



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4120186/2018

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Held in Edinburgh on 30th November 2018

Employment Judge: David Hoey (sitting alone)

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Miss V Kyriacou

Claimant

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Osman Celik

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Respondent is ordered to pay the Claimant the following sums (which are gross sums):

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1. £200.49 by way of unpaid wages
2. £24.20 by way of accrued holiday pay

Reasons

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1. This case called for a final Hearing in respect of the claims for wages that the Claimant alleged were due. Both the Claimant and the Respondent were in attendance. The Claimant had produced a copy of her grievance letter. There were no other productions. The Claimant had brought another witness but as this witness
5 could only speak to the hours which the Claimant worked, which the Respondent did not dispute, that witness was not called.

2. The Hearing began by clarifying what the Claimant's claims were and the Respondent's position in relation to the matter.

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Preliminary issues

3. It was clear that the first preliminary issue that required to be resolve was whether
15 or not the Respondent was in fact the Claimant's employer. The Response Form stated that the Respondent was not the Claimant's employer as the business had been sold 4 years ago. The Claimant contended that the Respondent was her employer at all material times as she had been interviewed by him and he had in essence managed her during her short employment. That would be a matter for
20 evidence.

4. The second issue that required to be determined was what sums, if any were due to the Claimant. She maintained that she had worked 27 hours and 10 minutes for which she claimed £7.38 an hour. She also sought holiday pay in the sum of £23.91
25 (which was a sum the Citizens Advice Bureau had calculated for her).

5. Both the Claimant and the Respondent gave evidence.

Findings in fact

6. I make the following findings in fact from the evidence that was led. The following findings are made from an assessment of the witness evidence and the letter that was produced. While other evidence was led, the findings relate only to the issues that require to be determined by the Tribunal.
7. The Respondent is a restaurateur. He owns the premises at 8 St Mary's Street in Edinburgh (known as the Fig Tree Bistro).
8. The Respondent was looking for waiting staff and his manager recommended the Claimant as a good worker.
9. On 14 May 2018 the Claimant attended the Respondent's premises. She had a discussion with the Respondent and was then asked to work for a 2 hour "trial shift". She was told that she would not be paid for her 2 hours' work, albeit she would be working. She would serve customers and carry out waiting tasks. She would also be able to see how the business worked and ask questions.
10. At the end of the 2 hour shift the Respondent advised the Claimant that she had been successful and she was told that she would be paid £7.38 an hour for her role. No contract was issued nor was any confirmation letter issued. There was no paperwork in connection with the interview or the position issued by the Respondent. Everything that happened was done orally.
11. The Respondent told the Claimant that he owned the restaurant premises at 24 St Mary's Street. After the interview and trial shift he took her to that restaurant

which was a few doors down from where she had been interviewed and did her 2 hour trial shift (8 St Mary's Street). The Claimant was introduced to the manager of that restaurant. He told the Claimant that the Respondent owned the restaurant.

5 12. The Claimant was told to attend 8 St Mary's Street for her first shift and collect the key for 24 St Mary's Street where she would work (in the restaurant). On occasion when she worked at 24 St Mary's Street, she would go to 8 St Mary's Street, for example, to collect crockery from the bistro which she would then take to the restaurant.

10 13. The Claimant worked 4 shifts in 24 St Mary's Street, namely on 21, 22, 25 and 26 May 2018. She worked for a total of 25 hours and 10 minutes.

15 14. The Respondent would enter the restaurant at 24 St Mary's Street on regular occasions and would speak to staff, including in areas the public were not allowed to enter, such as the kitchen.

20 15. After 26 May 2018 the Claimant was told by her manager that he and the Respondent had decided the Claimant would be given no more work. She worked no more shifts.

25 16. On 25 June 2018 the Claimant sent a letter address to "The Manager" at the restaurant at 24 St Mary's Street seeking payment for the work she had done. That letter stated that she had asked for payment but was told her shifts were "training shifts". The letter explained that the Claimant had sought advice from Citizens Advice and she had been advised that payment was due. The Respondent did not reply to that letter.

17. The Claimant sent a second letter dated 2 August 2018 this time to the Respondent at his home address. Citizens Advice Bureau assisted the Claimant in obtaining this address. That letter referred to the fact the Claimant had asked for payment verbally and had sent the letter of 25 June 2018 but no response had been forthcoming. This letter was expressly stated to be a grievance in respect of the sums outstanding for wages and holiday pay as claimed before the Tribunal. The letter stated that in the absence of payment the Claimant would “escalate this with ACAS”.
18. The Respondent did not reply to that letter.
19. The Claimant took advice from Citizens Advice and engaged in Early Conciliation and then lodged her claim with the Tribunal.
20. The Respondent in the Response Form stated that he had no connection with the Claimant’s employer and that he had sold the business 4 years ago. He accepted that he owned the Bistro at 8 St Mary’s Street but not the restaurant at 24 St Mary’s Street.
21. In exercise of its case management powers the Tribunal directed that the Respondent should provide full details of the name and address of the person to whom the business was sold. The Claimant was asked to provide any paperwork that identified her employer.
22. The Claimant responded by saying no paperwork was ever issued and she had been interviewed and worked her trial shift at 8 St Mary’s Street and worked at 24 St Mary’s Street.

23. The Respondent responded by saying he had no connection with 24 St Mary's Street as he owns 8 St Mary's Street. That letter said that he had told the Claimant to contact the restaurant directly. The Respondent did not provide any more information as to who he says the correct employer was.

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Observations on the evidence

24. This is not an easy issue to determine since there is a very clear conflict in evidence.

10 The Respondent is emphatic that he did not employ the Claimant. His position was that he interviewed the Claimant and gave her a 2 hour trial shift. He accepted that she did work that shift but it was a chance for her to show how she handled the tasks.

15 25. His evidence was that she was "not up to the job". He said that in his view he did not think she could cope and was "not good enough". Despite that, he maintained that he told the Claimant that his friend owned the restaurant a few doors down and that as he was looking for workers he would take the Claimant along the road and show her this place of work.

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26. His evidence was that after he had told the Claimant she was not good enough to work in his bistro, he walked with her to the restaurant a few doors down and told the manager that the Claimant was looking for work and that they should "talk to her". The Respondent then left the Claimant with the manager of the restaurant and
25 she worked there (for that business).

27. The Respondent is adamant that he did not own that restaurant. He accepted that he was friends with the owner and would frequent the restaurant, including by going into the kitchen.

5 28. I was faced with two competing accounts on the central issue as to who employed the Claimant. The Claimant alleged the Respondent was her employer as she had been told this by the Respondent and her manager and that was what she had understood during her employment. The Respondent denied this and was emphatic he had simply referred the Claimant to his friend's business. No paperwork had been
10 produced in relation to the interview process.

29. I preferred the evidence of the Claimant in relation to this matter. The Claimant had carried out the trial shift for the Respondent. She candidly accepted that she had been told by the Respondent that she would not be paid for the trial shift. Her
15 evidence was clear and cogent.

30. The explanation by the Respondent was less credible. If the Claimant was unable to cope with the duties seen by the Respondent (when working at the Bistro), it was unclear why she would be suitable to work for the Respondent's friend's business –
20 a restaurant and a business that the Respondent attended regularly.

31. There was no credible reason given why the Respondent was able to recommend the Claimant as suitable for his friend's business to do the same work he concluded was work for which she was unsuitable in his business.

32. I also took into account the Claimant's evidence that she was not exclusively working at 24 St Mary's Street as there were occasions when she would attend at the bistro at 8 St Mary's Street. She saw the Respondent during her work in both locations.

5 33. The Respondent had known about the Hearing for around 2 months and had been given a number of opportunities to put the matter beyond doubt, such as by providing clear details as to whom he said employed the Claimant. The Respondent had not responded to the grievance submitted by the Claimant despite its clear terms to set out his position.

10 34. The Respondent maintained that if the Claimant approached the owner of the business at 24 St Mary's Street, that he said employed her, they would pay her. That is despite the Claimant having sent the letter dated 25 June 2018 to that business with no payment being made.

15 35. It was for the Claimant to establish who her employer was and I was satisfied that her evidence was credible and reliable. I therefore accepted that the Claimant was employed by the Respondent, when she carried out her work (both at 8 St Mary's Street and 24 St Mary's Street).

20 36. The Respondent candidly accepted that he saw the Claimant working when he was at 24 St Mary's Street and he was unable to challenge the number of hours she said she had worked.

25 **Law**

37. Section 13 of the Employment Rights Act 1996 makes it unlawful to pay to a worker a sum less than that which is properly payable under the contract of employment.

Section 23 of the Employment Rights Act 1996 gives the Tribunal the power to consider a complaint that there has been an unlawful deduction of a wage.

38. Regulation 13 and Regulation 13A together entitle a worker to 5.6 weeks paid holidays each year. Regulation 14 states that where a worker's employment ends and holidays have accrued, the employer should pay the worker a sum that represents the value of the accrued leave.

Submissions

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39. The Claimant stated that the Respondent had been clear during her interview in telling her that she would be able to work for him. There was no reason for her to doubt what she had been told and during her time working there was nothing that changed her position that the Respondent was her employer for the duration of her employment. She sought payment of the sums she said were due.

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40. The Respondent denied that he was the Claimant's employer and said that he did not own the premises at 24 St Mary's Street. He had simply interviewed her, given her a 2 hour trial and then introduced her to his friend's business which traded at 24 St Mary's Street. He argued the claims should be dismissed.

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Decision

41. I was satisfied that the Claimant entered into a verbal contract with the Respondent whereby she would be paid £7.38 for each hour she worked. The work she carried out was for the Respondent.

5 42. While the Respondent maintained that the trial shift would be unpaid, she did in fact work for those 2 hours. She is entitled to be paid for that work.

43. The Claimant also worked 25 hours and 10 minutes. She is entitled to be paid for that work too.

10 44. She is therefore entitled to be paid for 27 hours and 10 minutes at £7.38 an hour which gives a sum of £200.49.

15 45. The Claimant also sought holiday pay. She had accrued holidays for the time she worked. She had not taken any holidays. Calculating holiday pay for hourly paid staff is notoriously difficult.

20 46. The ACAS Guide on holiday pay (see <http://m.acas.org.uk/media/pdf/r/c/Acas-guide-Holidays-and-holiday-pay.pdf>) notes that if a member of staff works on a casual basis or very irregular hours, it is often easiest to calculate holiday entitlement that accrues as hours are worked. Holiday entitlement of 5.6 weeks is equivalent to 12.07 per cent of hours worked over a year. The 12.07 per cent (per hour) figure is 5.6 weeks' holiday, divided by 46.4 weeks (being 52 weeks – 5.6 weeks). Thus a shorthand way to calculate entitlement is to say that for every hour worked, holidays
25 at a rate of 12.07% of that hour's pay amounts to accrued holidays.

47. Using this shorthand calculation, the Claimant is entitled to 12.07% of £200.49 which gives £24.20 by way of accrued holiday pay.

48. The Respondent is therefore ordered to pay the Claimant the sum of £200.49 by
5 way of wages and £24.20 by way of holiday pay. These are gross figures.

Employment Judge: Hoey

Judgment Date: 05 December 2018

10 Entered into the Register: 10 December 2018

And Copied to Parties