EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 16 to 18/3/2022

Claimant: Ms A Zaremba

Respondent: Ariya Hotels Ltd t/a The Boltons Hotel

Before: Employment Judge Mr J S Burns
Members Ms E Flanagan and Mr M Baber

Representation
Claimant: Mr H Ahmed (Counsel)
Respondent: Ms M Stanley (Counsel)

JUDGMENT

1. The claims succeed.
2. The Respondent must pay the Claimant the sum of £13406.59 by 1/4/2022.

REASONS

1. The claims were for unauthorised deduction from wages, (consisting in a claim for pay for hours spent on call during September to November 2020), and direct sex discrimination and automatic unfair dismissal contrary to section 103A ERA 1996 pertaining to the Claimant's summary dismissal on 24/11/2020.

2. We heard evidence from Mr B Wilson (the Respondent's operations director), the Claimant, and Mr M Wajs her partner. The documents were in an agreed bundle. We also received into evidence some login/log out records. At the start of the hearing we obtained further particulars from the Claimant of the alleged protected disclosures. During the course of the hearing the Respondent's solicitor sent us a table summarising some information relevant to the wages claim. We were referred to various legal authorities all of which we have considered.

Findings of fact regarding claim under section 103A ERA 1996.

3. The Claimant was employed by the Respondent which operates a chain of hotels in London. The Claimant began her employment with the Respondent on 21/12/2019 as a receptionist.

4. Prior to the lockdowns caused by the Covid 19 pandemic, the Respondent provided 24 hour attendance by receptionists in its hotels. After the lockdowns in 2020 and as a cost-cutting measure it changed this to employing receptionists to attend reception for a paid shift ending typically at 11pm, and then requiring the receptionist to remain in the hotel on call overnight, sleeping in a hotel room but being available when called to attend to duties.

5. There were at least 30 receptionists subjected to this regime in the Respondent's various hotels.

6. The Claimant returned to work from full furlough in the last week in September 2020. The hotels at which the Claimant worked charged cheap room-rates and opened their doors during

the lockdowns to persons who were not key workers and hence attracted a significant number of guests who used their hotel rooms to stage parties or return to late, intoxicated after partying or carousing elsewhere.

7. The Claimant became concerned about her personal safety and the safety of other receptionists employed by the Respondent in a similar situation to herself. She also became exhausted as a result of being on-call overnight, especially when after a disturbed night attending to hotel duties she was then rostered to work a shift the next day.

8. On 28/9/2020 the Claimant spoke to Ms Laura Pankatie (a hotel manager) stating - *"I wasn't well and don't like how we have to work throughout night and then throughout the day - I am tired - I cant work being constantly tired and sleep deprived - these working hours are not in our contract - you are treating the employees wrong"*.

9. The Claimant followed this up making further similar comments (about being tired as a consequence of being required to work day and night) to Ms Pankatie over the next 8 weeks until the Claimant was dismissed.

10. While the statement on 28/9/2020 and the subsequent conversations with Ms Pankatie are not specifically referred to in the Claimant's particulars of claim or witness statement, the terms of her text on 30/10 are consistent with these having taken place as described in the Claimant's oral evidence. Although Ms Pankatie is still employed by the Respondent she was not called as a witness to give any evidence about her dealings with the Claimant or about her subsequent discussions with Mr Wilson about the Claimant.

11. On 30/10/2020 the Claimant sent a text to another hotel manager Paula (page 76) which stated "*Ive already told you and Laura that Im not going to do evening shift and then night and next day 7am…the thing is that whenever I do night call I don't sleep all night so its really hard for me maybe you guys get some sleep but I don't…"*

12. In response Ms Pankatie changed one shift for the Claimant, but things did not improve generally and the Claimant continued to complain about the on-call arrangements.

13. On 9/11/2020 the Claimant sent a text to Paula (page 82) *"I had people making reservations and checking in all night…1am, 2am 3, 4am..I didn't sleep all night…*"

14. Mr Wilson kept a close watch over the hotels under his management and was in close touch with the two managers Ms Pankatie and Paula to whom the Claimant was making these comments and complaints over the eight week period up to 18/11/20.

15. On 18/11/20 Mr Wilson, who habitually checked the accounts and financial postings of the hotels under his management, noticed that the Claimant had made an error as a consequence of which a guest at the Bolton Hotel had been undercharged £19.94.

16. Mr Wilson sent an email to the Claimant asking for an explanation. The Claimant 3 minutes later replied stating "*The rate was not overrode properly".* This was in fact an incorrect explanation, which however the Claimant was unaware of at the time.

17. 22 minutes later Mr Wilson sent a further email to the Claimant, setting out a detailed correct explanation which was that the Claimant had failed to charge the customer for breakfasts. Mr Wilson went on to write "*You don't care and cant be bothered to look so you just posted £19.94 to balance the account. When questioned you have still not bothered to look and just said rate adjustment..Please correct me if I am wrong?"*

18. The Claimant found this part of Mr Wilson's email to be aggressive. We agree with this description. It also shows that by then Mr Wilson had adopted a negative attitude and had condemned the Claimant by this stage.

19. The Claimant replied later that evening, apologising twice to Mr Wilson for the mistake and asking for advice so as to assist her to adjust the account. She included the following comment: "*However, I do not agree with you saying that I do not care or bother to do things at the hotel as I and others have been working really hard here during the pandemic basically dedicating our life, free time and safety with no complaints whatsoever*."

20. Mr Wilson was apparently not satisfied by this.

21. In paragraph 19 of his witness statement Mr Wilson referred to him having had a discussion with the manager Ms Pankaite about the Claimant during which Ms Pankatie "*explained that she had other concerns with the Claimant and would address them"*. In his evidence Mr Wilson was unable to give an explanation about what these "*other concerns*" were.

22. Mr Wilson instructed Ms Pankaite to start disciplinary proceedings against the Claimant - and under Mr Wilson's guidance she sent out a formal letter dated 20/11/20 summoning the Claimant to a disciplinary hearing on 24/11/20 and accusing the Claimant of *"a)Failure to check the account of the guest resulting in the loss of £20 of breakfast vouchers when booking out.(b)Failure to check the same account when questioned and (c)Tardiness on the 17th resulting in the shift starting 2 hrs late".*

23. On receipt this letter the Claimant sent an email dated 23/11/2020 in reply, setting out her side of the story and highlighting the health and safety concerns she had previously raised with the Respondent. The Claimant wrote "*We are being asked to work extremely long hours with no real breaks during the day and night. I have verbally informed you a few times that I am not happy with this, as such shifts make me really tired and I am not able to function and think properly simply because I do not sleep at night. It is a real health and safety issue that you are aware of but do nothing about. I am skipping the fact that we are not even getting paid for all the hours we are required to work. Therefore you should bear in mind that we are only human beings and it is understandable for us to make a mistake especially in such a working environment*. ….*I would like to state that you are more than aware of all the outstanding health and safety issues in both hotels and you pretend that you cannot see or do anything about it using us to work long hours and also risk our safety not only from Covid 19 but personal too, as there are no security guards or even CCTv in operation at night where I have to be in direct contact with sometimes either drunk or on drugs, very aggressive and abusive guests*"

24. The Claimant explained further in her email that her lateness on the 17th was because she had made a mistake about the rotas, because she was exhausted by overwork. She complained that the Respondent was trying to get rid of her because she is an outspoken member of staff, who is calling to attention the health and safety issues in the business; and she also offered to repay the £20 lost by the hotel.

25. Ms Pankaite passed the Claimant's email to Mr Wilson who read it. Ms Pankaite then stepped aside and Mr Wilson took over and conducted the disciplinary hearing on 24/11/2020 thus enabling himself to act as prosecutor, jury and executioner.

26. The Respondent's transcript of the hearing contains indications of Mr Wilson adopting a somewhat scornful and dismissive attitude to the Claimant's concerns. For example when the Claimant expressed a concern that somebody could kill her while she was on duty at the hotel, Mr Wilsons immediate response was "*that could happen anywhere. On the street, in a bar in a restaurant…".* We have already noted the tone of Mr Wilson's email of 18/11. We accept the Claimant's evidence that during the disciplinary hearing, Mr Wilson was bad-tempered, shouted and banged the table and made it obvious from an early stage that he was intent of dismissing the Claimant regardless of whatever she had to say. At the end of the meeting, Mr Wilson told the Claimant that she was being dismissed for gross misconduct, and was told to pack her bags and to leave the hotel and she did so. The dismissal was confirmed by letter which also offered the Claimant an appeal which she failed to take up.

Relevant law relating to the section 103A claim

27. A protected disclosure is a disclosure of information which in the reasonable belief of the worker (which term includes but is not limited to "employee") making the disclosure, is made in the public interest and tends to show one of the states of affairs listed in section 43B(1)(a) to (f) and it must be made in accordance with any of the sections 43C to 43H ERA 1996. Section 43B(1)(d) which describes the content of one class of such disclosures reads: "…*that the health and safety of any individual has been, is being or is likely to be endangered"*

28. Section 103A ERA 1996 provides that an employee who is dismissed shall be treated as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

29. In claims for unfair dismissal if the employer fails to show a legitimate potentially fair reason and fails to disprove the section 103A reason contended for by the Claimant, then it must be held that the dismissal is for the section 103A reason.

Conclusions on section 103A claim

30. The Claimant relies on her communications referred to in paragraphs 8, 9, 11, 13 and 23 above as protected disclosures. It is true that the main thrust of these communications is directed to the Claimant's concern about her own personal health, safety, work-situation and terms and conditions, however these were not her only concerns. Her oral complaints to Ms Pankatie (paragraphs 8 and 9 above) included references to the Respondent's employees in the plural. While the Claimant's email of 18/11/20 (paragraph 19 above) is not in itself relied on as a protected disclosure, it is part of the context showing the focus of the Claimant's concerns and in it she refers not only to herself but to the others who (had been) "*working really hard here during the pandemic …"* The Claimant's email to Ms Pankatie of 23/11/20 (paragraph 23 above) contains several references to the receptionists generally, using the plural pronouns "we" and "us".

31. We find that each of the Claimant's complaints as identified in paragraphs 8, 9, 11, 13 and 23 read in context fulfilled the definition of a protected disclosure as defined in section 43B(1)(d). The Claimant plainly had a reasonably belief in the subject of her complaint namely the health and safety issues arising from a regime imposed by the Respondent on the Claimant but also at least 30 others - which issues the Respondent's managers appeared to be either ignorant of or were intent on ignoring. She also had a reasonable belief that her complaints if properly addressed would benefit a large group of others in a similar position to her across the Respondent's hotels and hence that her complaints were in the public interest in that sense.

32. We find on a balance of probabilities that Mr Wilson was well aware before 18/11/2020, and as a consequence of his discussions and communications with Ms Pankatie and Paula, of the fact that the Claimant had been making the protected disclosures which she had made prior to that date. We find that the fact that the Claimant had been complaining about the on-call regime and its effect on health and safety was one of the subjects which must have been discussed between Mr Wilson and Laura shortly before Mr Wilson instructed the disciplinary proceedings to be started. Once they started but just before Mr Wilson stepped in to take over the disciplinary hearing, the Claimant sent her email of 23/11/20 which referred to and repeated much of the substance of her previous complaints, which email was sent to and read by Mr Wilson.

33. There is a significant mismatch between the triviality of the Claimant's misconduct in failing to charge a customer £20 and Mr Wilson's disproportionate and angry reaction. Taken at its highest this was a minor matter made in innocence by a tired but hard-working employee, who apologised repeatedly and profusely as soon as she could.

34. The suggestion that the misconduct was aggravated because when Mr Wilson challenged the mis-posting, the Claimant gave a quick wrong explanation without apparently looking into the error as fully as she might have done, appears contrived. The Claimant did not know what had gone wrong and appears to have made an innocent guess while busy dealing with something else and Mr Wilson would have been well aware of this.

35. The Respondent had a disciplinary procedure which provided inter alia for summary dismissal in the event of gross misconduct referred to as follows "*Occurrences of gross misconduct are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct.* …theft and fraud are cited as examples"

36. Plainly the Claimant was not guilty of gross misconduct justifying a summary dismissal. Mr Wilson as an experienced Operations manager would have been well aware of this.

37. It is agreed that many other mis-postings were made by various staff frequently. The mis-postings by Alex were an example. There is no evidence that Mr Wilson reacted to any other of the many mis-postings by other staff in the same determined, angry and disproportionate manner as he did when dealing with the Claimant. We are therefore left looking for some other explanation for his conduct.

38. Mr Wilson appears to have seized on the Claimant's mis-posting of a small sum and used this, together with a reference to lateness on 17th included as a make-weight, to cover a dismissal of the Claimant which he wanted for other reasons, namely the fact that she had made it clear to her managers and via them to Mr Wilson of her concerns about the on-call regime which had been forced on her and others.

39. We do not accept as legitimate or genuine the misconduct reason put forward by the Respondent and the Respondent has failed to disprove the section 103A reason contended for by the Claimant. We therefore find that the fact that the Claimant had made the protected disclosures was a principal reason for her dismissal, and the claim succeeds.

Findings of fact regarding the direct sex discrimination claim

40. In support of her sex discrimination claim the Claimant referred to a comparator namely Aleks. He was a male receptionist employed by the Respondent who on 12 November 2020 mis-posted or lost two transactions valued at £52.36 and £49.28 respectively. He disclosed these to Mr Wilson at the time. It was suggested by the Respondent that as those mis-postings had not been originally discovered by Mr Wilson and as Aleks did not give an inaccurate explanation about them to Mr Wilson, in those ways the Aleks mis-posting incident was different from the Claimant's mis-posting of the £19.94, and so he is not a good comparator.

41. We do not find that there is a significant difference in culpability between the Claimant's and Aleks mis-postings. The reason Mr Wilson alerted the Claimant's mis-posting to the Claimant is simply that he spotted it first, whereas Aleks spotted his first. The Claimant was apologetic and did what she could to make amends for making this small mistake which attempts were rejected out of hand by Mr Wilson. Mr Wilson was not interested in the fact that the Claimant was exhausted and overworked when she made her mistake. In contrast Mr Wilson appears to have been happy to accept Aleks's similar excuse about tiredness (see page 83) and to condone patiently the two higher value mis-postings by him.
42. In January 2021 Aleks left the Bolton Hotel reception unmanned and the hotel front door unlocked when he went to talk to another employee at an adjacent hotel. There is no objective evidence to support Mr Wilson's suggestion that Aleks was engaged in official business doing

training when absent from his post. During his absence a thief entered the Bolton reception and stole the safe located there and its contents. Even if the safe did not contain far more money than the £20 lost by the Claimant, (which is unlikely) the cost of replacing the safe would have greatly exceeded £20. Leaving the hotel unstaffed was contrary to a specific instruction given by a manager to the Claimant, Aleks and other receptionists on 3/11/2020 namely "*Most important: we cannot leave the hotel unless there is somebody to cover us".* This was a far more serious matter than the trivial misconduct by the Claimant. However, it is agreed that Aleks was not disciplined for this incident and in his oral evidence Mr Wilson bent over backwards to find implausible mitigation for him, for example suggesting that the real cause of the theft was not because Aleks had left his post and failed to lock the hotel front door, but rather that the Respondent had failed to "*nail down the safe".*

43. It was also agreed that Aleks failed on several occasions to take pre-authorisation from customers as a result of which omissions the Respondent was unable to recover compensation when the customers damaged their hotel rooms. Although Mr Wilson gave vague evidence that he thought Aleks may have been disciplined in some way for this, and we accept that Aleks had to repay the irrecoverable damages out of his own earnings, no documentary evidence was produced to show what if any discipline beyond financial restitution was applied to him.

44. It is agreed that Aleks was not dismissed by the Respondent in response to any of these incidents.

<u>Relevant law relating to Sex Discrimination claim</u>

45. Section 4 Equality Act 2010 provides that sex is a protected characteristic

46. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.

47. The requirement is on the Claimant to show less favourable treatment by comparison with an actual or hypothetical comparator whose relevant circumstances must be the same or not materially different.

48. Section 136 EA provides that it there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

49. The proper approach to the reverse burden of proof is that once the employee proves facts from which an inference of discrimination could be drawn the burden moves to the employer to prove that it did not discriminate, on a balance of probabilities. It must then show that the less favourable treatment was in no sense whatever on the ground of sex and cogent evidence will be required to discharge the burden. <u>Barton v Investec Henderson Crosthwaite Securities</u> 2003 ICR 1205 subsequently confirmed by Court of Appeal in <u>Igen Ltd v Wong .</u>

<u>Conclusions on Sex discrimination claim.</u>

50. During final submissions Mr Ahmed, who is still completing his second six as a pupil barrister, and in response to a question about a point of law posed by the tribunal judge, answered that the Claimants' claim under section 13 EA 2010 was in the alternative to the claim under section 103A ERA 1996. This is not stated in the Claimant's particulars of claim nor in her witness statement both of which read as if the sex discrimination claim is additional to the section 103A claim. The Tribunal is unclear whether Mr Ahmed had instructions on the point before giving his answer which may also have been influenced somewhat by the suddenness and terms of the judge's question. The trial and the Claimant's case up until then had not been conducted on the basis that the discrimination claim was in the alternative only.

51. When Ms Stanley made her final submissions, she submitted that in the light of Mr Ahmed's answer, it would be wrong for the tribunal to treat the sex discrimination claim as additional to the section 103A claim and therefore we should deal with the discrimination claim in the alternative only. However, she also properly conceded that as a matter of law a single dismissal can contravene both section 103A ERA 1996 and section 13 of the Equality Act 2010.

52. The tribunal has decided to deal with the matter disregarding Mr Ahmed's answer (which to the extent necessary we give permission for him to withdraw[1]) and on the basis of the pleaded Claimant's case which put forward additional claims not in the alternative; there being no forensic prejudice to the Respondent in us so doing, and avoiding the injustice which would be caused by us doing otherwise.

53. Ms Stanley submitted that Aleks is not a good comparator to the Claimant because the circumstances affecting his misconduct was materially different to that of the Claimant. We reject this submission and find that he is in fact a very good comparator - being a male receptionist working alongside the Claimant under the same regime but who was not dismissed by Mr Wilson despite the fact that Mr Wilson was aware that Aleks had being guilty of a series of infractions which must have caused far higher loss and greater inconvenience to the Respondent and which on any objective view were at least as serious and probably far more serious than the petty and isolated mis-posting of £20 in response to which the Claimant was dismissed.

54. The question is whether, as we have found that it was the whistleblowing rather than her gender which was the principal cause of the Claimant's dismissal, the Claimant is entitled to an additional finding that her gender was a secondary material cause.

55. The outcome to that question should be determined by the operation of the normal principles in section 136 EA 2010. The Claimant by reference to a relevant male comparator has adduced facts which establish a prima facie case of sex discrimination which passes the burden to the Respondent to show that the Claimant's gender played no material part in the decision to dismiss her. We are not satisfied by the Respondent's explanations and therefore the Respondent has not shown that it did not contravene the provisions of section 13. Accordingly, the direct sex discrimination claim also succeeds.

<u>Findings of fact regarding Wages claim</u>

56. The Claimant had a written contract of employment which was comprised of the Employee Handbook (not produced in evidence) and a Statement of the Main Terms of Employment. The latter document stated inter alia that "*your wage is currently £9.75 per hour payable monthly in arrears…*" There was no provision enabling the Respondent to unilaterally vary the contract.

57. As already described, in 2020 the Respondent imposed a regime of requiring receptionists to work on-call after and sometimes between working shifts. The Claimant started experiencing the real effect of this when she returned in the last week of September 2020 from full furlough to part time under a flexi furlough arrangement.

58. In early October 2020 the Claimant sent a text to Mr B Wilson asking "*whether we get paid for the on call shifts?*" Mr Wilson replied by text on 5/10/2020 stating "*we will not be paying for the on-call shifts. There will be an element of recognition for those shifts but they will not be paid per say (sic). The reason we have staff on-call rather than working is we cannot afford the additional 8 hours at the moment*".

[1] When these reasons were being read out to the parties Mr Ahmed responded by saying he withdrew his answer.

59. We reject the Respondent's suggestion that the Claimant had been told before 5/10/20 that she was not to be paid her hourly rate for being on call. If she already knew this, she would not have to have asked Mr Wilson then.

60. The parties' respective cases as to the hours which the Claimant spent on call during the months the subjects of her claim were as follows: September 2020 Claimant 42.5 hours, Respondent 42 hours; October 2020: Claimant 95 hours, Respondent 94 hours; November 2020 - parties agree 116 hours. We prefer the Respondent's figures and find that during these three months the Claimant was thus on call 252 hours.

61. It was also agreed that the Respondent in respect of this period paid the Claimant 13 hours over and above the hours she worked on regularly paid shifts.

62. The difference between the parties in relation to the wages claim was whether the Claimant was entitled to any outstanding payment in relation to the difference between 252 and 13 namely 239 on call hours, and if so whether this should be at the contractual (£9.75) or NMW (£8.36) rate.

63. The Respondent suggested that the Claimant had very little to do during the on-call periods, which were typically from 11pm to 7am. We were referred to log on and log off data which were said to show the occasions when the Claimant had accessed the Respondent's electronic system. It was suggested that the mostly scanty logging entries during the on-call hours showed that little work was done at those times. However, we accept the Claimant's and her partner's evidence that the Claimant was kept fairly busy during the on-call times, typically being called between about 5 and 10 times per on call shift. She had tasks to deal with in addition to those requiring her to log in to the electronic system, for example assisting guests, many of whom were drunk and difficult, dealing with complaints, opening doors and handing out supplies such as soap, toilet-paper and electric heaters.

64. The Claimant complained contemporaneously and repeatedly about being unable to sleep on call and being tired - which she would not have done if she was able to sleep undisturbed.

Law relevant to the wages claim

65. The courts have generally taken a restrictive approach to cases in which an employer has sought to impose unilaterally a detrimental variation on an employee, especially where the employee is in a weak bargaining position.

66. It is a requirement of a valid contract that it should be sufficiently clear to be enforceable. This must apply to a contract which is varied as much as it does to an original contract. Hence a purported variation which if applied would render the contract too vague and uncertain to be enforced, cannot be an effective variation.

67. Where there is no term in an employment contract permitting a unilateral variation by a party, then such a contract can be varied only by mutual consent. In the absence of such consent, the imposition by one party of a variation detrimental to another party is likely to amount to a breach of contract which the other party may accept by resignation.

68. If a party does not resign in response to a breach then after the elapse of a reasonable period the party may be deemed to have waived the breach or affirmed a varied contract which includes the imposed term. Before that stage is reached the innocent party even without resigning or accepting the repudiation is entitled to sue to enforce the original terms of the agreement under the "stand and sue principle".

Conclusions on wages claim

69. There was no term permitting the Respondent to vary the contract unilaterally and there was no consultation or reasonable procedure adopted to explain or justify the imposition. These factors are the more significant because the Respondent was dealing with vulnerable low paid employees in a weak bargaining position.

70. The Respondent purported to impose a unilateral variation on the Claimant's employment contract, the terms of the purported variation being explained and communicated to the Claimant for the first time by Mr Wilson in his email of 5/10/2020 in which he wrote "*we will not be paying for the on call shifts. There will be an element of recognition for those shifts but they will not be paid per say (sic).*" This was vague and contradictory and at no time was it explained what the *element of recognition* would be. The contract as varied would have been unenforceable as regards a fundamental element - namely the Claimant's entitlements to be paid for the numerous on-call hours worked. We find that this purported variation was too unclear to be capable of being accepted.

71. Alternatively, if the proposed variation was capable of a binding acceptance, we do not find that the Claimant accepted the variation impliedly by her conduct or otherwise. Although about 7 weeks elapsed between 5/10/2020 and 24/11/20 when the Claimant was dismissed, we do not find in all the circumstances that sufficient time had elapsed by the time of her dismissal for her to be deemed to have waived the breach or affirmed any contract incorporating the new term such as it was. During that time the Claimant was working on-call shifts under protest and was exhausted.

72. Although she did not send a formal letter stating in terms that she was working under protest, and the focus of her informal protests was about the effect on her health and safety rather than the pay issue, it is clear from her email on 23/11/2020 that she was also unhappy about and regarded as an injustice the fact that she was not receiving pay for the on call hours - see her words "*I am skipping the fact that we are not even getting paid for all the hours we are required to work".*

73. Had she not been dismissed she would still have been entitled on 24/11 to stand and sue on her original contract.

74. That being the case she is entitled to enforce her contractual entitlement which states that she is entitled to *"£9.75 per hour payable monthly in arrears…*".

75. The contract does not say that she will only be paid if she works all of every hour on duty. It does not say that she will be not paid if she is required to work for the Respondent by staying on-call in the hotel overnight when she might be able to sleep at times.

76. The requirement that in order to be paid she should be awake for purposes of the employer's work which applies to claims under the National Minimum Wage Regulations 2015 (see for example regulation 32) does not apply to these common law employment principles.

77. Usually an employee is entitled to pay if during the times arranged with the employer, the employee is ready, willing and able to do so much of the work as the employer makes available to them. The fact that the employer has little for the employee to do at particular times while the employee is at work is no defence to a claim for pay.

78. The Claimant complied with the Respondent's instruction to stay in the hotel and keep herself ready, willing and able to work at all or any times during the on-call hours as was required for the Respondent's business.

79. Therefore, whether the Claimant was busy or idle during the on-call hours or asleep or awake, the Claimant is entitled to enforce her contractual entitlement to £9.75 pay for each of her unpaid on-call hours which we have already found are 239 in number.

Remedy

Wages due for 239 hours on call at £9.75 per hour £2330.25

(Contrary to her schedule of loss, the Claimant is not entitled to a basic award or compensation for loss of statutory protection as she did not have two years' service. Her claim for an award for lack of a statement of terms and conditions is not made out. Nor is any claim for an uplift for non-compliance with an ACAS Code.)

Having been dismissed on 24/11/2020 and having started searching shortly after dismissal, the Claimant obtained a fully mitigating new job on 26/1/2021. She took reasonable steps to mitigate and is entitled to loss of earnings for 9 weeks at the rate of £260.38 ie £2343.42 and lost employer pension contributions of £41.76 Total loss caused by dismissal £2385.18

As dismissal was also discriminatory the loss caused by dismissal attracts an award of interest at 8% pa from the half way date between 24/11/2020 and 18/3/22 (namely 21/7/2021) to 18/3/22 that is £125.99

Damages for injury to feelings caused by discriminatory dismissal (as claimed by Claimant and agreed conditionally by Respondent) £7750

Interest on £7750 at 8% pa from 24/11/2020 to 18/3/2022 that is £815.17

Total **£13406.59**

J S Burns Employment Judge
London Central
18/3/2022
For Secretary of the Tribunals
Date sent to parties: 21/03/2022