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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Gibson

**Respondent:** Pink and Lily Ltd t/a The Barn Brasserie

**Heard at:** East London Hearing Centre

**On:** 20 April 2018

**Before:** Employment Judge Russell (sitting alone)

**Representation**

**Claimant:** In person

**Respondent:** Mr M Xenakis (Managing Director)

## JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The Claimant's breach of contract claim succeeds in the sum of £1,153.80
- (2) The claim for unpaid holiday succeeds. The Claimant is awarded £923.04 (8 days' holiday).
- (3) The employer's contract claims fails and is dismissed.

## REASONS

1 By a claim form presented to the Tribunal on 2 January 2018, the Claimant brings a claim in respect of notice pay and holiday pay which he says he was entitled to upon the termination of his employment. The Respondent resists the claims and brings its own contract claim for loss of profit and/or damages caused by what it says was the Claimant's breach of contract in failing to give the required period of notice.

2 The Claimant was employed as a manager by the Respondent, a restaurant business, from 28 February 2017. It was an express term of his contract that he would give 12 weeks' notice of termination.

3 By September 2017, the Claimant was unhappy in his employment. In an email to Mr Xenakis on 25 September 2017, he made it clear that he was considering his future position. Mr Xenakis responded the same day, referring to the Claimant's reference to resignation and stating that he did not wish the Claimant to do so. Mr Xenakis did not refer to the Claimant's contractual notice period in the event that he did resign nor did he refer to the impending Christmas period which would inevitably be busy for a restaurant business. I accept that Mr Xenakis genuinely wished to retain the Claimant as an employee and he did not in that email remind the Claimant of his contractual obligations or state that the Respondent would hold him to them.

4 On 1 October 2017 the Claimant resigned in an email sent to Mr Corke, Mr Xenakis and an Elizabeth Xenakis. In the email, the Claimant confirmed that:

**"...I have accepted a new job ...**

**I understand that this may not be an ideal time but I feel that I have made the best decision for myself.**

**I am happy to work a 6 week notice period and work on occasions should you need me to do so – during my notice period I may need to use up add [sic] odd holiday day.**

**My last date of fulltime employment will be the 12<sup>th</sup> November.**

**I wish yourselves and the Barn a successful future."**

5 The Claimant received no written acknowledgement of his resignation, whether by email or by letter. Today in evidence, Mr Xenakis says that he had verbal discussions with the Claimant in the early part of October (after receiving the resignation email) and before the Claimant's employment terminated in. Mr Xenakis says that in these discussions he told the Claimant that he was required to work a 12 week notice period. The Claimant denies that any such conversation took place. No such conversations are pleaded in the Respondent's detailed Response nor referred to in an email sent by Mr Xenakis in February 2018. Indeed no conversations about notice period have been asserted until oral evidence today. On balance, I did not find Mr Xenakis' evidence on this point to be reliable and I find that there was no discussion about notice period and the Claimant was not told that he was required to work his full notice period. I accept his evidence that had the Respondent stated to him at the time that he was obliged to work the 12 week notice period in full lest he be held in breach of contract that he would have done so.

6 The Claimant worked as usual up to and including his shift on 16 October 2017. The Claimant then took (and was later paid for four days holiday).

7 On 20 October 2017, the Claimant was called to attend a meeting with the general manager, a Mr Dustin Kennedy. There was a discussion about the Claimant's use of a Taste card (a card which gives a discount on a restaurant bill applied at upon payment at the till) and there was some discussion about jugs lent by the Claimant to his other catering company, Bouquet Garni. There is a dispute of evidence as to what was agreed in the course of that meeting.

- The Claimant's evidence is that he denied any wrongdoing. He explained his use of the Taste card and the lending of jugs. Mr Kennedy was happy with his explanations. The Claimant's employment terminated that day but Mr Kennedy agreed that the Respondent would pay the Claimant in lieu up until the expiry of his notice period on 12 November 2017 and with a further payment in lieu of outstanding holiday entitlement.
- Mr Xenakis' evidence on behalf of the Respondent was that Mr Kennedy told the Claimant during the course of the meeting that his employment would be terminated with effect that day because of his misconduct relating to the Taste card and lending jugs. In other words, the effective date of termination was 20 October 2017 and the Claimant was aware that he would be entitled to no further payment.

8 There is no letter or email confirming the content of the discussion at that meeting nor are there any notes provided by Mr Kennedy. Mr Kennedy has not given evidence (whether oral or written), rather Mr Xenakis has given evidence of what he says he was told by Mr Kennedy. Hearsay is admissible in the Tribunal but it must be approached with a degree of caution. In support of his evidence, Mr Xenakis relies upon the Claimant's claim form which he says contains an admission that in the course of the meeting on 20 October 2017 he was dismissed without payment in lieu. The relevant extract reads:

**"I handed my notice in and was offered payment in lieu of notice which I accepted. I was then accused handling cash incorrectly and various other things and was finished with no notice pay or holiday paid."**

The Claimant denies that this was an admission as the Respondent contends.

9 I consider that the claim form contains no more than a statement of what in fact occurred; it was not an admission by the Claimant that he was guilty of wrongdoing or that he had been told by Mr Kennedy on 20 October 2017 that he was being dismissed with no further payment. The Claimant's claim form does not refer to what was said in the meeting and the alleged admission is not consistent with the Claimant's contemporaneous email sent on 23 October 2017. In that email, the Claimant refers to the conversation with Mr Kennedy and requests confirmation that he would be paid on the last day of the month for and up to expiry of his notice period of 12 November, including any holiday accrued and not taken (which the Claimant calculated as 12 days). Mr Kennedy sent no substantive response to that email, simply saying that he would look into the position with payroll. Whilst Mr Kennedy did not therefore confirm that agreement had been reached as the Claimant asserts, nor does it support the Respondent's case that the Claimant had been told on 20 October 2017 that he was being dismissed with no further payment. I find that if Mr Kennedy had told the Claimant that his employment was being terminated on 20 October 2017, he would have clearly set it out in his reply to the Claimant's assertion of an agreement to pay him until 12 November 2017.

10 In the absence of a substantive response, the Claimant emailed again on 31 October 2017, again referring to the agreement to pay him in lieu of notice until 12 November 2017 and complaining that he had been paid only up until 20 October 2017.

The Respondent did not reply at the time to contest the Claimant's assertion. Mr Kennedy was still employed by the Respondent at that date and I consider that had he told the Claimant on 20 October 2017 that employment was terminated with immediate effect, as Mr Xenakis suggests today, the position would have been made clear in response to the Claimant's emails. It was not. Instead, Mr Xenakis' email sent on 31 October 2017 refers to the discussion with Mr Kennedy about the use of discount vouchers, missing cutlery and items lent to Bouquet Garni but does not assert that as a result the Claimant's had terminated with need for further payment on 20 October 2017.

11 The Claimant's response to Mr Xenakis on 1 November 2017 was to reassert the agreement with Mr Kennedy that he would be paid his notice pay and outstanding holiday. Again, Mr Xenakis did not reply to express any disagreement nor did he assert that the Claimant was in breach of contract by giving only six weeks' notice.

12 On the balance of probabilities, I prefer the Claimant's evidence and find that the agreement with Mr Kennedy on 20 October 2017 was that the Claimant's employment would terminate that day but he would be paid in lieu up to an including 12 November 2017 with further payment in lieu for accrued holiday.

### **Law and Conclusions**

13 The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 Article 3 provides "that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee's employment". The claim is for notice and, therefore, fall within the scope of art.3 and the Tribunal must decide whether there was breach by the Respondent to pay monies which were contractually due to the Claimant.

14 An employee's entitlement to paid annual leave is set out in regulations 13, 13A, 14 and 16 of the Working Time Regulations 1998. In particular, regulation 14 provides that where the employment is terminated during the course of a leave year, we must determine the amount of any payment in lieu of accrued but untaken holiday by multiplying the statutory entitlement by the proportion of the leave year expired and then deducting the actual amount of leave taken.

15 The Respondent's contract claim is brought under Article 4 of the Extension of Jurisdiction Order. It claims damages which it says were outstanding on the termination of the Claimant's employment, namely losses caused by the Claimant's failure to give 12 weeks' notice as required by his contract of employment.

16 I have found that the contract of employment required the Claimant to give 12 weeks' notice of termination. The Claimant did not do so, offering only six weeks' notice. At first glance, therefore, it may appear that the employer's contract claim should succeed. However, it is necessary to consider the conduct of the employer at the time that the Claimant gave notice. The Respondent did not object or seek to hold the Claimant to his full notice period. When giving notice, the Claimant made clear that he was prepared to work on occasions when he was required to do so after the six weeks' notice period. I have found that if required to work a full 12 weeks, the

Claimant would have done so. On 20 October 2017 Mr Kennedy agreed the Claimant would be paid up to an including 12 November 2017 with payment in lieu for accrued holiday.

17 Based upon my findings of fact, I conclude that the Claimant proposed a shorter notice period and the Respondent accepted that shorter notice period without objection. The express term of the contract was varied and 6 weeks' notice was accepted. There was no breach of contract by the Claimant. Indeed, I am satisfied that the Respondent has only asserted its entitlement to the full 12 weeks' notice in the course of these proceedings in order to defeat the Claimant's claim for notice and/or holiday pay.

18 For these reasons, the Respondent's contract claim fails and is dismissed. The Claimant was entitled to be paid in lieu of notice until 12 November 2017 and his claim for breach of contract succeeds. When he resigned, the Claimant had already secured new employment. Upon the termination of his employment with the Respondent on 20 October 2017, the Claimant was able to start his new job on an earlier date and I accept his oral evidence that he was paid in the new employment from 6 November 2017. In so doing, I conclude that the Claimant mitigated his losses and it is not appropriate to order the Respondent to pay him notice for that period when he has already been paid in new employment. The Claimant is therefore entitled to damages for breach of contract in the sum of **£1,153.80** (21 October to 5 November 2017, being 10 working days at a net daily rate of £115.38).

19 As for holiday pay, it was common ground between the parties that there was accrued but untaken annual leave at the date of termination of employment. The dispute was whether this was eight days (Respondent) or twelve days (Claimant). This dispute turns on the four days' holiday taken between 16 and 20 October 2017. In his resignation email, the Claimant accepted that he may use up some of his holiday entitlement during his notice period. I am satisfied that the Respondent was entitled to require the Claimant to use some of his accrued holiday entitlement during the notice period. In conclusion, the Claimant was entitled to 8 days' outstanding holiday at a daily rate of pay of £115.38. A total sum of **£923.04**.

20 The total award which the Respondent must pay to the Claimant is **£2,076.84**.

Employment Judge Russell

22 May 2018