EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103876/2018

Held in Edinburgh on 24th August 2018

Employment Judge: S Cowen

Mr T Puges Casquero	Claimant Represented by:- Miss Del Valle Pedros
Black Moon Events Ltd	Respondent In person via Mr Grierson

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Respondent made an unlawful deduction from the wages of the Claimant, contrary to s.13 Employment Rights Act 1996, when they failed to pay him, as agreed, holiday pay for additional holidays in December 2017 and January 2018. The Respondent shall pay the Claimant £924.14.
2. The Respondent failed to pay the Claimant for accrued but unused holiday at the date of termination contrary to Regulation 14 Working Time Regulations 1998. The Respondent shall pay the Claimant £154.02.

3. The Respondent breached the contract of employment with the Claimant by failing to provide work between 16th January 2018 and 23rd April 2018. The Respondent shall pay the Claimant compensation of £5,313.82.
4. Further, the Respondent has failed to provide the Claimant with written particulars of employment is ordered to pay £770.12 in accordance with s.38(3)(b) Employment Act 2002.

Reasons

Introduction

The Claimant claims arrears of pay and unpaid holiday pay, in breach of contract. The Claimant gave evidence himself via a Tribunal appointed interpreter Mr Moya. Mr Francisco Palacios, a former employee also gave evidence for the Claimant (in English). Miss Del Valle Pedros who represented the Claimant also made use of the interpretation of Mr Moya for parts of the hearing. Mr Grierson gave evidence on behalf of the Respondent. The Tribunal was referred to a bundle of Claimant's productions and a bundle of Respondent's productions. Both parties made closing submissions.

The issues in the case were;

I. Was there a contract of employment between the Claimant and Respondent,
II. What were the terms of any such contract,
III. Was there any variation of the terms of the contract,
IV. Was there a contractual agreement as to holidays in excess of statutory holidays,
V. Was there an unauthorised deduction from the claimant's wages in respect of hours worked or holidays? If so, how much?
VI. Was the claimant provided with written particulars of employment as required by section 1 of the ERA?
VII. If not, should any award be subject to an uplift and if so, how much?

Findings of Fact

The Tribunal makes the following findings of fact:

1 The Claimant was hired by the Respondent as a 'chef' and subsequently as a 'head chef' in their public house known as the 'St Vincents', having previously rejected an offer by kitchen manager Sebastian Makasewicz, to work at another venue owned by the Respondent and known as the 'Night Cap'.

Terms of the contract

2 The Claimant accepted an oral offer of work from Sebastian Makasewicz and started work on 11 August 2017 at St Vincents. The Tribunal finds that this was an offer of work on an hourly paid basis with an agreement that the usual working week would be 46 hours over 5 days per week. The Claimant was paid fortnightly. He was entitled to 28 days of annual leave in accordance with the Working Time Regulations 1998, Regulation 13(1) and 13A(2)(e).

3 The Claimant worked with Francisco Palacios to draw up a weekly rota to ensure that between them they covered the 92 hours per week that the kitchen was open. Sometimes the hours were not split evenly between them. Having agreed this rota between themselves, they would send a photo of it to Sebastian Makasewicz, who did not play any part in formulating the rota.

4 The Claimant requested his contract terms in writing via Francisco Palacios, but never received them. The Claimant was not told by anyone on behalf of the Respondent that his contract was a zero hours contract. The oral contract between the parties included the agreement that the Claimant would receive 46 hours of work per week. In reality, some weeks he worked more than 46 hours and some weeks he worked less, but on average he worked around 45 hours per week and was paid for the number of hours he worked each week.

5 The Respondent operated a clocking in and out system for all staff below managerial level. The Claimant was expected to use this system, as it was the source of reference for his payment each week. On a number of occasions, the Claimant asked the Respondent for further payment, saying that the system had

not in fact recorded the hours he had worked, as he had travelled between the two locations and could not therefore use the system appropriately. Mr Grierson made some additional payments beyond the recorded times on the clock system. Mr Palacios also said that he had issues with inaccuracies in the clocking in system. As Mr Palacios had also been required to use the clocking in system, despite the fact that he received an annual salary, the Tribunal finds that all staff below managerial level were required to clock in and out.

6 In October 2017 the Claimant was asked by Sebastian Makasewicz to work at the Night Cap, as the chef there had left. The Claimant did so temporarily. Around the end of October 2017 a pay rise was requested and it was agreed that the Claimant would be paid £9 per hour from 8th November 2017.

7 In November 2017 the Claimant was once again asked to work in the Night Cap and to train a new team of chefs. The Respondents, via Francisco Palacios, the head chef at St Vincents, offered the Claimant additional pay, extra holidays and bonuses if he would comply with the request. The Claimant accepted this offer on the grounds that he would undertake the work up to the 27th December after which he was due to go on a pre-booked holiday and that he would be allowed to take extra holiday until 15th January. The Claimant believed that Mr Palacios agreed on behalf of the Respondent that the additional holiday would be paid. Mr Palacios also understood that the Claimant would be paid for these additional days.

8 On 27th December 2017 the Claimant was informed by Chris Grierson, one of the Respondent's owners, that whilst he could still take holiday until 15th January, he would not be paid beyond his normal holiday period. The Claimant left some three hours earlier than the end of his shift, to go on holiday and was told by Chris Grierson that he would face disciplinary proceedings upon his return for doing so. No such disciplinary proceedings were started.

9 On 9th January 2017 the Claimant tried to contact the senior management of the Respondent to point out that he had not been paid appropriately and to say that he had received no notification of disciplinary proceedings. He received no reply

until 13th January when Chris Grierson asked him to explain again why he was entitled to more pay. He also told the Claimant at this point that there were '*no hours available as we're going to be closing both kitchens for the next few weeks whilst we refurbish and build a new team….. We're interviewing for a new head chef/kitchen manager from the 24th. You can see the advert on caterer.com'*.

10 The Claimant responded to this on 14th January when he enquired when he would be offered further work and pointed out that he had a contract for 46 hours per week.

11 The Claimant contacted the Respondent again on 29th January to ask when he would be required for work, but this letter was returned as uncollected.

12 Finally the Claimant sent a letter of grievance dated 5th February 2018 in which he raised a grievance to Chris Grierson about the fact that he had not been paid and not provided with work.

13 The Claimant received no response to this grievance. He therefore wrote and sent a resignation letter on 9th April 2018 giving notice to terminate his employment on 23rd April 2018.

14 The Tribunal finds that the Claimant worked from 11/8/17 to 27/12/17 which is 0.375 of the year. The Claimant being entitled to 28 days holiday per annum; he had therefore accrued 10.5 days of holiday. According to document C7, the Claimant's own diary, he had taken fifteen days of holiday from 11/8/17 to 27/12/17. At the point where he went on holiday on 27/12/17 he was in deficit to the Respondent by 4.5 days.

15 The Claimant's time off 28/12/17 to 15/1/18 was granted to the Claimant as additional holiday and therefore did not require the Claimant to work to acquire the holiday time. This amounted to twelve days of holiday (2.4 weeks).

16 The Tribunal finds that from the end of the agreed holiday period to the end of the holiday year (16/1/18 to 31/3/18) amounts to ten weeks. The Claimant would

therefore have accrued 5.3 days of holiday in that period. Having deducted the previous deficit, the Claimant would be owed 0.4 days holiday as at 31/3/18.

17 From the start of the holiday year to the date of termination (1/4/18 to 23/4/18) the Claimant would have accrued a further 1.6 days of holiday. Thus totally 2 days of holiday accrued, but untaken.

The Law

18 To establish whether there is a contract of employment between the Claimant and Respondent, the test to be applied in this case is that of *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*,

a. did the Claimant supply personal service

b. *was there a sufficient degree of control by the Respondent to consider the Claimant an employee*

c. *were there any other factors inconsistent with the Claimant being considered an employee.*

19 Further, the Tribunal must also consider the test of mutual obligation set out *Carmichael v National Power [1999] ICR 1226;* Where the parties have an obligation to provide work and an obligation to accept the work, there is likelihood of an employment relationship.

20 There are no specific requirements applicable only to zero hours contracts, save for the fact that employers are not allowed to include exclusivity clauses in such contracts. This is not applicable in this case, as no issue on exclusivity has arisen. Whether a contract amounts to a zero hours contract will be a matter for decision on the facts of the case as presented.

21 The Tribunal must look at the commercial reality of the contract in order to decide upon any express or implied terms of the contract.

Unlawful deduction

22 s.13 ERA sets out that the employee shall not have money withheld from his wages, unless there has been an agreement or by law,

13 Right not to suffer unauthorised deductions

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

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Holiday pay

23 Regulation 4 of the Working Time Regulations 1998 stipulates that the employee must be paid the pro rata value of accrued, but untaken holiday upon the termination of employment.

4.— Compensation related to entitlement to leave

(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[and regulation 13A]2 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 × B) − C where–

A is the period of leave to which the worker is entitled under [regulation 13] 1[and regulation 13A]2;

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.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise

Written particulars

24 s.1 of the Employment Rights Act 1996 (ERA) states that an employee is entitled to receive written confirmation of the particulars of his employment within two months of his start of employment. The particulars should include the hours of work and entitlement to holiday and holiday pay.

1 Statement of initial employment particulars

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and employee,

(b) the date when the employment began, and

(c) ……

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work (including any terms and

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

s.38(3) Employment Act 2002 indicates that where an employer has failed to provide s.1 written particulars, compensation can be awarded.

38 Failure to give statement of employment particulars etc

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) ……..

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 [or under section 41B or 41C of that Act],

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)],

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

Decision

26 Contract of Employment

The Tribunal is satisfied that there was a mutuality of obligation within the agreement between Claimant and Respondent to establish a contract of employment. The offer of work was on a long term, regular basis. The Claimant undertook that work personally, in return for regular payment. There was no evidence that the Claimant was allowed to decline the hours in any given week. There was no evidence of the Claimant having any other work at the same time, or any right to substitution. Equally there was no evidence of the Respondent

offering the work of chef at St Vincents to anyone else during the time the Claimant was working there. Both parties relied on the other to provide the work and to complete it. There was therefore sufficient mutuality as outlined in *Carmichael* to warrant an employment relationship.

27 The Tribunal found the Claimant to be an open and straightforward witness. He was not aware that the Respondent considered the contract between them to be a zero hours contract. Between the time he started work in August 2017 and January 2018 there had not been a time when the Claimant was not offered work over the course of a week, however the number of hours worked each week did vary, between 60 hours and 117.5 hours per fortnight.

28 The variation in hours each week arose because the Claimant and Mr Palacios arranged the rota between themselves on the understanding that they must cover 92 hours between them. This did not involve any variation by Mr Grierson or any other member of management.

Terms of the Contract

29 The Tribunal finds that the contract was in fact for 46 hours per week, subject to variation by agreement between the Claimant and the Respondent (via Mr Palacios), with the mutual expectation that the Claimant would normally work 46 hours per week. The Claimant would be paid for all the hours worked each week and hence some weeks he would be paid more than 46 hours and other weeks deductions could be made from that amount, in accordance with the hours worked.

Variation to hours worked

30 The Tribunal finds that this variable arrangement between the Claimant and the Respondent was agreed between the parties and that the Claimant was paid each week for the number of hours worked.

Paid holiday beyond Statutory entitlement

31 The Claimant's holiday entitlement was accrued at 12.07% of each hour worked.

32 The Tribunal finds that the Respondent via Mr Palacios offered the Claimant additional paid holiday, in return for agreeing to train a team of chefs at the Night Cap in December 2017. He was therefore entitled to time off and to be paid between 28th December 2017 and 15th January 2018 at the rate of 46 hours per week.

Breach of contract

33 The Tribunal further finds that on 14th January 2018 the Claimant was told that the kitchens would be closed and that there was no further work for him. He was advised he could apply for a new position. When the Claimant asked when he should return to work, he received no reply. This was a clear indication to the Claimant not merely that there were no hours currently available, but that he would no longer be considered by the Respondent to be an employee at all. This ultimately led to the Claimant resigning with notice.

34 The Claimant received no pay for the period 16th January to 23rd April 2018. There was no agreement between the parties that the Claimant would work on a zero hours contract. The failure to pay the Claimant amounted to an unlawful deduction of wages contrary to s.13 ERA.

35 The Tribunal found the evidence of Mr Grierson to be muddled and inconsistent. He told the Tribunal that the Claimant was not dismissed, but that the Respondent stopped offering him work. He also indicated that the Claimant had failed to present himself for work, but acknowledged that the message on 13th January asking when to return was sufficient for the Respondent to understand that the Claimant was offering himself for work. He then acknowledged that there was no work available as the kitchens closed on 23 January until the end of February. He also acknowledged that no work was offered to the Claimant at that time.

36 The Claimant is entitled to damages for the unlawful deduction between 16th January and 23rd April 2018. The Tribunal awards 13.8 weeks of net earnings; **£5,313.82**.

Holiday pay

37 When considering how much the Claimant's holiday pay would be, Mr Grierson indicated that he would be paid for an average week, but could not provide details of how this would be calculated. The Tribunal has therefore undertaken a calculation of the average pay of the Claimant in the 12 weeks preceding 27th December 2017. The net weekly pay is £385.06. The Tribunal finds that this is the appropriate amount for calculation of any outstanding pay.

38 The Tribunal has found as a fact that there was an agreement that the Respondent would pay the Claimant during his additional holiday. Therefore the Respondent has unlawfully deducted the Claimant holiday pay for the period 28th December 2017 to 15th January 2018 in breach of s.13 ERA.

Statutory Holiday Pay

39 The Claimant's time off 28/12/17 to 15/1/18 was agreed to be paid in addition to his statutory holiday entitlement. This amounted to twelve days of holiday (2.4 weeks). The Claimant is therefore owed **£924.14** for this period.

40 The Tribunal finds that at the date of termination the Claimant had accrued but not taken 2 days (0.4 weeks) of holiday and is therefore entitled to **£154.02.**

41 Statutory entitlement to written particulars

The Tribunal finds that the Respondent is in breach of s.1 ERA in failing to provide the Claimant with written particulars of his employment. The Claimant asked for his terms in writing but was never provided with them. In accordance with s.38(3)(b) Employment Act 2002 the Tribunal awards the equivalent of two weeks of net earnings, in the sum of **£770.12**.

Employment Judge: Cowen
Date of Judgment: 13 December 2018
Entered into the Register: 17 December 3028
And Copied to Parties