



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr A Shaban

AND

Javaid Akhtar
t/a The Lion of Asia

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Teesside

On: 8 and 9 June 2017

Deliberation: 27 June 2017

Before: Employment Judge Shepherd

Members: Ms E Wiles
Mr S Hunter

Appearances

For the Claimant: Mr N McDermott

For the Respondent: Ms A Davies

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of automatically unfairly dismissed pursuant to section 104 of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The claim of breach of contract by the respondent failing to pay the claimant notice pay is not well founded and is dismissed.

3. The claim that the respondent failed to pay the claimant for outstanding holiday pay pursuant to regulation 13 of the Working Time Regulations 1998 is well-founded and succeeds. The respondent is ordered to pay the claimant the sum of £611.74.

4. The claim that the claimant was denied rest breaks pursuant to the Working Time regulations 1999 is not well founded and is dismissed.

5. The claimant was not provided with written particulars of employment and the respondent is ordered to pay the sum of £504.96 pursuant to section 38 of the Employment Act 2002.

6. The claim of unlawful deduction from wages by failing to pay the National Minimum Wage is not well founded and is dismissed.

REASONS

1. The claimant was represented by Mr McDermott and the respondent was represented by Ms Davies.

2. The Tribunal heard evidence from:

Abdul Shaban, The claimant;
Sarfraz Ahmed, a friend of the claimant;
Banares Hussain, a friend of the claimant;
Javaid Akhtar, The respondent;
Muhammad Choudhry, former employee of the respondent;
Haroon Akhtar, The respondent's son.

The Tribunal had the assistance of an interpreter, Mr Safiq.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 73. The Tribunal considered those documents to which it was referred by the parties.

4. The issues to be determined by the Tribunal were as follows:

4.1. Whether the claimant was automatically unfairly dismissed pursuant to section 104 of the employment rights act 1996.

4.2 Whether the respondent was in breach of contract by failing to pay the claimant notice pay.

4.3. Whether the respondent failed to pay the claimant for outstanding holiday pay pursuant to regulation 13 of the Working Time Regulations 1999.

4.4. Whether there had been a failure to provide the claimant with rest breaks pursuant to the working Time regulations.

4.5. Whether the respondent failed to provide the claimant with written particulars of employment and, if so, the appropriate compensation this regard if there was another claim that was successful.

4.6. Whether the respondent made unlawful deductions from the claimant's wages by failing to pay the National Minimum Wage.

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions.

5.1. The claimant worked for the respondent as a Kitchen Porter. He claimed that he commenced employment on 20 May 2015 and initially worked 16 hours per week for which he was paid £40. He had asked about his wage being low and was told by the respondent that he would sort it out. The claimant also had another job working at Marco's Pizzeria 24 hours a week. He said that he ended that employment in order to work full-time for the respondent. He said that from 22 September 2015 he worked from 5 pm to 12:30 am on Tuesday, Wednesday, Thursday and Sunday and 5pm to 1am on Friday and Saturdays. A total of 46 hours per week. He was paid between £480 and £660 per week and produced payslips showing this

5.2 The claimant claimed that he was not paid the National Minimum Wage and that he was dismissed for asserting his statutory right in relation to wages and holiday pay. He also claims that he was not provided with the requisite rest breaks contrary to the Working Time Regulations. He also claims that he was not afforded paid holiday and not provided with written terms and conditions of his employment.

5.3 The respondent said that the claimant was employed from 13 October 2015 and only ever worked 12 hours a week. This was a small restaurant/takeaway and the respondent worked there full-time and so did his three sons and his brother. The business would not support another full-time employee and he only required the assistance of the claimant and Mr Choudhry for two hours during the evening when most of the trade in the business took place.

5.4 Both the claimant and the respondent agreed that the claimant worked the same hours as Mr Choudhry. Muhammad Choudhry said that he had been employed by the respondent between October 2015 and August 2016. He had brought the claimant to see the respondent and was there at the job interview when the respondent said to the claimant that he only had 12 hours work a week available for £100. Mr Choudhry said that he was paid above the minimum wage and given his holiday entitlement by the respondent. When pressed, he did not know what his holiday entitlement was. Mr Choudhry provided a copy of his payslip which showed that he received £400 on 30

June 2016 and that he had received a total of £1,200 in the first three months of the tax year.

5.5. The claimant left the respondent's employment on 22 August 2016. The respondent's evidence was that he had resigned and obtained another job but when that didn't materialise the respondent agreed to provide him with a further two weeks' work. The claimant asked for further employment but it was not provided. It was said by the respondent that the claimant left as a result of a falling out with Mr Choudhry and was not dismissed. The claimant said that he was dismissed as a result of raising issues in respect of his level of pay.

5.6. The Tribunal has considered this aspect very carefully. The two versions of events were totally at odds.

5.7. The evidence was in complete conflict. The burden of proof is on the claimant to establish that there was a dismissal and the Tribunal is not satisfied that he has discharged that burden and, in the circumstances, the Tribunal does not find in his favour. The claimant has not established that there was a dismissal.

The law

6. Section 104 of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee – alleged that the employer had infringed right of his which is a relevant statutory right.

7. The entitlement to rest breaks is set out in regulation 12 of the Working Time Regulations 1998 and applies where a worker's daily working time is more than six hours.

8. The entitlement to annual leave is set out in regulation 13 and regulation 13A of the Working Time Regulations 1998. A worker is entitled to 5.6 weeks annual leave and regulation 14 provides that where the proportional leave taken by the worker is less than the proportion of the leave you which has expired, his employment, making the payment in lieu of leave in accordance with regulation 16.

9. Section 38 of the employment act 2002 provides that where the Employment Tribunal finds in favour of the claimant in respect of the claim to which the statute applies the Tribunal must increase the award by the minimum amount of two weeks' pay and may, if it considers just and equitable in all the circumstances, increase the award by the higher amount of four weeks' pay. This does not apply if there are exceptional circumstances which would make an award or increase and just or inequitable.

10. Section 13 of the employment rights act 1996 provides that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or the workers previously signified in writing his agreement or consent to the making of a deduction. A failure to pay the National Minimum Wage is an unlawful deduction from wages.

Conclusions

11. The versions of events provided on behalf of the parties were diametrically opposed. The claimant says he worked 12 hours or 16 hours a week from 19 May 2015. He said then he gave up another job with Marco's pizza where he was working 24 hours a week and came to work for the respondent full-time, 46 hours per week, on 22 September 2015. The respondent says that the claimant worked 12 hours a week from 13 October 2015.

12. The preponderance of evidence was against the claimant. However, the Tribunal has not considered the issues on the basis of weight of evidence alone. It has taken a considerable amount of time in its deliberations. The evidence was poor on both sides. The transcripts of the recording made by the claimant of the conversations that took place before he left did not determine the issues. There were references to taking £100 "on the books" which were of concern. However, the Tribunal did not hear evidence of any other arrangement in respect of payment and that is not an issue upon which the Tribunal can reach a conclusion. The Tribunal finds that the claimant has not discharged the burden of proof. The claimant has not established that he was dismissed and in those circumstances his claim for automatic unfair dismissal is dismissed.

13. The claim that the claimant was owed some outstanding annual leave was accepted by the respondent. The claimant worked a total of 45 weeks from 13 October 2015 to 22 August 2016. The evidence from the respondent's accountant shows that the claimant was paid a total of £5,681.54 in that period. Based on a 12 hour working week that equates to £10.52 per hour. The Tribunal accepts that the claimant took one week's holiday and that he was entitled to a total of 67.2 hours statutory holiday pay. He had taken 12 hours holiday which leaves 58.15 hours outstanding. Taking this at the hourly rate over the full employment of £10.52 provides a figure of £611.74.

14. With regard to the failure to provide written particulars of employment. The respondent acknowledged that these particulars had not been provided. He said that he was not aware of the statutory requirement in this regard. The Tribunal has taken into account that this is a small employer. However, he has been working in this business and employing people for in excess of 25 years. The right to written particulars of employment is a basic well established right and an employer of the respondent's experience should have been aware of the requirement to provide written particulars of employment. In these circumstances the Tribunal finds it just and equitable to award the maximum four week's pay in the sum of £504.96.

15. The claim of breach of contract in respect of notice pay also fails as it was not established that there was a dismissal. The claimant left and did not work his notice period.

16. It was also not established that the claimant had an entitlement to rest breaks as it was not shown that he worked more than two hours a day.

17. The claimant has not established that he worked in excess of 12 hours per week and, in those circumstances, it was not shown that he was subject to unauthorised deductions from his wage by being paid less than the National Minimum Wage.

Employment Judge Shepherd

Date 7 July 2017

Sent to the parties on:

7 July 2017

For the Tribunal:

G Palmer