



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms D Devere

v

Oakfields (Easton Maudit) Limited

Heard at: Cambridge

On: 25 November 2019

Before: Employment Judge Johnson

Appearances For the Claimant: In person

For the Respondent: Mr Reeder, Director

RESERVED JUDGMENT

1. The Claimant's claims of breach of contract, unauthorised deduction of wages and a failure to pay statutory annual leave entitlement are well founded and succeed.
2. The amounts that the Respondent must pay to the Claimant in satisfaction of this judgment will be determined at a Remedy Hearing with a hearing length of 1 hour and on a date to be confirmed by the Tribunal.

RESERVED REASONS

Introduction

1. The Claimant was employed by the Respondent as a Catering Manager from 27 February 2018 until 18 December 2018 when she was dismissed for gross misconduct.
2. The Claimant commenced proceedings in the Employment Tribunal on 24 February 2019 following a period of Acas Early Conciliation from 31 December 2018 until 18 January 2019.
3. The case was initially presented as primarily one of unfair dismissal in addition to the complaints of breach of contract, unlawful deduction of

wages and failure to pay statutory annual leave entitlement. However, upon initial consideration by the Tribunal it was noted that the Claimant did not have sufficient continuous employment in which to bring an unfair dismissal complaint and it was not allowed to proceed.

4. As this case was originally treated by Listing as a straightforward money based claim, it was given a one hour time estimate for its Full Merits Hearing. However, it became clear at the beginning of the Hearing that there were difficulties with regards to the issues in this case and taking into account the evidence called and the documents relied upon, the actual hearing of witness evidence and final submissions took most of one day. Accordingly, the Judgment in this case was reserved.

Evidence Used at the Hearing

5. For the Claimant the Tribunal only heard witness evidence from the Claimant.
6. For the Respondent the Tribunal heard oral evidence from Mr Lawrence Mushayahembe an Operations Manager with the Respondent and Mrs Sara Morrison who is a Director with the Respondent. In addition, written witness statements of Ellen Hawkes and Helen Johnson were provided by the Respondent. It was made clear to the parties that as the statements would not be supported by oral witness evidence, their evidence would be given less weight than those witnesses who attended the hearing today.
7. In any event, it was felt in relation to the issues to be considered in this hearing, that Ms Hawkes and Ms Johnson simply confirmed that the Claimant left work early on 5 November 2018 and that in the case of Ms Johnson, that the kitchen following the Claimant's departure, had been left in some disarray.
8. This was a case where both parties had provided hearing bundles. Unfortunately, the Claimant's copies of the hearing bundle which had been sent by recorded delivery had failed to reach the Tribunal by the date of the hearing. However, I was able to share my bundle which had been provided by the Respondents with the witnesses as appropriate and the hearing was able to proceed without too much difficulty.
9. The Hearing started shortly after 11 o'clock in the morning but a short break was required to allow me to read the witness statements and the case did not properly begin until 12:15 pm. Apart for a break for lunch, the hearing continued without any further breaks.

The Issues

10. The issues in this case were as follows:

10.1 Breach of Contract (Wrongful dismissal)

It is accepted that the Claimant dismissed. However:

- (i) was there a fundamental breach of contract of employment? and
- (ii) if so, was the employee guilty of conduct so serious as to amount to a repudiatory breach of contract of employment entitling the employer to summarily terminate the contract?
- (iii) if not, how much notice was the Claimant entitled?

10.2 Unlawful deductions

Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with Section 13 of the Employment Rights Act 1996 by failing to pay all of the Claimant's sick pay and making further deductions from her monthly salary?

10.5 Failure to pay statutory annual leave

- (i) What was the Claimant's leave year?
- (ii) How much of the leave year had elapsed at the effective date of termination?
- (iii) In consequence, how much leave had accrued for the year under Regulation Section 13 and 13A?
- (iv) How much paid leave had the Claimant taken in the year?
- (v) How many days remain unpaid?
- (vi) What is the relevant net daily rate of pay? and
- (vii) How much pay is outstanding to be paid to the Claimant?

Findings of Fact

- 11. In making its findings of fact the Tribunal has followed the issues as set out in the agreed list above.
- 12. The Claimant was employed by the Respondent and from June 2018 she moved from being an Assistant Catering Manager at the Respondent's care home, to that of a Kitchen Manager. There was some support provided from time to time, but usually the Claimant was working primarily by herself. The Claimant was responsible for preparing the meals for the residents at the home.
- 13. The Claimant, on the evidence of Mrs Morrison, had been brought in to improve the state of the catering provision at the home. The Claimant was

clearly experienced and had a Level 2 City and Guilds qualification in Health and Safety Certificate: Food Safety. This had to be renewed from time to time but was valid at the time the Claimant was appointed to this role. However, once the Claimant became a Catering Manager it became essential the Claimant improved her certificate to that of a Level 3. This became an ongoing issue from the date of her appointment until the date of her dismissal in December 2018.

14. When the Claimant started work in this role, she described being concerned at how relaxed the Care Assistants were in permitting residents to enter the kitchen area and she was worried about the risk of cross contamination and more general issues of health and safety. It appeared not to be an issue that the Claimant worked hard to ensure that the kitchen area was properly looked after and kept hygienic.
15. Unfortunately, this caused some friction between the Claimant and her work colleagues who were not used to a kitchen at a home being strictly managed in this way. Their objection was that this level of restriction made the residents feel like the place was less of a home and more of an institution. There was no dispute however, that food safety was of paramount importance, especially as the home operated within the care sector was subject to strict scrutiny by the Care and Quality Commission, ('CQC').
16. What is clear, is that the Claimant failed to update her Food Safety Certification despite numerous requests being made by management. These requests began at the point of her appointment to the Catering Manager role and subsequently in her supervision meetings during October with Mr Mushayahembe.
17. The Claimant had suffered from a number of health issues during 2018 and had been informed by her optician that she had bleeding in her left eye in July 2018 which required injections. However, due to understandable concerns about more severe underlying medical problems, the Claimant was absent from work due to stress and anxiety in July 2018. The treatment did appear to be successful and she returned to work during August 2018.
18. While there was considerable pressure upon the Claimant to obtain the Food Safety Certification, the Claimant's evidence was that she kept reminding line management that it was extremely difficult for her to do this training. This was because they did not arrange for anyone to cover the kitchen while she carried out this task. It is understood that completing the Level 3 qualification on line would require several hours of work and this could not be accommodated during a shift while looking after the kitchen at the same time.

19. While Mr Mushayahembe was clear that the employer was keen to support the Claimant, the initial agreement that she would complete this course on 11 October 2018 could not take place due to a hospital appointment being arranged. The Respondent failed to arrange any further dates for the Claimant to undergo this training. It is unfortunate that they did not simply book one of the Claimant's shift days to be reserved for training and to put in place cover using agency work. The Respondent had made quite clear that they had no difficulty in arranging cover of this nature. As this is something that would be expected of management who were responsible for staffing rather than the Claimant, it seems surprising that this was not done.
20. Under these circumstances the situation continued where the Claimant did not achieve her Level 3 accreditation and the Respondents became increasingly more concerned about the impact such a shortfall would have upon any impromptu inspection by the CQC. This would suggest that there was all the more reason for them to instruct the Claimant to undergo the training and to make arrangements so that she would have to undertake it at short notice. This did not happen.
21. What did happen, was that Mr Mushayahembe became increasingly frustrated with the Claimant and referred the matter to the Employee Relations Manager John Quilter. Unfortunately, Mr Quilter was not called to give witness evidence and we were only able to hear evidence of Mr Mushayahembe. However, it seems that initially the meeting on 5 November 2018 was arranged to allow the HR Manager to discuss this outstanding issue with the Claimant and to ensure that she would secure this training as quickly as possible. Unfortunately, the manner in which this meeting was communicated to the Claimant did not specifically explain what the meeting was about, that it was not a disciplinary matter and instead the Claimant was of the impression that the purpose of the meeting was to discuss an issue which might have a severe impact upon her employment. While this might not have been the Respondent's intention, I find that this was the effect of how the meeting was communicated to the Claimant by Mr Quilter.
22. As a consequence, the Claimant panicked and due to anxiety she left her shift early, leaving the kitchen unattended with meals incomplete. On her journey home from work shortly afterwards she called the duty member of staff to explain that she may have left some potatoes on the hob cooking. This was subsequently followed up by a phone call from her sister.
23. At this point, it is clear that Mrs Morrison and other members of staff discovered the kitchen had been left unattended and it was in some state of disarray. I did not doubt that the kitchen would not have been left in an

ideal state given the manner in which the Claimant left the building. However, there does not appear any evidence to suggest that there had been an ongoing problem with the Claimant leaving the kitchen in a mess and indeed, if anything, she had been complemented on the basis that she had been able to restore the kitchen to some order even when she was not supported by an assistant.

24. Following her departure, the Claimant called in to say that she would be selfcertifying and went to her GP who actually gave her a sick note for six days. This was subsequently sent to the Respondent. The Claimant then commenced a period of holiday from 18 November 2018 until 7 December 2018. It had originally been booked as annual leave when she started working for the Respondent. However, when the Claimant returned to work she had been invited to a further meeting with the Respondent due to her failure to attend a meeting on 5 November 2018. She confirmed that she attempted to travel to this meeting which was her first day back at work but due to anxiety, turned around and phoned to say she could not come into work. At this meeting Mr Mushayahembe confirmed that it was treated as a disciplinary hearing and that due to the Claimant's failure to attend, it was felt that the meeting could go on in her absence. A letter had been sent out to the Claimant on 23 November 2018 in which she had received upon her return from holiday. Unfortunately, the Claimant was not informed of the precise reasons for the meeting, but both in relation to the invitation by Mr Quilter and the subsequent letter, Mr Mushayahembe was of the view that the Claimant would have been under no illusions that it related to her failure to secure the Level 3 qualification.
25. In the Claimant's absence, the meeting was treated as a disciplinary hearing and the Claimant was dismissed for gross misconduct. This was due primarily to the failure of the Claimant to keep the kitchen tidy and walking out leaving the kitchen in a mess. To some extent it was also caused by the Claimant's failure to obtain her Level 3 training. The primary reason, however, appeared to be on the basis in which she left the kitchen following her conversation with Mr Quilter on 5 November 2018.
26. What Mr Mushayahembe did confirm is that the original meeting on 5 November 2018 was not a disciplinary hearing and the Claimant had not been informed that the hearing would be of a disciplinary nature under the Respondent's disciplinary procedures. The decision to convert the meeting to a disciplinary hearing only took place once the Claimant had left the building on 5 November 2018 following the conversation of Mr Quilter about the meeting. The Claimant was not informed that that meeting, or indeed the subsequent meeting on 10 December 2018, was a disciplinary hearing. Clearly, she was under the impression that this was a possibility when she was spoken to by Mr Quilter on 5 November 2018.

27. Following the decision to dismiss the Claimant, she was informed in writing by Mr Quilter. She did respond shortly afterwards with an email confirming that she wished to take this matter further, although she did not formerly state that she was appealing the decision. Taking into account the fact that this email was sent to an HR professional, I think it is reasonable to conclude that the Respondent would have been expected to treat this matter as an appeal. However, no appeal was processed and the Respondent maintained that as far as they were concerned, no appeal had been instigated by the Claimant.

The Law Breach of Contract (Wrongful Dismissal)

28. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.
29. A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.
30. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.
31. In cases of wrongful dismissal, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: Shaw v B & W Group Ltd UKEAT/0583/11.

Unlawful Deductions

32. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.

Unpaid Annual Leave Entitlement

33. Regulations 13, 13A and 16 of the Working Time Regulations read together provide that a worker is entitled to 5.6 weeks (up to a maximum of 28 days) paid leave in any leave year. A worker's contract may provide an entitlement in excess of this statutory minimum. Regulation 14 provides that a worker is entitled to be compensated for accrued but untaken leave

upon termination of his employment. The leave entitlement in Regulation 13 may only be taken in the leave year in which it is due; Regulation 13A provides that a relevant agreement (such as a workforce agreement, incorporated collective agreement or any other legally enforceable written agreement between the employer and employee) may provide for leave to be carried forward into the following leave year.

34. The entitlement to paid leave under the Working Time Regulations is the minimum entitlement that an employer must provide to a worker and without prejudice any greater contractual entitlement granted to the worker by the employer.

Conclusions

35. The Respondent was clearly a sufficiently large company to have in place a HR Manager and systems to ensure that staff were properly managed. In many respects, the Claimant was supported by both Mrs Morrison and Mr Mushayahembe throughout her employment with regular meetings taking place and showing genuine concern for the health issues that she suffered.
36. Unfortunately, it appears that the Respondent while quite rightly taking the issue of the Level 3 qualification seriously, failed to instruct the Claimant to take this qualification on a particular day and arrange cover so that she could take the test on-line. Additionally, once management became exasperated with the Claimant's failure to undertake this on-line qualification, it decided to take further action in a way which left the Claimant somewhat distressed and fearing the worst. This matter could have been handled much better, but the reason for the Claimant's decision to depart the kitchen on 5 November 2018 was clearly due to the clumsy way in which she was informed of the meeting with Mr Quilter. She cannot be criticised for the manner in which she reacted and it is unfortunate that the Respondent decided to treat the outcome of this matter as a disciplinary issue. Had the invitation to the meeting had been better communicated, the Claimant would probably have remained in work.
37. Under these circumstances I am surprised that the Respondent then decided to convert this matter into a disciplinary hearing and I am even more surprised that they decided to do so without properly communicating this to the Claimant.
38. In considering the question of whether the employee was guilty of conduct so serious as to amount to a repudiatory breach entitling the Respondent to summarily dismiss the Claimant, I am not satisfied that this was the case. The initial issue of her failure to complete the additional qualification was not a repudiatory breach. The state that the kitchen was left by the

Claimant could not amount to a repudiatory breach without the Respondent having first satisfied itself what the reasons were for her doing so. She did not have a history of poor kitchen management and further enquiries should have been made of the Claimant. The Claimant could not reasonably be expected to understand the nature of the hearing that she was likely to face and the Respondent failed to ensure that she understood that a disciplinary process was being commenced and that the Claimant might be dismissed. Her participation would have allowed the Respondent's managers to reflect upon the issues that gave rise to the dismissal. It is for these reasons I find that the Claimant was wrongfully dismissed.

- 39. In terms of the failure to pay annual leave, I believe that the Respondent has failed to take account of the back dated sick note which would have meant that her annual leave in November was actually covered by sickness.
- 40. While the Claimant may have had difficulties in completing some of her time sheets, the failure of the Respondent to properly address these issues means that they owe the Claimant additional pay.
- 41. Accordingly, for these reasons I find that the Claimant's claim is well founded and is successful.
- 42. As it was not possible to reach an agreement concerning the amounts identified in the Claimant's most recent schedule of loss prepared and disclosed in her email dated 8 October 2019, it will be necessary to list this case for a Remedy Hearing in the Cambridge Employment Tribunal with a hearing length of 1 hour on a date to be confirmed. The parties may of course find that they are able to reach an agreement concerning a final figure and before the Remedy hearing takes place and if this is the case, they should inform the Tribunal in the event that a hearing is no longer required.

Employment Judge Johnson

Date: 4 December 2019

Sent to the parties on:

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For the Tribunal Office