EMPLOYMENT TRIBUNALS

Claimant: Luke Taylor

Respondent: Mr Kevin Sussmilch t/a the Hambrough Hotel

Heard at: Southampton **On:** 8 November and 21 December 2018

Before: Employment Judge Jones QC

Representation:

Claimant: In person
Respondent: Mr Barnes, Counsel

JUDGMENT

1. The Claimant was employed by the Respondent.

2. The Claimant's claims for unlawful deduction in respect of:

   (a) His salary for February 2018; and
   (b) Pay in respect of accrued but untaken holiday;

   succeed.

3. The Claimant's other claims fail and are dismissed.

4. The Respondent shall pay to the Claimant the sum of £2,159.82

REASONS

The Claim and Issues

1. The Claimant, who was not legally represented, did not have a clear idea of precisely how his claim was put. No formal list of issues had been agreed between the parties. It was possible, however, to identify the claims and issues with a sufficient degree of confidence from looking at the Claimant's form ET1. In summary:

    (1) The Claimant says that he was employed by the Respondent as Head Chef of the restaurant at the Hambrough Hotel. The Respondent denies that the Claimant was an employee. The Respondent says that the Claimant was a partner in a business that ran the restaurant. There is an issue, therefore, over his employment status; if the Claimant is right, and he was an employee, other issues arise;

    (2) The Claimant says he gave one month's notice of termination of employment on 28 February 2018. Both parties agree that that was his last day of working. The Claimant says his employment terminated on 28 March 2018 on expiry of his notice. The Respondent says that, if the Claimant was employed, his effective date of termination was 28 February 2018. There is an issue, therefore as to when the Claimant's employment terminated; and

    (3) The parties are agreed that the Claimant did not receive:

        (a) Any pay for work done in February 2018. The Respondent "set off" against the sum that might otherwise have been paid monies that it says it was owed in respect of loans, the cost of certain kitchen equipment purchased for the Restaurant and the cost of certain marketing deals entered into to promote the Restaurant. The Tribunal has to determine whether, in the circumstances, the Respondent made unlawful deductions from the Claimant's wages;

        (b) Any pay in respect of the period from 28 February 2018 to 28 March 2018. The Respondent says that the Claimant did not work during that period and was not entitled to any payment. The Tribunal has to determine whether the failure to make any payment represents and unlawful deduction from the Claimant's wages or, alternatively, amounts to a breach of contract; and

        (c) Any payment in respect of accrued but untaken holiday. The Tribunal has, again, to determine whether or not that constituted an unlawful deduction from the Claimant's wages.

The Law

(a) Employment Status

2. In order to bring a claim of unlawful deduction from wages the Claimant must be an "employee" or "worker". The Respondent contends that he can be neither if he was in partnership with the Respondent. That, it is said, is the effect of **Cowell v Quilter Goodison Co Ltd** [1998] IRLR 392 CA. That case was concerned with whether an equity partner could be an employee within the definition contained in **Regulation 2(1)** of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**. The Court of Appeal concluded that he could not, because, as a partner, he was could not be said to be an "individual who works for another person under a contract of service". The difficulty has been understood to be that you cannot employ yourself. Nor, it is reasoned, can you be employed by yourself and others (see Per Rimer LJ at Para 31 in **Tiffin v Lester Aldridge LLP** [2012] EWCA Civ 35).

3. The Court of Appeal in **Bates van Winkelhof v Clyde & Co** [2012] EWCA Civ 1207 decided, obiter, that the same must be true of workers. However, that case concerned members of an LLP. There is specific legislative provision concerning those who work for LLPs. The Supreme Court ([2014] UKSC 32) took the view that **s. 4(4)** of the **Limited Liability Partnerships Act 2000** allowed a member to establish that they were a "worker" within **Employment Rights Act 1996, s. 230(3)(b)** even if they could not establish that they would have been a worker had they been a partner in what one might call an "ordinary" partnership (that is one governed by the **Partnership Act 1890**). The Supreme Court's decision therefore overturns the Court of Appeal's finding but without specifically considering whether a partner in an ordinary partnership can be a worker. At Paragraph 29 of her judgment, Lady Hale says:

> "This means that there is no need to consider the subsidiary but important questions which would arise had s 4(4) borne the meaning for which Clyde & Co contend: (i) is it indeed the law, as held by the Court of Appeal in Cowell and Tiffin that a partner can never be an employee of the partnership; and (ii) if so, does the same reasoning which leads to that conclusion also lead to the conclusion that a partner can never be a 'worker' for the partnership? Suffice it to say that Mr John Machell QC, for the interveners, Public Concern at Work, mounted a serious challenge to the rule against dual status. Ellis was decided before s 82 of the Law of Property Act 1925 made it clear that a person could contract with himself and others. There are some contracts which a partner may make with the members of the partnership, such as lending them money or granting them a lease or a tenancy. So why should it be legally impossible to be employed, under either type of contract, by the partnership? This question raises two subsidiary questions: (a) whether such a relationship can arise from the terms of the partnership agreement itself (as apparently suggested by Lord Clarke at para [52] of his judgment), or (b) whether it can only arise by virtue of a separate contract between the partner and the partnership (a possibility kept open by Elias LJ in the Court of Appeal, see para [13], above). As it is not necessary for us to resolve any of these issues in order

> to decide this case, I express no opinion upon a question which is clearly of some complexity and difficulty."

That complex and difficult question may now arise in the present case. If it does (a matter to which I return in the discussion below) I am without any assistance by way of submission from either party.

4. The test of whether a partnership exists is whether the parties, by their actions, intended to create a partnership (see **M Young Legal Associates Ltd v Zahid Solicitors (a firm)** [2006] EWCA Civ 613). Mr Barnes, for the Respondent, confirmed that I should, applying **Autoclenz Limited v Belcher** [2011] UKSC 41, seek to identify what was the true agreement between the parties. That will involve looking at all relevant factors including, for instance, how and what the Claimant was paid. The fact that someone's income comes in the form of a salary rather than a direct share of profits does not prevent them being a partner (**Stekel v Ellice** [1973] 1 WLR 191 ChD) but, conversely, receipt of a profit share is not necessarily inconsistent with the recipient being an employee (**Williamson and Soden Solicitors v Briars** EAT 0611/10).

(b) Date of Termination

5. If the Claimant is an employee, the next issue to determine will be the date on which the contract of employment terminated between the Claimant and Respondent came to an end is a question of fact. It is relevant for two principal purposes:

(1) Determining the entitlement to paid annual leave that had accrued by the date of termination; and
(2) Determining whether the Claimant was entitled to receive any pay in respect of March 2018.

The date will also, however, need to be determined for the purposes of his wrongful dismissal claim.

(c) Unlawful Deductions

6. If the Claimant was a worker or employee, he had a right (conferred by **ERA 1996, s. 13(1)**) not to suffer:

> "a deduction from wages … unless –
>
> (a) the deduction [was] required or authorised to be made by virtue of a statutory provision or 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."

7. **Section 13(2)** provides:

> "In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract, comprised –
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect of which in relation to the worker the employer has notified to the worker in writing on such an occasion."

In the present case, there is no suggestion that the Claimant had written terms of employment, nor that the requirement in **S. 13(2)(b)** was satisfied.

8. A worker who has suffered an unauthorised deduction may bring a complaint to a tribunal pursuant to **Section 23**. If the Tribunal upholds the complaint, it makes a declaration that there has been an unlawful deduction (see **Section 24(1)**) and can make an order that the employer should pay the Claimant the amount of any deduction and any additional amount as it considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

9. **Section 25(4)** provides:

> "Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of a particular deduction or payment falling within section 23(1)(a) to (d), the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount."

In other words, even if the employer has a legal entitlement to a sum, if he unlawfully deducts and is made to pay back the money deducted, he loses his ability to recover that money by any other route.

(d) **Paid Annual Leave entitlement**

10. The Respondent accepts that, if the Claimant was an employee (or, indeed, a worker) he has a statutory entitlement to paid annual and additional leave pursuant to **Working Time Regulations 1998**, **Regs 13** and **13A** respectively and, further, that there would be an entitlement to be paid compensation in respect of accrued but untaken leave at the termination of any such employment pursuant to **Reg 14**. A claim for compensation can be pursued under the Regulations but may also be brought as an unlawful deductions claim (see **Stringer v HMRC** [2009] UKHL 31).

(e) **Wrongful Dismissal**

11. In order to bring a claim for wrongful dismissal, the Claimant must have resigned in response to a repudiatory breach of contract committed by the Respondent. Compensation is limited to the net value of pay and other benefits that he would have received (or which would have accrued) during his period of notice. Since there is no written contract in this case, if he is an employee, the Claimant will be entitled to a reasonable period of notice. **Employment Rights 1996, s. 86** provides that employees with less than two years' service are entitled to not less than one week's notice.

Evidence and Findings of Fact

10. The Hambrough Hotel ("the Hotel") overlooks the sea in Ventnor on the Isle of Wight. It is owned by Mr Kevin Sussmilch. He operates the Hotel business as a sole trader and is, therefore, the Respondent. "The Hambrough Hotel" is his trading name. The Hotel has a restaurant on the premises.

11. The Claimant was only 16 when he first worked for Mr Sussmilch. He worked in the Hotel kitchen under a Head Chef called Darren Beavers. The relationship between Mr Sussmilch and Mr Beavers subsequently broke down. Mr Beavers and his team left and Mr Sussmilch closed the Hotel's restaurant.

12. The Claimant spent some time working in restaurants in London, honing his skills. In or about July 2017, having returned to the Isle of Wight, the Claimant discussed with Mr Sussmilch re-opening the restaurant. According to the evidence of Mr Sussmilch and the Respondent's Finance Manager, Ms Barbara Stubbs, the Claimant's persistence overcame Mr Sussmilch's initial opposition to the proposal.

13. On the Claimant's case, the nature of the agreement reached was that he was to be employed as the new "Head Chef". Before the restaurant was re-opened he worked informally assisting with the preparation of breakfasts for guests at the hotel. HE accepted that 4 August 2017 was "probably" his formal start date. After the restaurant was re-opened, he was Head Chef at dinner but continued to be work shifts preparing breakfast. In return he received, initially, a gross salary of £18,000. That was increased subsequently increased to £20,000 and there had been, he says, agreement for it to be increased further still, to £26,000 with effect from February 2018. The Respondent denies that there was any agreement for a further increase. There is nothing to independently corroborate it and, in the circumstances, I have concluded that the Claimant's salary remained at £20,000 for the last month of his employment. In his witness statement he talks about being a entitled to a 20% profit share. An entitlement to a share of profits can, of course, be indicative of a partnership arrangement. He says he never received a profit share. The Respondent accepts that but points out that there were no profits to share.

14. The Claimant says that a number of evidential factors point towards his being an employee:

(1) the Claimant produced a tenancy application form dated 5 October 2017. The form has a number of different options for "Employment/Occupation Details". The box identifying him as "employed" has been ticked. The box identifying him as self-employed has not been ticked. A period of 2 years 3 months is given for his length of employment. That figure has been reached, it would appear by aggregating the time he formerly worked at the Hotel (when he was, undoubtedly, an employee) with his time as Head Chef;

(2) it is not in dispute that the Claimant was paid through the Respondent's payroll. The money came from the Hotel's bank account. It was, it appears, the Respondent's money.

(3) the Hotel staff prepared payslips (though, it appears never gave them to the Claimant). The payslips are headed "the Hambrough Hotel". Tax and National Insurance was deducted from the sums paid. The net sums seem to have been paid into the Claimant's bank account in parcels which added up over the course of a month to a twelfth of what he says was his salary.

(4) the Respondent contributed to a pension.

(5) the Claimant did work for the Hotel business when he worked a breakfast shift. The income was treated in the Hotel's accounts as its income and not the income of the restaurant. Income generated by food and wine sales in the evenings was, by contrast, recorded as restaurant income, but in practice the costs were borne by the Hotel Business (monies in the Hotel account paid for the food; wine; employment costs; kitchen equipment; heating; lighting, cleaning, etc.) and the income went into the Hotel's bank account.

(6) when, at the end of his time in the Hotel restaurant, the Claimant gave notice that he was leaving, he says that he asked the General Manager, Danielle Anderson (who submitted a statement but did not attend to give evidence – and therefore, upon whose evidence I can put very little weight) to calculate, amongst other things, the holiday pay that was due to him. She did so. The calculation supposedly took account of the fact that he had had some paid holiday already (7 working days, taken in January 2018). An entitlement to paid holiday is relied upon as being an indicator of employment status.

15. The Respondent says that the evidential factors identified above are misleading. The nature of the arrangement was that Mr Sussmilch and the Claimant were partners is a new business. That business was discrete from the Respondent's business. It is accepted that there is no document of any kind recording the existence of, let alone the terms of that partnership. He says that the proposed partnership was set out orally and Ms Stubbs gave evidence to similar effect. Mr Barnes says that the Claimant is stuck with that evidence as it was his obligation specifically to challenge it in cross-examination and he did not do so. That was not a submission I felt that carried decisive weight in the particular circumstances. The Claimant was not legally represented. He

had the assistance of a friend. That friend was not legally qualified. The way in which his case was advanced is reflected at box 15 of his Form ET1. He challenged the assertion that he was a partner by pointing to evidence which he said made it clear that he was instead an employee. That was the line taken in cross-examination and it is necessarily implicit in that case that he was not a partner. His witness statement gave an account of discussions which did not suggest that there was any express agreement that he should e a partner. When the Respondent's account of the meeting was put to him, he again denied that there had been any such agreement. His case was, I conclude, fairly put.

16. As to the "salary", Mr Sussmilch says that he appreciated their new venture needed time to get up on its feet. At the start, costs would necessarily exceed income and the Claimant would not be able to survive without income until the profits were generated. There was an agreement, recorded nowhere, that sums would be paid as advances against future profit share with the intention that they should be paid back later. In that respect the obligation to repay was treated less formally than the occasional advances made to the Claimant from the Respondent's petty cash. In the latter case there was at least a voucher filled in. Those sums were, I was told, to be set off against the advance payments of profit share. This made little sense for two reasons. The first was that the petty cash was the Hotel business's money and not the new venture's. The second was that it amounted, on Mr Sussmilch's evidence, to setting a debt (the advance from petty cash) off against another debt (the advances against future profits). If both were debts, the sums should have been aggregated and not netted off. It is perhaps significant that when presenting a document that purported to explain why the Claimant had received no payment in respect of February 2018, the sum of £1,397.10 is shown as "payment due" and not an advance or loan. Indeed, immediately below that in the document is the sub-heading "Loans/Marketing Deals/Chefs Items and Equipment Purchased" which again suggests that the sums paid to the Claimant monthly were not viewed as loans by the Respondent.

17. Mr Sussmilch accepted that the Claimant had been held out as an employee on the tenancy application form but did not accept that the description was accurate. He accepted that the Claimant had been on the Respondent's payroll. He accepted that the money to fund the regular payments came from the Hotel's funds. He accepted that expenditure relating to the restaurant came from and income was paid in to the Hotel's bank account. He accepted that contributions were made to a pension and that tax and national insurance was deducted, but alleged (through his counsel) that the Claimant had been "put on the books" as a "temporary measure". He accepted that internal accounts showed that the Claimant was being paid to work breakfast shifts at the hotel, but asked me to disregard those records as inaccurate. When doing breakfasts, Mr Sussmilch said, the Claimant had been volunteering. The pay recorded in the accounts as being paid to him for working the breakfast shift, he said, was notional and the references in the accounts were designed to shift costs from the Restaurant so as to make its financial position appear rosier than it was. That was done, he said, so as not to discourage the Claimant. I could not understand how there could be any costs-shifting occurring since the costs associated with breakfast were

properly costs associated with the Hotel business run by the Respondent. If, as Mr Sussmilch suggested, the Claimant was volunteering on his breakfast shifts he would have known that he was not being paid and there would be no reason to misrepresent the situation in the internal figures. I did not, therefore, find Mr Sussmilch's evidence on this point convincing.

18. Ultimately, Mr Sussmilch's answer to any evidential difficulty was to stress that he had not wanted to re-open the restaurant; that he had been talked into it; that he had only been willing to do it on a partnership basis and that that was what had been specifically agreed. As to how and by whom the Claimant was paid; or the intricacies of how costs were paid and where income went, that could all have been "sorted out" at the end of the year before accounts were submitted, but they had never reached that point because the Claimant had left and it had become academic.

19. The facts of the termination of the relationship are as hotly contested as those of its creation. The parties are agreed that the Claimant purported to give a month's notice in writing. They are also agreed that he did not work his notice. The Claimant says that is because the locks were changed and he was not able to attend work. The Respondent says that the Claimant simply stopped turning up for work and that the locks were not changed. There is very little by way of corroboration available for either account. In favour of the Claimant's account, it might be said that he would be unlikely to give notice unless he intended to work it and Mrs Stubbs's evidence confirms that the notice expressed an intention to work the month. In his evidence to the Tribunal, the Claimant stressed that he was trying, as it were, to do the decent thing. However, evidence from Ms Anderson on behalf of the Respondent suggested that the Claimant had asked that items of kitchen equipment should wrapped in cling film with a view to his removing them, which would be difficult to reconcile with his intending to continue working. She also talks of his having a confrontation with a colleague called Martin and of his then walking out. Ms Anderson did not attend the Tribunal hearing and her evidence was not tested in cross-examination. In the circumstances, I have been careful not to place too much weight on the evidence. If there was a concern that the Claimant might be intending to remove equipment that would make it more likely that the Respondent would wish to allow him access to the premises. I am left, therefore, with contradictory evidence and little substantial corroboration. Whilst, as I explain below, I have preferred the Claimant's evidence in relation to whether it was agreed that he should be a partner, I do not think it is appropriate to work on the assumption that if a party's evidence is to be preferred on one issue it is to be automatically preferred on all issues. That leaves me, unusually, in having to determine the issue on the basis of the burden of proof.

20. Certain elements of his claims require him to show that he remained in employment beyond 28 February 2018. Specifically, I have in mind his claims for unlawful deduction in respect of his salary and holiday pay to which he alleges he became entitled as a result of working during March 2018. He has the burden of establishing that his employment did not terminate on 28 February 2018. He has not, I find, discharged that burden. He did no work after that date and he has not been able to establish on

a balance of probabilities that that was because he was prevented from doing so by the Respondent.

21. The alternative claim of wrongful dismissal raises a different issue. The Claimant will have to show not that his employment continued but that it ended as a result of his having accepted a repudiatory breach on the Respondent's part. Certainly, excluding the Claimant from the workplace would potentially amount to a repudiation, but it falls to the Claimant to establish that the repudiation occurred. Given the contested nature of the testimony and the lack of meaningful corroboration, I am unable to conclude on a balance of probabilities that any such exclusion occurred.

22. In the circumstances, I conclude that the Claimant's employment terminated on 28 February 2018.

Conclusions

(1) Was the Claimant an employee?

23. The Claimant was an employee within the meaning of **Employment Rights Act 1996**. I reach that conclusion for the following reasons:

(1) I did not accept the evidence of Mr Sussmilch and Ms Stubbs that it was made clear at a meeting that the relationship was to be one in which Mr Sussmilch and the Claimant were to be partners. It may have been how Mr Sussmilch saw the relationship developing but I do not accept that an agreement was reached on that basis. I have concluded that Mr Sussmilch's approach was to engage the Claimant to work for him in the first instance, with a view to reviewing the structure of the business after a period of operation;

(2) I rejected Mr Sussmilch and Ms Stubb's evidence because:

(a) There was a complete absence of any documentation referring to, let alone recording, the nature and terms of the supposed partnership. It seemed to me to be highly unlikely that a businessman of Mr Sussmilch's experience (both generally and specifically, given his previous unhappy experience with the restaurant) would have failed to have made at least some record of the arrangement and exceptionally unlikely that it would not have been at least referred to in some form in a document thereafter, whether in communications within the hotel, with the Claimant himself, with external advisers, or within the accounts;

(b) Such reference as is made in documents to the Claimant's status is either only consistent with the Claimant being an employee (e.g. the tenancy application form); suggestive of an employment relationship (e.g. the payslips); or at least consistent with an employment

relationship (e.g. the fact that the Claimant and his pay appears in the internal accounts in a manner which is indistinguishable from colleagues who are accepted to have been employees);

(c) The sums paid to the Claimant were paid using money from the hotel business; via the hotel business and treated from a tax perspective as being salary. Pension contributions were made and he was treated as having been entitled to paid holiday. There is nothing about what he was paid, when or how he was paid or how those sums were recorded that and accounted for that suggests that what he was receiving was a loan. It is, I consider, exceptionally unlikely that the small loans from petty cash would have more carefully recorded than a regular series of much more significant payments;

(d) He worked alongside employees and was included in the same way as they were on the same sets of rosters; and

(e) I found the Claimant's oral evidence as to his own understanding to be clear and convincing.

No one factor was decisive and no one factor was essential. The decision that I have reached is as a result of considering the factors in the round.

(2) On what date did his employment end?

24. The Claimant's employment ended on 28 February 2018.

(3) Was there an unlawful deduction in respect of his February 2018 pay?

25. There was an unlawful deduction. The Claimant should have received his monthly salary for February which is £1,666.67.

(4) Was there an unlawful deduction in respect of this March 2018 pay?

26. There was no unlawful deduction. His employment terminated at the end of February 2018.

(5) Was the failure to pay him in respect of March 2018 a breach of contract?

27. It was not. His employment terminated at the end of February 2018 but without a wrongful dismissal.

(6) Was there an unlawful deduction in respect of accrued holiday pay?

28. There was, in respect of holiday accrued but untaken at February 2018. The Claimant had been in employment for 208 days at the date of the termination of his employment. That suggests that he had, by 28 February 2018, 16 days leave

entitlement of which he had taken 7. That leaves a balance of 9 days. His pay entitlement was £493.15 and that represents the sum unlawfully deducted.

29. The total sum due to the Claimant is £2,159.82.

Employment Judge Jones QC

20 January 2019