EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104703/2024

Sitting at Edinburgh (via Could Video Platform)
On 17 September 2024

Employment Judge P Smith

Ms L McDermott	**Claimant** **In person**
RBH Hotel Management Ltd	**Respondent** **Represented by:** **Mr A Crammond of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's claim of wrongful dismissal is dismissed.

REASONS

Introduction

1. By a claim form presented on 23 April 2024 the Claimant presented a sole claim, of wrongful dismissal, to the Employment Tribunal. A claim of wrongful dismissal is a contractual claim, generally (though not always) for unpaid notice pay where an employee has been dismissed summarily or on short notice. This case was brought purely for damages representing pay for the period of notice the Claimant contended she ought to have been given by the Respondent before the termination of her employment, the Claimant having actually been dismissed without notice. The claim was defended by the Respondent.

2. The Tribunal was presented with a productions file amounting to some 216 pages and was taken to some of those documents during the course of the evidence. In addition, the Claimant produced typed notes of her disciplinary meeting and, by consent, these were also introduced into evidence. The Claimant later supplied a full copy of that document, for which the Tribunal is grateful.

3. The Tribunal heard oral evidence from the Claimant herself in support of her own case, and from Mr Reon Puchert (General Manager) and Ms Georgia Robertshaw (Receptionist) on behalf of the Respondent. All witnesses were the subject of questioning by the other party and by the Tribunal.

4. The Claimant presented a written witness statement from a Ms Nikolett Nagy and wished for me to read that document and take it into account in making my decision. No order permitting for witness statements had been made in these proceedings. Despite the Respondent's objection to my doing so I decided to read Ms Nagy's statement in order that I could do justice to the parties (the Claimant being a party litigant unfamiliar with the procedure in the Employment Tribunals). However, ultimately I decided to attach no weight to that statement. It was agreed by the parties that Ms Nagy was not a witness to the key incident in the case nor to the surrounding events, and the statement itself in my judgment amounted to no more than a character reference for the Claimant. It did not assist me in my determination of this claim.

5. At the outset of the hearing it was agreed that the relevant questions the Tribunal would have to decide were as follows:

5.1. To what period of notice of the termination of employment was the Claimant contractually entitled to, in principle?

5.2. Was the Claimant dismissed without notice?

5.3. Was the Respondent entitled to dismiss the Claimant without notice, i.e. in circumstances where it was entitled to terminate the contract because the Claimant had acted in fundamental breach of contract?

5.4. If the Respondent was not so entitled, in what sum should damages be assessed and the Respondent ordered to pay to the Claimant?

Findings in fact

6. All of my findings have been made according to the applicable standard in the Employment Tribunals, namely the balance of probabilities. The actual factual disputes in this case were relatively narrow and I have made only those findings which it has been necessary to make in order to determine this claim.

7. It is evident from the Claimant's CV, which was shown to me in the course of the evidence, that she is a highly educated and well-travelled individual. Amongst the Claimant's varied experiences included a ten-month stint working as a music teacher to children between the ages of around six to fourteen in Shanghai, China, in 2009/10.

8. The Claimant was employed by the Respondent as a Food and Beverage Team Member from 1 August 2022 until her summary dismissal on 25 March 2024. Throughout the employment the Claimant worked at the DoubleTree by Hilton Edinburgh City hotel, a hotel located in Edinburgh city centre and one which the Respondent manages. She was initially employed to work 16 hours per week, but at some point during the employment this changed to 32 hours per week.

9. It was agreed that the Claimant's gross annual salary for working 32 hours per week was £19,946. It was also agreed that the Claimant's gross monthly salary was therefore £1,495.50.

10. I was shown a document which set out the Claimant's monthly payments and these tended to fluctuate around a sum of around £200 higher than the £1,495.50 gross basic salary each month. It was explained to me that the Respondent also paid gratuities to staff such as the Claimant using a tronc system and that it was these gratuities which accounted for the higher figure in each case. The Claimant agreed in evidence that there was no entitlement to be paid these gratuities even though the Respondent regularly paid her in respect of them. She further confirmed that these gratuities were not the subject of her claim in terms of the amount of damages she was claiming. I therefore took the matter of the gratuities no further.

11. The Claimant was provided with a statement of employment particulars – headed "Terms and Conditions of Employment" - at the outset of the employment, as would be expected of the Respondent. In evidence the Claimant stated that she believed that she had an entitlement to be given notice of termination by the Respondent of four weeks or 30 days. I rejected that evidence. Clause 3.6 of the statement of particulars, and the table that appeared underneath (as part of that clause), was abundantly clear that in the case of an employee with length of service of between three months and four years as this Claimant had, the period of notice that had to be given by the Respondent was one month. That period, I find, was the Claimant's entitlement to notice under her contract of employment.

12. Mr Puchert is the Respondent's General Manager at the hotel, and Ms Robertshaw is a Receptionist who was working at the hotel at the material time.

13. As would be expected for a hotel of this name in the location it occupies, the DoubleTree is a busy hotel which regularly caters for guests visiting Edinburgh from all over the world. In terms of the hotel layout, the reception area – predictably – is very much a public-facing area within the hotel. Adjacent to the

reception area is a lobby which has seating areas towards the front door of the hotel. To get from the hotel restaurant to the reception area one must cross the lobby.

14. The DoubleTree by Hilton name is of international renown and reputation. The Respondent's workforce at the hotel is also highly diverse.

15. The Respondent provides a wide range of training to its employees, and I was shown a document which set out the full extent of the training the Respondent had provided to the Claimant specifically. Amongst the matters on that list was an Equality in the Workplace course, which the Claimant agreed she undertook on 26 October 2022. The Claimant agreed, and I therefore found, that this training included certain modules. Whilst I was not shown the detail of the training or the materials provided, it was clear from the names of the modules that the training the Claimant was provided with covered subjects that included her own responsibilities with regard to equality in the workplace, and putting knowledge into practice.

16. The Claimant agreed in evidence, and I also therefore found, that she had undertaken equality and diversity training in her prior employments.

17. At the material time the Respondent had numerous policies in force at the hotel, which applied to employees such as the Claimant. It has a Dignity at Work policy which, although limited in scope to managers, employees, contractors, agency staff and anyone else engaged to work at one of its locations, explains to employees the concept of harassment. The explanation given is that harassment is *"unwanted conduct related to relevant protected characteristics, which are... race (which includes colour, nationality and ethnic or national origins)..."*. It also explains that the purpose of an act need not be to violate a person's dignity or to create an offensive (*etc.*) environment for someone else for the act to amount to harassment. It can be done through conduct that has nevertheless unintentionally had that effect.

18. By clause 9.1 of the Dignity at Work policy the Respondent reminds employees of their own responsibilities in this regard. At the top of a list is states that employees can help to create a work environment free of harassment by *"being aware of how your own behaviour may affect others and changing it, if necessary – you can still cause offence even if you are "only joking"*."

19. Also at the material time, the Respondent had an employee handbook. Within that document the Respondent informed its employees about equal opportunities and specifically stated that, *"RBH is committed to providing equal opportunities and to avoiding unlawful discrimination in employment and against customers. We intend that no individual shall be discriminated against on the grounds of any Protected Characteristic referred to in the Equality Act 201. This policy applies to all RBH employees at every level and all employees in any hotel managed by RBH."* This section of the handbook also made it clear that violations of this policy would be deemed a disciplinary matter. Given her acceptance in evidence I found that the Claimant was familiar with this document and that it had been covered as part of her induction.

20. Also at the material time, the Respondent had a Disciplinary policy in force at the hotel. Whilst naturally this policy provided for a procedure that ought to be followed in the applicable circumstances, amongst its provisions included matters which the Respondent stated it would normally deem as amounting to acts described as "gross misconduct" (clause 4.7.1). The list is said to be non-exhaustive and it did not specifically name discriminatory acts or harassment (or words to that effect) within it, but it does mention *"personal conduct prejudicial to the efficiency, discipline or reputation of the company"* and *"any other serious breach of trust and confidence"* as being matters deemed to be acts of gross misconduct.

21. In terms of the incident that gave rise to the Claimant's dismissal, the facts are largely uncontentious. Upon these facts being agreed between the parties, my findings are that on the morning of 14 March 2024 (a Thursday) the Claimant was at work. The breakfast service having recently ended, she was tasked with

clearing the restaurant. Also working that morning was Ms Robertshaw, who was working on the reception desk.

22. On that date the vast majority of the hotel's residents were Chinese tourists visiting Edinburgh.

23. Certain matters relating to the surrounding circumstances are not agreed. The first is whether a colleague, Mr Andres Castellanos, was also present at the reception desk in the proximity of Ms Robertshaw at the material time. Mr Castellanos was the Respondent's Assistant General Manager at the time. I find that he was present, accepting the evidence of Ms Robertshaw who confirmed that she was "very clear" about her recollection of him being present because both she and Mr Castellanos were the only members of staff working on reception for the whole shift on that day. That account was corroborated by an email sent by Ms Robertshaw to a Ms Abigail Fell (of the Respondent's HR department) on 18 March 2024, which confirmed in terms that Mr Castellanos was present at the reception desk. It was further corroborated by a written statement sent to Ms Fell by Mr Castellanos himself, which confirmed that he was there but also very specifically *why* he was: he was having to deal with customer complaints because of disruption to the hot water supply, and because another member of reception staff (referred to as Savia) was yet to arrive at work.

24. I found Ms Robertshaw to be a reliable witness whose account was corroborated in multiple sources of documentary evidence and who recalled events with a clarity that the Claimant did not always demonstrate in her own evidence. I further accepted Ms Robertshaw's evidence that at the time of the event in question, Mr Castellanos was no more than two metres away from her. He would, therefore, have been in a good position to hear things that were said to Ms Robertshaw.

25. Whilst clearing the restaurant the Claimant found a bottle of sauce which had been left behind. Whilst the Claimant did not know what the bottle contained (as the label was written in what appeared to her to be Chinese script), she assumed it was soy sauce. The Claimant proceeded to walk from the restaurant, crossing

the lobby, to get to the reception desk. The Claimant presented the bottle to Ms Robertshaw at the desk.

26. Upon presenting the bottle to Ms Robertshaw, the Claimant said to her, *"the ching chongs left this at breakfast"*. Mr Castellanos overheard this comment being made by the Claimant.

27. The Claimant's initial evidence on this matter was that she had used the word *"chongs"*, rather than *"ching chongs"*. Putting aside whether there is any material difference between those two terms, I decided that the Claimant in fact used the phrase *"ching chongs"* rather than simply *"chongs"*. From the typed notes of the (later) disciplinary meeting which she herself provided, the Claimant was recorded as having told Mr Puchert, *"Yes, well, I'm pretty sure I said Chong, but you know my memory doesn't serve me fantastically."* By contrast, Ms Robertshaw said in evidence that she was *"very clear"* in her recollection of what the Claimant said, and that she could remember it *"word for word."* Her version was corroborated by what she had told Ms Fell in her email of 18 March, and also by a written statement provided by Mr Castellanos on 19 March. Making due allowance for the agreed fact that English is apparently not Mr Castellanos' first language and an immaterial difference in spelling, his statement confirmed that the Claimant had used the term "*Cheng-Chungs".*

28. The terms "ching chong", or indeed simply "chong", amount in essence to the same thing. The latter is an abbreviation of the former. It is a well-known racist term used to refer to persons of apparently Chinese or east Asian ethnicity or appearance. In the experience of this Tribunal it is known to have this derogatory status, but the wider extraneous evidence that was available to the Tribunal in the hearing was supportive of that conclusion. Ms Robertshaw – a New Zealander – confirmed that she understood the term to be racist and that she had heard it used in this way both in the United Kingdom and in her native New Zealand, where it was also commonly understood as being racist. Furthermore, Mr Puchert confirmed that he understood the term to amount to a *"racial slur"*.

29. In evidence, the Claimant attempted to equate the use of this term “chongs” with the use of the terms “Aussies” for Australian people, “Kiwis” for New Zealanders and “Yanks” for Americans. In the view of this Tribunal, such comparisons are not apt. Whilst naturally any term referring to nationality (as these do) can be used in a negative way towards or about people of particular nationalities, that is altogether different from using a term that is *of itself* derogatory about such people. “Chong” or “ching chong” attract the status of racist terms because they are mocking of their subject and the manner of speech perceived as being used by Chinese and east Asian people. Moreover, they are notorious and generally accepted as being racist in our society as a whole.

30. The Claimant’s evidence was that whilst her choice of language was deliberate and not mistaken, she did not know that the term “ching chongs” - or indeed “chongs” - was racist terminology. I rejected that evidence. I find the Claimant knew full well that her use of the term “ching chongs” was racially derogatory. Not only is the term notorious in wider society as carrying those racial connotations but a plea of ignorance was particularly difficult to accept when made by a highly educated, worldly individual who had on her own admission worked in diverse workplaces (including China) and been the subject of comprehensive, recent training on equality-related issues.

31. At the time that comment was made several of the Chinese residents of the hotel were present in the lobby, seated in the seating areas or standing around. There was no evidence that any of them overheard what the Claimant had said, and no evidence that any of them complained about it. The Claimant disputed that there was anybody in the lobby but I preferred the evidence of Ms Robertshaw who confirmed that there were. I preferred Ms Robertshaw’s evidence on this point for the reasons previously expressed, but also because the Claimant’s evidence as to the layout of the hotel lobby and reception area meant that she would have had her back to the lobby when addressing Ms Robertshaw at the reception desk. Ms Robertshaw, by contrast, had full visibility of the lobby from her position at the desk at the time.

32. Following the Claimant's comment Ms Robertshaw was *"quite stunned"* by her having made it, and turned to Mr Castellanos with the rhetorical question, *"did she really just say that?"*. For his part, Mr Castellanos recorded his reaction as one of having taken offence. Given the proximity of those written statements to the incident itself, and the lack of challenge to Ms Robertshaw on the point by the Claimant, I accepted that both were offended by the Claimant's comment.

33. A short while later Mr Castellanos approached the Claimant, whom by that time was behind the scenes polishing cutlery. He asked her about the comment and she told him that whilst she had used the term it had not been used with malice; as she put it, it was simply a term she uses for Asian people in the UK.

34. What then happened was the subject of some dispute. The Claimant's evidence was that Mr Castellanos instructed her not to use the term *in the presence of Ms Robertshaw* in future. In cross-examination Mr Crammond challenged this evidence and suggested that the actual instruction was that the Claimant should not use the term *in the workplace* in future. In support of this Mr Crammond put to the Claimant the written account of Mr Castellanos of 18 March, which stated that, *"I said that I understood there was no malice behind the comment however it is not appropriate to use it in the work environment as it does not show our values of Inclusion and Diversity, I also asked her to please refrain to use it again while at work."*

35. I did not accept the Claimant's evidence on this point, and instead found that the instruction given to her by Mr Castellanos was as he had written. Simply being instructed not to use a quite obviously racist term in the presence of one colleague, but not imposing such a prohibition in relation to the wider workforce and hotel guests, seemed to this Tribunal to be inherently illogical and unlikely. It would run counter to the Respondent's clear commitment to equality and diversity in its operations, and Mr Castellanos held a position of some seniority at the hotel. It would also involve Mr Castellanos, and thus the Respondent, running the risk that the Claimant might leave that conversation believing that she could continue to use that term in the presence of the very people of whom the term "ching chongs" is racially directed towards.

36. On the evening of 15 March 2024 (a Friday) the Claimant emailed Ms Fell of HR, at 9.06pm. She described her demeanour in drafting this email as being *"pissed off"*, which I accept was indeed the case. The email header says *"Banter"* and the text of that email is reproduced in full, as follows:

> *Dear Abi,*
>
> *Please excuse the frankness of my communication, I am somewhat pissed by a mini-conversation that took place on Thursday between myself and Andres.*
>
> *Apparently, one of the new (ish) reception team had taken mild offense to a term/nickname that I had used to refer to overseas guests and spoke to Andres about it. Typical of Andres's 'management' style, rather than address any minor detail impartially or objectively, he panders to any hint of a complaint that had no foundation whatsoever and was nothing more than the result of oversensitive and childish behaviour.*
>
> *The reception team member is from New Zealand, and clearly whatever I had said, may have held a different meaning to those down under, however, both her and Andres have been very quick to loose sight of the fact that I am British, and this is the UK. I will not in any way be asked to modify what was nothing more than a bit of British Banter because some inexperienced traveller has failed to adjust to British culture. Had Andres dealt with that in the expected manner, he would have assured the girl that the term is not considered offensive to the British and therefore no offense was intended, Andres (himself a foreign national) has been in the UK more than long*

enough to have grown accustomed to British banter and expressions.

I was asked not to use the term again around the kiwi (she probably finds that term offensive also) and made to feel as though I was in some way in the wrong. I will not apologise for being British least of all in my own bloody country.

That's all.

Regards,

Lynn.

37. In my judgment, there are certain problems within this email:

37.1. The first is that in criticising Mr Castellanos – who had quite properly taken the incident up with her – the Claimant tried to downplay the wrongdoing she knew she had done in making the comment and instead state that the issue had *"no foundation whatsoever"*. That comment was well wide of the mark.

37.2. The second problem concerns assumptions made about Ms Robertshaw. The Claimant assessed that any offence caused to Ms Robertshaw was *"mild"* but she could not in fact have known Ms Robertshaw's strength of feeling on the matter. Also, the Claimant postulated that the term she had used may not have been offensive to Australians/New Zealanders; that was a huge assumption and one that was very likely to be wrong given that "ching chongs" is notorious as a racist term in the English-speaking world in general. She also assumed that Ms Robertshaw would be offended by the use of the term "Kiwi", when there had been nothing to suggest she would have been.

37.3. The third problem is that in saying that the term she had used was not deemed offensive by British people, the Claimant was plainly wrong and (as I have found, above) she knew that she was wrong.

37.4. Fourthly, and most significantly, in emphasising her own Britishness whilst taking the opportunity to make baseless criticisms about Ms Robertshaw – alleging that she was *"oversensitive"*, *"childish"* and had failed to integrate into British society – the Claimant attempted to portray herself as the victim in the whole affair. Even allowing for the fact the Claimant was, as she described, "pissed off" when writing this email, it was quite astonishing.

38. On 18 March 2024 (a Monday) Ms Robertshaw emailed Ms Fell with her version of events of the previous Thursday morning. That same morning Ms Fell emailed the Claimant to invite her to an investigation meeting concerning the incident the previous Thursday morning and the "Banter" email referred to above. The meeting was scheduled to take place on 20 March 2024 at the hotel, and convened by Ms Elle Holland (Cluster Financial Controller) at 2.30pm.

39. The following day (19 March 2024) the Claimant replied to Ms Fell stating that she was dissatisfied with how the incident had been handled, that she had referred the matter to the Cluster HR Manager, Ms Cheng Griffiths for formal handling, and that she would not attend the scheduled investigation meeting. That same day Mr Castellanos provided his written version of events.

40. On 20 March 2024 Ms Fell wrote back to the Claimant informing her that the investigation meeting would be postponed to 22 March. That meeting ultimately went ahead on that date. Whilst is not necessary to delve too deeply into the discussion that took place, the note of the meeting again records, and I find, that the Claimant unjustifiably criticised Ms Robertshaw on the basis that the latter had not *"culturally adjusted"*. The Claimant admitted using the term "chongs" but, on reflection, stated with rather less confidence that, *"*[I] *think I said chongs, as that is what I refer to them as. It was immaterial at the time, feel insignificant so*

cannot remember." She reiterated that she thought this was an acceptable term to use in relation to Chinese people. When the relevant section of the Dignity at Work policy was put to her regarding offence being caused even unintentionally, the Claimant did not acknowledge that this is what had happened, nor indeed did she apologise. The Claimant's conduct in the investigatory meeting was consistent with what she had said in the "Banter" email on 19 March.

41. The Claimant was suspended at the conclusion of the investigatory meeting and later that day was invited, by letter, to a disciplinary meeting on 25 March 2024. The allegations against the Claimant remained to all intents and purposes the same.

42. The disciplinary meeting went ahead on 25 March. The manager holding the meeting and responsible for making decisions was Mr Reon Puchert, who gave evidence to the Tribunal. Again without delving too deeply into the discussion at the meeting, it was necessary to resolve one matter: whether the Claimant apologised for her conduct on 14 March or not.

43. I have reached the conclusion that the Claimant did not apologise; instead she used the meeting in order to minimise her own wrongdoing. She stated that she did not consider that the term used referred to race but to nationality despite, in reality, knowing otherwise. She stated that she only realised the term she used was offensive and that she had *"done something wrong"* after she had had the conversation with Mr Castellanos and a further conversation with one of the chefs working at the hotel. This was not only untrue but totally inconsistent with the express position she had adopted in her "Banter" email and in the investigatory meeting with Ms Holland, namely that she had done nothing wrong. When Mr Puchert first asked her if she felt she should apologise, the Claimant stated (carefully using a double negative) that she had not said she would not apologise. At the second time of asking (later in the meeting) there was a long pause before the Claimant answered, *"Erm I'm sorry that I've said something that's caused her offence but, in a sense, I've kept out of it because of all of a sudden, it's gone off in some silly direction."* In my judgment, whilst on its face this comment included an apology it was not an apology in substance. Putting that comment in its proper

context, it was in my judgment an attempt by the Claimant to deflect attention from her own actions and instead wrongly portray herself as the real victim.

44. Having adjourned to deliberate, Mr Puchert returned to the meeting and delivered his decision, which was that the Claimant was summarily dismissed. Mr Puchert's reasons were expressed orally at the time and confirmed in writing the following day (26 March 2024). Mr Puchert found the Claimant guilty of making an offensive comment in a guest-facing area, of sending the "Banter" email of 15 March, and of not *"following up"* with the affected employee (Ms Robertshaw) or demonstrating any accountability during the intervening period. I interpreted not *"following up"* to mean, in essence, the Claimant's failure either to apologise – or at least acknowledge the error of her ways – to Ms Robertshaw. Mr Puchert found that the Claimant's conduct breached clause 7 of the Respondent's Dignity at Work policy and was of such severity that he deemed the Claimant's conduct to amount to gross misconduct under the Disciplinary policy.

45. In the absence of any challenge to this part of his evidence by the Claimant, I accepted Mr Puchert's evidence and find that it was for these reasons that he decided to dismiss her.

The law

46. A claim of wrongful dismissal is a contractual claim. It is not the same thing as an unfair dismissal claim, which is a statutory claim and involves very different considerations to a wrongful dismissal claim. The Employment Tribunal has jurisdiction to determine wrongful dismissal claims by virtue of **art.3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**, as a contractual claim arising on the termination of employment.

47. A central feature of every contract of employment is the relationship of trust and confidence between the employer and employee. There exists an implied term in every contract of employment that one party to the contract *"will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to seriously damage or destroy the relationship of mutual trust and*

confidence" with the other (**Malik v Bank of Credit and Commerce International SA (in liquidation) [1997] IRLR 462**, House of Lords).

48. A breach of the implied term of mutual trust and confidence is always a fundamental breach of contract (**Morrow v Safeway Stores plc [2002] IRLR 9**, Employment Appeal Tribunal).

49. Returning to claims of wrongful dismissal specifically, if an employee is summarily dismissed they will normally be entitled to damages representing payment for their period of notice if the circumstances did not justify summary dismissal. Whether such a dismissal was justified depends on whether in the circumstances the employee's conduct can be regarded as a repudiation of their contract (**Macari v Celtic Football and Athletic Co Ltd [1999] IRLR 787**, Court of Session, Inner House; **Malik**).

50. Whilst each case is fact-sensitive, the Court of Session has provided guidance to Employment Tribunals as to what repudiatory conduct means (**McCormack v Hamilton Academical Football Club [2012] IRLR 108**). The essential principle (set out at paragraph 8) is that,

> *"… summary dismissal has to be regarded as an exceptional remedy calling for substantial justification. It will not readily be sustained for misconduct which only peripherally affects the performance of core duties under the relevant employment contract. To bring summary dismissal into play, repudiatory conduct must be so serious as to strike at the foundation of the employer/employee relationship, and for practical purposes to make its continuance impossible."*

Analysis and conclusions

51. Based on my findings in fact and my application of the law as set out above, my conclusions in relation to the issues set out in paragraphs 5.1 to 5.4 appear below. I have borne in mind the parties' respective submissions in reaching my conclusions but have not cited them in full.

(i) To what period of notice of the termination of employment was the Claimant contractually entitled to, in principle?

52. My conclusion on this issue is straightforward and uncontroversial. The Claimant's in-principle contractual entitlement to notice was a period of one month. That conclusion is based upon my finding (at paragraph 11, above) that the Claimant's statement of employment particulars expressly stipulated this as being the entitlement for someone with the length of service she had. The Claimant's length of service was almost 18 months (paragraph 8) based on the agreed dates of employment.

(ii) Was the Claimant dismissed without notice?

53. This matter is equally uncontroversial. It was an agreed fact that the Claimant was dismissed on 25 March 2024, without notice, and my finding (at paragraph 44) reflects this.

(iii) Was the Respondent entitled to dismiss the Claimant without notice, i.e. in circumstances where it was entitled to terminate the contract because the Claimant had acted in fundamental breach of contract?

54. This question is the critical issue in the case.

55. In my judgment, determined objectively, the Respondent was entitled as a matter of contract to dismiss the Claimant without notice because the Claimant had conducted herself in a way that was likely to seriously damage or destroy the relationship of mutual trust and confidence between her and the Respondent (applying **Malik**, **Macari** and **McCormack**). Necessarily, that conduct amounted to a fundamental breach of contract (applying **Morrow**), entitling the employer to dismiss summarily.

56. Considering the relevant facts objectively and in their proper context, my reasons for reaching this conclusion are as follows:

56.1. The Claimant used a racially offensive term (*"ching chongs"*) in the workplace (paragraphs 26 and 27) and that of itself is serious misconduct;

56.2. The Claimant's choice of terminology was deliberate and not used mistakenly (paragraph 30);

56.3. That term was undeniably racist and it is well-known in wider society as having that status (paragraph 29);

56.4. The term was known by the Claimant herself to be racist when she used it (paragraph 30);

56.5. The comment was not only made in a public area of the workplace but was directed to a colleague and made within the earshot of another, the Assistant General Manager (paragraph 26);

56.6. In addition, the comment was deliberately chosen by the Claimant to refer to the very people it racially demeans (paragraph 28), with the hotel largely catering for Chinese tourists at the material time (paragraph 22) and with some of them present in the vicinity at the time the comment was made (paragraph 31);

56.7. The Claimant acted as she did despite having been provided with training on equality and diversity issues in both this and previous employments, and despite having been specifically informed by this employer as to what harassment means and what one should not do (paragraphs 15, 16 and 19);

56.8. Whilst there is no evidence that any of the Chinese guests overheard or were offended by the Claimant's comment, Ms Robertshaw and Mr Castellanos were both offended by it (paragraph 32);

56.9. The reaction of the Claimant to being challenged about her conduct was, without justification, to deny key aspects that made the conduct obviously problematic, to minimise her culpability and to castigate others who were in no way at fault (paragraphs 36, 37 and 43);

56.10. The reaction of the Claimant in only very reluctantly – and even then, not genuinely – accepting any culpability in relation to the incident (paragraph 43) the confirmed to the Tribunal that there was a real risk that she might continue to use such terminology whilst at work;

56.11. The Claimant's workplace was one which has a diverse workforce (paragraph 14) and it is legitimate for the Respondent to wish to take measures to protect those employees against even unintentional conduct that might amount to racial harassment;

56.12. By its very nature and location, the Claimant's workplace caters for international guests (paragraphs 13 and 22) and it is legitimate for the Respondent to wish to take measures to protect those guests from even unintentional conduct that might amount to racial harassment;

56.13. The Respondent does ascribe a high degree of importance to equality and diversity matters in its relevant policy documents and employee handbook (paragraphs 17 to 20), which includes deeming racial harassment as a disciplinary matter; and,

56.14. The Respondent has a degree of responsibility for maintaining the good name of the DoubleTree by Hilton hotel brand. Its employees are the face of that brand to the hotel guests. Conduct of the kind carried out by the Claimant would run the risk of damage being caused to the Respondent's reputation and to the international reputation of DoubleTree by Hilton, even if that did not occur in this particular case.

57. It follows that when Mr Puchert acted, on behalf of the Respondent, to terminate the Claimant's contract of employment on 25 March 2024, he did so in circumstances where the Respondent was contractually entitled to do so.

58. For these reasons, the claim of wrongful dismissal must necessarily fail.

(iv) If the Respondent was not so entitled, in what sum should damages be assessed and the Respondent ordered to pay to the Claimant?

59. Given my conclusion in relation to issue (iii), above, this issue falls away and there can be no award of damages. However, if I had been required to decide it I would have concluded that damages should have been assessed as representing wages lost by the Claimant in the notice period she would otherwise have been entitled to. That would have been the agreed sum of £1,495.50. Naturally, given that the claim has failed there is no basis for ordering the Respondent to pay damages to the Claimant.

Disposal

60. For all these reasons, the Claimant's claim of wrongful dismissal is dismissed.

Employment Judge: P Smith
Date of Judgment: 20 September 2024

Date sent to parties 23/09/2024