incident was the one which took place on 16 January 2021 and which was witnessed by the Deliveroo driver where the Claimant quickly adjusted her undergarments and attended to the customer without washing her hands. The Respondent submitted CCTV to the Tribunal of two other incidents on 15 and 16 January 2021. The Tribunal accepts that these were the correct dates as explained by the Respondent even though the dates on the videos were 16 and 17 January 2021 respectively. These videos did not include the incident witnessed by the Deliveroo driver as described by the Respondent.
15. In her evidence, the Claimant accepted that there was one incident of sexual intimacy between her and the waiter. She did not accept that there were any witnesses and said she did not see a Deliveroo driver. The CCTV footage disclosed clearly demonstrated incidents on two separate days.
16. Ms Giagoumi stated that she invited the Claimant and the waiter by text message on 16 January 2021 to join a meeting the next day (17 January 2021) at which she dismissed the Claimant and the waiter with immediate effect given the seriousness of the issue.
17. The Claimant accepted that a meeting to discuss the incident took place but her evidence was that she and the waiter admitted the issue, that Ms Giagoumi told them off and asked them to leave the room. She did not accept that she was dismissed in the meeting. The Claimant accepted in her evidence that her actions with the waiter were inappropriate but that she didn't accept that it amounted to gross misconduct. In cross-examination, the Claimant described elements of the incidents as involving kissing, hugging, groping and fondling but said that no clothes were removed and there was no sexual intercourse.
18. It is the Tribunal's finding that there were two incidents on 15 and 16 January 2021 involving intimacy between the Claimant and the waiter as evidenced by the CCTV footage. The Tribunal accepts the Claimant's description of these incidents as accurate i.e. that they involved kissing, hugging, groping and fondling but that no clothes were removed and no sexual intercourse took place.
19. The Tribunal accepts Ms Giagoumi's evidence that there was an additional incident on 16 January 2021 witnessed by the Deliveroo driver that was not included in the CCTV footage provided to the Tribunal. It is the Tribunal's finding that this incident was similar to the others i.e. involving kissing, hugging, groping and fondling, that no clothes were removed and no sexual intercourse took place. The Tribunal accepts Ms Giagoumi's evidence that this incident took place in an area potentially visible to customers and that this was witnessed by a Deliveroo driver who reported the incident to her.

20. It is the Tribunal's finding that the reason for dismissal was misconduct relating to sexual intimacy between the Claimant and the waiter. Ms Giagoumi gave cogent evidence about the events leading up to the meeting. She explained that business was busy with takeaway and delivery services and that she needed the Claimant and the waiter and that she would not have dismissed them unless there were serious reasons. The Tribunal accepts Ms Giagoumi's evidence that there was no meeting in January 2022 to tell staff that the restaurant was closing due to Covid-19.
21. The Claimant was invited to the meeting on 17 January 2021 by text message sent the previous evening. Ms Giagoumi accepted that she did not explain the purpose of the meeting in advance and that she held a single meeting with both the Claimant and the waiter present. Ms Giagoumi accepted that there were no notes of the meeting, that she did not confirm the outcome of the meeting in writing or inform the Claimant of her right to appeal the outcome. Ms Giagoumi did offer the Claimant and the waiter the opportunity to review CCTV footage but this was declined.
22. There was some confusion in relation to the Effective Date of Termination. The Claimant's ET1 used a date of 15 January 2021. The Respondent's ET3 states the same date but later also refers to 18 January 2021. The Claimant's witness statement and the Respondent's witness evidence mention a date of 17 January 2021. It is the Tribunal's finding that the Effective Date of Termination was 17 January 2021.
23. *Holiday Pay*
24. The Claimant states she is entitled to 25 days' holiday per year as stated in her contract and she claims unpaid holiday pay for the period 3 April 2020 – 2 April 2021 in the sum of £3,661.50. The Respondent's evidence is that the Claimant is entitled to 28 days holiday per year. This accords with the minimum under the Working Time Regulations. The Tribunal finds that the Claimant's entitlement was 28 days per annum.
25. The Claimant's holiday year is set out in her contract of employment (3 April to 2 April). Her contractual hours are 9am – 5 pm with a paid lunch break. The Claimant's payslips confirm that her hourly rate up to and including July 2020 was £9.50 and was increased to £11.00 from August 2020. This accords with the Claimant's Schedule of Loss.
26. The Claimant was employed for 41.08 weeks of the holiday year. She therefore accrued 4.42 weeks' annual leave from 3 April 2020 to 17 January 2021 (5.6 divided by 52 x 41.08).
27. The Respondent stated that the Claimant took 2 weeks' holiday in the summer and this was paid in August 2020. The Claimant's payslip for this period includes an entry for 112 hours of holiday pay. This equates to 14 days based on 8 hours per day (i.e. 2.8 weeks' of leave). In her Schedule of Loss, the Claimant acknowledges that this payment was made. This left an entitlement of 1.62 weeks i.e. 8.12 days (1.62 x 5 = 8.1). Based on 8 hours per day, this

amounted to 64.8 hours at an hourly rate of £11.00. This amounted to a sum of £712.80.

28. The Respondent's evidence is that the Claimant was paid in advance for holiday relating to the period to the end of the 2021-2022 holiday year. Ms Giagoumi's evidence is that this was paid on 3 December 2020 to the Claimant's Bulgarian bank account at her request and that this is evidenced in the Claimant's bank statement from the relevant period. Ms Giagoumi said that the sum of £1,644 was paid but that she doesn't recall how this was calculated. The Claimant's Bulgarian bank slip shows a payment from the Respondent of 3,481.36 (presumably this is Bulgarian Lev). The Claimant says that this payment is for work done and that the outstanding holiday pay for the year remained unpaid.
29. The Tribunal has been provided with a copy of the Claimant's bank statement for her Bulgarian bank account for December 2020 but only with bank statements for her English bank account for January 2021 – August 2021. No other bank statements for the English account have been provided.
30. The Tribunal prefers the Respondent's evidence in this regard. Ms Giagoumi gave cogent evidence on the holiday position and that the days were paid in advance in December 2020 to the Claimant's Bulgarian account. In cross-examination, Ms Giagoumi clearly explained that this payment did not relate to wages as wages were paid into the Claimant's English bank account. November's hours were paid in December and December's hours were paid in January. The Claimant did not present her English Bank statements in relation to the same period.
31. It is the Tribunal's finding that the Claimant took 14 days' annual leave during the summer of 2020 which was paid in August 2020. 8.1 days remained untaken and this was paid in its entirety to the Claimant's Bulgarian bank account on 3 December 2020.
32. *Unlawful Deduction From Wages*
33. Ms Giagoumi accepted in evidence that she did not pay the final January 2021 salary to the Claimant. She stated that the Claimant has caused severe damage to the Respondent's reputation and that this was so severe that she decided not to pay these sums. She accepted that the money is owing and that £902.04 is the correct sum.

The Law

Unfair Dismissal

34. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the

respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 17 January 2021.

35. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.
36. In this case the Respondent dismissed the Claimant because it believed she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).
37. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.
38. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439*, *Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, and *London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

Unlawful Deduction from Wages

39. Section 13(1) provides the right for a worker not to suffer an unauthorised deduction from wages:

13 Right not to suffer unauthorised deductions.

(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.

40. Section 23 of the Employment Rights Act 1996 provides a worker with the right to bring a complaint to the Employment Tribunal:

23 Complaints to employment tribunal.

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

41. Section 27 of the Employment Rights Act 1996 includes a definition of wages for the purposes of the act.

Unpaid annual leave – Working Time Regulations

42. Regulation 13 and 13A of the Working Time Regulations 1998 set out the entitlement to 5.6 weeks' annual leave per annum.

Entitlement to annual leave

13.—*(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).*

(2) The period of leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or before 23rd November 1998, three weeks;

(b) in any leave year beginning after 23rd November 1998 but before 23rd November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23rd November 1998 which has elapsed at the start of that leave year; and

(c) in any leave year beginning after 23rd November 1999, four weeks.

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture) except where, in the case of a worker partly employed in agriculture, a relevant agreement so provides.

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant 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 (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Where by virtue of paragraph (2)(b) or (5) the period of leave to which a worker is entitled is or includes a proportion of a week, the proportion shall be determined in days and any fraction of a day shall be treated as a whole day.

(7) The entitlement conferred by paragraph (1) does not arise until a worker has been continuously employed for thirteen weeks.

(8) For the purposes of paragraph (7), a worker has been continuously employed for thirteen weeks if his relations with his employer have been governed by a contract during the whole or part of each of those weeks.

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

Entitlement to additional annual leave

13A.—*(1) Subject to regulation 26A and 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) The period of additional leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) 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 employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

*(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c);
or*

*(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d)
in respect of that part of the leave year which would have elapsed before 1st
April 2009.*

*(7) A relevant agreement may provide for any leave to which a worker is
entitled under this regulation to be carried forward into the leave year
immediately following the leave year in respect of which it is due.*

*(8) This regulation does not apply to workers to whom the Agricultural
Wages (Scotland) Act 1949 applies (as that Act had effect on 1 July 1999).*

43. Regulation 14 of the Working Time Regulations 1998 gives the right to make a claim for accrued but untaken annual leave.

Remedy

Polkey Reduction

44. Where there is a finding of unfair dismissal, the Tribunal should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8*, *Software 2000 Ltd v Andrews [2007] ICR 825*; *W Devis & Sons Ltd v Atkins [1977] 3 All ER 40*; and *Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*.

Contributory Fault

45. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.
46. Section 122(2) provides as follows: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."
47. Section 123(6) then provides that: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Conclusions

Unfair Dismissal

48. The Tribunal finds that Ms Giagoumi did have a genuine belief that the Claimant was guilty of misconduct. Her evidence was clear that was the reason for dismissal.
49. However, the Respondent did not carry out a reasonable investigation in relation of all aspects of the case. There was no investigation meeting with the Claimant before she was invited by text message to the final meeting.
50. The Claimant was not made aware in advance what the meeting related to or the seriousness of it. The Claimant did have the chance to respond to the allegations in the meeting and was offered a chance to review the CCTV evidence. The Claimant and the waiter were both dismissed in the same meeting which would not have allowed the Claimant to speak freely about the incident without the waiter hearing this.
51. Whilst the Claimant did admit the allegations, there was no adjournment or time taken to consider the outcome. The outcome was not delivered in writing and the Claimant was not informed of her right to appeal. The Respondent's position is that this was not necessary given that the Claimant had admitted to the allegations.
52. The Respondent's position is that this is a straightforward case of misconduct. The Respondent discovered that inappropriate behaviour had been going on for some time. The Respondent called the Claimant into a meeting, she came clean and the Respondent took a reasonable view that the conduct warranted dismissal.
53. The Tribunal finds that no reasonable employer in the Respondent's position would have made the procedural failings that the Respondent did. The Claimant's contract of employment makes reference to a Disciplinary Policy but the Respondent did not refer to it or share it with the Claimant. Whilst the Respondent is a small employer, this does not excuse the level of these failings.
54. The Tribunal finds for these reasons that the Respondent's decision to dismiss the claimant was outside the range of reasonable responses to her conduct. The Tribunal finds, therefore, that the claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

Statutory Redundancy Pay

55. The reason for the dismissal was misconduct. The Claimant was not made redundant and as such, no statutory redundancy payment is due.

Holiday Pay

56. The Claimant's leave year was 3 April – 2 April and she had been employed for 41.08 weeks of the year at the Effective Date of Termination.. She therefore accrued 4.42 weeks' annual leave from 3 April 2020 to 17 January 2021 (5.6 divided by 52 x 41.08).
57. The Claimant took 2.8 weeks of leave during the holiday year). This left an entitlement of 1.62 weeks i.e. 8.1 days (1.62 x 5 = 8.1). Based on 8 hours per day, this amounted to 64.8 hours at an hourly rate of £11.00. This amounted to a sum of £712.80.
58. However, it is the Tribunal's finding that this sum was paid to the Claimant on 3 December 2020. Therefore, no further payments are due to the Claimant.

Unlawful Deduction from Wages

59. The Respondent admitted that payment for work done in January 2021 was due. There is no legal basis for this to be withheld. The Claimant's claim is well founded and the Respondent must pay the Claimant the agreed sum of £902.04.

Remedy

60. The parties are asked to attempt to agree the remedy figure between themselves and if they are able to reach agreement they should inform the Tribunal as soon as possible. Meanwhile the Tribunal will list a remedy hearing.
61. The Tribunal makes the following provisional findings, but is willing to hear submissions from the parties on these matters at a remedy hearing where required:

Polkey Reduction

62. The Tribunal has considered the possibility that the Claimant may not have been dismissed if proper procedures had been adopted. However, the Tribunal finds that if the Respondent's management had followed a proper process that it is inevitable that the Claimant would still have been dismissed without notice in any event. In making that assessment, the Tribunal has considered that the Claimant had admitted the misconduct and how seriously the Respondent had taken these actions. The Tribunal considers that it would have taken a period of two weeks to complete the investigation and hold the disciplinary meeting. This would not have been a complex investigation and there were not a significant number of witnesses. There was a therefore a 100% chance that the Claimant would have been dismissed within two weeks so would have been paid for a further two weeks.

Contribution

63. The Tribunal must consider whether it is just and just and equitable to make a reduction to the basic and compensatory award in the circumstances of this case and if so, at what level.
64. The Claimant's conduct said to give rise to contributory fault is her involvement in incidents of sexual intimacy with her work colleague on the premises, during working hours in an area that was customer facing. The Tribunal has no hesitation in finding that that conduct was blameworthy. This behaviour was clearly not appropriate in a work environment and took place on more than one occasion. The Claimant did accept that her behaviour was inappropriate but she did not believe it amounted to gross misconduct. The Tribunal finds that they are such as inevitably to merit a substantial adjustment to both basic and compensatory awards.
65. Whilst the Claimant accepted that the behaviour was inappropriate, she did not express any remorse. In her evidence, she did not accept the seriousness of the incidents. She did not raise any mitigation in relation to this behaviour. On this basis, the Tribunal finds that the basic and compensatory awards should be reduced by 100% to reflect the Claimant's culpability.

Employment Judge S Connolly
31/05/2022

Sent to the parties on:
31/05/2022

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For the Tribunal Office: