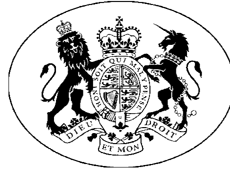

EMPLOYMENT TRIBUNALS

Claimant: Ms N Niknejad

Respondents: (1) Hotel Management Services Limited and (2) Hotelwala Limited

Heard at: **Midland West Employment Tribunal via CVP**

On: **6 and 7 June 2022**

Before: **Employment Judge Fitzgerald**

Representation
Claimant: In person via CVP
Respondent: Mr Mian of Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's employment transferred to the Second Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 in June 2020. Therefore, the correct Respondent to this claim is the Second Respondent, Hotelwala Limited.

2. The Claimant's claim of wrongful dismissal (notice pay) is successful and the Second Respondent is ordered to pay the Claimant £297.50 notice pay.

3. The Claimant's claim of holiday pay is successful and the Second Respondent is ordered to pay the Claimant £2,558.50 holiday pay.

4. The Claimant's claim for unlawful deduction of wages is partly successful. The first part of her claim relating to an alleged underpayment on 14 April 2020 was lodged out of time and it was reasonably practicable for this claim to have been lodged in time. Therefore, this aspect of the claim fails and is dismissed. However, the unlawful deduction of wages claim relating to unpaid furlough pay is successful and the Second Respondent is ordered to pay the Claimant £1,189.50 net wages.

5. The Claimant was not provided with a written statement of particulars at the time these proceedings were commenced and an award of 4 weeks' pay is made. The Second Respondent is ordered to pay the Claimant £1,190.

6. The Second Respondent may deduct any necessary sums for tax and national insurance from the payments detailed at paragraphs 2 and 3 above.

REASONS

Claims and Issues

1. The Claimant brings claims of:
    a. Wrongful dismissal/ notice pay;
    b. Holiday Pay;
    c. Unlawful deduction of wages;
    d. Financial losses consequential to the failure to pay wages;
    e. Failure to provide a written statement of employment particulars.

2. There is a live issue in this case as to which of the two Respondents is the correct employer at the relevant time and upon whom liability, if any, falls.

3. The issues in this case were determined by Employment Judge Battisby at the Preliminary Hearing on 29 September 2021. These issues were agreed as the relevant issues by the attending parties at the outset of the hearing. I will not read out those issues now, but they are clearly set out at para 39 of the Tribunal's Order dated 30 September 2021 and I make findings in respect of each legal issue.

4. The Claimant and Mr Mian on behalf of R2 were in attendance throughout the hearing. R1 did not attend. The clerk made considerable efforts to contact R1. The notice of hearing appears to have been served on R1 by post at 47-50 Hockley Hill. R1 (Mr Ali) has provided a statement on 20 May 2022 which has clearly been prepared for the hearing and strongly suggests he was aware of it. Mr Mian has indicated that Mr Ali was trying to join, but has not called to the Tribunal or contacted us with any difficulties. The clerk has tried to call numerous times throughout the morning of 6 June 2022 before we started to hear evidence, but has had no success in getting through and we have no e-mail address. Representatives from R2 have also sought to contact Mr Ali with no success. I also do not appear to have an ET3 from the first Respondent. Therefore, under the Employment Tribunals Rules of Procedure, Rule 47, I decided to go ahead to hear the case in R1's absence as I believe that is in accordance with the overriding objective to resolve this case without delay (it having been lodged in Oct 2020) and we have done all we can to contact R1. I have no confidence that R1 would attend or participate in the case even if a postponement was made.

5. At the beginning of the hearing the Claimant made a request for additional documents to be considered. These were WhatsApp messages between her and R2's witness, Mr Lakhari. I have considered the overriding objective and the balance of prejudice. I am also mindful that this is a case where neither party has complied with the directions on time. R2 appears to have served its bundle and statement on C on Friday 3 June 2022 just before the hearing. It is hard for R2 to now object to late disclosure. I do appreciate it is the day of the hearing, however the documents may be relevant to the claim and will assist me in reaching determination of the issues. They are not overly long and are relevant to Mr Lakhari who is going to be giving evidence and I will give sufficient time for Mr Mian to share the documents with the witness and take instructions. We have a sufficiently long hearing window for that to happen. It is in accordance with overriding objective to allow the documents into evidence.

Procedure, documents and evidence heard

6. I had before me 3 bundles. The first was prepared by the Claimant and included her witness statement and relevant attachments. The second two bundles were submitted by R2: Hotelawala bundle including the witness statement of R2's witness, Mr Lakhari; and Bundle 2 including the witness statement of Mr Ali (R1's witness who did not attend).

7. I heard evidence from the Claimant and Mr Lakhari. Unfortunately, Mr Lakhari was not able to appear on camera on the CVP due to technical difficulties which we tried to resolve

without success. The Claimant was happy to proceed with audio only. I have considered Mr Ali's statement, but given it limited weight due to his non-attendance.

Facts

8. The Claimant started employment with Hotel Management Services Limited on 24 March 2019. At that time R1 operated the lease of the premises of the Ladbrooke House Hotel and operated the hotel business. The Claimant worked alongside a group of colleagues and her main duties were receptionist. At that time the Claimant was not aware of the legal name of her employer and simply believed that she was working for the Ladbrooke House Hotel. The Claimant was aware that the hotel management was headed up by an individual named Dr Malik and that he was responsible for approving wages etc.

9. The Claimant was given a brief employment contract at the commencement of her employment and asked to sign it, but was never permitted to retain a copy. She and other employees requested a copy of their contracts regularly throughout their employment, but these were never provided. The Claimant was disadvantaged as she did not know what her contractual terms were. No copy of the employment contract has been supplied by either Respondent as part of these proceedings.

10. The Claimant worked a minimum of 35 hours per week and was paid £8.50 per hour. Her holiday entitlement was 28 days per annum. She did not take any holiday throughout the period her employment, i.e. from 24 March 2019.

11. When the Government opened the furlough scheme in March 2020 the Claimant was put onto furlough. The Claimant's payslip for March 2020 shows a net payment of £1086.46. This was not paid into her bank account and instead a payment of £699.04 was paid on 14 April 2020. It was established in evidence with the Claimant that she then received furlough payments covering April 2020 through to September 2020 inclusive. I have had no evidence before me from either Respondent as to what exact period each of the furlough payments cover. On reviewing the Claimant's bank statements the payments seem to be made either at the end of the month they cover, or the start of the following month. In the absence of any other evidence I deem the furlough payments to be paid in arrears covering the full previous calendar month. Therefore the Claimant received furlough payments covering the period until 30 September 2020.

12. I accept the evidence of Mr Lakhari that R1's lease of the Ladbrooke House Hotel ended in April/ May 2020 and R2, Hotelwala Limited, took over the lease and commenced trading from the middle of 2020. Mr Lakhari was not sure of the exact date but thought this to be around June 2020. The business was operated as the Ladbrooke House Hotel both by Hotel Management Services Limited and then subsequently by Hotelwala Limited. I have heard evidence that over the summer of 2020 the hotel was not operating at full capacity due to Covid, but was hosting key workers and a small number of other residents (5-10 in total). There was also re-decoration work going on during August and September 2020, but the business did not stop operating completely during this time.

13. Mr Lakhari started his employment with Hotelwala Limited on 10 August 2020. Mr Lakhari also reported to Dr Malik, the same individual as the Claimant was aware headed up Hotel Management Services Limited. The Claimant returned to work from furlough for 2 weeks in August 2020 and was engaged in showing Mr Lakhari and his assistant the ropes. Messages were exchanged between the Claimant and Mr Lakhari during this time about how the rota and payment of staff worked. The Claimant was not informed of any change of companies, simply that Mr Lakhari was the new general manager.

14. The Claimant re-commenced furlough after this 2-week period and was then sent a letter by post dated 6 October 2020 terminating her employment with no notice. The letter was short and stated that she was no longer employed by Hotel Management Services Limited and was signed off by the Ladbrooke Hotel. I find that the Claimant's understanding from this letter was that she was dismissed by her employer and therefore the dismissal was effective on behalf of whichever Respondent was the legal employer at the relevant time. The notice of dismissal took effect when the Claimant either read it, or had a reasonable opportunity of doing so (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22*) and I find that it is reasonable to assume this to be the second day after posting: therefore the date the Claimant's employment ended is 8 October 2020.

15. The Claimant was also sent a P45 by Hotel Management Services Limited stating her last day of employment to be 30 September 2020, however for the reasons stated above I find the dismissal date to be 8 October 2020.

The Law
TUPE

16. The Transfer of Undertakings (Protection of Employment) Regulations 2006 operate to protect employment where there is a relevant transfer. This covers a transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity (a business transfer) (*regulation 3(1)(a), TUPE*).

17. This involves consideration of three elements:

    a. Is there an economic entity - "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary." (*Regulation 3(2), TUPE.*)

    b. Has there been a transfer of that economic entity. TUPE applies to a transfer "howsoever effected" (*regulation 3(4)(b), TUPE*).

    c. Does the economic entity retaining its identity following the transfer.

18. Pursuant to Regulation 4 of TUPE a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee. On the completion of a relevant transfer:

    a. all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

    b. any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

Notice

19. The Employment Rights Act 1996, s86, sets out the minimum period of notice required to terminate a contract of employment.

20. Employees with continuous employment of at least one month but less than two years are entitled to at least one week's notice from the employer.

Holiday Pay

21. A worker (which includes an employee) is entitled to 5.6 weeks' annual leave in each leave year pursuant to the Working Time Regulations 1998. This is equivalent to 28 days for those who work full-time. No minimum period of service is required to qualify for statutory annual leave.

22. If the leave year is not specific in a relevant agreement (such as an employment contract) then the leave year begins on the date the worker's employment commenced and each anniversary of that date (Regulation 13(3)).

23. There are some circumstances in which case law has established that workers can carry over unused statutory holiday to the next year (and sometimes beyond) – for example sick leave, maternity leave. This can also include where the worker did not have an effective opportunity to take their statutory holiday entitlement. (*Max-Planck-Gesellschaft zur*

Forderung der Wissenschaften eV v Shimizu (C-684/16) EU:C:2018:874, decided at the same time as *Kreuziger v Berlin (C-619/16) EU:C:2018:872*). These cases demonstrate that there is a requirement that the employer show, in particular, that it provided sufficient information to the worker about their holiday entitlement, and the potential loss of untaken entitlement at the end of the leave year.

Unlawful deduction from wages

24. It is unlawful for an employer to make a deduction from a worker's wages unless:
    a. The deduction is required or authorised by statute or a provision in the worker's contract; or
    b. The worker has given their prior written consent to the deduction.

(Section 13, ERA 1996.)

25. Subject to the rules on extension of time for early conciliation a claim must usually be brought within three months beginning with:
    a. For a deduction, the date of payment of the wages from which the deduction was made.

26. An employment tribunal may still consider a complaint presented outside the time limit if it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three-month period, and the claimant has presented it "within such further period as the tribunal considers reasonable" (section 23(4) ERA)

27. Pursuant to s24(2) ERA an Employment Tribunal may order the employer to pay financial losses which are consequential to the unlawful deduction of wages.

Employment Particulars

28. Under s38 of the Employment Act 2002 when these proceedings were commenced, if there was a breach of the employer’s duty to give the worker a written statement of employment particulars then I must make an award of 2 weeks’ pay and, if just and equitable then a higher award of 4 weeks’ pay -unless there are exceptional circumstances that would make it unjust or inequitable to make the minimum award.

Conclusions

29. I now turn to my conclusions and deal with each identified issue.

30. Firstly the questions on employee status and who the relevant employer was. I have found as a matter of fact that the Claimant was a permanent employee of Hotel Management Services Limited from 24 March 2019 (and indeed there was no suggestion otherwise from either Respondent). Therefore she was an employee within the meaning of section 230 Employment Rights Act.

31. I next turn to whether there was a TUPE transfer. I have considered the test for a relevant transfer. Was there an economic entity – an organised grouping of resources which has the objective of pursuing an economic activity? In my view Hotel Management Services Limited’s operation of the Ladbrooke House Hotel clearly satisfies this. There was an organised grouping of staff (including the Claimant) running the operation of the hotel under the overall management of Dr Malik. The purpose was to run the hotel for profit and this means that an economic activity was being pursued. Therefore the ‘economic entity’ test was satisfied.

32. I now turn to whether there was a transfer of that entity and did the economic entity retain its identity? Hotel Management Services Limited gave up the lease and running the business in April/ May 2020 and Mr Lakhari’s evidence is that Hotelwala Limited took over in June 2020. Mr Lakhari explained that there was redecoration going on when he joined in August 2020 and the intent was for the hotel to improve its offering to customers and improve the quality of service - as in his words it had been in ‘quite a state’. However the hotel continued to operate during this time with 5-10 guests which included key workers. I conclude that there was a transfer of the lease and operation of the economic entity of the Ladbrooke House Hotel when Hotelwala Limited took over in June 2020. I cannot pinpoint an exact date as this evidence was not before me, but the evidence shows that the hotel continued to operate throughout this time (albeit with a small number of guests) and thus

a transfer did take place. Mr Mian points out to me that there was no exchange of money between Hotel Management Services Limited and Hotelwala Limited, but this does not matter as TUPE can apply to a transfer howsoever effected and it is sufficient, as here, that one business takes over running an economic entity from another without any exchange of payment, or even any direct engagement between transferor and transferee. Further Mr Mian argues that Hotelwala Limited did not start operating the hotel until October 2020. I can see that a payroll was set up at that time, but it is clear from the evidence that Hotelwala Limited was operating the hotel in the intervening period as well: Mr Lakhari was in place and overseeing upgrading, 5-10 residents were there and according to Mr Lakhari's own witness statement Hotelwala Limited took over the lease and commenced trading from mid 2020 which he stated in evidence was around June 2020.

33. I also conclude that the economic entity did retain its identity. Whilst there were intended changes in the quality of customer service and re-decoration this does change the fundamental nature of the economic entity which was to run a hotel on the premises under the trading name of the Ladbrooke House Hotel (or the Ladbrooke Hotel).

34. I have noted that the parties did not operate on the basis that TUPE would apply and the Claimant was not informed of a TUPE transfer, or indeed any change in employer. However TUPE operates by law if the legal test is satisfied, regardless of the intentions or actions of the parties. I am also mindful that the Claimant continued to be paid by Hotel Management Services Limited for 3 months after June 2020. However again I do not consider that this impacts on whether TUPE applied in June 2020, otherwise this would give the parties the option to conspire to deny the Claimant her rights under TUPE. Finally the Claimant's letter of dismissal was signed off by the Ladbrooke Hotel and purported to end her employment with Hotel management Services Limited. Again I do not consider that this letter has any legal effect on whether TUPE applied in June 2020 (that is a matter of law). In light of my findings by the time the Claimant received this letter she was actually employed by Hotelwala Limited, but I still consider this letter to be an effective termination of that employment as it was signed off by the Ladbrooke Hotel and the Claimant understood her employment (with whoever her legal employer was) to be terminated at that point.

35. In light of my finding that there was a TUPE transfer of the Claimant's employment in June 2020, this means that Hotelwala Limited stepped into the shoes of the Claimant's employer in June 2020. Hotelwala Limited is therefore the correct Respondent for this claim.

36. As regards notice pay I find that the Claimant was not given the required statutory notice of 1 week (given her length of service) and received no payment in lieu. I therefore award the Claimant one week's pay. The Claimant worked 35 hours per week at £8.50 per hour. Therefore one week's pay is £297.50. Given the relevant period is only one week it would not be reasonable to reduce this amount due to any failure by the Claimant to mitigate her losses.

37. As regards holiday pay I find that the Claimant had accrued but untaken holiday at the point her employment ended on 8 October 2020. I have accepted the Claimant's unrefuted evidence that she did not take any holiday during her employment. In light of the relevant case law as referenced above I have not been provided with any evidence from the Respondents that the Claimant was provided with sufficient information about her holiday entitlement and the potential of losing her entitlement if she did not take it. This is the sort of information that might be in an employment contract, but the Claimant was not permitted to have a copy of her contract, despite her requests. Also, as the Claimant was not provided with her contract, and there was no contract before me, her holiday year runs from the date she commenced employment, i.e. 24 March. I find that the Claimant can carry over her untaken holiday entitlement from the previous holiday year (i.e. from March 2019) and this means that 8.6 weeks were outstanding on termination (5.6 weeks annual entitlement from 24 March 2019 until 24 March 2020 and then a further 0.54 of the holiday year on a pro rata basis until her dismissal). I therefore award the Claimant the sum of £2,558.50 in holiday pay. (£297.50 x 8.6).

38. Turning then to the claim of unlawful deduction of wages. Firstly in relation to the alleged shortfall of furlough pay from the payment made on 14 April 2020. The Claimant commenced her Early Conciliation on 28 October 2020, over 6 months later. A 3 month

time limit applies to this claim unless it was not reasonably practicable to bring the claim in time. The Claimant explained that she was trying to resolve this herself without recourse to litigation and it wasn't until later that she realised through a friend that she could bring a claim/ contact ACAS. However this is a strict test and I believe it was reasonably practicable for this claim to have been brought in time. Therefore this claim fails.

39. In respect of the later furlough payments I have found that the Claimant received payments covering until 30 September 2020. Her employment ended on 8 October 2020. This means that there was a 39 day period for which she did not receive her wages (namely her furlough payment). From the bank statements I can see that the regular monthly furlough payment was £915.04. Working on an average of 30 days per month this equates to a daily pay rate of £30.50. I therefore award the Claimant unpaid wages in the sum of £1,189.50. (39 x £30.50).

40. I have had no evidence submitted to me of financial losses sustained by the Claimant attributable to the unlawful deduction of wages and therefore no further award is made in this regard.

41. Finally I find that the Claimant was not given a written copy of her statement of particulars. Whilst she did sign a copy this was not given to her, despite many requests. At the time these proceedings were commenced the Claimant's employer, Hotelwala Limited, was in breach of s38 Employment Act 2002. The Claimant was disadvantaged by not being given a copy of her contract and the on-going failure to provide this caused her some distress. I consider it just and equitable to make the higher award of 4 weeks' pay which is a sum of £297.50 x 4 = £1,190.

42. In conclusion therefore my Judgment is that Hotelwala Limited must pay the Claimant:

    a. £297.50 notice pay;
    b. £2,558.50 holiday pay;
    c. £1,189.50 net wages;
    d. £1,190 for failure to provide a written statement of particulars.

43. Hotelwala Limited may deduct any necessary sums for tax and national insurance from the first 2 payments.

Employment Judge Fitzgerald
28 June 2022