EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102136/17

Held in Glasgow on 12 & 13 February 2018

Employment Judge: Robert Gall

Mr Mahrez Oubacha	**Claimant** **In Person**
1. Serkan Aydin And Hakan Dumen	**1st Respondents** **Represented by:** **Ms J Barnett -** **Employment Consultant**
2. Serbajar Ltd	**2nd Respondents** **Represented by:** **Ms J Barnett -** **Employment Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) The second respondents are ordered to pay to the claimant the sum of £300 (Three Hundred Pounds) representing monies in respect of breach of contract, failure to pay notice pay.

E.T. Z4 (WR)

(2) The second respondents are ordered to pay to the claimant the sum of £2,500 (Two Thousand, Five Hundred Pounds) representing 25 days holiday accrued but untaken at time of termination of the contract of employment of the claimant or holidays taken during employment but unpaid.

(3) The second respondents are ordered to pay to the claimant the sum of £200 (Two Hundred Pounds) representing 2 weeks` pay, this being awarded in circumstances where there was a failure by the second respondents to give to the claimant a statement of employment particulars, the sum awarded in terms of Section 38 of the Employment Act 2002.

REASONS

1. This case called for Hearing on Monday 12 February 2018. It proceeded that day and the subsequent day.

2. Evidence was heard from the following parties:-

- The claimant
- Sidahmed Naimi, former colleague of the claimant
- Mohammed Djebarri, former colleague of the claimant
- Serkan Aydin, Director of Serbajar Ltd

3. A bundle of productions was lodged. The claimant added to that bundle both on 12 and 13 February 2018, documents being lodged of consent.

4. The claim had been brought against Mr Aydin and Mr Dumen. Form ET3 had been submitted by those parties stating that the true employer of the claimant was a limited company, Serbajar Ltd. That company was added as the second respondent in the claim.

5. No form ET3 was submitted by Serbajar Ltd. The solicitor for the respondents Mr Aydin and Mr Dumen confirmed, however, that she acted on behalf of Serbajar Ltd.

6. This point was clarified at the outset of the Hearing. It was agreed that form ET3 set out the position for both the individuals and the limited company. There was no objection to that form being taken as having been submitted on behalf of both of the individuals and also on behalf of Serbajar Ltd.

7. The claimant confirmed at the outset of the Hearing that in his view the individuals were his employer. This was as he had dealt with them as individuals.

Preliminary Matters

8. At the outset of the Hearing I referred to the fact that the claim extended to one of unfair dismissal. The claimant, however, did not have two year`s service. He had just under one year of service.

9. I explained to the claimant that two years' qualifying service was required before a claim of unfair dismissal could be advanced, unless the ground of dismissal was said to be one of a limited number of grounds in relation to which no qualifying service was required. After airing those with the claimant, he confirmed that none of those grounds applied. He therefore accepted that

with less than two years' service his claim of unfair dismissal could not proceed.

10. The respondents accepted at this point that if there was any payment due to the claimant in respect of notice, 3 days payment was due. They argued, however, that the contract of employment was an illegal contract and therefore could not be enforced. That, they said, meant that the claim before the Employment Tribunal could not proceed.

Amendment of Response

11. The response form referred to the claimant having received an advance of funds and sought to offset that advance if any sum was awarded to the claimant.

12. At the outset of the Hearing however Ms Barnett confirmed for the respondents that they did not seek to deduct anything from any award which might be made by the Tribunal, on the basis that there was no written contract of employment or written authorisation enabling any such deduction. Ms Barnett also sought to delete the terms of paragraph 4 of the response. She sought to substitute an alternative paragraph 4.

13. The original paragraph, now deleted, read:-

> "*the Employer has calculated the Claimant`s holiday entitlement as being 73.5 hours which amounts to holiday pay of £529.20. The Claimant has received advance on his earning of £200 and therefore the balance of holiday entitlement due to the Claimant is £329.20 which the Employer is prepared to pay. Calculation of holiday entitlement attached."*

14. The replacement paragraph proposed by way of amendment read:-

> "*The respondents made payment of £400 to the claimant via his colleague Mr Sidahmed and this amount was holiday pay entitlement and should be considered by the Tribunal as having been paid towards holiday pay if any sum by way of holiday pay is found due to the claimant."*

15. The amendment was allowed without opposition.

16. It had been anticipated by the claimant that he would lead one witness beyond those who gave evidence on his behalf. That witness was Dainius Karalius. Mr Karalius required a Russian interpreter if he was to give evidence.

17. At the end of the first day of the Hearing, the claimant`s case had been completed apart from potential evidence from Mr Karalius. A Russian interpreter had not at that point been arranged. The question of whether anything was to be added by way of evidence by hearing Mr Karalius was explored with the claimant. He said that Mr Karalius would be speaking to the fact that Mr Karalius had a claim for holiday pay and had not been paid any holiday pay. Similar evidence had been taken from Mr Sidahmed and Mr Djebarri.

18. It seemed to me that if this was the extent of the evidence anticipated from Mr Karalius, hearing from him would not add to the information before the Tribunal. The claimant considered the position and agreed that he would not have Mr Karalius present at Tribunal to give evidence on 13 February 2018.

Facts

19. The following were found to be the relevant and essential facts as admitted or proved.

20. The business which trades as Roma Restaurant at 46 Bath Street, Glasgow is owned and operated through a limited company, Serbajar Ltd. One of the Directors of the limited company is Serkan Aydin. It may be that Hakan Dumen is a further Director of the company.

21. The trading entity and employer of the claimant was Serbajar Ltd rather than either of the two individuals, Mr Aydin and Mr Dumen or a combination of them. Reference in this Judgment to the employer and to the respondents are references to Serbajar Ltd.

22. The respondents were looking for a new Head Chef for their premises in Bath Street, Glasgow in May 2016. An employee in one of the other premises operated by them recommended the claimant to them.

23. The claimant attended the respondents premises in May 2016. He met Mr Dumen. They discussed the position.

24. It was agreed that the claimant would work between 4.5 and 5 days each week. It was further agreed that he would be paid £100 per day after tax. No contract of employment or statement of employment particulars was issued to the claimant. Nothing was confirmed in writing. He started with the respondents on 30 May 2016.

25. The claimant was paid cash in hand on Fridays of each week. Other staff were also paid cash in hand on Fridays of each week. The claimant received the rate of £100 for each day he worked or a proportion thereof, so that if he worked, for example, for 4.5 days in a week he received £450 for that week`s work.

26. The claimant worked with the respondents until 3 May 2017. He was at that point dismissed. He received 2 days` pay in lieu of notice, leaving a balance due to him of 3 days` pay. He has not been paid that amount. The sum of £300 is due to be paid by the respondents to the claimant in payment of the balance of notice.

27. The respondents in dealing with HMRC in relation to the claimant proceeded on the basis that the claimant worked for them 16 hours per week. They calculated tax to be deducted in making any payment to the claimant on the basis of the claimant working for them during those 16 hours per week. They prepared wage slips showing the claimant as working 64 hours over a 4 weekly period. The claimant was not however given these wages slips.

28. As far as the claimant was concerned he received payment at the agreed rate of £100 per day in his hand, being paid weekly for the days which he had worked in that week. The claimant assumed that tax was being paid by his employer, the respondents, on his behalf. That had been the situation he experienced in previous employment with different employers.

29. It was only around April 2017 that the claimant saw wage slips which the respondents produced. At that point the claimant was approached by Mr Aydin. Mr Aydin queried with the claimant whether there was a reason for his tax code having changed. He gave the claimant the document which appeared at page 33 of the bundle. That contained 3 payslips. One showed the tax code for the claimant as being "*BR*". That is believed to denote basic rate. The other two payslips showed the tax code as being "*OT/1*".

30. Mr Aydin said to the claimant at this time that the claimant was due to pay an additional amount of PAYE of £92 in respect of each period covered by the payslips, a total of £276. He wrote that calculation on the document which appeared at page 33.

31. The claimant`s concern and focus during his employment was as to what he received in his hand. He did not consider or investigate what deductions had been made in respect of tax, national insurance or what calculations the respondents carried out in that regard. His view was that deductions from his salary in respect of tax were not his concern.

32. Other staff members similarly did not receive regular payslips. Other members of staff were also shown in their payslips and as far as HMRC were concerned as working 16 hours per week whereas in fact they worked many more hours than that per week.

33. There was therefore in respect of the claimant and other employees inaccurate reporting by the respondents to HMRC of hours worked and tax and national insurance properly payable. There was underpayment by the respondents to HMRC of tax and national insurance properly due in respect of the earnings of the claimant and of other employees.

34. The claimant did not initiate any such underpayment or inaccurate reporting to HMRC. He was unaware of the details in respect of his employment being supplied by the respondents to HMRC.

Termination of Employment

35. The claimant`s employment with the respondents ended when he was informed on 1 May 2017 that this was so. He was due to be given one week`s notice of termination of his employment. He was informed by the respondents that his employment would terminate on 8 May 2017. He worked on 2 and 3 May 2017. He received payment in respect of those working days. He did not work for the respondents after 3 May 2017. He did not receive any payment in lieu of notice in respect of the 3 remaining working days of notice.

He is therefore due the sum of £300 which falls to be paid to him by the respondents.

Holidays

36. During the claimant`s employment with the respondents any holiday which he took was unpaid. Other employees who worked for the respondents were also in at least some instances unpaid in respect of holiday time taken by them.

37. The claimant was entitled to 25 days of annual leave in respect of his year of service with the respondents. That is the amount calculated on the basis of the reality of the claimant working a full working week each week for the respondents.

38. At time of termination of the claimant`s employment with the respondents he had taken an element of time off by way of leave but had not been paid for it. There were holidays which had accrued but which had not been taken by him, whether unpaid or paid.

39. In summary, his entitlement at date of termination in respect of holidays accrued but untaken or taken but not paid was 25 days.

40. The respondents are therefore due to make payment to the claimant of 25 days of pay in respect of leave accrued but untaken or leave taken but unpaid. No such payment has been made. The sum due to him is £2,500.

The Issues

41. The issues for the Tribunal were:-

(1) Was the contract of employment between the claimant and the respondents an illegal contract such that it was void and unenforceable through the Employment Tribunal?

(2) If the contract of employment was not illegal and was therefore enforceable through the Employment Tribunal, was any sum due to the claimant by the respondents in respect of notice not given to him at termination of employment?

(3) If the contract of employment was enforceable, was the claimant due to be paid by the respondents any sum in respect of holidays accrued but untaken at the date of termination of employment or in respect of holidays taken during the course of employment but unpaid?

(4) Given the absence of any statement of particulars of employment was there to be an award made by the Tribunal of the minimum amount in terms of Section 38 of the Employment Act 2002, or were there exceptional circumstances making any such award unjust or inequitable? If an award was to be made was it to be of the minimum amount or the higher amount detailed in that section?

Applicable Law

42. A contract of employment is deemed unenforceable in an Employment Tribunal in circumstances where there is in terms of the contract fraud in relation to tax, involving underpayment to HMRC. This is confirmed in the case of ***Hall -v- Woolston Hall Leisure Ltd [2001] ICR 99*** ("***Hall***").

43. This stipulation applies where an employee knowingly participates in the illegal performance. The employee requires to know of the fact that performance is illegal and to have actively participated in that illegal performance. This is a question of fact and degree for the Tribunal in reaching a view upon the level of participation by the employee.

44. Other relevant cases are ***Hewcastle Catering Ltd -v- Ahmed & Another [1982] ICR 626***, ***Newsome -v- Shepshed Albion 91 Football Club EAT/627/92***, and ***Wheeler -v- Quality Deep Ltd t/a Thai Royal Restaurant [2005] ICR 265***.

45. These cases highlight that Courts and Tribunal should take a pragmatic approach to the different factual situations which occur, seeking to right genuine wrongs providing that the Tribunal does not appear to be assisting or encouraging employees to commit illegal acts. Knowledge of deceit on the part of the employee is a relevant factor. It is relevant to consider who the driving force behind any action is. It is also relevant to have regard to the employee`s knowledge or lack of it of the English language and legal system. In ***Hart -v- PG Bones Ltd ET/320222/97*** the Tribunal was of the view that it was "*unconscionable*" that an employer could take advantage of a situation it had created

by defrauding Inland Revenue in respect of tax and then seeking to deprive the employee of his right to pursue an unfair dismissal claim by founding upon that.

46. Absent grounds of summary dismissal an employee with the length of service of the claimant is entitled to one week`s notice on termination of his employment. Alternatively he is entitled to receive payment in respect of that week.

47. If an employee at time of termination of his employment has accrued holidays and those holidays have not been taken, he is entitled to be paid in respect of those holidays. That is in terms of Regulation 14 of the Working Time Regulations 1998. An employee is entitled to paid leave in terms of those Regulations.

48. Section 38 of the Employment Act 2002 provides that if an employee has not received a statement of employment particulars then if a ruling is made in favour of an employee in a case of the type listed in Schedule 5 of that Act the Employment Tribunal "*must*" make an award of the minimum amount unless there are exceptional circumstances which would make an award unjust or inequitable. The award is to be of the minimum amount namely 2 week`s pay unless circumstances are such that it is just and equitable for it to be set at the higher amount, 4 week`s pay.

Submissions

Claimant`s Submissions

49. The submissions made by the claimant were very brief. He stated that he was of the view that he was due money in respect of the balance of notice pay and in respect of holidays. He asked that the Tribunal award those monies and left the matter in the hands of the Tribunal.

Respondents Submissions

50. Ms Barnett produced written submissions. She spoke to those and supplemented them. The following is a summary of her submissions both oral and written.

51. The first issue addressed by Ms Barnett was that of illegality of the contract. She said that for the contract to be illegal the claimant must have in some way known of the illegality and there must have been participation by him.

52. The illegality was that the claimant was paid cash in hand on the basis of working an average of 50 hours per week over a 5 day period. He was shown, however, in the employment records with HMRC to have been working 16 hours per week for the respondents. He therefore received money in respect of which no tax and national insurance had been deducted.

53. The Tribunal was urged by Ms Barnett to accept the evidence from Mr Aydin. He had said that the claimant had dictated the terms of his employment. The claimant had said to him at the time of employment that he required to be paid £100 per day and would only take the job on that basis with 16 hours per week being put through

the books rather than the full hours being put through the books. The respondents had agreed to those terms as they required a

Head Chef. The Tribunal should also accept the evidence from Mr Aydin that the claimant had received wage slips on a regular basis and knew of the misrepresentation of his earnings to HMRC.

54. In brief, participation by the claimant was established, Ms Barnett said, given that he had set out the terms of employment as required by him.

55. Evidence from Mr Aydin as to payment made to the claimant at termination of his employment should also be accepted. That evidence was that the claimant had received two payments each of £450 on his termination of employment. The first payment represented 2 days` work he had carried out and 2.5 days` pay in respect of notice. The second payment represented £200 in respect of a further 2 days` of the notice period and £250 towards his holiday pay. The money had been given to the claimant`s work colleague at the time, Sidahmed Naimi.

56. Ms Barnett said that the claimant`s position was not credible. He was not supported, she said, in his evidence by his former colleagues when he said that he had not received wage slips. Mr Naimi said that **he** received wage slips on some occasions. Mr Djebarri said that **he** had received wage slips. The claimant`s position that he did not receive wage slips or did so at the earliest two weeks prior to termination of his employment was not credible. The evidence from Mr Aydin that he had spoken to the claimant regarding his tax code change in September 2016 should be believed. It was strange if this conversation had occurred two weeks prior to an unexpected and unforeseen

termination of employment of the claimant. Ultimately, however, even if the claimant did not receive wage slips the Tribunal should accept that the claimant was aware

of the inaccurate information being given to HMRC as to his income position, resulting in a fraud on HMRC.

57. Mr Naimi had said that he was aware that wage slips showed that he worked 16 hours per week when he worked more than that. He said that staff were aware that wages were put through on this basis. Although he denied that the claimant was aware of this, that did not ring true, said Ms Barnett. It would be a point discussed amongst all staff in her view. Mr Naimi simply did not wish to compromise the claimant`s position.

58. Mr Djebarri had said that his payslips showed what he had received in hand. That should not be accepted given the manner in which he gave that evidence. He had been concerned that he would be admitting to some illegality, Ms Barnett said.

59. There had been evidence as to the claimant going to Algeria around the end of March 2017. There had been a schedule produced by the respondents bearing to show payments made to the claimant. They showed payment for 2 days` work in each of those weeks. The claimant therefore had not been paid whilst away apart potentially for 2 days. Payment made for those 2 days should be deducted from any holiday pay found due to the claimant.

60. Doubt was also cast by Ms Barnett on the evidence as to when this trip had been. It appeared it might have been before Christmas, with witnesses being somewhat vague and open to suggestion in questioning as to when the trip might have been. Extra baggage receipts produced by the claimant did not prove the position as to when this holiday had been taken.

61. Relevant law was set out by Ms Barnett. She referred to ***Hall***. She also referred to ***Newland -v- Simons & Willer (Hairdressers) Ltd [1981] ICR 521***. That case, she said, confirmed that where both the employer and employee knowingly commit an illegality by way of fraud on the Revenue in relation to payment of the employee, the contract was one prohibited by statute and common law with the employee being precluded from enforcing employment rights which the employee might otherwise have against the employer. The question was whether the employee had knowingly been a party to a deception on the Revenue. That was the position in this case, Ms Barnett said.

62. The claimant certainly had been aware of the deception on HMRC. He could not claim to have no knowledge and to have been ignorant of that. He had continued in employment, his employment only ending as the respondents had dismissed him. Whilst he had said in evidence that he would not have accepted the practice if he had known of it, the Tribunal should keep in mind evidence, which Ms Barnett asked the Tribunal to accept, that the claimant must have known of the practice.

63. The claimant should therefore be precluded from bringing the claim due to the contract of employment being illegal.

64. If the Tribunal did entertain the claim, the holiday pay claim should see a deduction made from it of £250 in respect of the payment made on termination of employment through Mr Naimi and also £200 in respect of the 2 days` which appeared to have been paid in respect of time taken in March 2017 by the claimant. The evidence also was that payment of 4.5 days` of notice pay had been made by the respondents. It was highlighted to Ms Barnett that this was not the respondents' position in terms of form ET3.

Equally it was not their position when she lodged an amendment at the outset of the case. She accepted that.

Discussion & Decision

65. This was a difficult case in which to focus the evidence. The claimant was keen to explain why his dismissal was unfair. Given the absence of qualifying service on his part the circumstances of his dismissal did not, however, form a matter before the Tribunal. The respondents accepted that dismissal had occurred in circumstances where notice was appropriate.

66. The claimant was also concerned at references which had been made by the respondents in form ET3 to monies advanced to him, and that monies were, in terms of form ET3, to be deducted from any sums which might be found due to the claimant in terms of the claim. Again, however the respondents had departed from that line at the outset of the Hearing, confirming that they would not look to deduct any monies from any sums found due to the claimant. Evidence, however, strayed into this area from time to time and had to be steered away from it.

Illegality of Contract

67. The respondents were quite open in stating to the Tribunal that they had misrepresented the position to HMRC in that they under declared the hours and earnings of the claimant. Their position, however, was that this was at the insistence of the claimant himself or, in any event, with the knowledge and active participation in that process of the claimant. The claimant, on the other hand,

maintained that his only concern was to receive £100 in his hand in respect of each day of work.

68. The law in this area recognises that there are many different employment situations. With an arrangement of this type there may well be instances where the employee is actively involved in the "scheme" to defraud HMRC. There may be, at the other extreme, instances where an employer puts in place an arrangement of that type without the employee having any input or indeed choice in the matter.

69. I required to assess the evidence given to me in this case. That evidence came from the claimant, Mr Naimi, Mr Djebarri and Mr Aydin.

70. I did not accept that the claimant had "*driven*" this arrangement. I accepted his evidence. That was that, at time of his becoming employed by the respondents, what was key to him was that he received £100 in his hand in respect of each day of work. That was a very straightforward and simple position on his part. He said that he did not concern himself, in effect, with how that figure was achieved. He had assumed that all deductions were being made in order that the respondents could meet the requirement which he had set out that he receive £100 payment in respect of each day of work. I did not see that there was a basis on which he would have, as Mr Aydin had it, then insisted that he appeared on the respondents` book as working 16 hours per week.

71. Further, one fact struck me as significant and as being consistent with the claimant's position that the respondents were behind the "16 hour" declaration to HMRC. The claimant was said by the respondents to have

insisted upon the arrangement that he was "*through the books"* on the basis of working and being paid for 16 hours per week, whilst in reality working around 50 hours per week. That was said to have been a precondition of his accepting the post. If that was so, with the claimant being said to initiated this arrangement and to have insisted upon it being in place, what struck me as significant and at odds with that was that other employees of the respondents were also employed on this basis. At least 4 other employees were said to have been employed on this basis. That suggested that this was not an arrangement emanating from the claimant. There was no suggestion that those other employees had started at the same time as the claimant. Indeed, Mr Naimi was one of those employees. His dates of employment were different to those of the claimant. The fact that he was "*on the books*" showing as working 16 hours per week yet worked more hours and received money in excess of the payment shown on the records, lent considerable weight to this being an arrangement which the respondents put in place and on a regular basis rather than as being one which, as Mr Aydin had it, the claimant insisted upon if he was to take up employment with them. I was therefore satisfied on the evidence that the claimant had not initiated this arrangement.

72. The possibility remained that the claimant had actively participated in the arrangement by being aware of it and consenting to it. Again, however, I did not accept that as being the position. The evidence was somewhat confused as to production of payslips. Mr Aydin said that the claimant received those regularly as did other employees. His evidence was that payslips for kitchen staff were given to the claimant who then distributed them to other employees. That was not, however, a position put to the claimant. It was not a position put either to Mr Naimi or Mr Djebarri. Mr Naimi in particular said that he did not receive many payslips. He said that he had not seen payslips

until he had been employed by the respondents for some 6 or 7 months. He was not challenged on that evidence.

73. I was satisfied on the evidence that the claimant had not paid particular attention to payslips when he received those. I accepted his evidence that he received copies in particular some 2 weeks prior to termination of his employment. At that time the issue of tax was raised with him by the respondents with the claimant being asked to make a payment to them of tax due to HMRC. On his evidence, the claimant did not pay a huge amount of attention to the terms of the payslip. Indeed, he was of the view that his employers were Mr Aydin and Mr Dumen, the Directors of the respondent company. The payslips showed Serbajar Ltd as employer. It seemed to me that that entity had been the employer rather than individuals in a sole trader capacity or on a partnership basis.

74. The claimant`s position was consistent with that of many employees in general, in that whilst employees perhaps should scrutinise payslips and information contained in them, as long as payments are being received of the amount which they regard as being due to them, the written detail of that in terms of payslips or accounting to HMRC are often matters entrusted by them to their employers.

75. Whilst I accept that the respondents were engaged in a fraud upon HMRC, it seems to me entirely inappropriate that they are able to found upon their own illegal actings in order to defeat the claim of an employee brought against them. I can understand the proposition that if the employee is involved in a reasonably significant way in the defrauding of HMRC, then that employee should not be able to seek enforcement of the contract. If, as I was satisfied was the case here, however, there is either no knowledge or some passing knowledge of what might be put as things being "*not quite right*", then it does

not seem to me to be appropriate to deny an employee such as the claimant in that scenario the right to bring a claim before the Employment Tribunal.

76. On the facts found and on that principle, I was satisfied that the claim before this Tribunal could proceed.

Notice Pay

77. The evidence of Mr Aydin as to payment of notice was entirely unsatisfactory. The claimant said that he had received 2 days` pay. This left a claim in respect of 3 days` pay outstanding.

78. The respondents' initial position was that if payment of notice was to be ordered by the Tribunal then 3 days` pay indeed was appropriate. That was stated by Ms Barnett at the outset of the case.

79. There was no questioning of the claimant suggesting that he had received payment towards notice of an amount beyond the 2 days to which he spoken in evidence. There was no suggestion put to Mr Naimi that he had received payment in respect of notice pay due to the claimant beyond the 2 days of notice pay accepted by the claimant as having been received.

80. When Mr Aydin came to give evidence, however, he said that Mr Naimi had received two amounts of cash, each in the sum of £450. One represented 2 days` pay and 2.5 days` pay in respect of notice due to the claimant. The other represented 2 days` pay in respect of notice and £250 towards holiday pay due to the claimant. This evidence was entirely unheralded. I did not find it credible. It contradicted the position as to what had been paid by the

respondents to the claimant by way of notice as expressly set out by the respondents through Ms Barnett at the outset of the Hearing.

81. On the evidence I found it established that the claimant had received 2 days` pay towards the 5 days` notice pay which ought to have been paid to him. This leaves outstanding payment in respect of 3 days, £300.

Holiday Pay

82. In relation to holiday pay, again there were issues of credibility. It was difficult to know what to make of the evidence as to the extra baggage said to have been involved in a trip in March 2017. It was also difficult to know what to make of the listing of cash payments which the respondents had produced. On asking Mr Aydin about that list, he said that the Bookkeeper had produced the information and that the Bookkeeper would be able to speak to the detail. The Bookkeeper did not, however, appear to give any evidence. The claimant had confirmed in his evidence that he believed the records of cash payments made to him set out in this production to be accurate.

83. From the slightly confusing picture which emerged from evidence, I concluded that the claimant had only been paid in respect of work carried out by him. He had not been paid for any holidays taken by him. Equally he had not taken all leave to which he was entitled during his period of employment.

84. In my view the payments of one day per week in March 2017 reflected work carried out by the claimant rather than payment in respect of holidays taken by him. It seemed to me that he had taken almost 2 weeks of holiday but that he may have worked one day in each week, resulting in a payment to him of £100 in respect of each of those weeks.

85. I did not accept that there had been a payment by the respondents to Mr Naimi in respect of holiday pay due to the claimant notwithstanding that being the evidence from Mr Aydin. The respondents did not show in their calculation of holiday pay at page 29 of the bundle any deduction in respect of holidays taken and in respect of which payment had been made. They did not refer to that in form ET3. The payslips produced make no reference to any sums paid by way of holiday pay.

86. The amendment made at the start of the case said that the respondents had paid £400 to Mr Naimi in respect of holiday pay. Both the claimant and Mr Naimi acknowledged that £450 had been paid to Mr Naimi on behalf of the claimant. Both, however, were clear that this payment was in respect of work carried out by the claimant rather than being connected in any fashion to holiday pay or notice pay. Mr Aydin`s evidence was not consistent with the amendment. He said that £250 had been paid towards holiday pay. He was the party present at Tribunal who had given instructions prior to the amendment being lodged.

87. I concluded that no monies had been paid to the claimant in respect of holidays either taken or accrued. It was agreed that he was entitled to 25 days holiday in respect of his year of service. On the basis of £100 per day being paid to him, that results in a payment due to him of £2,500.

Absence of Statement of Particulars of Employment

88. The remaining matter is that of the payment due in terms of Section 38 of the Employment Act 2002. Payment under that section must be ordered by the Tribunal if no statement of employment particulars has been issued to an

employee and a claim of the type listed in Schedule 5 of that Act is successful at Tribunal. That precondition is met.

89. The payment is to be for 2 weeks' pay unless there are exceptional circumstances rendering such an award unjust or inequitable. No such circumstances were advanced. Had a statement of employment particulars been issued, the identity of the employer would have been clear. It would also have been clear what hours it was, officially, that the claimant was to work and at what rate of pay. That might have been consistent with the payslips or it might have been consistent with reality. Had it been consistent with the

payslips it would have been far harder for the claimant to argue that he was unaware of the arrangement which the respondents operated.

90. It seemed to me therefore that an award of 2 weeks` pay was appropriate in terms of Section 38 of the Employment Act 2002. I did consider whether the higher amount of 4 weeks` pay was appropriate. That is to be awarded if the Tribunal considers it just and equitable in all the circumstances. I did not regard there as being any material before me which made that a just and equitable outcome. The minimum amount therefore in terms of that section is awarded i.e. 2 weeks` pay amounting to £200.

Employment Judge: Robert Gall Date of Judgment: 19 February 2018 Entered in register: 22 February 2018 and copied to parties

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