



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Joseph

**Respondent:** Swallow Coffee Shop Ltd

**Heard at:** London Central Employment Tribunal **On:** 13 December 2018

**Before:** Employment Judge Davidson

## **Representation**

**Claimant:** Mr O Couchman, Representative

**Respondent:** Mr M Parkes, Director

# JUDGMENT

The claimant's complaint of unpaid holiday pay fails and is dismissed.

The claimant's claim for notice pay succeeds and the respondent is ordered to pay to the claimant £469.00.

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Employment Judge Davidson

Date 13 December 2018

JUDGMENT SENT TO THE PARTIES ON

14 Dec. 18

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FOR THE TRIBUNAL OFFICE

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# REASONS

The respondent has requested written reasons for my decision. In light of the overriding objective and the value of the claim, I set out brief written reasons for my decision.

## Issues

1. The issues for the hearing were
  - a. Whether the claimant is owed holiday pay
  - b. Whether the claimant is owed notice pay

## Facts

2. The respondent operates a coffee shop in West London which opened in June 2017. The claimant began working for the respondent as a barista from shortly before it opened. She generally worked 5 or 6 days a week and was entitled to 20 days paid holiday plus paid bank holidays each year.
3. After the respondent had some issues with the claimant's conduct in November 2017, the claimant disclosed that she was suffering from anxiety and depression and she apologised for her behaviour. Mr Parkes was sympathetic and the parties put the incident behind them.
4. On 13 January 2018, the claimant was late for work. She sent a text message at 8.00am, the time she was due to start, apologizing for her lateness and explaining that her alarm did not go off and that she had been suffering from insomnia. In the event, the claimant attended work at 9.35 without further updating Mr Parkes on her arrival time. He was not able to open the shop until she arrived. He issued her with a formal warning, in response to which the claimant apologised and promised to improve her timekeeping and communication.
5. In February 2018, Mr Parkes asked the claimant to cover a shift on 14 March to cover a colleague's holidays. The claimant agreed.
6. On 27 February, the claimant and her colleague both forgot their shop keys and Mr Parkes had to come to the shop to open up. Later that day, the claimant sent an email apologising for forgetting her keys and saying that, due to a private issue which had arisen, she was now unable to cover the 14 March shift despite agreeing to do so.
7. Mr Parkes replied by email noting that the claimant had not apologised at the time about forgetting her keys. He expressed concern about the lack of respect shown to him and the inconvenience of her decision not to work the shift on 14 March. He threatened to dismiss her but agreed to give her a final written warning instead as long as she worked the 14 March shift. He then said that there was a real prospect of her being dismissed if she repeated her conduct.
8. The claimant then agreed to work the 14 March shift.

9. On 17 March, Mr Parkes injured his finger and left the shop for medical treatment. He was advised not to return to work that day. Later that day, at about 4.45pm, Mr Parkes' partner, Mr Lieper, came to the shop to pick up a cake. He saw that the cakes were boxed up, the downstairs grill was turned off as was the induction hob, one area of the shop was being mopped and the chairs were on the tables, with the lighting turned off. There were two customers in the outside space who were served with coffees by the staff on duty.
10. The shop normally closes at 6pm and the staff work until 6.30pm to clean up. If the shop is not busy, Mr Parkes often allows the cleaning to start earlier and the shop sometimes closes early if there are no customers.
11. After Mr Lieper told Mr Parkes that the cleaning had started early without his consent, Mr Parkes telephoned the staff and raised his voice in anger. Later that day, the claimant emailed Mr Parkes and tendered her resignation, objecting to being shouted at. She offered to work four weeks' notice instead of the two weeks in her contract.
12. In reply, Mr Parkes set out his complaints regarding what had happened at the shop that afternoon and said he could no longer trust her. He told her that her employment terminated that day. He denied that this decision was a reprisal for her resignation but that he had already decided to sack her and had composed his email when he received hers. The claimant gave her explanation for the events at the shop and confirmed that the shop had not closed early.
13. The respondent declined to pay the claimant her notice pay, alleging that there was a breakdown of trust which was a fundamental breach of contract.
14. The claimant started a new job on 28 March 2018, working approximately 30 hours per week.

#### Determination of the Issues

15. I find that the claimant has not identified which days of holiday she says she took and was not paid for. She agrees with the respondent's calculation of the holiday she had taken but disagrees that she was paid for bank holidays. She did not produce any evidence that bank holiday days had not been included on her payslips. Her holiday pay claim fails.
16. I find that the respondent dismissed the claimant, not allowing her to work her notice after she had resigned. Mr Parkes told the tribunal that the reason for this was a cumulation of
  - a. the claimant's lateness on 13 January,
  - b. the events of 27 February including not being sufficiently apologetic for forgetting her keys and her saying that she was no longer available to work a shift and
  - c. the events of 17 March when the cleaning of the shop was done earlier than it should have been.
17. Mr Parkes accepted that, if it had not been for the earlier incidents, he would have imposed a warning for the early cleaning incident. I note that Mr

Parkes' decision to dismiss was made before he had asked for an explanation, albeit he said he would be prepared to reconsider his position if she provided an explanation.

18. If this had been identified as an act of misconduct, it was clearly not an act of gross misconduct, even on the respondent's own case. The dismissal may well be justified as a further incidence of misconduct after a warning has been imposed, but that would be a dismissal on notice.
19. The respondent contends that the claimant had fundamentally breached the implied term of trust and confidence by the cumulative effect of her conduct and attitude towards Mr Parkes. Most cases of repudiatory conduct by an employee will involve dishonesty, disobedience or negligence. In all cases, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of that contract.
20. I do not accept that the claimant's conduct evinced an intention no longer to be bound by the contract. In fact, notwithstanding her view that Mr Parkes' aggressive conduct entitled to her to resign, she offered to work out extended notice so that the respondent would not be short-staffed. I find that Mr Parkes' conduct was, at times, overbearing including threatening dismissal when the claimant did not want to work an extra shift she had volunteered for, notwithstanding she gave plenty of notice. In addition, his aggressive behaviour to the staff on 17 March before taking into account any explanation they may have given was indicative of an overbearing style of management.
21. I do not find, on the evidence before me, that the claimant's conduct went to the root of the contract. It is not uncommon for employers and employees to have points of disagreement, or for employees to have lapses in discipline, but that does not necessarily amount to a fundamental breach of the employment agreement. I do not find that any of the claimant's conduct, even taken cumulatively, justifies summary termination.
22. Taking into account the claimant's mitigation, I award her the sum of £469 in respect of unpaid notice pay.

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Employment Judge Davidson

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