EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms A Canevarolo

- and –

Mother Restaurants Ltd

HELD AT **London South** **ON** **14 August 2018**

EMPLOYMENT JUDGE PHILLIPS

Appearances
For Claimant: **in Person, assisted by Mr Tantram**
For Respondent: **Mr D Biffani, Director**

FULL MERITS HEARING JUDGMENT

1. The Claimant's claim of breach of contact (notice pay, holiday pay) succeeds.
2. The Respondent is ordered to pay to the Claimant damages for breach of contract in the sum of (gross) £2,414.10.

REASONS

1. The claims that were for determination at this Hearing were put by the Claimant in her ET1 as notice pay, holiday pay, and arrears of pay, arising out of having been given one month's notice to terminate her employment by the Respondent. The Respondent says, as the Claimant did not turn up for work, it was not obliged to remunerate her for her notice period.

2. There were no witness statements. Oral accounts were heard from the Claimant and Mr Biffani. Mr Tantram assisted the Claimant when needed. Mr Biffani handed up some copy e-mails, which the Claimant confirmed were authentic, relating to an exchange between the Claimant and the Respondent. The Claimant produced one additional email on her phone.

Findings of fact

3. While on holiday, in March 2018, the Claimant received, by email dated 26 March, from Mr Biffani, one month's notice of the termination of her employment as a General Manager at the Respondent's restaurant based at Battersea Power Station. She had been employed there since 20 October 2017.

4. The email referred to the Respondent's appreciation for the Claimant's hard work and commitment, but said for various reasons it was necessary "to propose a parting of the ways". It said it understood this would be upsetting and wanted to have an amicable and respectful agreement. It stated that the Claimant could work her notice period minus any holidays and there would need to be a meeting "to handover". The email concluded that the decision to tell the Claimant at this time had been taken because she might want to extend her holidays. The Claimant had had no previous warning this was to happen and said she found it very upsetting. She replied the next day to say she could meet on the Thursday 29th March (when she would be back from her holiday). Mr Nick Pound suggested it was best to meet away from the restaurant and it was agreed there would be a meeting between him and the Claimant in a restaurant in Borough Market at 12.00 on 29th March.

5. In the event, have taken advice from the CAB and ACAS, the Claimant did not attend the meeting that had been arranged. Instead she sent an email to Mr Pound at 1.05 on 29 March, apologising for not turning up, informing him that she had been advised to communicate via email, and saying that the 26 March email was ambiguous and needed some clarification. She said the advice to her was that she remained employed until she received a letter of dismissal, and that as she was rostered to work on Sunday 1 April she needed to know by the Saturday what was going on. Mr Pound replied, by an email timed at 1.40, with the heading "re: termination of your employment with mother restaurants Ltd". He said there could be no doubt that "we were talking about terminating your employment with one month's notice" and went on to confirm that in line with her contract and their legal obligations to her, her employment would terminate on 26.04.2018. He sought to emphasize that the Respondent wanted an amicable split and didn't want things to end in a bad way, that she was still employed and in her notice period. He said, "for us it's a question of whether you wish to work out your notice period or leave before and how to present this decision to the staff". He ended by asking the Claimant not to call the restaurant or contact staff members, saying she was still officially on holiday.

6. The Claimant says she discovered on her return to the UK that from 27 March she had been shut out of the Respondent's Planday on-line roster system, (which meant she was unable to check any staff Rosters), did not receive her usual email / What's App notice of her own rota from Mr Pound or Mr Biffani, and, it having been made clear to her she should not contact staff, she did not go into work on 1 April.

7. There was a further email exchange on 3 April, when she talked about garden leave and Mr Pound rejected the suggestion that this was on offer. He indicated that as the Claimant had not turned up for work her employment would be terminated immediately with no notice pay. Mr Biffani says removal from access to Planday was a normal temporary protective measure, as there had been issues in the past with

vindictive staff causing problems. He said this was just their normal procedure and if the Claimant had said she wanted to carry on working she would have been reinstated into it. He said the Respondent wanted a friendly parting and wanted to meet the Claimant before she restarted work. The Claimant said she thought she was owed on termination maybe 4 days holiday pay. Mr Biffani said any outstanding holiday would have been taken by the Claimant during her working of her notice. The Claimant says she is owed £2,228.40 after tax plus any outstanding holiday pay.

Legal arguments

8. Mr Biffani says that as the Claimant did not come into work, she was in breach of her contract, was therefore summarily dismissed and there was no obligation to pay her. The Claimant in essence says that she was not able to go into work because of the "obstacles" put in her way by the Respondent – don't meet at the restaurant, no access to the Planday system, no contact with staff, no email of her own roster.

Conclusion

9. This is a contractual notice dispute – there is no unfair dismissal claim, and so I do not have to examine the reasonableness of the Respondent's conduct as opposed to ascertaining, as a matter of fact, whether termination was in accordance with the contract. In the normal course of events, if the correct notice is given, then an employee cannot complain and how this is done is irrelevant. As long as the Claimant turns up for work she will be entitled to be paid until the end of her notice period. However, in this case, the Claimant did not turn up for work when she was due to, and was then told that because of this, even though she was already in a notice period, she had been summarily dismissed – ie without notice and without any entitlement to be paid.

10. In my judgment, the Respondent effectively made it impossible for the Claimant to turn up for work – it took her off the Planday system without explanation, it told her not to contact staff and wanted to meet her somewhere other than the restaurant. She was not sent her usual roster. Further, it was the Respondent who had asked for a meeting before the Claimant restarted work, and had suggested that it was best for this not to take place at her place of work, the restaurant because of its potential impact in other staff. As at the time of the last communication before the Claimant was due to report back for work, on 29 March, Mr Pound had ended by asking the Claimant not to call the restaurant or contact staff members, saying she was still officially on holiday. He said nothing specific about coming into work on the 1 April or about the meeting. When the Claimant did not reply, he did not chase this up. These circumstances amount in my judgment to a breach by the Respondent of the implied contractual term of trust and confidence.

11. In my judgement, it was for the Respondent to be clear to the Claimant as to how they wished to proceed. Treating her failure to come to work on 1 April as gross misconduct in those very unclear circumstances, without more, is in my view unjustified. I do not find that the Claimant was in breach of contract when she did not turn up for work, nor do I find that the circumstances justified the Respondent summarily dismissing the Claimant. That being the case, even thought the Claimant

did not continue to work, there are no grounds on which the Respondent can rely in my judgment to justify not paying her damages for her notice period.

12. It is possible to view this as a case where the Claimant could be said to have been constructively dismissed by virtue of the Respondent's behaviour, which breach she accepted by not going to work. Or, alternatively, it could be said that the Respondent breached the Claimant's contract by dismissing her without notice. Either way, she is entitled to damages, which will be limited to the relevant notice period of one month to 26 April.

13. Mr Biffani says she was in fact paid to the end of the month of March and any outstanding holiday would have been taken during the period of her notice. The Claimant says she looked for work over this period and did get some ad hoc bar work. She says the gross amount due to her is £2,833. Taking all these matters into account, I assessed the total damages to be awarded in this case at the grossed up figure of £2,414.10. I therefore order that the Respondent is to pay this sum to the Claimant. The Claimant will be responsible for accounting to the Inland Revenue for any tax or national insurance that would be due, given that this is a grossed up figure.

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Employment Judge Phillips
14 August 2018