



EMPLOYMENT TRIBUNALS

Claimant: Miss N Lewis

Respondent: The Parade (Neath) Limited

Heard at: Port Talbot **On:** 22 June 2022

Before: Employment Judge C Butcher

Representation

Claimant: In person

Respondent: Miss Hodgkin, Counsel

JUDGMENT having been sent to the parties on 6 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The Claimant was employed as a General Manager at 'The Castle Hotel', Neath at the time her employment ended on 15 August 2020. She had commenced employment on 5 December 2016 at Blanco's Hotel, where her duties included reception work and waitressing.

2. By ET1 received on 6 October 2020, the Claimant made a claim for unfair dismissal, failure to pay her notice entitlement, unlawful deductions in respect of wages, deductions in respect of pension contributions and payment in lieu of accrued untaken annual leave on termination. The Claimant had complained that she had not been provided with itemised pay statements in accordance with Section 11 Employment Rights Act 1996 (ERA 1996) but she has now received these. The Claimant also complained that she had not been provided with a P45 and/or P60. Any failure by an employer to provide a P45/P60 to an employee does not fall within the jurisdiction of the Employment Tribunal.

3. The Respondent is a hospitality business employing 44 people as at the date of their ET3. The Respondent defended the claim on the basis that the Claimant resigned from her employment and was not dismissed.

4. Early conciliation started on 28 August and ended on 28 September 2020.

5. At a preliminary hearing before EJ R Evans on 1 July 2021, it was established that the Respondent was the Claimant's employer at the relevant date.

6. The Claimant's application was originally listed for a final hearing on 17 & 18th February 2022. Unfortunately, the hearing could not go ahead as scheduled as the Respondent's appointed representative, Mr David Williams could not attend due to an emergency medical appointment in hospital.

7. At the hearing on 17th February, it was directed that the Respondent provide a calculation of the breakdown of the holiday pay sum paid and an explanation as to what the 'uplift' of £60 is for. A further direction was made for the Claimant provide an updated Schedule of loss, highlighting areas of dispute with the Respondent's calculations for holiday pay and wages claims. All documents were before the Tribunal.

Relevant Law

8. Section 94 of the ERA confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of a complaint to the Tribunal under section 111. The Employee must show that she was dismissed by the Respondent under s95.

9. Section 98 ERA deals with the fairness of dismissals and there are two stages. The employer must show that it had a potentially fair reason for the dismissal within s98(2) and secondly, if so, the Tribunal must consider whether the employer acted fairly or unfairly in dismissing the employee for that reason.

10. If the employer dismissed because they believed misconduct, a potentially fair reason, the burden of proof rests with the employer that, on the balance of probabilities, the employee was dismissed for a potentially fair reason. S98(4) deals with fairness generally, taking into account the size and administrative resources of the employer and shall be determined on the substantial merits of the case.

11. The leading cases in this area remain *Burchell v BHS [1978] IRLR 379* and *Post Office v Foley [2000] IRLR 827*

12. A Tribunal must not substitute its own view of what is reasonable as set out in the case of *DPP Law Ltd v Greenberg [2021] IRLR 1016*.

13. A Tribunal is not required to identify all the evidence relied on in reaching its conclusion and is not required to express every step of its reasoning provided it complies with the Court of Appeal's guidance in *Meek v City of Birmingham District Council [1987] IRLR 250*.

14. Wrongful dismissal/dismissal in breach of contract concerns a dismissal by an employer in breach of the employee's contract of employment. This can, and often does focus on whether an employment contract has been terminated without the

necessary notice period.

15. Required notice periods are provided for through agreement in the employment contract, or through the statutory scheme contained at s86 ERA. Section 86 ERA provides a statutory minimum notice entitlement which cannot be reduced by contractual agreement. This provides that after one month's continuous employment, an employee would be entitled to at least one week's notice with increases in entitlement based on years of service. Payment in lieu of notice can be provided for in a contract.

16. Where an employee does have an entitlement to a notice period, there are circumstances in which the employer can dismiss without the need to give notice. These are where it can be established that there has been a repudiatory breach of contract by the employee. In these circumstances, a summary dismissal (dismissal without notice) can be justified.

17. As established in *Johnson v Unisys Ltd [2001] UKHL 13*, an employee is not allowed to bring a wrongful dismissal claim relying on the implied term of trust and confidence to recover damages for loss arising from the unfair manner of his dismissal. This is covered by the statutory right to claim unfair dismissal, which has various restrictions on who is eligible to claim, time limits the amount that can be awarded and so on. An employee is not able to circumvent the statutory rules by seeking compensation for the unfairness via a wrongful dismissal claim.

18. The Claimant was not pursuing a claim for wrongful dismissal but her claim was that of unfair dismissal.

19. In relation to the claim of unauthorised deduction of wages, it is accepted by the Respondent that the Claimant was an employee of the Respondent as defined by s230(1) Employment Rights Act 1996 and she is therefore entitled to bring a claim for unauthorised deduction from wages.

20. Wages are defined in s27 ERA and in the case of *Delaney v Staples [1992] IRLR 191*, emphasis was given to the 'normal meaning' of wages, that is, consideration for work done or to be done under a contract of employment. This can include salary and holiday pay.

21. An unauthorised deduction of wages is defined at s13(1) Employment Rights Act which states that an employer shall not make a deduction from the wages of a worker employed by him unless:

(a) a 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.

The Issues

22. Unfair dismissal

22.1 Was the Claimant dismissed?

22.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

22.3 Was it a potentially fair reason?

22.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant.

22.5 In respect of remedy, the Claimant did not wish to be reinstated or re-engaged to their previous employment but sought a compensatory award.

22.6 If a compensatory award was to be made, how much should it be? In determining this the Tribunal takes into account the following:

- i. What financial losses has the dismissal caused to the Claimant?
- ii. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period should the Claimant be compensated?
- iii. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason?
- iv. If so, should the Claimant's compensation be reduced? By how much?
- v. Did the ACAS Code of Procedure on Disciplinary and Grievance Procedures apply? Did the Claimant or Respondent unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
- vi. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
- vii. Does the statutory cap of 52 weeks' pay of £86,444 apply?
- viii. What basic award is payable to the Claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before dismissal? If so, to what extent?

Unauthorised deductions

23. Were the wages paid to the Claimant less than the wages she should have been paid?

24. Was any deduction required or authorised by statute?

25. Was any deduction required or authorised by a written term of the contract?

26. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

27. Did the Claimant agree in writing to the deduction of wages before it was made?

28. How much is the Claimant owed?

29. In relation to holiday pay, was the Claimant entitled to carry forward any leave from the previous leave year?

30. What holiday pay, if any, is owed to the Claimant?

The Hearing

31. I was presented with a bundle of documents amounting to 284 pages. I heard oral evidence from Mr Willem Germishuizen, senior manager, Ms Anne Reynolds, supervisor, Ms Shirley Short, waitress, Ms Helen Folland, administration manager and Mr Clive Hopkins, owner of Blanco's Restaurant and The Parade and Mr Lee Ireland, payroll officer on behalf of the Respondent.

32. The Claimant gave evidence in support of her claim. Miss Jodie Jones, waitress also gave evidence on her behalf. All parties confirmed their oral and written evidence by oath or affirmation.

33. The Claimant confirmed that she was claiming in respect of the following complaints:

- i) Unfair dismissal;
- ii) Unlawful deduction of wages; and
- iii) Payment in lieu of untaken accrued holiday pay.

34. Mr Germishuizen confirmed his written statement at page 225 that he had understood that the Claimant had wanted to leave her employment as her mother had resigned her employment with the Respondent. He gave evidence that on 14/8/20, the Claimant took exception to an investigation into the hours worked by her mother for the Respondent and had informed him that she was going to leave. The Claimant was demanding that Mr Gerishuizen examine CCTV footage relating to her mother and said words to the effect that if her mother's employment was to be questioned, then she would leave there and then. He had subsequently been made aware by Mr Hopkins and other members of staff that the Claimant had left her employment on 15/8/20, the following day.

35. Miss Reynolds confirmed her written statement at page 227 and gave evidence that the Claimant had told her that she had given in her notice. and that she had been talking about doing so for quite a while as she had not been enjoying her job. She was unable to provide precise dates but was adamant that the Claimant had been talking about leaving for some time before the date her employment ended.

36. Miss Short also gave evidence that the Claimant had informed her that she was going to hand in her notice and was aware that the Claimant's mother was also leaving her employment. After the Claimant had spoken to Mr Hopkins, Miss Short asked her how Clive had taken it, to which the Claimant replied that he was "disappointed but very understanding".

37. Miss Folland confirmed her written statement and gave evidence that she had been informed by the Mr Hopkins on 14th August 2020 that the Claimant had given her notice and that she had informed him approximately two weeks earlier that she wished to leave her employment.

38. Mr Hopkins gave oral evidence that the Claimant had informed him in early August 2020 that she wished to leave her employment. He had made attempts to dissuade her as he had not wanted her to leave. He recalled being surprised that

the Claimant had been rude towards him on the day she left as they had previously had a good relationship. He denied dismissing her at any point and was clear that the Claimant has resigned and that they had both agreed that she would not be required to work any notice. Mr Hopkins stated that the Claimant had given her verbal resignation on at least two separate occasions and on each occasion he had asked her to reconsider, but that if she wanted to leave, she should do so.

39. Mr Ireland confirmed that he had prepared the calculation relating to the payment uplift as set out at page 279. This was based on 50 hours per week, not 40 as had been agreed by the Respondent in their ET3. As a result, the hourly rate of the Claimant's pay should be calculated as £13.75 rather than £11.00.

40. In her evidence, the Claimant confirmed that she was not seeking to pursue any issues relating to the nature of her employment but had done so to provide background. She acknowledged that she discussed leaving her employment and that she had spoken with Mr Hopkins directly on more than one occasion about leaving. He had agreed to meet again to see if she had changed her mind. The Claimant did not accept that she had decided to leave her employment, only that she was considering it.

41. When questioned by Counsel for the Respondent about the evidence of the Respondent's witnesses, the Claimant disputed their evidence as untrue and fabricated. The Claimant was unable to provide any explanation that several witnesses had confirmed that she had informed them of her intention to leave and that she had handed in her notice.

42. In her oral evidence, the Claimant disputed that she had stated she was going to leave, but when pressed, she conceded that she may have said it, but could not be 100% sure.

43. Miss Jones confirmed her written evidence and gave oral evidence that evidence that the Claimant had informed her she had been dismissed. Miss Jones also confirmed that she had been aware of the discussions that the Claimant had had regarding her wish to leave her employment prior to 15 August 2022.

Submissions

44. Counsel for the Respondent accepted that there had been an unlawful deduction of wages following recalculation of the hours worked by the Claimant. The Respondent had agreed that the Claimant was employed for 40 hours per week rather than 50 hours and as such, the hourly rate should be recalculated from £11 to £13.75 and that there had been a deduction amounting to £616.

45. In relation to the claim for holiday pay, I was referred to page 123 paragraph 9 of the written terms of employment which state that no outstanding leave will be permitted for to transfer from one year to the next.

46. With regard to the claim for unfair dismissal, it was submitted that this was a matter of fact as to whether there was a resignation or dismissal and that this could be given verbally. There were no special circumstances, such as the heat of the moment. The Claimant had raised the issue of leaving and said that she was going to leave. I was referred to the ET1 at page 24, paragraph 26 (iii) and further references within the ET1 to the Respondent telling the Claimant to think about her

decision, which Counsel submitted demonstrated that this was well thought out. I was also referred to the evidence of Miss Short and Miss Reynolds who stated that the Claimant had informed them of the decision to leave.

47. Counsel submitted that the Claimant conceded in evidence that she 'may have said she was going to leave'. This evidence supported the credibility of the Respondent's evidence in relation to what they had been aware of. The Claimant had provided a clear and unambiguous statement of her intention to resign and she did so.

48. The Claimant in her submission questioned why the Respondent had not obtained her resignation in writing and she submitted that this was because she did not resign. She had spoken on many occasions to Mr Hopkins about wider issues, but it was he who told her to leave.

49. With regard to the remaining claim relating to holiday pay, the Claimant did not accept that this had been rectified and wished to pursue payment for previous years' accrual.

50. In her submission, the Claimant sought to raise the issue of outstanding pension contributions. This had not been identified as a live issue in the previous Case Management Hearing but the Claimant did not accept that all payments due on her behalf had been made. Mr Ireland was recalled on this specific issue and gave evidence that he understood all payments had been made.

Findings and conclusions

51. I find that evidence given on behalf of the Respondent by several existing staff members to be credible in the detail of events and the accounts of conversations with the Claimant. I do not accept that these witnesses have been coerced or chosen to provide inaccurate evidence of their recollections and I consider that the evidence they have given can be relied upon. I place particular weight on the evidence of Miss Short and Mrs Reynolds who gave detailed evidence of the Claimant's actions. I find that the Claimant's evidence that the Respondent's witnesses were being untruthful as lacking credibility and her evidence could not therefore be relied upon.

52. I find that the Claimant had been unhappy with various issues within her employment and that she decided to leave her employment. Whether this was directly related to her mother leaving her role or not is less significant than the Claimant's repeated discussions with Mr Hopkins as to difficulties and her expressed intention given to her colleagues that she intended to leave. I find that the Claimant was unclear in her evidence today as to whether she had in fact informed colleagues that she intended to leave and on the balance of probabilities, I find that she acted upon her expressed intentions and she resigned her position. I accept the evidence of Mr Hopkins that he and the Claimant agreed that she leave without working her notice period in view of his repeated attempts to encourage the Claimant to remain in employment. I find no reason to doubt that Mr Hopkins reluctantly accepted the Claimant's decision to leave and that they agreed that she should leave straight away. I do not accept that she was dismissed and as such, her claim for unfair dismissal fails.

53. Turning to the unauthorised deduction from wages, the Claimant did not

provide her written consent in advance of the deduction and I do not find that this was exempt deduction under s 14 Employment Rights Act 1996. The Respondent did not provide any evidence that there had been any prior written consent to the deduction and I therefore find that the Respondent did make an unauthorised deduction of wages.

In any event, this is now conceded by the Respondent.

54. In relation to the issue of holiday pay, the Claimant was in a managerial role and as such would have known the procedure in relation to holiday entitlement. I find that the Claimant was aware that untaken leave could not be carried over into subsequent years. She did not dispute that she had received details of her holiday entitlement as set out in the written terms as contained at pages 119-132 of the Bundle.

55. The Respondent has made a payment to the Claimant of £3575 gross and I accept the Respondent's calculations of accrued but untaken holiday being 40 hours per week at £13.75 per hour for a period of 6.5 weeks. I find that an unauthorised deduction had been made in payment for accrued holiday for the final leave period ending in 2020 but I make no order in this regard as the Respondents have made a payment in full for this amount.

56. No evidence was put before me in relation to any consequential loss arising from the unauthorised deduction and I make no order in this regard.

C Butcher
Employment Judge

22nd June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON 18 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche