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EMPLOYMENT TRIBUNALS

Claimant: Mrs J Tanner

Respondents: (1) The Ridgeway Hotel Ltd
(2) Mr S Chrysanthou

Heard at: East London Hearing Centre

On: 1 June 2022

Before: Employment Judge Thackray

Representation
Claimant: Mr D Cook (USDAW)
Respondent: no attendance

JUDGMENT having been sent to the parties on 20 June 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. The claimant, Jill Tanner, was a hotel receptionist employed by the first respondent, The Ridgeway Hotel Limited from November 2001 to 5 October 2021. The Second Respondent Mr Stylianos Chrysanthou is a director of the first respondent and was effectively the claimant's manager during that period. All claims against the second respondent were dismissed.
2. By a claim form presented on 23 December 2021 the claimant makes claims in respect of:
 - a. unfair dismissal within section 98 of the Employment Rights Act 1996, including that the respondent failed to communicate with her as to her dismissal or the reason for it when the claimant attempted to return to work at the end of the period during which she had been on furlough;
 - b. Breach of her contract of employment by the respondent by failing to give her the required, or any, notice of termination of her employment;

- c. holiday pay relating to accrued but not taken holiday entitlement and for holiday taken but not paid;
 - d. a shortfall in furlough payments during the Covid 19 pandemic;
 - e. failure to provide a statement of the terms of employment and
 - f. failure to provide reasons for dismissal.
3. The respondent has not engaged with the claim and did not file an ET3, correspond with the Tribunal or attend the hearing.

Claims and Issues

4. Unfair dismissal

- 4.1 Was the claimant dismissed?
- 4.2 If the claimant was dismissed, what was the reason or principal reason for dismissal
- 4.3 Was it a potentially fair reason?
- 4.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

5 Remedy for unfair dismissal

- 5.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 5.1.1 What financial losses has the dismissal caused the claimant?
 - 5.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 5.1.3 If not, for what period of loss should the claimant be compensated?
 - 5.1.4 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?
 - 5.1.5 If so, should the claimant's compensation be reduced? By how much?
 - 5.1.6 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - 5.1.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

- 5.1.8 What basic award is payable to the claimant, if any?
- 5.1.9 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- 6 Wrongful dismissal / Notice pay
 - 6.1 What was the claimant's notice period?
 - 6.2 Was the claimant paid for that notice period?
- 7 Holiday Pay (Working Time Regulations 1998)
 - 7.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
- 8 Unauthorised deductions
 - 8.1 Did the respondent make unauthorised deductions from the claimant's wages during the period of furlough and if so how much was deducted?
- 9 Statement of employment particulars
 - 9.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
 - 9.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? Would it be just and equitable to award four weeks' pay?
- 10 Written statement of reasons for dismissal
 - 10.1 Whether the claimant is entitled to a payment in respect of a failure to provide a written statement of reasons for dismissal contrary to section 92 Employment Rights Act 1996.

Procedure, documents and evidence heard

- 11 I was provided with a paginated bundle of 96 pages which included a schedule of loss. The claimant's representatives sent up to date information about the claimant's current wages on the day of the hearing.
- 12 The claimant gave evidence herself but did not call any other witnesses.
- 13 The respondent did not appear. The file evidenced that he had been properly served with the claim and notices and there had been no communication from the respondent.

- 14 I considered the claimant's evidence on her substantive claims and in relation to remedy and invited submissions on both claims and remedies.
- 15 The possibility of a TUPE claim had been included in the claim as there had been a suggestion that the hotel had been sold. The claimant's representative confirmed that this was no longer pursued as the business appeared not to have been transferred.

Findings of fact

- 16 The claimant started work as a receptionist at the Ridgeway Hotel in November 2001 having seen the job advertised in the local paper. She was interviewed and offered the job by the second respondent personally. Until October 2019 she was paid in cash. Initially she worked part time but this became full time.
- 17 The bundle contained timesheets and wage slips for the employees at the hotel for the period February 2019 to October 2019 showing the hours worked in each week and the rate of pay of £9.25. The claimant gave evidence that this was the net hourly rate and that the respondent paid tax and national insurance
- 18 From October 2019 payments were made by bank transfer, usually in the name of the first respondent, but sometimes in the name of the second respondent.
- 19 No contract of employment or note of terms of employment was given. I accept the claimant's evidence that she generally worked Monday – Saturday, though latterly took Wednesdays off and so worked 5 days. She was required to cover for her colleagues as and when required. Core hours were usually 8 am to 6 pm. The claimant gave evidence that she worked a minimum of 36 hours a week. A schedule provided, relating to April 2019 to March 2020 (the period of a year prior to furlough) showed that an averaged of 38.11 hours per week was worked. The claimant's statement incorrectly stated that this calculation period had been from February 2019 and I noted the correction to April.
- 20 The best available evidence in the form of bank records showing payments and older payslips and timesheets showing calculations, showed that the claimant's gross weekly pay was £441 and her net pay was £352.52.
- 21 The second respondent was somewhat changeable in his practices, allowing staff to organise a rota and holiday cover, but sometimes intervening. It was frequently the case that financial matters had to be raised by staff and there was a lack of clarity about financial matters. There was proof of pension contributions being paid late on a number of occasions. The claimant gave evidence that in 2018 the second respondent told her that she owed him for pension contributions so she gave him a lump sum. She requested that subsequently deductions should be made from her weekly wages.
- 22 Holiday pay was dealt with in different ways, the claimant said. Until 2019 she had received a lump sum of some £1,200 per year in April or May for holidays taken. The last payment may have been £1,500. There was no strict holiday allowance, but she always took around 4 weeks a year plus some long weekends. This, the claimant said, was flexible as long as the receptionists could arrange cover for their absence.

After 2019 there was no further payment specifically related to holiday pay in that way. The claimant's evidence was that she had continued to take holiday as previously; there was no evidence that she had accrued holiday which she had not taken. The claimant was not able to provide any evidence regarding entitlement to any additional holiday pay. I found that there was no documentary evidence as to holiday entitlement or holiday pay entitlement, nor that lump sums had been paid or that there was an expectation of further pay to support the claim in relation to holiday pay.

- 23 In March 2020 work stopped at the hotel due to the pandemic and the claimant chased the second respondent for furlough payments. After 10 weeks a lump sum payment was received and then further payments were made, which purported to be 80% of the wages, until 29 September 2021. No calculation of the payments was provided, despite requests by the claimant. Proof of payment showed weekly payments of £212. These were sometimes made relating to 2 or more weeks at a time and then in late 2020 and 2021 payments were made on a monthly basis. The furlough payments were made in the name of the first respondent until July 2021 when they were made in name of second respondent.
- 24 For the furlough period of 80 weeks between March 2020 and 5 October 2021 I found that the claimant had been entitled to payments at 80% of £352.52 per week = 282 per week. She received £212 per week, producing a shortfall of £70 a week. Over the period of 80 weeks I found that there was a shortfall of £5,600.
- 25 When news came in September 2021 that the furlough scheme was coming to an end, the claimant phoned second respondent about what the position was regarding returning to work. She received no reply. She attended work on Monday 5 October 2021 to find the hotel closed and looking derelict. There appeared to be squatters in the building. She wrote to her employer on 7 October 2021 by letter and on 13 October 2021 by email asking about her employment. She received no response. The claimant noted that a colleague had also attempted to contact the second respondent and had visited the premises; she had had no contact from her employer and also found the hotel apparently derelict and not operating.
- 26 I found that the business had ceased at some point during the Covid-related closure and that the claimant had been made redundant as her job no longer existed. I found that the claimant had not been given any notice of her dismissal by way of redundancy. There had been no communication at all from the claimant's employer and so no consultation, negotiation or notice. The claimant gave evidence that the hotel remains closed and that the business appears to have ceased. This was supported by the fact that it was noted from the Tribunal file that an application had been made to Companies House for the First Respondent to be struck off the register.
- 27 The claimant obtained 2 ACAS conciliation certificates, dated 29 November in respect of the second respondent and 30 November for the first respondent. She issued her claim on 23 December 2021. The claimant received a missed call from the second respondent after the schedule of loss was sent out by the Tribunal but has received no other contact from him.

Legal principles and conclusions

Relevant Legal Principles and Conclusions – unfair dismissal

- 28 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 s/he was dismissed by the respondent under section 95.
- 29 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.
- 30 The claimant had worked solely for the first respondent for 19 years as a receptionist. Her hours varied but she had core working hours that were required and she was paid an hourly rate for the hours undertaken. The respondent paid tax and NI on her behalf and contributed to a pension scheme.
- 31 Taking into account the evidence that the business of the first respondent appears to have ceased trading and that there is no job currently available I find that the claimant has been dismissed by way of redundancy.
- 32 Whilst redundancy is a potentially fair reason for dismissal this claimant was not adequately warned or consulted; there was no evidence that the respondent adopted a reasonable selection decision, nor took reasonable steps to find the claimant suitable alternative employment. Far from a fair procedure being undertaken the claimant was not informed of any intention regarding her job either before or after she presented for work on 5 Oct 2021. I took into account the size and administrative capacity of the business and found that the respondent had not behaved reasonably by failing to communicate to any degree the intention to dismiss the claimant after almost 20 years of service.
- 33 I have the band of reasonableness in mind in reaching my decision and I find that no reasonable employer in the respondent's position would have dismissed the claimant in this way. The lack of any fair procedure or any communication rendered this an unfair dismissal and therefore the unfair dismissal complaint succeeded.

Unfair Dismissal Basic Award and redundancy payment

- 34 The claimant had been employed for 19 years, all over the age of 41 and there she was entitled to an award calculated on the basis of 1.5 times her gross pay for each of her the years of employment, a factor of 28.50.
- 35 Using the figure of £441 per week gross pay as the nearest approximation available from the evidence this amounted to an award of £12,568.50. In other circumstances she would be entitled to a basic award in that amount, however, I find that she is entitled to this sum as a redundancy payment as the dismissal was on the basis of redundancy and therefore she was not entitled to a basic award. I did not consider

there to be any contributory factors that would have justified any award being reduced.

Unfair Dismissal Compensatory Award

- 36 In relation to the compensatory award, the claimant lost her income in its entirety, however, I found that even had a fair procedure been adhered to she would have lost her employment in any event as the business has closed down and she had been made redundant. There was no job for her to return to and she was not entitled to a compensatory award.
- 37 I awarded £400 for loss of statutory rights.
- 38 The recoupment regulations do not apply as the claimant received did not receive income related Employment and Support Allowance.

Relevant Legal Principles and Conclusions – breach of contract and unauthorised deductions

- 39 An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled.
- 40 Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.
- 41 The claimant was entitled to receive a statutory notice period of 12 weeks. She received no notice. I conclude that the claimant is entitled to damages for the breach of contract. The intention is to put the claimant in the position she would have been had the contract been performed correctly i.e. the position she would have been in had the respondent given her the three months' notice to which she was entitled.
- 42 Although damages are calculated on a net basis, since the claimant will be liable for tax on the element of the notice pay relating to pay, I use the gross figure in the calculation. The claimant's gross weekly pay was £441. 12 weeks' loss of pay is £5,292
- 43 For the furlough period of 80 weeks between March 2020 and 5 October 2021 I found that the claimant had been entitled to payments at 80% of £352.52 per week = £282 per week. She received £212 per week. A shortfall of £70 a week. 80 weeks = £5,600.
- 44 Regulation 14 of the Working Time Regulations 1998 requires an employer to pay an employee in respect of holidays accrued but untaken in the leave year upon termination. There was no written evidence as to the leave entitlement or the way in which holiday pay had been dealt with. The claimant gave evidence that lump sums had been paid in previous years but not since 2019. There was no evidence to support that this had been the practice. The claimant had continued to take holiday

and it did not appear that she had accrued but untaken holiday. There was no clear evidence on which to make a finding in relation to outstanding holiday pay and I made no award.

Written Statement of Terms

45 Section 38 of the Employment Act 2002 provides as follows:

“(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5...

(3) If in the case of proceedings to which this section applies— the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996, 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 by the higher amount instead.”

46 I awarded 4 weeks’ pay for a failure to provide a statement of terms complying with section 1 of the Employment Rights Act 1996 (£1,764), taking into account the lengthy employment and that at no time had any documents been provided setting out the terms of employment.

47 I further awarded 2 weeks’ pay for failure to provide written reasons (£882).

48 All claims against the second claimant are dismissed.

49 The total award which the first respondent must pay to the claimant is £28,270.

Employment Judge Thackray

22 September 2022