Case No: 2301127/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS:

Mr J Shaw
Ms S Campbell

BETWEEN:

Ms S Thornton

Claimant

and

Le Maitre Limited

Respondent

ON: **21 & 22 March 2017**
In Chambers – 23 March & 3 May 2017

Appearances:

For the Claimant: Mr M Hendra, Solicitor
For the Respondent: Ms K Cornacchia, lay representative

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed. The tribunal makes a Basic Award of **£2850**. The compensatory award of £2,212.62 is extinguished by the ex gratia payment of £3500.

2. The claim for statutory rest periods succeeds in respect of 7.2.16 only. The tribunal awards **£73.56**.

3. The Respondent failed to provide the Claimant with a written statement of particulars of employment pursuant to section 1 Employment Rights Act 1996. The tribunal awards 4 weeks' pay, totalling **£1900.**

4. The age discrimination complaint fails.

5. The Respondent is ordered to pay the Claimant the total sum of **£4,823.56**.

REASONS

1. By a claim form presented on 16 June 2016, the Claimant complains of unfair dismissal, age discrimination, breach of the Working Time Regulations (weekly rest breaks) and failure to provide a statement of employment particulars. All claims were resisted.

2. The Claimant gave evidence and we also heard from Matthew Thornton, her son, on her behalf. The Respondent gave evidence through Karen Cornaccia, Managing Director, and Maxine Wilson, her sister. The parties presented a joint bundle of documents and references in square brackets in the judgment are to pages from the bundle.

Issues

3. The issues in this case are set out at Schedule A of the case management order of 23 August 2016 save that the holiday pay claim has been settled.

The Law

Age Discrimination

4. Section 13(2) of the Equality Act 2010 (EqA) provides that a person discriminates against another because of age if he treats them less favourably than he treats or would treat others and cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Weekly rest breaks

5. Regulation 11 of the Working Time Regulations 1998 (WTR) provides that a worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.

Unfair Dismissal

6. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed and section 98(2) sets out the potentially fair reasons for dismissal. These include redundancy and capability.

7. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

Findings and conclusions

8. Having considered the evidence, the submissions of the parties (provided in writing and orally) and the relevant law, we have reached the following findings and conclusions on the agreed issues:

Introduction

1. In September 2011, the Claimant responded to an advert placed by the Respondent in The Lady magazine for a Live-In Housekeeper/Companion. The role included Household cleaning, cooking and Ironing plus companion to an elderly gentleman, Harold Berlinski (HB), with early dementia but no medical issues [1]. The Claimant responded to the advert on 19 September and was interviewed by Maxine Wilson (MW) (one of HB's daughters). The Claimant was offered the job and started on the 3 October 2011.

2. Although the role was a domestic one within a family, the Claimant was employed by the family business, Le Maitre Ltd, a company whose business was pyrotechnics for road shows, employing 110 employees. HB was the company chairman and Karen Cornacchia, (KC) HB's other daughter, was joint managing director with her brother in law, Rick Wilson. (RW) MW was the Accounts Manager.

Statement of Employment Particulars

3. The Claimant claims that she never received a contract of employment and was unaware that she was employed by the company; believing that she was employed by the family. The Respondent contends that she was provided with a written statement of employment particulars at the beginning of her employment. In support of this, the Respondent has provided a copy of the company's generic statement of main terms of employment. There is nothing linking this document to the Claimant; it does not bear her name neither is it signed by her or anybody else. [5-5a]. Further the standard terms are those applicable to employees working within the business rather than for the Claimant's unique role.

4. In further support of its position, the Respondent asserted that Anne Harland, the Wages Clerk for the company, would have sent the Claimant a contract and would not have put anybody on the payroll (and by implication not paid them) unless she had received the signed contract back from them. What Ann Harland would have done is not evidence of what she actually did and she did not attend to give first hand evidence. The Claimant's employment was different from that of the normal company employee - she was effectively employed within the family and had live-in accommodation. Ms Harland may well have treated her differently in those circumstances.

5. We prefer the Claimant's evidence that she did not receive written employment particulars at the start of her employment. Even if we are wrong about that, we are satisfied that the Claimant did not receive updated particulars when her hours of work and salary changed or at any time thereafter, as required by section 4 ERA.

6. The Claimant contends that she was dismissed because of her age as KC and MW thought she was too old to continue caring for Harold. The Claimant was born on 2 December 1942 and was dismissed on 12 February 2016 at the age of 73. KC and MW contend that they were unaware of the Claimant's age until these proceedings.

7. There is a dispute about the age the Claimant gave on appointment. The Respondent says that when they asked her at interview her age she said 59. This is supported by the annotated notes on an email that the Claimant sent on 19 September 2011 and which MW used as a crib sheet during the interview to record the Claimant's responses. The

Claimant accepted that MW had asked her about her age at the time but claims that she replied late 60s. However, MW has written 59 on her crib sheet and it is the only annotation that could relate to that question. [2]

8. On her P46 starter form, the Claimant's date of birth is recorded as 1949. When asked in cross examination where that information would have come from, the Claimant said, her driving licence. Yet her licence had her birth year as 1947. The Claimant's explanation, bizarrely, was that she thought that she was born in 1949 and only recently realised that she was born in 1942. Given that none of her official documentation referred to 1949,as her year of birth, she must have provided that information to the Respondent. Therefore, by the time the P46 was completed the Respondent would have believed the Claimant to be 61, going on 62 years old, when in fact she was 68 going on 69. Similarly, by the time of her dismissal, the Respondent would have believed her to be 66 when in fact she was 73.

9. Whilst the definition of direct age discrimination at section 13(1) EqA only requires discrimination to be on grounds of age in general rather than on grounds of the Claimant's specific age, that is not the way the Claimant put her case. It is clear from the list of issues that the complaint was that she was dismissed because of her (my emphasis) age rather than an age group. [A32] Her numerical age at dismissal was 73. Based on the evidence, we are satisfied that the Respondent did not know the Claimant's age when it dismissed her.

10. The Claimant alleges at paragraphs 45 of her statement that KC had said to her during her dismissal meeting that "*it's time to get someone else in so you can retire*". KC and MW deny this. The Claimant's representative made clear at the preliminary hearing on 16 August 2016 that the age discrimination claim was one of direct discrimination only – there was no harassment claim – and that the only detriment alleged was the dismissal. [A33] It follows that the alleged comment is not a free standing claim but only something from which the tribunal could draw an inference of discrimination from.

11. We have not drawn any inferences from the alleged comment firstly, because we cannot say, on balance of probabilities, that the comment was made. Secondly, based on our finding in the unfair dismissal section below, we are satisfied that the dismissal was not because of age. The age discrimination complaint is not made out.

Weekly Rest Periods

12. It is common ground that at the start of the Claimant's employment, her working days were Monday to Friday with the weekends off. The Claimant said in evidence that initially, she had almost every weekend off and would leave the house on Saturday, returning on Sunday night.

13. In or around April 2014, it was agreed between the parties that the Claimant would receive a pay increase for extending her days of work. The Respondent says that it was agreed that the Claimant would add Saturdays to her working week and would continue to have Sunday's off. The Claimant told us that the payment was to cover the weekend and that she did not know she was allowed to have Sundays off as she got the impression that the Respondent wanted her there all of the time. There was no contractual documentation confirming the new arrangement.

14. The Claimant's pay changed from £23,751 to £28,125 per annum, an increase of £4374. That more or less equates to an extra day's pay per week, which is consistent with the Respondent's case. We therefore find that the contract was extended to cover Saturday working only, not Sundays. How the Claimant worked in practice is another matter.

15. The main reason for extending the Claimant's working week was that HB's mental health had deteriorated as his dementia had progressed and KC and MW were concerned that he should not be left in the house on his own.

16. The Claimant contended that she was providing care for HB 7 days a week. She claimed that although MW and RW assisted with HB's care when they could, they were frequently at their holiday home in Majorca for weeks at a time or or elsewhere on holidays and long weekends away and on those occasions, she would be left to look after HB on her own. MW accepted that she and the family would go to their home in Majorca for 3½ weeks in August and would holiday during the children's half terms and on those occasions, the Claimant would look after HB without relief. Although the Claimant was provided with a list of people she could ring as back up on those occasions, our impression was that this was only for emergencies and she rarely did so.

17. KC said in evidence that although the Claimant was entitled to one day off a week, it was not fixed to a particular day though she generally took it on Sunday. We do not accept this. Under the original contract she did not work Sundays and the amended agreement only extended the working week to Saturday. The Claimant was therefore not contractually required to work Sundays under the original or amended terms. In our view, the reason that the Respondent now seeks to argue that Sunday was not a contractual day off is so that they can say, as they did, that the Claimant sometimes took her rest day on other days of the week. In support of this, the Respondent produced a manuscript list of the Claimant's time off with entries covering dates between January 2014 and 1 January 2016 which were not Sundays. [105-106]. Although the Claimant accepted that MW was flexible and allowed her to take time off during the week if she needed to, we accept her evidence that she had to return home in time to put HB to bed so could not be away for more than 12 hours. That is not, in our view, a substitute for the statutory 24 hour uninterrupted weekly rest period.

18. The Claimant came across to us as someone who was very obliging, who was not particularly assertive and saw looking after HB as a vocation rather than a job. This was clear from her testimony to us. At one point she said "*I was content to stay and spend time with Mr B in the garden. I was very fond of the old boy"*. "*The trouble is I am too kind*." The Claimant's son, Matthew Thornton, told us that his mother goes over and above what she needs to do because she feels obliged to help.

19. A clear example of this was when the Claimant fell and strained her arm. On that occasion, she was in sole charge of HB as MW and RW were away and although she had a list of people she could call in emergencies, she did not call anyone from the list. The reason she gave us for not doing so was that she did not want to bother anybody and just wanted to carry on. Even when she subsequently discovered that the wrist was broken she continued to work and did not tell MW that she was in pain and needed time to recover. When the tribunal panel asked her why not, she said "*I never like to say anything. I never complain*".

20. MW no doubt knew of the Claimant's obliging nature and this is probably the reason for her not arranging relief cover when the family were away, secure in the knowledge that the Claimant would look after HB without complaint. It is not an answer for the Respondent to say, as it did, that the Claimant did not want to be relieved. Whilst she could not be forced to take rest days, there was still a requirement on the Respondent to positively enable her to do so.

21. In the case Scottish Ambulance Service v Truslove UKEATS/0028/11, which was a case related to the refusal of the entitlement to rest breaks, the Employment Appeals Tribunal (Scotland) held that an employer had an obligation to afford the worker the entitlement to take a rest break. For the purposes of Regulation 30(1) WTR, that entitlement will be "refused" by the employer if it puts in place working arrangements that fail to allow the taking of 20 minute rest break. The principle is of equal application to the weekly rest period. The fact that there was no fixed arrangement for relief cover for Sundays meant that rest days had to be specifically arranged around the convenience of the MW and RW. This was an unnecessary barrier to the Claimant taking her contractual rest day as a matter of course and we are satisfied that on the occasions when she was unable or deterred from taking Sunday off because alternative arrangement had not been made for HB's care, this amounted to a refusal of the rest break.

22. The Claimant claims for 104 rest days. Although she was unable to say when challenged how that figure was arrived at, it seems to equate to 2 years' worth of rest periods, presumably dating from when the contract changed. That raises a time point.

23. By Regulation 30(2) WTR, an employment tribunal cannot consider a complaint about the refusal of rest periods unless it is presented before the end of the period of 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted. The time limit is subject to an extension to take into account early acas conciliation. (Reg 30B WTR). Time can also be extended where the tribunal is satisfied that it was not reasonably practicable for the claim to be presented in time and that it was presented within a reasonable time thereafter. (Reg 30(2)(b) WTR).

24. The Claimant's employment terminated on Friday, 12 February 2016 and given that Sunday was her contractual rest day, the date on which her last rest day should have been exercised was Sunday, 7 February 2016. The primary time limit for a claim in respect of that date expired on 6 May 2016. Early conciliation commenced on 6 May and ending on 17 May 2016 as a result of which, the time limit was extended to 17 June 2016. The claim was presented on 16 June 2016 therefore the claim for refusal of a rest day in respect of 7 February 2016 is in time. However, any claims in respect of rest days preceding that date are out of time and in the absence of any evidence from the Claimant to the contrary, we find that it was reasonably practicable to present those claims in time.

25. There are no dates identified by the Respondent after 1 January 2016 as days off in lieu of Sunday and they have presented no evidence showing that they enabled the Claimant to take a 24 hour uninterrupted break on 7 February 2016. We therefore find, in respect of that date only, that the Claimant was not afforded a weekly rest period. We have found as a fact that the Claimant was not paid to work Sundays and we have therefore awarded her a day's pay as compensation, which we have calculated at £73.56.

Unfair Dismissal

26. The Respondent says that the Claimant was dismissed by reason of redundancy.

27. On 28 January 2016, the KC and MW placed an advert for two carers/companions, to look after their father. The advert asked for candidates preferably with nursing experience. [57]. We were told that the positions were sought in order to provide relief for the Claimant so that she could have more time off. However, the positions were advertised as full time which is inconsistent with the ad hoc nature of relief work. Also, the advert said that the roles were live in and night shift. In December 2015, HB's family home was sold and the whole family moved into KCs apartment where there were insufficient bedrooms to accommodate them conveniently. The Claimant and HB had their own bedrooms but KC gave up her bedroom to MW and RW and slept in the lounge. The arrangement eventually decided upon by KC and MW was that the 2 appointees would work and live in on alternate weeks. There was no room for the Claimant in that arrangement, literally, as her bedroom would need to be available for the new recruits.

28. The Respondent contends that the Claimant was redundant as the requirements for her to provide companionship for HB and undertake housekeeping duties had ceased or diminished. Although the Claimant's duties when she was appointed were those of a companion/housekeeper, her responsibilities had changed over time and by the time of her dismissal her role was predominantly as HB's carer. Indeed KC confirmed in evidence that the Claimant's replacements carried out more or less same duties as she did. In those circumstances, the definition of a redundancy has not been met as the requirement for person(s) to act as carers for HB had not ceased or diminished; indeed it had increased.

29. We therefore considered whether there was a different reason for dismissal. Much of KC's evidence contained criticisms, some of it gratuitous, of the Claimant and her performance. These matters were never raised with the Claimant formally and KC confirmed, and we accept, that they were not the reason for her dismissal.

30. The Respondent told us that as HB's Alzheimers progressed, his condition deteriorated and he often needed tending to at night. Towards the end of the Claimant's time with him, he was regularly falling out of bed, incontinent and prone to infections. He was hospitalised on a number of occasions; the last time for our purposes was January 2016. KC told us that it was for these reasons that she and MW decided that HB's needs would best be met by a qualified nurse with experience in dementia care. Although the Claimant accepted that she did not have the qualifications and experience they were looking for, she felt that she did a great job looking after HB and that the only reason she was dismissed was because KC did not like her. However, we are satisfied that the decision to change the nature of HB's care was genuinely motivated by a desire to provide the best possible care for HB in the time he had left. (we were informed by the respondent that HB died on 3.4.17) KC and MW decided that care was best provided by qualified nurses. That was a decision they were entitled to make and it is not for the tribunal to interfere with it.

31. We are satisfied that the reason for dismissal was capability, due to lack of qualifications.

32. Having identified the reason for dismissal, we went on to consider whether it was in all the circumstances fair to dismiss the Claimant for that reason. It is clear from the evidence that the decision to dismiss was taken before the Claimant was spoken to. On 5 February, Margaret Mstrijdom accepted the position of carer/nurse to commence on 10 February 2016, working one week on and one week off with another nurse who had also accepted the role. The first that the Claimant was aware of the recruitment was on 8 February 2016 when KC and MW sat down with her and explained their decision. The Claimant was told that she was to be made redundant and that her employment would end on 10 February 2016 – 2 days later. This was extended to 12 February at the Claimant's request. KC told us that the Claimant was not told about the recruitment to replace her in advance because they wanted the new persons in place before she left. That is not, in our view, a compelling reason not to consult with the Claimant. There is no suggestion that the Claimant would have "downed tools" and walked out at the news. We doubt very much that KC and MW believed she would and her genuine affection for HB would have prevented her acting in such a way. To give the Claimant 48 hours' notice of termination of employment, and as a consequence, notice to quit her accommodation after 5 years of dedicated and loyal service to HB was in our view unfair. The unfair dismissal claim therefore succeeds.

33. We also find that, given the decision to engage qualifying nurses to look after HB, the Claimant's dismissal would have taken place in any event but with proper consultation, we consider that it would have taken place a month later than it did. We therefore make the following award:

    a. Basic Award - £2850

    b. Compensatory Award – 1 month's net salary £1912.62

Plus	Loss of statutory rights £300 =	2212.62
Less	Ex-gratia payment (described as a redundancy payment)	3500.00 (-1,287.38)

    Total compensatory payment - nil

Failure to provide statement of employment particulars

34. Having found that the Claimant was not provided with an up to date statement of employment particulars, pursuant to section 38 Employment Act 2002, we award 4 weeks gross pay – 475 x 4 = £1900.

Judgment

35. The unanimous judgment of the tribunal is that:

    c. The unfair dismissal claim succeeds. The Claimant is awarded £2850.

    d. The claim for refusal of a daily rest period succeeds in respect of 7.2.16. The Claimant is awarded £73.56

e. The Respondent failed to provide a statement of employment particulars – The Claimant is awarded 4 weeks'pay of £1900.

f. The age discrimination claim fails.

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Employment Judge Balogun
Date: 20 June 2017