

JERSEY / JUDGMENT

Sylvia Sudra v Gallery Café And Deli

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IN THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

IN THE MATTER:	BETWEEN
	SYLVIA SUDRA
	CLAIMANT
	AND
	GALLERY CAFÉ AND DELI
	RESPONDENT
	TRIBUNAL

JUDGMENT

Reference: [2020] TRE 097 Hearing Date: 27 October 2020 Before: Advocate F B Robertson, Deputy Chairman Appearance: For the Claimant: In Person For the Respondent: Mr Waldemar Zelazko Also in attendance; Ms Anna Przybyszewska (translator) THE DECISION For the reasons set out below the Claimant's claims for Unfair Dismissal and Wrongful Dismissal are rejected. The Claimant is awarded £127.50 in relation to her claim for holiday pay.

REASONS

Introduction

1. By way of a Claim Form presented on 29 June 2020 the Claimant brought the following claims; (a) Unfair Dismissal (b) Wrongful Dismissal (c) Unpaid Holiday Pay 2. In summary, the Claimant claimed that the Respondent dismissed her without notice on or about 18 June 2020 by informing her that he had no hours for her to work. 3. By way of a Response Form dated 20 July 2020, the Respondent contended that the Claimant resigned without notice on or about 20 March 2020. 4. The Case Management Hearing held on 1 September 2020 set this matter down for a Final Hearing which took place on 27 October 2020 ("the Hearing"). 5. The Tribunal received witness statements and heard oral evidence from the Claimant and Mr Zelazko on behalf of the Respondent. The Tribunal also received a small bundle of

documents. 6. When making this Judgment the Tribunal considered all of the evidence both oral and written provided by each of the Parties and made findings of fact as set out below. In this Judgment only the facts that are relevant to the issues to be determined have been summarised. Where there have been factual disputes to resolve the Tribunal has done so on the basis of its assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the oral and written evidence. Material Facts and Evidence 7. The basic factual background was largely not in dispute between the Parties. Any material conflicts of substantive evidence are referred to and determined below. 8. The Claimant commenced work with the Respondent as a café assistant on 3 December

2018. She worked 30 hours per week and her gross weekly pay was £255. The Written Statement of Employment Particulars (the “Written Statement”) dated 30 November 2020 provided that the notice period for termination of employment by either the employer or employee was two weeks. The Written Statement further provided that the Claimant’s holiday entitlement was 14 days per annum, although it did not specify the commencement date for the holiday year. Events in March 2020 9. The evidence of the Claimant in her witness statement dated 5 October 2020 was that on 16 March 2020 she texted Mr Zelazko to indicate that she could not attend work as her daughter had symptoms of the Covid-19 virus and had to self-isolate. The Claimant further indicated that she stated that as it was really quiet in the café there was no point in her staying at work. (In her oral evidence at the Hearing the Claimant claimed she had been sent home by the Respondent on 16 March 2020, which was denied by the Respondent). 10. The Claimant’s further evidence was that she then became unwell and attended her GP who signed her off work for two weeks from 16 March 2020. (The Tribunal received in the Hearing Bundle a copy of a medical certificate dated 16 March 2020 signing the Claimant off work until 30 March 2020). The Claimant stated that she informed Mr Zelazko by telephone that she had been signed off sick. (This was denied by the Respondent). 11. The Claimant’s further evidence was that she texted the Respondent further on 17 March 2020 to indicate she thought it was better that she remained at home and she would let the Respondent know if “I feel better and if I can come to work earlier”. 12. The Tribunal was provided with a copy of a text dated 17 March 2020 which is in the following terms (in translation agreed by the Parties): “Hey Waldemar. I thought about it and I think that it is better when I stay at home, it does not happening to much...So it makes no sense for one to be there and risk. Besides Olivia says that her throat hurts her and she started coughing. For now I will stay at home until the end of the week. We will see how situation develops later, ok?” (The Tribunal noted that there is no reference in this text to the Claimant being ill or having been signed off work the previous day for two weeks). 13. The Claimant subsequently received a text from Mr Zelazko on 20 March 2020 informing her that the Café was closed due to the Covid-19 situation. 14. The Claimant further indicated that as a single mother on income support she had to provide further information to the Income Support Department of the Government of Jersey particularly if she was not going to continue to receive wages from the Respondent. Her further evidence was that she telephoned the Respondent at around 9pm on 20 March 2020

asking what was going to happen about her wages. She indicated that Mr Zelazko indicated he wasn't certain but would check with the Social Security Department on Monday. 15. The further evidence of the Claimant was a little confused. She indicated that Mr Zelazko did not apply for wages for her from the Government during the lockdown although he did for the rest of the Respondent's staff. The Claimant did not offer an explanation as to why the Respondent dealt with her differently. In the event she requested Mr Zelazko to prepare a letter for her to send to Social Security setting out her employment details in order to update her Social Security claim. 16. A draft letter was prepared by the Respondent on or about 22 March 2020. It was in the following material terms; To whom it may concern, From 21.03.2019 Gallery Café and Deli has suspended trading due to Corona virus Till further notice. Her last day of work was on Monday 16th March 2019 on her request. Sylwia received payment on 23th of March 2019 for the amount of £25.56 for 3h and 20 min What's state on weekly time sheet. Her contract is 30 hours per week with £8.50 per hour paid weekly. Start date 03.12.2018, first pay 10.12.18 She is entitled 2 weeks of paid holidays per year. All details are provided in her written statement of employment. If you have any questions please contact hg.cafe17@gmail.com Tel.07700340402 Kind Regards Waldemar Zelazko 17. (The Tribunal noted that certain of the dates in the draft were incorrect as they referred to 2019 rather than 2020). In any event the draft was sent to the Claimant by the Respondent on or about 23 March 2020. She sent a text to the Respondent that evening confirming that she had received it but indicated that the letter had to state that "23rd will be the last payday" and that her salary was paid weekly. The Tribunal noted that whilst the Claimant suggested another couple of amendments, which are not material for present purposes, she did not seek to amend the sentence which stated her last day of work was 16th March "on (or at) her request". The Claimant in her evidence at the Hearing claimed that she should have sought to amend the phrase "on her request", but added rather confusingly that she thought that it was a reference to being off work pursuant to her sick note. (The Respondent's evidence was that it was unaware she had received a Medical Certificate at this time). 18. The Claimant referred in her witness statement to a document produced by the Income Support Department headed "Change of Earnings". The document refers to information required to update an Income Support Claim in certain circumstances. The four circumstances are headed. "(a) I've started a new job

- (b) I've finished a job
- (c) My earnings or hours are changing
- (d) I'm self-employed" 19. The Tribunal notes that the only possible relevant category is (b) "I've finished my job" which includes the following terms. "We will need a letter/email from your employer confirming · The date you finished work · The date you received your final pay · A breakdown of how your final gross pay has been calculated · The period your last pay covers (including holiday pay) · Daytime contact details for your previous employer · The reason that you finished work". 20. The Tribunal notes that the requirements of the letter/email from the employer are consistent with the content of the letter which the Claimant

requested from the Respondent, on her evidence. 21. The Claimant indicated in her evidence that the level of her Income Support increased after 23 March 2020 as she was no longer getting paid by the Respondent. 22. Mr Zelazko gave information on behalf of the Respondent. His evidence was that the Claimant wished to go home from work on 16 March 2020 as the café was not busy. The Respondent had no objections given that the café was not busy, but the Claimant never indicated that she was unwell. On 17 March 2020 the Claimant sent her text which indicated she felt it would be better if she stayed at home, but which did not mention that the Claimant had been signed off work. Mr Zelazko indicated in his evidence that he was not happy to receive that text but denied that he sent a text to the Claimant stating that she “just think about my Ass” as alleged in the Claim Form. (Upon cross-examination by the Respondent the Claimant admitted that the Respondent had sent no such text). 23. Following his text of 20 March 2020 informing the Claimant that the café would be closed, the evidence of Mr Zelazko was that he informed the Claimant that day that he was waiting to hear from the Government as to its contribution to wages but that all staff of the Respondent would get paid as usual. 24. Mr Zelazko’s further evidence was that the Claimant called him on the morning of Sunday 22 March 2020. He informed her that he would “be paying wages throughout the Covid period” and that he was also awaiting to hear the Government’s proposals on Monday. The Claimant indicated that it “was too late” and that she wanted to get paid from Social Security rather than the Respondent as she believed she may receive more money. She thus indicated that she wanted to be removed from the Respondent’s payroll and requested that Mr Zelazko prepare a letter for her to send to Social Security setting out the information required by them. The Respondent agreed to remove her from the payroll and to write the letter to Social Security. The Claimant chased him for a copy of the letter by text at 15:03 later that day. 25. Mr Zelazko sent a draft of his letter, addressed to Social Security, to the Claimant on the afternoon of 23 March 2020. 26. The Claimant responded by text at 18:35 that day asking that the letter be amended including that it should state that the 23 March 2020 was the Claimant’s last payday (and not simply that she received a payment that day). Mr Zelazko accepted that as confirmation that the Claimant’s last day of employment with the Respondent was 23 March

2020. Mr Zelazko further gave evidence that the Claimant informed him that Social Security needed to know the date she stopped working for the Respondent. 27. Mr Zelazko’s further evidence was that the other staff of the Respondent were paid as usual and there was no need not to pay the Claimant but for her desire to be removed from the payroll and to cease work from 23 March 2020. Events in May/June 2020 28. The Respondent re-opened the café on 14 May 2020. The Claimant did not, however, contact the Respondent until 18 June 2020 when on her evidence she asked to come back to work as the schools had been re-opened. Mr Zelazko accepted that the Claimant had asked on 18 June 2020 when she could start work again (although the relevant messenger text was not in the Tribunal bundle). He indicated he was confused (given that he believed she had resigned) but offered her 20 hours of work per week in the future. The evidence of Mr Zelazko was that he wished to give the Claimant some shifts in the future even though she had previously resigned from

the payroll. There followed a series of inconsistent and heated texts with the Respondent claiming that the Claimant had indicated she was not returning to work and the Claimant claiming she never resigned and that the Respondent was now firing her. A couple of texts from 19 June 2020 will suffice by way of illustration: Mr Zelazko (11:24) “Due to our conversation from 22 of March. As you requested letter to social security which you insist that you want to get paid from social security rather than from gallery café came across to my mind that you are not required hours in the café”. The Claimant (11:46) “I never resigned and you never informed me at the time that this was what you believed hence my belief in remaining to be employed by you”. Holiday Pay 29. The Claimant claimed 1 week’s Holiday Pay and pay for the Bank Holiday on 31 August

2020. There was no evidence as to whether the Claimant had received any Holiday Pay for 2020. The only evidence was that she was entitled to two week’s Holiday Pay per annum and pay for Bank Holidays. Analysis of Evidence and Findings of Fact 30. The Tribunal found the evidence of the Claimant to be inconsistent at times and at variance on occasion with the albeit limited documentary evidence. The Respondent’s evidence through Mr Zelazko was more coherent and consistent both internally and with the documentary evidence. Where there was a conflict of evidence the Tribunal preferred the evidence of the Respondent as it found it to be more credible and reliable than the Claimant’s. 31. In relation to the relevant disputed or uncertain facts the Tribunal finds as follows; (a) The Claimant indicated to the Respondent that she wished to be removed from the Respondent’s payroll from 23 March 2020 and that she wished from that date to claim increased Income Support. (b) The Claim for increased Income Support made by the Claimant based upon a ‘Change of Earnings’ was on the basis that she had “finished work” with the Respondent on 23 March 2020. The Law 32. Article 61 of the Employment (Jersey) Law 2003 (“the Law”) provides that an employee has the right not to be unfairly dismissed. However, the questions posed by the Law as to the fairness of a dismissal are only engaged if the Tribunal finds that there was a dismissal as opposed to a resignation. If an employee terminates the contract with or without notice for reasons of his or her own which are unrelated to the employer’s conduct that does not amount to a dismissal under the Law. 33. Conduct which demonstrates an intention to cease working for an employer can amount to a repudiation of a contract which, in other language, amounts to a resignation (*De Sousa v Danny Yau Ltd* [2019] JRC 169). 34. As to a claim for wrongful dismissal, that is a dismissal in breach of contract, it is again first necessary to establish that the employee was dismissed. If the employee resigned then the question would be whether they might have done so without giving adequate notice. In this case there was no claim by the employer for damages in that regard.

Conclusion

- (a) Unfair and Wrongful Dismissal 35. The Tribunal finds on the evidence that the Claimant resigned on 23 March 2020 in requesting to be removed from the Respondent’s payroll and in making an application for increased Income Support based upon a change of earnings as

a result of her choosing to finish work with the Respondent. Additionally and/or alternatively, by her conduct she made it clear that she had no intention of continuing to work for the Respondent which amounted to a repudiation of the contract by her which in turn amounted to a resignation. The Respondent accepted the repudiation by removing her from the payroll at her request and assisting her with her application for Increased Income Support on the basis that she had ceased to work for the Respondent. As this is a case of resignation, the claim for wrongful dismissal also fails. (b) Holiday Pay 36. The Claimant resigned on 23 March 2020. On the reasonable presumption that the Holiday Year was a calendar year she was therefore entitled to approximately $\frac{1}{4}$ of her Holiday Entitlement upon resignation. The total Holiday Entitlement was two week's pay equating to £510. She is thus awarded £127.50 in relation to this head of claim. She is not entitled to any compensation for the Bank Holiday on 31 August 2020 given the date of her resignation. Advocate F B Robertson, Deputy Chairman Date: 4 March 2021

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