



EMPLOYMENT TRIBUNALS

Claimants

Miss Z Basted (3400971/2016) v
Mrs S Cox (3400972/2016)
Miss L Jones (3400973/2016)

Respondents

(1) Jason Coolbaugh
(2) Blue Agave Mexican
Restaurants Ltd

Heard at: Norwich

On: 25 May 2017

Before: Employment Judge Postle

Appearances:

For the Claimants: Mr Curl (Barrister)

For the Respondents: Both respondents did not attend and were not represented.

JUDGMENT having been sent to the parties on 22 June 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Written reasons provided in response to a request of the 30 June 2017.

1. Judge Postle apologises for the delay in providing the written reasons, this was due to an oversight.
2. Judgment having been given on 25 May 2017 in favour of each claimant against the first respondent as follows:-
 - 2.1 In the case of Miss Basted (Case No 3400971/2016):-
 - 2.1.1 An order for the first respondent to pay the sum of £1,483.40 in respect of an unlawful deduction of wages.
 - 2.1.2 The first respondent to pay the sum of £1,314.00 representing four weeks pay for the failure to provide written statement of terms.
 - 2.2 In the case of Mrs S Cox (Case No 3400972/2016):-

- 2.2.1 An order for the first respondent to pay the sum of £1,772.10 in respect of unlawful deduction of wages.
 - 2.2.2 An order against the first respondent for the failure to provide written statement of terms in the sum of £1,341.00.
 - 2.2.3 There was also an order to pay by the first respondent the multiple claim issue fee and setting down fee of £850 but in light of the recent judgment that is no longer applicable.
- 2.3 Finally, In the case of Miss L Jones (Case No 3400973/2016):-
 - 2.3.1 An order against the first respondent for unlawful deduction of wages in the sum of £466.08.
 - 2.3.2 A further sum of £576.00 against the first respondent again for the failure to provide written statement of terms and conditions.
3. Each claimant brought claims of unlawful deductions of wages against their former employer a Mr Jason Coolbaugh and have each provided a witness statement setting out their respective positions.
4. Further each gave oral evidence at the tribunal confirming the contents of their witness statements and confirming the wages outstanding (ie which were never paid).
5. Miss Basted's claim was presented to the tribunal on 23 September 2016 against the first respondent Mr Coolbaugh having employed Miss Basted in his restaurant that he operated under the name of 'Blue Agave Mexican Grill'.
6. The claimant in fact worked for the first respondent from 28 May 2016 to 1 August 2016 who was trading under the name 'Blue Agave Mexican Grill' from premises in 3 Upper King Street, Norwich. The premises were operated as a Mexican restaurant and carried on under that name by Mr Coolbaugh as the proprietor.
7. As referred to above the claims were brought together with claims of Susan Cox and Leanne Jones who were also employed by Mr Coolbaugh and have also been left with unpaid wages.
8. Miss Basted which was endorsed by the other two claimants told the tribunal from the outset of their employment by Mr Coolbaugh failed in his obligations as an employer. These failures included;
 - 8.1 Pay was always late of intermittent and ultimately at times they were not paid at all. The sums claimed remained outstanding despite repeated promises from Mr Coolbaugh himself to pay the claimants.

- 8.2 Each claimant was not provided with a written statement of particulars of employment, either at the outset of their employment or at any time subsequently.
 - 8.3 It would appear each claimant was not provided with proper itemised pay statements, despite this being a statutory obligation on all employers.
 - 8.4 It is believed that Mr Coolbaugh never registered any of the claimants for PAYE or National Insurance during the currency of their employment.
9. It would appear originally Mr Coolbaugh had agreed to pay monthly when pay was late, he agreed to start paying fortnightly but this was never adhered to. Monies paid to the claimants was in 'dribs and drabs' without itemised pay statements setting out pay periods or clear deductions for tax and national insurance.
10. Indeed Mr Coolbaugh on 24 July 2016 sent a text message to all employees in which he wrote:-

“Hello all Agavarian’s, had a good meet with landlord today. Have come to an arrangement that will keep us in biz. It’s still a challenge, but now do-able. Thank you for your help, support and effort.”

It would appear that Mr Coolbaugh does not deny there is outstanding wages due to each claimant. In fact it was confirmed in subsequent emails to not only Miss Basted but to the other claimants.

11. Miss Jones started working for Mr Coolbaugh at 'Blue Agave Mexican Grill' on the 23 June and resigned with immediate effect on 1 August because she was simply not being paid for the hours she worked.
12. The position remained the same with Mrs Cox, with her being constantly being told she would be paid by him but to date the outstanding wages have not been paid.
13. It would also appear despite alleged deductions being made for Income Tax and National Insurance they have not been passed onto the relevant authorities.
14. It is interesting to note that in each case the first respondent failed to enter a response, merely emailing the tribunal on 28 October stating:-

“I received a copy of claim notice but I am missing the paperwork to respond further the business has not been trading since 3 September and the premises handed back to the landlord a few weeks ago. If I can get a copy of the response paperwork it would be appreciated. Also short extension would be appreciated. The court date scheduled is fine for me.

Lastly the claim appears to be against me personally. Blue Agave Mexican Grill was the trading name of Blue Agave Mexican Restaurants Ltd. All claims should be made in the name of Blue Agave Mexican Restaurants Ltd.”

As a result of this information the claimants were informed what Mr Coolbaugh had indicated and all claims were then served on the limited company. The interim hearing was therefore postponed. A new hearing date was therefore re-listed to allow service on the limited company.

15. All three claimants disputed that they were ever notified or employed by a limited company, and in fact Miss Basted gives evidence that her bank statements showed part payment of wages from Blue Agave Mexican only and no reference to limited. Furthermore Mr Coolbaugh always signed off his emails:-

“Jason Coolbaugh
Blue Agave Mexican Grill”

It is interesting to note that all of the emails the claimants received from Mr Coolbaugh do not feature in any way a company name (Ltd).

16. Apparently the website for Mr Coolbaugh’s restaurant does not refer to the Ltd company’s name at all.
17. As far as all the claimants were concerned Mr Coolbaugh conducted himself in his legal relationship with each of them as a sole trader employing each claimant in his personal capacity.
18. A response was filed by Mr Coolbaugh on behalf of Blue Agave Mexican Restaurants Ltd on 9 January 2017 in which he appears to accept the claimants are owed money but refers to Blue Agave Mexican Restaurants Ltd trading as Blue Agave Mexican Grill as being the claimants’ employers. Further advising that the limited company ceased trading on 3 September 2016. However, what Mr Coolbaugh fails to address on behalf of the limited company is the assertions put forward by Miss Basted in her detailed arguments.
19. It would therefore appear from Miss Basted’s evidence which is endorsed by the other claimant’s the following:-
 - 19.1 There was no written contract of employment provided to any of the claimant’s confirming who they were employed by.
 - 19.2 There was no written statement of particulars of employment provided to any of the claimants setting out who their employer was.
 - 19.3 No pay slips were ever provided with the exception of Mrs Cox who received a pay slip (1) only after she left the employment, which in the

bottom right hand corner refers to a limited company, but this was raised on the 2 September approximately one month after all the parties had gone to ACAS. Miss Jones did not receive any pay slips.

- 19.4 There is nothing to suggest any of the claimants was ever registered for Income Tax or National Insurance.
- 19.5 It appears in each case the claimants were paid from Mr Coolbaugh's bank account not a Limited Company bank account.
- 19.6 None of the claimants were ever aware of the existence of a company until after their employment ended.
20. All the evidence tends to suggest that Mr Coolbaugh was employing each claimant in his personal capacity.
21. Selwyn's Law of Employment 19th Edition explains:-

“It has to be asked what was the true agreement between the parties in all the circumstances of the case (of which the written agreement is only a part), and to examine all the relevant evidence, including how the parties conducted themselves in practice. The relevant bargaining power of the parties must also be taken into account in deciding whether the terms of any written agreement in truth represented what was agreed (Autoclenz v Belcher).”
22. In this case it is clear there was no written agreement for the claimants to look at because Mr Coolbaugh did not cause one to exist.
23. If one considers the parties conduct, then the claimants' must prevail, it is simply not open to Mr Coolbaugh to keep the existence of a limited company concealed from the claimants at all material times and then hide behind separate corporate identity later. As for the relative bargaining power this clearly points in favour of the claimants.
24. Furthermore the company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 (“Regulations”) came into force in the 31 January 2015, the regulations are designed to ensure that people know what legal person they are dealing with. That objective is to prevent people hiding behind undisclosed limited liability when it suits them, which is exactly what Mr Coolbaugh is trying to do.
25. Part 6 of the regulations requires that a company shall disclose it's registered name in all forms of it's business correspondence and documentation:-
 - 25.1 Regulation 24(1)(g) – the company must disclose it's registered name on it's website; and
 - 25.2 Regulation 24(2) - the company must also disclose on it's website the

part of the United Kingdom which it is registered, it's registered number and it's registered office.

26. Every page from the website of the Blue Agave Mexican Grill was available before the tribunal (tab 4, pages 2-13 of the bundle provided) there is no reference anywhere to the company, it's registered name, it's registered number or it's registered Office (which is not the trading address shown on the website). It is therefore not open to Mr Coolbaugh to advance a defence based on his own illegality. Accordingly Mr Coolbaugh cannot deny that he was the claimants' employer.
27. Guidance is also available in the case law to show that the employment appeal tribunal has address the question of the employer's identity where there is a dispute in Khatri (1) the London Central Mosque Trust Limited (2) the Al-Medina Nursery Limited UKEAT-0110-12-MAA Silver J had before him an appeal where the appellant contended that she was employed by the first defendant (the Mosque) rather than the second defendant (the nursery). As in the instant case there was no written contract. The EAT dismissed the appeal and held that the nursery was the employer, on the basis that:-
 - 27.1 The pay slips were headed with the name of the nursery;
 - 27.2 The P46 identified the nursery as the employer;
 - 27.3 Timesheets signed by the claimant were headed the nursery;
 - 27.4 In some draft terms and conditions prepared by the claimant, the employer was stated to be the nursery.
 - 27.5 The claimant had originally brought her claim against the nursery but then subsequently added the Mosque and changed her case;
 - 27.6 Correspondence from the employer was on the letterhead of the nursery;
 - 27.7 Invoices signed by the claimant included the letter headed with the name of the nursery.
28. In these cases:-
 - 28.1 With the exception of Miss Jones, the claimants have never received a pay slip and Miss Jones only received one pay slip sometime after she left the employment.
 - 28.2 The claimants have not seen documents relating to Income Tax or National Insurance.
 - 28.3 Prior to the determination or resignation of each of the claimant's employment there was no indication at any time in any form that the

company even existed let alone that it was the claimants' employer.

29. Indeed Mr Coolbaugh signed himself off in correspondence as:-

“Jason Coolbaugh
Blue Agave Mexican Grill”

Rather than both Blue Agave Mexican Restaurants Ltd.

30. In those circumstances I have no hesitation in confirming that the reality of the situation was that Mr Coolbaugh, the first respondent was the true employer of each of the claimants and is therefore responsible for the judgments.

Employment Judge Postle

Date: ...2 November 2017

Judgment sent to the parties on

.....2 November 2017.....

.....
For the Tribunal office