



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103155/2023 (V)

Held at Aberdeen on 2 October 2023

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Employment Judge N M Hosie

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Ms Amie Thomson

**Claimant
In Person**

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South River Property Ltd

**1st Respondent
Represented by
Ms S Mofteh,
Director**

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Portland Hotel Trading Ltd

**2nd Respondent
Represented by
Mr J Harling,
Director**

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E.T. Z4 (WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

5 The Judgment of the Tribunal is that:-

1. the claim against the first respondent, South River Property Ltd, is dismissed;
2. the claim under s.23 of the Employment Rights Act 1996 is well-founded and
10 the second respondent, Portland Hotel Trading Ltd, shall pay to the claimant the sum of Nine Hundred and Sixty Pounds (£960) as unlawful deductions from wages; and
- 15 3. the claimant was unfairly dismissed by the second respondent, Portland Hotel Trading Ltd, and the second respondent shall pay to the claimant the sum of Five Thousand, Four Hundred and Twenty Pounds (£5,420), by way of compensation.

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REASONS

Introduction

1. The claimant, Amie Thomson, brought complaints of unfair dismissal and for
25 unlawful deduction from wages. Her claim was denied in its entirety by the respondents.

Identity of the claimant's employer

- 30 2. I was able to establish at the start of the Hearing that the claimant's employer, and the correct respondent for her claims, was the second respondent Portland Hotel Trading Limited. This was a matter of agreement among the parties. Accordingly, the claim was dismissed against the first respondent,

South River Property Limited, and it only proceeded against the second respondent (“Portland” and hereinafter also referred to as “the respondent”).

The evidence

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3. On behalf of Portland I heard evidence from:-

- Jeffrey Harling, a Director of Portland
- Sam Moftah, a Director of the first respondent “South River” and Mr Harling’s wife.

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4. I then heard evidence from the claimant and on her behalf from:-

- Cornelia Petcu, a former work colleague of the claimant. Ms Petcu is Romanian and she had the benefit of giving her evidence with the assistance of a Romanian Interpreter.

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Relevant documents

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5. Both parties submitted documents, to which the witnesses referred at the Hearing (“P”).

The facts

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6. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the issues with which I was concerned.

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7. Portland acquired the Portland Hotel in Lybster, Caithness (“the Hotel”). The ownership of the Hotel was transferred by way of a so-called TUPE transfer

on 18 March 2023 from the previous owner, S1 Partnership (Lybster) Ltd (“S1”).

5 8. The claimant had been employed by S1 at the Hotel since 1 March 2019 as a Head Waitress. She also did some reception and office work. Her employment particulars were one of the productions (P1-3).

10 9. The claimant was still employed at the Hotel at the time of the TUPE transfer on 18 March 2023. Accordingly, her employment, along with the employment of all the other employees at the Hotel at the time, transferred to Portland on that date, on their existing terms and conditions. This meant, amongst other things, that the claimant had continuity of employment from 1 March 2019.

Meeting with the Hotel staff on 22 March 2023

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10. The Hotel was routinely closed during the “off season” from around the end of October until the beginning of May the following year. It was not open, therefore, when Portland took ownership.

20 11. However, Jeffrey Harling, the respondent’s Director, arranged a meeting with the staff on 22 March 2023 to introduce himself and his wife. The claimant was in attendance at the meeting.

25 12. There was a conflict in the evidence which I heard about what was communicated by Mr Harling to the staff at that meeting. Both he and his wife, Ms Mofteh, said that he told the staff the Hotel would be opening on 17 April 2023 and that they expected all the staff to report for work then. However, the claimant’s understanding was that she would not necessarily be required to report for work on 17 April. She said that Mr Harling had
30 advised everyone at the meeting that their contracts of employment were to be updated and she understood that she would be contacted and “called in”

to sign her contract, before being required to start work. Mr Harling had also advised that there was a "health and safety video to be watched".

5 13. I did not find this conflict easy to resolve but I decided that the claimant's account was to be preferred.

14. The reasons for this were that the claimant gave her evidence in a measured, consistent and convincing manner and presented as credible and reliable;
10 her evidence was consistent with a number of e-mails which she sent to the respondent which I refer to below; it was not unusual for the claimant not to start work before May; and there was a degree of corroboration of her evidence from her witness Ms Petcu who was also in attendance at the meeting and said that they were told that the "new manager" would be in
15 contact to arrange for their contracts to be signed.

15. There were a total of around 15 employees at the Hotel and, as it transpired, some 4 or 5 called in to the Hotel and arranged to sign their contracts before the Hotel opened on 17 April. However, no one made contact with the
20 claimant.

16. The claimant was on holiday after the meeting but returned to her home which is within walking distance of the Hotel on 16 April.

25 17. All the other employees reported for work on 17 April, but the claimant did not as she had not heard from the respondent.

18. When the claimant did not report for work on 17 April Mr Harling decided to "fill her job role". He arranged for Ms Lydia Scott-Hall to increase her hours
30 of work and to engage another employee, Charles Dykes, on a part-time basis. Apart from the claimant not reporting for work on 17 April, another reason why Mr Harling believed that the claimant would not be returning to work was that he had received a "WhatsApp message" from Steven Swan,

the previous owner of the Hotel and a Director of S1, in the following terms (P.22): *"I cannot speak for Amie, but I did advise you at the time that putting a previous subordinate in charge of her would not work"*.

5 19. Mr Swan knew the claimant well. He is the brother of the claimant's partner. The "previous subordinate" he referred to in his e-mail was a lady by the name of "Caroline". Mr Harling had appointed her as Events Manager at the Hotel. She had worked previously at the Hotel as a Waitress. The claimant was her manager at the time. Their relationship had been a difficult one.

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20. However, the claimant denied that this was a factor in her not reporting for work when the Hotel opened on 17 April. She maintained, consistently, that she had been waiting from someone from the Hotel to contact her to arrange for her contract to be signed and for her to view the Health and Safety video.

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21. Further, she had been involved in the arrangements for Mr Swan's wedding at the Hotel on or about 7 April and she had arranged for Caroline to be the Events Manager at the wedding. She claimed that even if she had been aware of Caroline's permanent appointment that would not have prevented her working at the Hotel.

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22. Mr Harling claimed that he did not hear further from the claimant after the Hotel opened on 17 April when he replaced her. He said that he had gone to her home which is close to the Hotel but there was no one there. He claimed that the first communication he received from her was an e-mail in May when she advised that she intended consulting ACAS.

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23. However, I accepted the claimant's evidence, which as I recorded above was credible and reliable, that she had tried to telephone the Hotel on 2 or 3 occasions but she couldn't get through and that she had gone into the Hotel on 25 April to enquire what was happening. She was told that Mr Harling

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wasn't there and she had left a note asking him to contact her. However, Mr Harling denied ever having received any note from her.

24. What was of particular significance, so far as the veracity of the claimant's evidence was concerned, was the fact that she sent a number of e-mails to the respondent which were consistent with her evidence. Mr Harling claimed that he never saw these e-mails as he was undergoing medical treatment at the time. However, I was satisfied that the claimant had sent the e-mails to Mr Harling's e-mail address.

25. On 28 April at 15:57 she sent the following e-mail (P.8/9): -

"I'm writing in relation to my position at the Portland Hotel.

Firstly, you contacted me by phone to invite me up for a staff meeting which took place on 22 March 23. Which I attended. In the meeting it was stated that we'd all be contacted and brought in to discuss roles, contracts etc.

The only other contact I have had with yourselves was on the 06 April 23 when Sam asked me for a chat, I said that I would be in the Hotel on 07 April 23 and make myself known to you on arrival (which I did). I was never approached for that chat. Subsequent to that I was in the building all weekend and again never once was I approached.

I now find myself having to explore options on how to resolve this,. Including a chat with ACAS to get advice on how to proceed.

Having been TUPE over to yourselves, from my previous employer. Below I have highlighted some of the points that are in my contract.

- *As per my contract I should have been receiving pay of £240 p/w for 52 weeks of the year. Up until now I have received no payments.*

- *As per the meeting on 22 March 23 it was said that we would all be contacted regarding our positions, contracts etc. I'm still waiting for a meeting and have never received any calls or e-mails inviting me in.*

- *2 of my subordinates have been put in managerial positions. One of which walked out of her position 3 years ago, because she couldn't follow the rules and regulations laid down and continually undermined others including myself in our job roles. You have now employed her, in a position that would put her as my immediate supervisor/manager. The other was also under my supervision and will now be my*

supervisor/manager. I was never consulted on these positions of which I held prior to your take over.

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- *According to TUPE regulations my employment should remain the same as my previous contract states. On reading the TUPE regulations there have in fact been many breaches of the terms and conditions.*

 - *I have tried calling the Hotel on 3 separate occasions with no reply. I also visited the Hotel on Tuesday 25 April 2023 to meet and try and resolve the issues to which I was told you weren't available. I left a letter on reception asking to be contacted so we could discuss the details of my employment on your return. I have had no response to this letter.*

 - *I have subsequently found out that that (sic) was a staff meeting on Wednesday 26 April 2023. To which I wasn't invited.*
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If you could please get back to me regarding the above points and how we move forward before Friday 05 May 2023.

20 *I look forward to hearing from you."*

26. As the claimant had not received a response to her e-mail, she sent a further e-mail on 8 May to Mr Harling's e-mail address and also to the Hotel. It was in the following terms (P.10/11):-

25 *"Good evening Jeff & Sam,*

I e-mailed you on the Friday 28 April 2023 and attached a letter outlining my concerns.

30 *I had given you a week to respond, Friday 5 May 2023.*

To date I have not received a reply.

35 *If I am not contacted by 4pm tomorrow Tuesday 9 May 2023.*

I will have no alternative but to see what options are open to me."

27. The claimant had taken advice from ACAS and she was also in
40 correspondence with them (P. 12-17).

28. The following is an excerpt from an e-mail she received from ACAS on 23 May (P.14): *“Thank you for your e-mail. I have tried ringing Respondent on the number provided but it is set not to receive calls. I am limited to sending an e-mail and waiting for a response.....”*

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29. An ACAS conciliator was able eventually to make contact with Mr Harling. He advised that the claimant’s position had been filled. He offered the claimant employment at the Hotel as a Housekeeper. A copy of the proposed “Employment Contract” was one of the productions (P.19/20)). This provided that the claimant would be engaged at first for a probationary period and that she would only have continuous employment from 17 April 2023. That was the date when Mr Harling filled the claimant’s role as Head Waitress at the Hotel.

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30. The claimant rejected the offer and sent an e-mail to ACAS on 23 May to explain why (P.16).

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Discussion and Decision

20 Dismissal

31. The respondent accepted that the claimant was effectively dismissed on 17 April 2023 when Mr Harling filled her role at the Hotel, as a consequence of her not reporting for work that day. I am satisfied that that was the effective date of termination of her employment.

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Unlawful deduction from wages

32. Although the Hotel was closed during the “off season” from October until May the following year, in terms of her contract the claimant continued to be paid at the rate of £240 each week, whether or not she was working. She was paid

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her wages by her former employer, S1, the “TUPE transferor” until 18 March 2023 when the business transferred to Portland. However, the claimant did not receive any payment of wages from Portland. In the course of the Hearing, Mr Harling, the respondent’s Director accepted that the claimant should have been paid wages by the respondent for the 4 week period from the date of the transfer to the respondent’s ownership on 18 March 2023 until her dismissal on 17 April 2023. It was accepted, therefore, that there had been an unlawful deduction from her wages of **£960** (4 x £240). This sum requires to be paid, by the respondent to the claimant.

Unfair dismissal

33. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 (“the 1996 Act”) requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is conduct. I was satisfied that the claimant was dismissed for that reason. However, that is not to say that I was of the view that the claimant was guilty of the conduct complained of, namely a failure to report for work, only that the respondent and Mr Harling, in particular, believed she was and that was the reason for the dismissal.

34. The remaining question which I had to determine, therefore, under s.98(4) of the 1996 Act, was whether the respondent had acted reasonably in treating that reason for dismissing the claimant as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case.

35. To determine whether a dismissal for conduct is fair valuable guidance is provided in the well-known case ***British Home Stores Ltd v. Burchell*** [1978]

IRLR 379. Mr Justice Arnold gave the following guidelines in that case at page 380:-

5 *“What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of that employee of that misconduct at that time. That is really stating shortly and compendiously what in fact is more than one element. First of all there must be established by the employer the fact of that belief: that the employer did believe it.*
10 *Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think that the employer, at the stage at which he formed that belief, on those grounds, at any rate at the final stage at which he formed the belief, on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”*
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36. So far as the first branch of that three-fold test was concerned I was satisfied that Mr Harling believed that the claimant had no intention of returning to work
20 and that was why he filled her post immediately.

37. However, I was not satisfied that he had reasonable grounds to sustain that belief.

25 38. Under paragraph (a) of subsection 98(4) of the 1996 Act the question of whether the employer acted reasonably, particularly when the reason for dismissal was related to the conduct of an employee, frequently involves consideration of the adequacy of the employer’s investigation into some alleged wrong doing and thus whether a reasonable employer would have
30 concluded that the employee was guilty.

39. There was no such investigation, in any meaningful way, by the respondent and moreover it was perfectly clear that it was the claimant’s intention to continue working at the Hotel. This is evidenced by the various e-mails which
35 she sent to the respondent none of which were responded to.

40. In my view, Mr Harling acted precipitously by filling the claimant's role immediately without even speaking to her. It must have been clear from the claimant's subsequent e-mails that she intended to continue working at the Hotel and yet he took no steps to resolve the matter and consider rescinding his decision. He was simply not prepared to countenance the claimant continuing to work at the Hotel as Head Waitress as his response to ACAS was that her position had been filled.
41. There was an offer of a Housekeeping position to the claimant but that was a different role altogether. It was not in accordance with the TUPE regulations and moreover, the proposed employment contract only gave the claimant continuity of employment from her termination date on 17 April 2023 and not from 1 March 2019 when she first started working at the Hotel. It was perfectly understandable, therefore, why the claimant refused the offer.
42. Further, the respondent, and Mr Harling in particular, singularly failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. He failed to investigate the reason for the claimant not reporting for work on 17 April; failed to establish the facts; failed to inform the claimant of the problem; failed to hold a meeting with the claimant to discuss the problem; failed to afford the claimant an opportunity to appeal. There were no procedures whatsoever. The claimant was simply presented with a *fait accompli*: her position had been filled.
43. I had little difficulty, therefore, arriving at the view that the respondent had not acted reasonably in all the circumstances.
44. I was not satisfied that the claimant's dismissal was within the band of reasonable responses which an employer might reasonably have adopted in the circumstances. No reasonable employer, acting reasonably, would have filled the claimant's position, and effectively dismissed her, when she did not report for work on 17 April, based on the flimsiest of evidence from Mr Swan that she might not wish to work for the new Events Manager. The claimant

had worked at the Hotel for over 4 years. She had never given any indication to Mr Harling that she did not intend to return to work when the Hotel re-opened.

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45. Accordingly, the claimant's dismissal was unfair.

Compensation

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46. So far as the Basic Award is concerned, as I recorded above the claimant earned £240 per week, whether or not the Hotel was open. At the time of her dismissal she had 4 complete years' service and she was 43 years of age. She is entitled therefore, to a Basic Award of 5 weeks' pay which amounts to **£1,200**.

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47. So far as the Compensatory Award is concerned, the claimant was unemployed from the date of her dismissal on 17 April 2023 until 4 August 2023 when she was able to secure alternative employment with earnings at the same level as she had when she was employed by the respondent. I decided that it would be just and equitable to award her compensation to reflect her financial loss for the 15½ weeks when she was unemployed which amounts to **£3,720** (15.5 x £240).

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48. The claimant is also entitled to compensation for so-called "loss of statutory rights", which I assess at **£500**.

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49. Accordingly, the total Compensatory Award is **£4,220** and when the Basic Award of **£1,200** is added, the total monetary award is **£5,420**

5 **Employment Judge: N M Hosie**
 Date of Judgement: 11 October 2023
 Date sent to Parties: 12 October 2023