



EMPLOYMENT TRIBUNALS

Claimant

Mr Steven Stafford

v

Respondent

The Kings Head Country Hotel Ltd

Heard at: Bury St Edmunds

On: 24 August 2018

Before: Employment Judge McNeill QC

Appearances:

For the Claimant: In person

For the Respondent: Mr K Dennis, Director

JUDGMENT having been sent to the parties on 6 September 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. The claimant in this case claimed for arrears of pay, which he alleged were due to him from the respondent, in the sum of £5,049.00. He also claimed for a payment in lieu of his annual leave entitlement in, untaken on the date of termination of his employment, pursuant to regulation 14 of the Working Time Regulations 1998. The amount claimed was £1,782.00. Finally, he claimed for one week's notice pay in the sum of £495.00. All the figures were based on net earnings.
2. Against his total claim of £7,326 he gave credit for £1,320.66: an amount already paid to him by the respondent. His total claim was therefore for £6,005.34.

The Issues

3. There were two key issues to determine. First, what was the rate of pay agreed with the claimant? Secondly, on what date was the claimant's employment by the respondent terminated.

5. In relation to the second issue, the respondent contended that the claimant's employment terminated on 27 October 2017 because that was said to be the last day of his employment on a P45 which was sent to him and dated 30 October 2017.
6. The claimant relied on an effective date of termination of 6 December 2017. He submitted that, while it was not absolutely clear that his employment was being terminated on that date, he did not contend for any later date.

The Evidence

7. I heard oral evidence from the claimant and from three Directors of the respondent company, Mrs Sandra Bowman, Mrs Nicky Bowman and Mr Keith Dennis. I read all the documents in a bundle which was produced for the hearing and, in addition, two documents which were produced by the claimant and which I read without objection from the respondent at the hearing, which were relevant to the matters which I had to decide. One was a record of text messages passing between Mrs Nicky Bowman and the claimant on 29 and 30 November 2017. The other was a pay slip dated 17 April 2017, showing a basic gross pay figure for a four week period to 17 April 2017, in the sum of £2,538.46. On a pure arithmetical basis, that figure reflected a gross annual salary of £33,000 per annum.

Findings of Fact

8. The respondent runs a hotel business in Great Bircham, Kings Lynn.
9. The claimant started to work for the respondent in February 2017. He worked initially on a part-time basis, advising the respondent on matters relevant to their business, until 1 April 2017. From 1 April 2017, he was employed by the respondent full time as General Manager of the hotel.
10. The respondent initially offered to pay the claimant £28,000 a year for his full-time contract. The claimant wanted £33,000 a year. The respondent agreed to pay £28,000 a year through payroll and £100 a week in cash, giving a total of about £33,000 a year, and the claimant agreed to that. The claimant knew that he would be liable to declare the additional payment to HMRC. The claimant was not provided with a written statement of particulars of his employment, either at the start of his employment or at all.
11. The claimant's first pay slip was dated 17 April 2017. Initially the pay slip showed a payment for four weeks based on a gross salary of £33,000 a year. When Mrs Nicky Bowman saw this, she asked the accountants who had prepared the payroll figures to provide a replacement pay slip reflecting employment only from 1 April 2017 and a salary of £28,000 per year. A second pay slip was produced on that basis.

12. On 4 October 2017, a complaint was made that the claimant had used abusive language to a female member of staff. At about 9 o'clock that evening, Mr Dennis told the claimant that he was suspending him and that the respondent was going to take some legal advice. Mr Dennis said to the claimant that he had holiday due, but he did not tell the claimant to take holiday. The respondent's practice in relation to holiday was that, if employees wanted holiday, they would make a request and the respondent would then put the holiday dates up on a board.
13. On 18 October 2017, the claimant received a letter from the respondent, dated 16 October 2017. In that letter, it was confirmed that the claimant had been suspended on 4 October 2017. There was reference to allegations of misbehaviour and misconduct against him, and the letter then said this:

“Your employers do not wish for you to return to the Kings Head as your ongoing conduct and unacceptable behaviour cannot continue. Therefore, and as you are not employed under a formal contract, under a probation period, we propose that you can either go through the disciplinary process whereby a meeting will be arranged to discuss your misconduct, which is being investigated as soon as possible, you have the right to be accompanied to this meeting. The other option is that as you have been employed under a probation period, you have accrued statutory notice period of one week, you have been paid for this in lieu of notice and in lieu of going through the disciplinary process. If this is the option you wish to pursue a settlement agreement will be forwarded for your signature.”
14. In short, the claimant was being offered two options: one to go through a disciplinary process; the other simply to accept a payment in lieu of one week's notice and to sign a settlement agreement.
15. The claimant responded on 18 October 2017, by an email to the respondent's solicitors. He referred to his suspension and he addressed in that email the allegations that were being made against him. He said that he should be paid his usual salary during his suspension, which he said was £33,000 based on £28,000 paid by BACS and another £100 per week in cash. He referred to his accruing holidays and said that he would expect payment for those in full. He said that he should receive his full pay until 20 October 2017, 15.6 days of accrued holiday pay, and one week's notice based on full pay. There was then reference to some belongings he had and a hope expressed that the parties could come to an agreement.
16. The terms that he set out in that letter were not acceptable to the respondent. They did not accept them. The respondent then sent the claimant a proposed settlement agreement on 24 October 2017. The claimant made it clear to the respondent from the start that he wished to be able to defend himself at a disciplinary meeting against the allegations made if a settlement could not be reached.
17. The settlement agreement of 24 October 2017 was not acceptable to the claimant; he did not sign it.

18. The claimant then took a 'letter before action' to the respondent on 13 November 2017, again making counter proposals for settlement. Having heard nothing back, on 17 November 2017, the claimant emailed the respondent's solicitors to confirm again that he was willing to attend a disciplinary meeting.
19. Meanwhile, on 30 October 2017, his P45 had been prepared showing his last date of employment as 27 October 2017. A pay slip was processed on 30 October 2017, showing net pay in total at £1,827.23. In that pay slip dated 30 October 2017, the payments were set out as, '*basic pay for 4.5 units*', and then, '*holiday pay 12 units*', and '*notice pay 5 units*'.
20. The claimant had not been paid any salary save for the four and a half days between 2 October and 30 October 2017.
21. On 29 November 2017, the claimant received a text from Mrs Nicky Bowman which said,

"We would like to arrange a meeting with yourself on Saturday 2 December 2017, at 10:30 at the Kings Head. Please confirm you can attend."

He replied, "*What is the basis of the meeting please?*"

The answer was, "*You requested a disciplinary one*"

And he confirmed, "*I will be there*"

In practice, because of family illness, the respondent could not go ahead with the hearing on 2 December 2017, but the hearing did go ahead on 6 December 2017.
22. At the meeting on 6 December 2017, there was discussion of the alleged disciplinary matters. Mr Dennis then told the claimant that he was no longer employed by the respondent and would have to go to the tribunal if a settlement could not be reached.

Analysis and Conclusions

24. As the agreed annual rate of pay was £33,000 (in fact £33,200 but the claimant contended only for £33,000), any losses due must be calculated on that basis.
25. In relation to termination of the claimant's employment, the respondent relied on its letter to the claimant of 16 October 2017. That letter did not terminate the claimant's employment. It was made clear in the letter that the claimant had two options: (1) to go through a disciplinary process; or (2) to enter into a settlement agreement. The settlement offered at that time was not accepted and no settlement was reached after that.

26. The claimant made it clear that he wished to go through a disciplinary process, and, in the event, albeit after some delay, that is the course which the respondent pursued.
27. The respondent relied on the sending of the P45 and the payments made to the claimant in October as terminating the claimant's employment. A P45 is not on its own effective to terminate an employee's contract of employment. The termination of a contract of employment must be a clear and unequivocal act when looked at on an objective basis. Although payments were made, which were described as 'a payment in lieu of notice and holiday pay', at no stage did the respondent say to the claimant that it was terminating his employment as at that date. Given the subsisting offer to the claimant to go through a disciplinary process, the payment made and the fact that the claimant had not taken holiday, the respondent's act was not unequivocal. The claimant was entitled to be paid for the month of October and the respondent could not avoid making payment simply by labelling what was being paid as 'a payment in lieu of notice and holiday pay'. While a payment in lieu of notice normally implies termination of a contract, this has to be considered in this case against the respondent's other acts, including the offer to the claimant to go through a disciplinary process.
28. The respondent was not entitled to require the claimant to take holiday during his period of suspension and indeed Mr Dennis has fairly confirmed that he did not do so. Therefore, in reality, the payments for October 2017, when looked at in substance constitute little more than the pay to which the claimant was already entitled.
30. At the same time as the P45 was sent, the respondent remained prepared to conduct a disciplinary process which, considered on an objective basis, was indicative of a continuing contract of employment between the parties.
31. I therefore find that the contract was not terminated on 27 October 2017, or indeed 30 October 2017, the date of the P45, but that it continued until 6 December 2017, when Mr Dennis made it clear that the claimant was no longer employed by the respondent.
32. The claimant's claims are therefore upheld.
33. The respondent did not challenge the figures set out in the claimant's witness statement as a matter of arithmetic, if the claimant were correct about the date of termination. Having said that, and bearing in mind that both parties represented themselves, I took account that the claimant, gave evidence before me that he took three to four days holiday during the time that he was with the respondent. Giving the respondent the benefit of the doubt on this and treating it as four days, I calculated that the claimant's total holiday entitlement was 19 days. Taking off four days, the claimant was entitled to a payment in lieu of holiday for 15 days. I therefore reduced the figure claimed in respect of holiday to £1,485.

34. The claimant was therefore entitled to a payment in respect of his net wages in the sum of £5,049; a payment in lieu of annual leave of £1,485; and one week's notice pay in the sum of £495, giving a total of £7,029. Against that sum, the claimant must give credit, as he fairly does, for £1,320.66. He is therefore entitled to a total of **£5708.34**

Employment Judge McNeill QC

Date: ...21.11.18.....

Judgment sent to the parties on
.....21.11.18.....

.....
For the Tribunal office