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EMPLOYMENT TRIBUNALS

Claimant: Mr D Spencer
Respondent: Stratford East Trading
Heard at: East London Hearing Centre
On: 12 July 2018
Before: Employment Judge C Lewis

Representation

Claimant: In Person
Respondent: Mr J Brammage, Counsel

JUDGMENT

1. The Claimants claim for payment in lieu of accrued time off in lieu is dismissed.

REASONS

1. The Claimant brought a claim for payment for outstanding toil or additional hours worked in excess of his contractual hours and for which he had not been paid at the time of his termination of employment and in his claim form, he expressed that claim as being owed £4219.04 which he accepted was the figure calculated on a gross basis. The Tribunal's jurisdiction is either by virtue of the Extension of Jurisdiction Order 1994 for a claim for breach of contract which is outstanding on termination of employment or, as an unlawful deduction from wages under Section 13 of the Employment Rights Act 1996. The Claimant claims a total of 412 hours which he said he worked in excess of his

contracted hours. The Respondent denies there is any entitlement to pay in lieu of time off in lieu and denies that the Claimant is entitled to 412 hours of time off in lieu. The Claims are brought by the Claimant and the burden is on him to establish the entitlement to payment either contractually or as a payment of wages lawfully due. As provided with the bundle of documents from the Respondent and a witness statement from Ms Dempsey for the Respondent, the Claimant gave evidence and confirmed the content of the his claim form and showed a copy of series of text messages from his phone between himself and his former line manager Mr Ian Williams which the Claimant relies on to show that Mr Williams agreed he should be paid for his accrued additional hours. Ms Dempsey was the Respondent's general manager responsible for its human resources.

Findings of Fact

2. The Respondent is a trading subsidiary of Pioneer Theatres Limited responsible for running the theatre's bar and kitchen. The Claimant was employed as Head Chef between 26 July 2017 and his effective date of termination which was 23 March 2018 on an annual salary of £27,500. The Claimants contract is in the bundle and dated 24 July 2017, page 31. Clause 4 sets out his hours of work the following terms quote "*..hours of work will vary according to the workload but will generally be 48 hours per week and will include weekends and evenings. Additional hours will occasionally be required for which an informal time off in lieu system operates. There is no provision for overtime payments in this position*". We are satisfied that clause specifically precludes overtime payments. Clause 10, termination and notice period can be found at page 32 of the bundle. 10.3, "*on satisfactory completion of your probationary period, you will be entitled to received two calendar months written notice to terminate your employment*". The Claimants job description was also in the bundle. It is consistent with the contract in terms of the recording of the notice period as being two months and the expected hours to be 48 hours

per week. Also in the bundle was a copy of the Respondent's toil guidelines for heads of departments, at page 38 which says as follows

".. with the exception of production staff and staff paid on an hourly rate, like box office and cleaning and maintenance staff, most permanent employees do not have the provision within their contract for earning overtime. For these staff there is an informal arrangement for time off in lieu. This is a sign to be a direct replacement of 1 hour/day off for an extra hour/day worked, as everyone is expected to do a bit extra from time to time, but as recognition and reward for working regularly over or considerably over their usual hours.

Time off in Lieu

Time off in lieu is granted at the discretion of the line manager and the employee should always seek permission to take time off in lieu. The time off in lieu then needs to be logged with the admin office by the employee or the line manager".

We are satisfied that this policy makes clear there is no direct link between number of extra hours worked and number of hours of toil accrued. Part of the Claimants role in running the kitchen was the drawing up of rotas to ensure sufficient staff numbers in the kitchen. The bundle contained copies of the rotas drawn up by the Claimant between July 2017 and January 2018. These regularly showed the Claimant rota'd to do more than 48 hours per week and he has included in his claim the additional hours in excess of 48 hours per week as part of his claim for additional hours worked. The senior chef King, took a period of extended absence as unpaid leave between 15 November to 14 January to spend Christmas in Jamaica. During this period the Claimant worked additional hours and arranged the shifts so as to avoid bringing in agency staff who were more expensive

than the regular kitchen staff. According to Ms Dempsey, a plan was drawn up by the Executive Director Deborah Sayer and Ian Williams, the Claimants line manager, together with the Claimant to ensure the Claimant did not overstaff the kitchen and in a copy of this found at page 50 of the bundle, the Claimant disputes having agreed this plan and said he was not party to any such meeting. Ms Dempsey accepts the Claimant did not put the plan into action. The Claimant understood that he had an agreement with Mr Williams that he could take toil in January in return for working the additional hours during King's absence. Ms Dempsey accepted that she was informed by Mr Williams that he had agreed with the Claimant that he could take toil in January 2018 for additional hours worked whilst the senior chef was away. The Claimant complains that due to events outside his control, he did not get the opportunity to take these additional hours as toil in January. King did not return until halfway through the month and then on 23 January, he was suddenly told the kitchen was closing and he was being made redundant. At page 40 of the bundle is the letter to the Claimant dated 23 January informing him that his position was being made redundant with effect from 23 March 2018. In that letter the Claimant is informed that he will continue to be paid for his notice period which is two months in the normal way, *"...at the end of your notice period which is 23 March 2018 your position will be redundant. You will not be required to work during your notice period. A P45 will be sent to you after your final payment has been processed"*.

3. The Claimant believed that having been denied the opportunity to take the additional hours he had worked as toil, he ought to be entitled to payment for those hours instead on termination of his employment. He sent a text message to Mr Williams asking him if he would be paid for his outstanding holidays and additional hours on termination. From Mr William's response, the Claimant understood Mr Williams to have agreed that he would be pad for them. Mr Williams response began with the word 'yes' and informed the Claimant

he would need to get the figures together to give to management. The Claimant asserts that the next part of Mr William's response referred to him not having authority to agree and refers to a discussion in respect of the Claimant's proposal that he take over running the kitchen as a franchise and not the payment for the additional hours. The Respondent disagrees and it maintains in any event, that Mr William's does not and did not have the authority to authorise payment for toil which was contrary to the company policy. There is an email trail in the bundle dating from 31 January (page 45), when the Claimant asked Ms Dempsey about the payments for outstanding holiday and 56 days owing for hours worked outside his contractual hours. Ms Dempsey responds informing the Claimant that he would be paid 13 days holiday in his final payment and that the Respondent does not make payments in lieu of toil. The Claimant repeated his request on 5 February (page 44) asking whether it meant that he would not be paid for the days he has worked over his contracted hours, to which Ms Dempsey responded "*yes, we do not make payments in lieu of toil. You are currently on full pay whilst not working which acts to compensate for any toil you may have accrued*". The Claimant continued to query the Respondents position and Ms Dempsey followed up by speaking to Mr Williams on 22 February to ask him to clarify the agreement he had with the Claimant (page 49). Mr Williams informs Ms Dempsey of what he recalls having agreed, attaching a template for the kitchen hours (that is the document at page 50) which he says was agreed with Deborah and the Claimant and states "*at no point did I ask Devon to exceed these hours for himself although we did discuss having some time in lieu to be worked while King was away, which was to be taken in January. There was an agreement that we would not use agency, but using these hours there would be no need. Upon his dismissal, he asked about his hours and I said that that was a conversation he would have to have with yourself and/Neil as I was not part of that process*". This is the basis for the Respondents assertion that the comments in the text message referred to the authority to pay the

additional hours, Mr Williams not having that authority. Ms Dempsey responded to the Claimant on 24 February in an email which is at page 51 setting out the contractual term in respect of time off in lieu and quoting from the company time off in lieu guidelines for heads of departments. The final paragraph of that email sets out the following “...no additional hours have been logged. Having discussed this with Ian, he said you could take time off in lieu in January for additional hours your worked during the period when your senior chef was on holiday. In this time your rota which you alone have a copy of, shows an additional 174 hours, this is 18 days. You were given of your position being made redundant on 23 January 2018. Redundancy takes effect from 23 March 2018. You are not expected to work during this period and the 22 days time owing are to be taken during the time you are not working but being paid. No other time owing has been authorised, which is a contractual condition”. In her evidence Ms Dempsey clarified that the reference to 22 days should have been 18 days and that she had gone through the rotas provided by the Claimant and calculated the hours from those. The Claimant does not accept that his notice period should be counted as toil or counted against the toil that he had accrued. He believes that he is entitled to notice pay and also the Respondents actions in denying him access to the building and to the system on 24 January, indicates that he was no longer to be considered an employee from that date. Thereafter after being told of the redundancy, his pass was deactivated. He was however paid in the normal way in March and February and the payslips are at page 87 and 88. the March payment (page 87) includes 13 days holiday pay at the end of that period. I am satisfied that the effective date of termination was 23 March 2018 as stated in the letter notifying the Claimant, giving him two months notice of dismissal and that the Claimant was paid in the normal way in February and March but not required to come into work so in effect ,was on some form of garden leave. The Claimant is correct that he is entitled to notice and his contract provides him to be given two months notice and I am satisfied he was given two

months notice in which time, he could have been required to come into work but was not. He had two months during which he was paid and not required to come to work.

Conclusion

4. From the contractual provision, the contract provides specifically that there should be no payment for overtime and that there is an informal arrangement for toil. This **????** policy is at the discretion of the line manager and is not to be granted on a like for like or day to day basis. I accept the Claimant worked regularly in additional to his 48 hours but under his contract he was not entitled to toil for each hour, it was at his manager's discretion. There is no evidence of an agreement for toil to be taken for each additional hour that he worked. Prior to his colleague, the senior chef King's absence, the only agreement relates to the period of King's absence when Mr Williams had indicated that the Claimant would be allowed to take some time off in lieu in January for additional hours worked. I am satisfied that the text message from Mr Williams does not itself sufficiently clear to be able to alter the express contractual terms and nor was he in a position to have that authority to vary the contractual agreement. There is no contractual agreement for pay in lieu of notice for the Claimant to rely upon. The Claimant however asserts that it is in effect morally due to him to consider whether he has a claim under the provisions of unlawful deduction from wages. Those are for wages that are lawfully due and having found that there is no contractual obligation to pay, it cannot be said those payments were lawfully due although the Claimant believes they are morally due to him, I am satisfied that Ms Dempsey pointed out to him during his notice period on two occasions, 5 February and 24 February, that he was in fact being paid for two months when he was not required to come to work, that is paid time off work and extinguishes his claim to toil and I am satisfied that Ms Dempsey must be right that he accrued 18 days for the relevant period of

King's absence were extinguished during the two months notice period. I therefore dismiss the Claimants claim.

Employment Judge C Lewis

24 July 2018