



EMPLOYMENT TRIBUNALS

Claimant:

Miss R Niemiec

v

Respondent:

Brighton One Limited
(t/a The George Street Hotel)

Heard at:

Reading (by CVP)

On: 5 March 2021

Before:

Employment Judge

Appearances

For the Claimant:

In person (with Mr N Schinder)

For the Respondent:

Miss J Patel (solicitor)

RESERVED JUDGMENT

1. The respondent has underpaid the claimant in respect of holiday pay, and must pay her **£110** in respect of holiday pay.
2. The claimant's other claims are dismissed.

REASONS

Introduction

1. The claimant brings a range of different claims in respect of money she says she is owed by the respondent. She was employed by the respondent as "front of house assistant" from 14 May 2018 until her resignation, which took effect on either 10 or 13 May 2019 (the difference is immaterial for the purposes of her claim).
2. The respondent operates The George Street Hotel, a 41 room hotel in the centre of Oxford, as well as the Bocardo Hotel, a smaller 11 room hotel across the road from The George Street Hotel.

The hearing

3. The claimant gave evidence at the hearing and presented her claim with the assistance of Mr Nicholas Schinder. Miss Patel represented the respondent, and Mr Hardeep Gidda, who described himself as the managing director of the respondent, gave evidence for the respondent.

4. Given the Covid-19 pandemic, the hearing was conducted by video – CVP. I had a bundle of 151 pages prepared by the respondent, but on occasion also needed to refer to a separate bundle prepared by the claimant in which she had set out her claims. After hearing final submissions from the parties I reserved my decision as I did not consider I had sufficient time left at the end of the hearing to give proper consideration to the various claims brought by the claimant.

The claimant's contract of employment

5. On 4 May 2018 the claimant signed terms and conditions of employment with the respondent, which included the following terms:

“... this statement of main terms will supersede all other offers, agreements, discussions and understandings ...

1 Place of work

You will generally be located at George Street Hotel ... but from time to time you may ... be required to work at the Bocardo Hotel ...

4 Job title & duties

You will be employed ... as Front of House Assistant but you may be required to undertake other reasonable duties ...

5 Hours of work

You are required to work a minimum of 40 hours per week ... you will be expected to work such hours and days as are reasonably necessary for the proper performance of your duties in line with the nature of your role. Your hours may fluctuate up or down, and your hours of work may be irregular and extend beyond normal working hours ...

7 Holiday and holiday pay

The holiday year runs from 1st January – 31st December each year and all your entitlement must be taken in that current year ...

Full time employees will be entitled to 28 days paid holiday ... in a full holiday year. The annual holiday entitlement will be calculated on a pro-rata basis according to your start date ...

Entitlement is accrued monthly at the flat rate of 1/12th of the full annual entitlement for each completed calendar month of service worked during each holiday year ...

Upon termination of your employment ... you shall be entitled to payment in lieu of holiday days earned during the holiday year ...

The Company reserves the right to require you to take any unused holiday during your notice period ...

Any holiday entitlement not taken by the end of the holiday year may not be carried forward to the next holiday year without the prior consent of your manager.

In the absence of such consent, any unused entitlement will be lost ...

8 Sickness/injury benefit

If you are unable to work because of sickness and injury ... you may at the sole discretion of the Company be paid Company Sick Pay at the rate and for a period to be determined by the Company. There is no contractual right to Company Sick Pay ...

You will not be entitled to any sick pay for the first 3 days of any absence due to sickness ... Sickness payments that you could be eligible for are as follows ... up to 2 weeks' full pay and 2 weeks's half pay."

Night work

6. Very shortly after she started work the claimant started doing night duties at the Bocardo Hotel. This involved her being present at the hotel from either 21:00 or 22:00 overnight. She had a room and bed to sleep in. There was a dispute between her and Mr Gidda as to how extensive her night duties were. I will address that dispute later. At first she was paid her standard hourly rate for this, regardless of whether she was asleep or awake. From July 2018 onward she was paid half her hourly rate for this, regardless of whether she was asleep or awake. Typically she did one or two of these night duties each week.

The claims

7. The claimant helpfully set out her claims under a number of headings, which I will address below:

Non-payment of worked hours

8. The claimant had set out at length her calculations on hours worked and hours paid, from which she concluded that she was due a payment of £2,301.20 (plus interest).
9. Mr Gidda said that someone was required to be present overnight at the Bocardo Hotel in case of emergencies such as a fire alarm. A member of staff stayed overnight. They were given a room and a bed and, as far as he was concerned, would very rarely be called upon to carry out any work. He said that there was a night security guard based at the George Street Hotel who worked nights and was available in case of any problems at the Bocardo Hotel. Miss Patel suggested to me that in the absence of any decision from

the Supreme Court I should apply the Court of Appeal's decision in Mencap v Tomlinson-Blake [2018] EWCA Civ 1641, to the effect that people who were on sleeping-in duty were not working when asleep.

10. The claimant pointed out that Mr Gidda was not based at either hotel so may not be aware of what actually happened in practice. She described regularly having to deal with guests who were late or who had lost or non-functioning key cards, along with having to deal with phone calls overnight from various booking agencies. She also added that it was very difficult to sleep in the room that was provided, particularly as it faced on to a busy street in the city centre.
11. As is often the case, the truth lies somewhere in between the parties' cases on this point. The Bocardo Hotel has only eleven rooms, and I do not see how late guests or phone calls could have occupied a full night shift for the claimant. However, equally I do not accept Mr Gidda's suggestion that any problems at the Bocardo Hotel could be dealt with by the security guard at the George Street Hotel. In practice anything needing attention at the Bocardo Hotel overnight would have to be dealt with by the claimant, but this would have in fact occupied very little of her time overnight. This is properly to be considered a Tomlinson-Blake type situation, in which the claimant is not to be regarded as working unless actively carrying out work. The fact that the claimant's accommodation may have been unsatisfactory or uncomfortable does not affect this analysis. Payment of half her overnight hours would have more than covered those hours for which she was actually working when overnight at the Bocardo Hotel. She is not entitled to any additional pay in respect of her night work.
12. The parties had prepared rival tables showing what were said to be hours worked by the claimant. The claimant's version was at p38 onwards and the respondent's version was at p83 onwards of the bundle. The claimant says her figures are based on an electronic time recording system operated by the respondent. The respondent says that its figures are based on manual signing in/out sheets which were the official record of hours worked for pay purposes.
13. August 2018 is the month with the largest alleged shortfall in wages, so seems suitable as an example. As it happens, the parties' records of hours worked match for the whole of August 2018. From 19 August onwards they differ on what that means in terms of pay.
14. From 19 August onwards, the parties' contentions are as follows:

	Hours worked	C hours pay	R hours pay
19/20 August	21:00 – 07:30	10	5
20/21 August	21:00 – 09:00	11:30	6
23 August	09:00 – 18:30	9	9

24 August	08:00 – 16:30	7.5	8
25 August	09:00 – 18:30	9	9
26/27 August	18:00 – 09:00	14:30	7
27/28 August	18:00 – 09:00	14:30	7
31 August	09:00 – 18:30	9	9

15. The parties largely agree on hours worked when it is solely a day shift, but differ in respect of the night work.
16. Notes on the respondent's records show the calculation for 19/20 and 20/21 August to be simply half the hours worked, and for 26/27 and 27/28 to be payment of three hours full pay (for the period 18:00 – 21:00) then half pay from 21:00 onwards. Based on my findings above, that would be correct. For the period to 21:00 the claimant was properly working and due to be paid full rate. From 21:00 she was on the sleep-in shift and was correctly paid at half rate.
17. I have gone on to review the September figures, for which the analysis is the same, except that from September onwards the claimant's figures (taken from the electronic records), differ a few minutes either way from the respondent's. I accept that in most cases the electronic check in/check out is likely to be a few minutes before and after the formal time the claimant was due to start, but I do not accept that arriving a few minutes early or leaving a few minutes late from her shift gave rise to any additional entitlement to pay. The October figures also follow the same principles.
18. Based on my findings set out above, the respondent is applying the correct principles to the claimant's pay, and no further pay for hours worked is due to her.

Breach of contract – fewer than 40 hours being paid for a week

19. This depends on the claimant having a contractual entitlement to be paid for a minimum of 40 hours a week regardless of how many hours she actually worked in that week. In practice her hours varied. Most weeks she worked more than 40 hours, but for some it was less than 40 hours. The claimant's position is that during the course of her recruitment interview she was told that she would be paid for a minimum 40 hours a week, in order to give her some assurance given the high cost of living in Oxford. Mr Gidda denied this.
20. The difficulty for the claimant is that while her contract of employment says that she is required to work a minimum of 40 hours a week, it goes on to say that hours may vary up and down. The contract also says it supersedes any prior agreements. In those circumstances I do not see how, if an agreement was made at the interview, it can prevail over the written contract. The claimant was not entitled to a minimum of 40 hours pay a week.

Non-payment of holiday pay

21. The claimant accepted that during 2018 she had taken 16 rather than ten days holiday. Her holiday entitlement would then be reset at the start of 2019. She did not take any holiday prior to submitting her notice. It was the respondent's case that the claimant had been required to take holiday during her notice period. She accepted that she had been required to take holiday and had actually taken holiday during her notice period, and this is shown by the records at p105-6. Accordingly I accept the respondent's position that she was not entitled to any accrued holiday pay at the end of her employment, as she had taken and been paid for the relevant holiday during her notice period.

Underpayment of holiday pay

22. Neither party particularly focussed on this claim during the hearing. The claimant's position was that she had been underpaid holiday pay because her holiday pay had been paid based on a 40-hour week rather than the average of her previous 12 weeks' pay (which would have come to a higher figure, due to the additional hours she worked). This in turn depended on her being an employee with "no normal working hours" within the meaning of s224 of the Employment Rights Act 1996.
23. The logic of the respondent's arguments and my finding in respect of any minimum guarantee of 40 hours work a week would be that she did not have normal working hours. Accordingly I find that s224 applies in respect of the calculation of her holiday pay. There was no challenge by the respondent to the hours or calculations made by the claimant under this section, so I find that she is entitled to be paid the amount she claims, but not including interest, which is generally not payable for periods prior to the judgment in employment tribunal proceedings. This amounts to £110.

Non-payment of sick pay

24. This is a claim for contractual sick pay during the claimant's notice period. However, as Miss Patel said, the claimant's contract does not give her any contractual entitlement to sick pay. At most there is a discretion for the respondent to pay a limited amount of company sick pay – but the claimant has no contractual entitlement to be paid company sick pay. In those circumstances I cannot make an award in respect of unpaid sick pay.

Pension payments

25. Pay slips produced by the respondent appear to show appropriate pension deductions having been made. I understand from what the claimant said in her evidence that she accepted that the proper deductions had been made, but that she had only learned of this on being provided with a full set of her pay slips very recently. I accept the respondent's position that these deductions were properly made.

Damages for stress and suffering

26. The tribunal has no jurisdiction to make such an award in connection with the claimant's claims.

Employment Judge Anstis

Date: 8 March 2021

Sent to the parties on: 15 March 2021

For the Tribunals Office

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