EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4120683/2018

Hearing Held at Dundee on 7 December 2018

Employment Judge: I McFatridge (sitting alone)

Mr A Panagonov	**Claimant** **In person**
Canmore Pub Company Limited	**Respondents** **Represented by:** **Mr Stewart** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is

1. The respondents' application for an extension of time for presenting the response is granted and the ET3 response submitted on 14 November 2018 is accepted although late.
2. The claimant's claim of unlawful deduction of wages succeeds. The respondents shall pay to the claimant the sum of One Thousand Pounds (£1000) in respect of wages unlawfully deducted.
3. The claimant's claim for breach of contract (failure to pay notice pay) succeeds. The respondents shall pay to the claimant the sum of Five Hundred Pounds (£500) in respect of this.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he was due a sum in respect of unpaid wages and notice pay following the termination of his employment with the respondents. No response was received during the statutory period which expired on 26 October 2018. On 14 November the respondent submitted a response and on page 7 of this he asked that it be accepted late. An Employment Judge decided that this application be neither accepted nor rejected at that stage but should be considered at the commencement of the hearing in the case which was already fixed for 7 December 2018. At the outset of the hearing I heard evidence on oath from Mr Stewart, a Director of the respondents in relation to the issue of whether or not I should accept the late response. I made factual findings based on this evidence as below.

Findings in Fact re Application for Extension of Time

2. The respondents are essentially a family company which runs the Royal Hotel in Forfar. The hotel is run by Mr Stewart, his wife and his daughter. Mr Stewart stays in the hotel some nights but also stays at his home address which is different. He changed his home address at some point in the recent past. The ET1 was sent to the registered office of the company at 15 Academy Street, Forfar. This is the address of the respondents' accountants. Mr Stewart has frankly no idea what happened to the claim form and believes that at some point it arrived in the hotel and was filed away by someone. His position was that he had come across it whilst going through papers and had thereafter responded as quickly as he could. He did not say whether his "finding" of the application was in any way prompted by the Tribunal correspondence sent to him for information on 12 November 2018.

3. With regard to his defence I questioned Mr Stewart as to the nature of this. On one reading it appeared that he considered he was not due to pay the claimant because the claimant had not been a good employee and in Mr Stewart's words 'could not even perform basic tasks such as pouring a

pint'. Mr Stewart confirmed that whilst this was his view he also accepted that this would not be a reason for not paying the claimant. He confirmed that, as mentioned in his response he did not accept that the claimant had worked the hours stated and did not accept the rate of pay agreed.

Discussion re Acceptance of Late Response

4. Rule 20 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 gives the Tribunal discretion as to whether or not to accept a response late. Although previous versions of the rules gave guidance on the matters which were to be taken into account and the relative weight to be given to them the current rules do not do this I therefore considered that I am required to exercise my discretion bearing in mind the overriding objective which is to do justice between the parties.

5. As I observed to Mr Stewart at the hearing his excuse for not presenting the response in time is particularly thin. His understanding was that the registered office of the company was in the course of being changed but it is clear that the ET3 was sent to the registered office of the company which according to the Companies House website remains 15 Academy Street. Essentially his position was that important legal documents sent to the registered office of the company were not acted upon. As I said at the time I considered this is a poor state of affairs and if it has not already done so is likely to cause the respondent considerable difficulties in his business life. I also considered that I am required to take into account the nature of the defence. Mr Stewart's position was that he disputed that the claimant had worked hours for which he was entitled to be paid and he disputed the rate of payment. He extended this to state that he was prepared to pay the claimant £400 he considered this sum was due.

6. The conclusion was that if the respondent was factually correct in his assertions then there was at least the possibility that would be partially successful in defending the claim.

7. At the end of the day what I had was a fairly weak reason for putting the response in late. On the other hand I felt that in terms of the overriding objective the interests of justice are paramount. In considering the balance of prejudice I had to take into account that if I refused to accept the ET3 then the respondents would be unable to defend the allegation against them and would end up with an order for payment of a substantial sum without having had the opportunity to put their case. On the other hand the prejudice to the claimant would be relatively slight. Both claimant and respondent were present and ready to proceed with a substantive hearing of the claim. If the claimant's claims were well-founded then all that he would suffer would be the loss of the windfall of being able to get a judgment in his favour without having to give evidence or argue any points. In those circumstances I felt that I was prepared to overlook the thinness of the reason for not submitting the form in time and decided that it would be appropriate to allow the ET3 to be received. The substantive hearing of the case then commenced. Evidence was given by the claimant on his own behalf. Mr Stewart then gave evidence on behalf of the respondents. No productions were lodged by either party but during the course of his evidence I permitted the claimant to read out the text dated 3 August 2018 in which he was dismissed from his mobile phone. On the basis of the evidence I found the following factual matters relevant to the claim to be proved or agreed.

Findings in Fact Regarding Principal Claims

8. The respondents operate the Royal Hotel as noted above. For some time Mr Stewart and his family have felt the need to have an additional senior member of staff at the hotel as a Manager. They were looking for someone who had experience in the hotel industry and would be able to take some of the pressure off the family members and also provide them with the benefit of their experience. An advert was placed and the claimant responded to this. The claimant was previously the manager of a 33 bedroom hotel at a seaside resort in Bulgaria. At the time he applied the claimant was also employed as a Relations Manager at Gleneagles Hotel, Perthshire. This is a middle management position.

9. The claimant met with Mr Stewart on two occasions in June 2018. On the first occasion there was a general discussion regarding Mr Stewart's requirements and the possibility of the claimant working as a Manager. There was no discussion at that stage regarding rates of pay or any other contractual details.

10. A second meeting took place during which some contractual details were discussed. It was agreed that the claimant would be working a five day week, usual office hours. Mr Stewart offered a salary of a certain amount and the claimant rejected the initial offer. The parties then agreed that the claimant would be paid a salary at the rate of £26,000 per annum.

11. Mr Stewart was keen for the claimant to start straight away. The claimant explained that he required to give one month's notice to Gleneagles and would not be able to start until the end of July. Mr Stewart wanted the claimant to start earlier and there was a discussion, the upshot of which was that the claimant would see if his employers were prepared to allow him away early.

12. Subsequently the claimant reported back to Mr Stewart that his employers were not prepared to dispense with his notice period but that he would come into work at the hotel on his days off. At no point was anything said during these meetings about pay. A discussion did take place about the claimant coming in to meet the staff and familiarise himself with the hotel. This conversation took place prior to the claimant confirming that his employers were not prepared to dispense with notice and that he was prepared to come in and work on his days off.

13. The claimant came into work at the hotel in early July. He worked two or three days in the first week of July and two to three days in the third week of July. He came into the hotel in the morning between 9:00 and 10:00 and left in the afternoon between 5:00 and 6:00. During this time he involved himself in working for the hotel. He met with staff and discussed various issues with

them. He discussed issues of stock control with the kitchen staff. He also discussed issues regarding fridges and record keeping with them. He spoke to customers at reception. He took a booking for a wedding and made enquiries with the local authority with a view to permitting weddings to be held at the hotel. He started negotiations with various credit card companies with a view to providing credit card facilities to the hotel at a cheaper cost. The precise days in July which the claimant worked prior to 28 July were not identifiable however I accepted that the claimant worked a total of five days in the period from 1-28 July.

14. The claimant's notice expired and he commenced work full time at the hotel on 28 July. Prior to this Mr Stewart and his family already had misgivings as to whether the claimant was the right person for the job. There was a mismatch in expectations as to what a Hotel Manager would do. Mr Stewart's expectation was that the claimant would be much more hands on and for example would become involved in serving drinks at the bar and be another pair of hands when required. He also wanted the claimant to be pro-active. He did not mention these misgivings to the claimant. The claimant worked for five days after he started working at the hotel full time. This was a full working week. At 9:37 on 3 August the respondents' Mr Stewart sent a text to the claimant thanking him for his service but advising that the respondents did not believe things were working out and dismissing him. Subsequently the claimant has sought payment of the wages which he considers he is due together with notice pay. He has not received any payment whatsoever from the respondents.

Matters Arising from the Evidence

15. There were no documents lodged by either party and it was frankly difficult to pin either party down to specific dates with any kind of precision. There was agreement between them that the claimant had come in for various days prior to his official start date at the end of July. The respondents' position was that this was 25 July the claimant thought it was 28 July. It is not necessary for me to reach a concluded view because both parties were agreed that the

claimant worked five days. There is also agreement that the claimant was thereafter dismissed by text and that he has not received any payments in respect of salary or notice pay from the respondents. Both parties were agreed that there had been a discussion between the parties in June and that the claimant had been offered the position. It was also agreed that the claimant had come in for a total of around five days in the early part of July before his start date. There was a difference between the parties as to whether there had been a second meeting in June at which salary had been discussed. The respondents' position at the hearing was that he simply could not remember salary having been discussed. He then said that he thought it had been about £20,000. When pressed on this he again said he could not remember. I considered it highly unlikely that the claimant would have started employment or that Mr Stewart would have hired the claimant without there being some agreement on salary. I found the claimant's explanation to be cogent and believable. Frankly I did not find Mr Stewart's explanation to make any sense. I therefore found as a fact that the claimant had been hired on the basis of an annual salary of £26,000.

16. Although both parties were agreed that the claimant had come in in early July it was Mr Stewart's position that the claimant had simply come in as a volunteer in order to meet the staff and familiarise himself with the business. His position was that he was absolutely clear in his own mind that there was no question of the claimant being paid for this. Mr Stewart entirely denied the claimant's suggestion that there had been a discussion about him asking his previous employers to waive the notice period or that the claimant coming in to work had been in the context of Mr Stewart having told the claimant that he would prefer it for him to start as soon as possible. The grist of Mr Stewart's claim however was that the claimant did not have the skills as a Hotel Manager which Mr Stewart had anticipated and that he had not carried out work which was of any use to the hotel. Mr Stewart's position was that he could have obtained someone at minimum wage to do the work the claimant had done while he was there both before and after his full time start date in July. His position was that the final straw had come when the claimant had reported to him that he had seen three members of the public come into

the bar and wait to get served. The claimant said that he had waited to see how long it took for the staff to notice them and serve them. Mr Stewart was horrified at this since he considered that as a Manager the claimant ought to have personally gone over to the staff and served them himself.

17. At the end of the day I preferred the claimant's evidence. It appeared to me that whilst it might have been reasonable and perhaps expected for the claimant to come in for perhaps half a day to meet the staff and look around the hotel to see what was going on and for this to be done on an unpaid basis it was a totally different thing for the claimant to come in and work full shifts for days on end. It appeared to me to be inherently much more likely that the claimant's version of events was correct.

18. Much of the time at the hearing was spent with Mr Stewart being dismissive of the claimant's skills as a Manager. It appeared to me that there was a clear mismatch between what Mr Stewart expected a manager to do and what the claimant expected the role would entail. It appeared to me that both parties were expressing their views in this regard honestly.

19. I accepted the evidence of both parties that there had been no discussion at all about notice periods.

Issues

20. The issues I required to determine was whether the claimant had suffered an unlawful deduction of wages through not having been paid any wages at all for the work he did and whether the claimant was entitled to notice and if so, given that the parties were in agreement he had not received notice, whether he was due any payment in lieu of notice.

Discussion and Decision

21. I considered that the best approach to the matter would be to decide whether or not there was a contract of employment in this case and what the rate of

pay was. Once this had been established I required to consider the period for which the claimant was entitled to be paid. The claimant would only be entitled to be paid for periods he had worked under a contract of employment. I then required to decide if what the provisions of the contract were in respect of notice and whether the claimant was entitled to a payment in lieu of notice.

22. The parties did not enter into a written contract in this case and the evidence of the parties in relation to the discussions which they had were contradictory. As noted above I accepted the claimant's evidence that salary was discussed and it was agreed that the claimant would be paid at an annual salary of £26,000. This equates to a weekly gross pay of £500 per week.

23. There is no dispute between the parties that the claimant worked for one week immediately prior to his dismissal. Mr Stewart's position was that the claimant was not a satisfactory employee during that week but it appears to me to be absolutely clear that the claimant was working under the contract for that week and is entitled to be paid £500 for that week. With regard to the period of time when the claimant was coming in on his days off in the first few weeks of July I accepted that the claimant came in for a total of one week. The key question was whether he was working under the contract of employment in that week or whether he was, as the respondents suggested, simply coming in to familiarise himself with the hotel. I accept there was no express agreement between the parties that the claimant would be paid for those days he came in. The question is whether in the circumstances and context in which the claimant came in to the hotel for those days there was an implied term that he would be paid.

24. It is usual for an employment contract to be made up of both express and implied terms. It is recognised in law that it is unusual for the parties to a contract of employment to specify all the terms of that contract when it is made. Implied terms form a binding part of the contract and are those which the parties are taken to have agreed by virtue of the circumstances in which the contract has been made and performed. The question of whether or not a term is implied is not a question of looking at the issue of whether or not

that term would be reasonable. It can only be implied if the Tribunal satisfied that it would have been the intention of the parties to include it in the agreement. Traditionally when the higher courts have looked at the matter they have indicated that generally the Tribunal must be satisfied that either the term is necessary in order to give the contract business efficacy or that it is normal custom and practice to include such a term in contracts of that particular kind, that an intention to include the term is demonstrated by the way in which the contract has been performed or the term is so obvious that the parties must have intended it.

25. In this case it is clear to me that when the claimant came in to the hotel he was doing more than simply familiarising himself with the way the hotel operated and the staff. He was doing work. Mr Stewart's position was that the claimant was coming in as a volunteer. The claimant's position was that he was coming in as an employee expecting to be paid. It appears to me that the appropriate question for me to ask myself is that if the parties had addressed their mind to the issue prior to the claimant coming in based on their knowledge of the agreement would there have been an expectation that the claimant be paid. My view is that given the context it is much more likely that a term should be implied to the effect that the claimant would be paid for this time rather than that the claimant was coming in as an unpaid volunteer to work a week's worth of shifts. It would have been open to the parties to expressly agree this but they did not. Given that there was no discussion on the matter it appears to me that a term should be implied to the effect that the claimant would be paid for any shifts he worked prior to his official full time start date. I consider that this would be the case both in the interests of efficacy and also on the basis that it is something which would generally have been normal custom and practice. Matters might have been different if it had been a question of the claimant coming in for a few hours but to come in for a full week and to do work of the type which the claimant did do is far beyond this. Accordingly it is my view that when the claimant was working in early July he was working under the contract of employment and is entitled to be paid for this. He is entitled to be paid for this week in addition to the week he worked full time after his 'official' start date

26. I therefore accepted the claimant's evidence that he worked a total of two weeks and he is entitled to be paid two weeks' wages amounting to £1000.

Notice Pay

27. With regard to notice pay I find that there was no express term in the contract relating to this. It is also clear that the claimant was not entitled to any of the minimum periods of notice as set out in Section 6 of the Employment Rights Act since he did not have 28 days' continuous service. The question I require to consider is whether it was an implied term of the contract that the claimant receive one week's notice. The background circumstances are that the claimant was being employed as a Manager on a salary. He was giving up a job where he was required to give one month's notice. The parties did not address the issue. No doubt both parties at that stage were optimistic and hopeful that the employment relationship would be long and successful. If they had addressed the issue there is no doubt in my mind that in the interests of business efficacy they would have agreed that a short period of notice would be appropriate. I considered that this term can also be implied on the basis of being normal in this type of situation. I specifically asked Mr Stewart whether there had been any discussion that the claimant was on a trial period and Mr Stewart flatly denied that such a discussion had taken place. In all the circumstances I consider that looking at the background the existence of an implied term that the claimant, a professional manager would not have agreed to be summarily dismissed without notice is a reasonable assumption for me to make. The claimant is seeking one week's notice. I consider that is reasonable. The parties were agreed that the claimant was dismissed by text message and received no notice whatsoever. I consider he is entitled to pay in lieu of notice of one week's pay amounting to £500.

28. The total amount payable by the respondents to the claimant is £1500. The respondents shall be entitled to deduct from this any payments they are required to make to the public authorities in respect of National Insurance and PAYE and the claimant shall accept such a sum under those deductions in

settlement of the sums due under this judgment but only in the following circumstances:-

1. At the time of payment the respondents provide the claimant with a written calculation of the amounts which they have so deducted.
2. The amounts so deducted are immediately paid to the revenue authorities.
3. The respondents provide the claimant with a written receipt or other proof of payment of the amount deducted to the revenue and that no later than seven days after the date on which the payment is made to the claimant. For the avoidance of doubt if payment is not made to the claimant within the statutory period and the claimant requires to do diligence in order to extract payment the claimant shall be entitled to do diligence in the full amount of this judgment as set out above. It shall then be for the claimant to account to the revenue for any tax and national insurance which is due.

Employment Judge: **Ian McFatridge**
Date of Judgment: **27 December 2018**
Entered in register: and copied to parties **27 December 2018**