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EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr G Fafinski

AND

The Lanesborough Hotel

Heard at: London Central

On:

23 July 2018

Before: Employment Judge Keith, sitting alone

Representation

For the Claimant: Ms A Zaleska, Friend

For the Respondent: Mr J Bryan, Counsel

REASONS

1. At the beginning of the Hearing, it was necessary for me to resolve a preliminary issue as to whether this Tribunal had jurisdiction to hear the claim of breach of the National Minimum Wage Act. For reasons that I have already given, I concluded that I did not have jurisdiction to hear the complaints and therefore the sole complaints that I had jurisdiction to hear were the claims of unlawful deduction from wages contrary to Section 13 of the Employment Rights Act 1996, specifically concerning overtime payments and second, whether any overtime payments impacted on outstanding holiday pay, by reference to the same claimed deficiencies, in breach of Section 13, or in breach of the Working Time Regulations 1998. In respect of those two issues, they were agreed between the parties and summarised in a skeleton argument prepared by Mr Bryan, as follows: -

2. Issues

a. Unlawful deductions from wages

- i. What were the Claimant's normal working hours under his contract?
- ii. Did the Claimant work in excess of those hours?

- iii. If the answer to ii is yes, was the term of the contract that the Claimant was to be paid overtime in respect of such excess hours?
 - iv. If the answer to iii is yes, what, if any, conditions had to be satisfied before overtime would become properly payable?
- b. Working Time Regulations/unlawful deductions from wages in respect of accrued holiday
- i. In respect of the Claimant's holiday pay, what proportion of the five weeks' holiday had accrued in the leave year which began from 1 January 2017, by virtue of the date of the Claimant's employment ending, which it did so by reason of his resignation on 9 September 2017?
 - ii. How many days were untaken by the Claimant by 9 September?
 - iii. If any accrued leave was untaken, was there any shortfall in the amount that the Claimant was paid in respect of holiday pay on termination and if so, how much?

3. In terms of the documentation, I had an agreed bundle, which included the witness statements of the Claimant; Summiya Chaudary, the Respondent's HR Manager; and Steven Gilles who had held various roles, but was either First Sous Chef or latterly Head Chef at the Respondent's organisation during the period to which the Claimant's claim relates. All witnesses also gave oral evidence, on which they were cross-examined, and in addition, a witness for the Claimant, a former employee, Theo Sourvinos, also gave oral evidence. The facts in the case were largely undisputed, except in a number of important areas which I will set out below in the findings in these reasons.

4. The Law

5. In respect of the claim for unlawful deductions from wages, Section 13 of the Employment Rights Act 1996 provides:

"13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him....

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the

meaning of this Part is not to be subject to a deduction at the instance of the employer.

6. In respect of the claim of failure to pay in lieu of accrued, but untaken holiday, Regulation 14 of the Working Time Regulations 1998 states:

“Compensation related to entitlement to leave

14.—(1) This regulation applies where—

(a) a worker’s employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(A X B) - C

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

B is the proportion of the worker’s leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

Findings of Fact

7. The principal document that I considered was the statement of main terms and conditions of employment, at page [1] of the Claimant’s bundle. In it included the following provisions:

Salary and benefits

Your basic rate of pay will be £21,000 gross per annum, paid monthly in arrears, which is made up of a basic salary and an element of service charge. You will also be entitled to an additional service charge payment as follows:

3% of your basic salary will be paid as your service charge on a monthly basis.

Hours of work

Your normal place of work will be at the Lanesborough and your normal working hours will be detailed in your departmental rota. Your normal working hours will be 48 hours per week excluding breaks. These hours may vary subject to seasonal needs of the business and your manager will advise you as to how these hours will be arranged. We reserve the right to vary your normal working hours. Your manager or human resources reserve the right to contact you outside the specified hours and to contact you at your home address if necessary.

Overtime

Occasionally you may be required to work in excess of your normal contractual hours, where possible time in lieu may be given (within 7 days) with prior authorisation from your manager. Any paid overtime must be authorised prior to working by the managing director. Overtime rates will not be paid until your full contractual working hours have been actually worked.

Holidays

You will be entitled to 28 days per annum the holiday year operating from 1 January to 31 December. For the purposes of your first and final year of employment your entitlement will be calculated on an accrual basis at the rate of 2.33 per month which accrues at the beginning of each calendar month. If you work part time your holiday entitlement will be pro rata the full-time entitlement."

8. Those were the written contractual terms which were said to govern both references to holiday pay and in relation to overtime, but they also referred to the 'departmental rota.'

9. In answering the first question as to what the Claimant's normal working hours were, it had been suggested by the Respondent that there was a contradiction between the reference to normal weekly working hours being 48 hours, and the reference to normal working hours being detailed in the 'departmental rota'. Ms Chaudary suggested in her oral evidence that before he signed the terms and conditions of employment, (which he did at page [5]), the Claimant 'would' or 'should' have been aware that his hours were in fact other than the 48 hours as stated, because the Claimant would have carried out a form of interview by working within the work environment and also must have known, noting the high pressure both within the industry generally but specifically within the Respondent's hotel, which was a 'high-end' hotel, that people rarely, if ever, worked only 48 hours. Ms Chaudary indicated that such working rotas "would have" been discussed with the Claimant at the time when he discussed employment with the Head Chef (not, at that time, Mr Gilles, who had no part in these discussions). However, it was notable that Ms Chaudary did not

commence employment with the Respondent until 31 July 2017, while the Claimant had started employment over a year previously, on 29 March 2016. Whilst Ms Chaudary surmised that a discussion would have taken place based on her later experience, I was not persuaded that her assertions were reliable, noting her lack of knowledge of other aspects of the Claimant's pay.

10. In particular, for example, when she was queried as to why 30 hours overtime had been paid to the Claimant in his January pay for 2017 to reflect hours worked in December 2016, Ms Chaudary was unable to explain the basis of the calculation. Whilst I do not find that she was intentionally dishonest in her evidence, I find that she was attempting to put a gloss on the circumstances by explaining that weekly hours other than those in the contract 'would' have been discussed. In addition, the Head Chef with whom the Claimant would have had discussions did not give evidence to this Tribunal and even though Mr Gilles gave evidence about his experience of working in the high-end restaurant industry, and again, whilst I make no findings that he was intentionally dishonest, I do not find as reliable his assertion that the industry practices as a whole were reflected in the individual discussions and negotiations that took place with the Claimant when he started work with the Respondent.

11. There can be some cases where a contract of employment is said not to reflect the reality of the parties' intentions, but bearing in mind that I have not heard evidence on behalf of anyone for the Respondent who had direct knowledge of the negotiations, I was not satisfied that it was appropriate to depart from the wording set out clearly in the contract of employment, namely that the Claimant's normal weekly working hours were 48 hours. It was said however, that I should give an alternative interpretation, because of the claimed contradiction between what was said in the contract and what was in the rota. However, I was not shown a copy of the rota other than in a summary format, which merely confirmed who was scheduled to work on a particular day. From reviewing that rota, it would not be obvious to the Claimant that there was a clear discrepancy between the 48 hours weekly working and any alternative hours.

12. I also did not accept that a form of an interview where somebody gains work experience and is also assessed would necessarily give a candidate an accurate view as to what their regular day-to-day working conditions would be. It was suggested by Ms Chaudary that it was incumbent on the Claimant himself to have made enquiries about his working hours. In reality I found that it is incumbent on any responsible employer to set out clearly what those working hours should be. Whilst I accept that many employers will have contracts of employment which state that there are core hours, beyond which somebody may be required to work additional hours as required, that was not the wording here there was a clear wording suggested that normal hours were as specified. The contract then went on to state what would happen where, if 'occasionally', (my emphasis) the Claimant was required to work in excess of his normal hours then where possible, time in lieu would be offered with prior authorisation from the manager, or paid overtime authorised, prior to working, by the managing director. I find as a fact that, by reference to his contract of employment, the Claimant's normal weekly working hours were indeed the 48 hours as specified and the

Claimant was not to know that his normal hours should exceed those at the date the parties entered in to the contract.

13. However, I was also referred by Mr Bryan to the fact that that would not be an end of the matter regarding an entitlement to paid overtime being payable. It did not follow that working overtime led to an unqualified right to payment for that overtime. There was quite clear and specific wording whereby on the one hand, overtime payment was required to be authorised at one level ie. by the managing director, while time off in lieu could be authorised by a manager. I find that such authorisations were not merely theoretical, and that the need for authorisation occurred in practice, specifically when the Claimant worked overtime in December 2016 and was paid overtime in January 2017. The Respondent had a discretion as to whether to allow additional time off in lieu or an overtime payment, but there was no contractual right to either benefit. The Respondent made such a payment for its busiest period, ie. over Christmas, but not later in 2017.

14. In conclusion, while the Claimant may well have worked in excess of his normal weekly hours during his employment, he did not have a contractual right to payment for overtime. Any overtime was at the discretion of the Respondent, on condition of prior authorisation of the Respondent's managing director. There is no evidence that such prior authorisation was given other than for December 2016. It may be said that the Respondent may be criticised for not permitting the Claimant either time off in lieu or alternatively paid overtime in advance where he had exceeded his normally weekly hours, but I do accept that without prior express consent that there was no automatic right to such benefits or payment and therefore on that basis, and at the second stage of Mr Bryan's analysis, the claim for payment of overtime must fail.

15. I then went on to consider the question of pay in respect of accrued but untaken holiday. Such pay may be calculated either under the Claimant's contract of employment or by reference to the Working Time Regulations, which in turn also depends on the Claimant's week's pay. I find that the Claimant's week's pay does not vary with the times or the hours he worked, ie he is neither a piece worker or a shift worker, but was paid an annual salary, initially of £21,000, which was subsequently increased, on a monthly basis. The Claimant's principal submission was that calculation of his weekly pay should vary dependent on overtime worked, but I have already rejected the claim of an entitlement to an overtime payment, without prior authorisation of the Respondent's managing director. A claim based on a higher weekly pay, because of overtime, which then resulted in a shortfall in his holiday pay, must therefore fail.

16. In the alternative, I considered whether the Claimant had accrued any holiday, at the date of termination of his employment, for which he had not been paid, by reference to the statutory formula outlined in the Working Time Regulations. The weeks of holiday which accrued did so regardless of the particular hours that the Claimant may have worked in that particular month and effectively that the calculation was based on a proportion of his week's pay. The parties agreed, and I find, that he had accrued a holiday entitlement in the

holiday year up to the date of the termination of his employment on 9 September 2017 of 21 days. As evidenced on a leave sheet at page [44], he had in fact taken and been paid for 21.5 days, so he had exceeded his holiday entitlement albeit that it is not suggested that the Respondent sought to recover the excess. On the basis that the Claimant's weekly pay did not vary, his claim for holiday pay must fail, both by reference to Section 13 of the Employment Rights Act 1996 as an unlawful deduction from wages; and under the Working Time Regulations.

17. For the reasons set out, all of the Claimant's claims fail and are dismissed.

Employment Judge Keith

Dated: 6 November 2018

Judgment and Reasons sent to the parties on:

6 November 2018

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For the Tribunal Office