



EMPLOYMENT TRIBUNALS

Claimant: Mr Krzysztof Raburski

Respondent: Pizza Cottage Limited

Heard at: North Shields

On: 6 & 7 June 2018

**Before: (1) Employment Judge A.M.S. Green
(2) Ms E Menton
(3) Ms M Clayton**

Representation

Claimant: Mrs M Inkin – Legal Representative

Respondent: In Person

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's contract of employment being tainted by illegality, his claims of

- (1) automatically unfair dismissal pursuant to section 104 of the Employment Rights Act 1996;
- (2) failure to provide a statement of particulars of employment under section 11 Employment Rights Act 1996;
- (3) unlawful deduction of wages for failing to pay the National Minimum Wage and notice pay; and
- (4) failure to pay outstanding holiday pay pursuant to regulation 13 of the Working Time Regulations;

are dismissed.

REASONS

The Claims

1. By a claim form presented on 29 January 2018, following a period of early conciliation from 8 December 2017 to 8 January 2018, the claimant brought complaints of: non-payment of the National Minimum Wage; non-payment

of holiday pay, asserting breaches of health and safety law. These claims were based on section 100 and 104 of the Employment Rights Act 1996 (“ERA”). He also claimed non-payment of notice pay and failure by the respondent to provide him a written statement of particulars of employment under section 11 ERA.

2. His claims arose from his employment at the respondent’s fast food takeaway where he stated on his claim form that he had worked from 1 February 2016; it should have been 30 September 2016. He resigned with immediate effect on 14 October 2017. He claimed constructive dismissal which was automatically unfair as he had asserted the foregoing statutory rights.

The hearing

3. The claimant, Monika Przybylska (the claimant’s aunt), Nicole Hollinshead (the claimant’s friend) and Siavash Rad (the proprietor of the respondent) adopted their witness statements and gave evidence. Ms Przybylska gave her evidence through an interpreter; the language was Polish. Ms Inkin and Mr Rad made closing submissions.

Burden and standard of proof and basis of our decision

4. The claimant must establish his claims on a balance of probabilities. In reaching our decision we have considered the oral and documentary evidence and our records of proceedings.

The oral evidence

The claimant

5. As part of his oral evidence relating to what he believed his weekly working hours where, the claimant explained to the Tribunal how he was paid. I had asked the claimant to explain further to me to clarify my understanding. He told the Tribunal that he worked approximately 60 hours per week. He did not have any record of his weekly working hours. However, we were taken to a series of copies of pages in notebooks which the claimant used to calculate his daily pay [64, 95B-186 & 188]. He explained that at the end of his shift, he would calculate the value of the orders and deliveries for the day. He explained that he was paid mainly in cash and that during the week he would be paid £40 per day and he would be paid £45 for working on Friday and Saturday. He would record his pay on the notebook page using the entry “Chris”. For example, on 7 June 2017, he paid himself £40 [123]. We were shown another example for 8 June 2017 which also records him paying himself £40 [124]. On 19 July 2017, he recorded that he was paid £40. On each occasion, he would take the money out of the till. He would give Mr Rad the relevant notebook entry and he would photograph the same for his own records.

Mr Rad

6. Under cross-examination, Mr Rad explained that he had been trading for approximately two years but had run various businesses for about 25 years.

He thought that he had employed about 15 people over that time. He said that the accountant would prepare the payslips. He used the information that the claimant had given him concerning his daily pay which he gave to the accountant. He said that either the driver or the claimant would prepare the note of the days takings and what was paid to them. He said that the claimant was paid in cash most of the time although he had paid him by bank transfer once. This was £400 for the "holiday pay". Initially, when he was taken to copies of the daily takings and payments he suggested that the handwritten notes did not relate to the claimant who was known as "Chris" but to "change". However, on further cross-examination he eventually acknowledged that the reference was to "Chris" (i.e. the claimant). Between 16 September 2017 and 14 October 2017, the total amount of his wages was £610 for each month. His payslips showed that he was paid £451.20 [206]. He was asked to account for the discrepancy to which he replied "the payslips are correct".

7. Mr Rad gave contradictory evidence about whether the claimant worked 16 hours per week, as stated on the pay slip, or additional hours. His evidence was very confusing because on the one hand he claimed that his hours were fixed but on the other he claimed that the claimant would work on a self-employed basis under an implied contract for services in excess of 16 hours per week. He did not provide a plausible explanation for his discrepancies in his evidence. It was also clear that he did not understand what he meant by an implied contract for services which he had referred to in paragraph 8 of his witness statement when speaking about the alleged self-employment and he eventually admitted that he had not written the statement himself but had help from Mr Savage who had previously represented him. He also believed that the claimant was claiming benefits which was why his working 16 hours per week was relevant. He thought that he was claiming housing benefit but wanted to work more than 16 hours. However, when questioned further, he told me that he was simply assuming that the claimant was on benefits. He then said he could not afford to give the claimant more than 16 hours work per week, but this contradicted what he said in his witness statement which suggested that the claimant worked additional hours on a self-employed basis.
8. Ms Menton asked Mr Rad about a document showing notes of payments [32D]. Mr Rad explained that the claimant had sent **these** details to Mr Savage of his earnings and when he worked. The information had been originally sent by text message, but this had been translated into the column of figures and dates.

Submissions

9. On the question of remuneration, Mr Rad submitted that he had paid the claimant according to his payslips.
10. Ms Inkin submitted that Mr Rad had given contradictory evidence in his defence, witness statement and oral evidence and she invited the Tribunal not to find him credible. On the question of remuneration, she submitted that the Tribunal had seen how the claimant had calculated his wages and the supporting documentation was in the bundle. She submitted that each of the notepad entries represented a shift that was worked by the claimant

which was not disputed. He had written his name each shift.

Applicable law

11. If a contract is tainted with illegality, in one form or another, it may not be possible to enforce some or all the rights which would otherwise be available. There are three situations where illegality may arise:
 - a. The employment was directly prohibited by legislation.
 - b. If the purpose of object of the contract involves criminality or immorality it will be unenforceable as being contrary to public policy. Such contracts may not be enforceable if the activities do not form a term of the contract.
 - c. There is Illegality in performance. This arises where the contract is legal on the face of of it but in some way, the performance is illegal. Most commonly, in an employment situation, this may involve some kind of tax fraud.
12. Two conditions must be satisfied when considering if a party will be prevented from enforcing a contract which is performed illegally:
 - a. The party must, in some way know of the illegality; and
 - b. Must also participate in the illegality.
13. We are reminded that in **Hall v Woolston Hall Leisure Ltd 2001 ICR 99** Gibson LJ said at paragraph 38:

In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee.

14. In **Newland v Simons & Willer (Hairdressers) Ltd [1981 IRLR 359]** the employee had claimed unfair dismissal in circumstances where the Tribunal had held that the employee knew or ought to have known that her employer had failed to pay tax and National Insurance contributions in respect of her wages. The EAT held that where both the employer and the employee knowingly commit illegality by way of a fraud on the Revenue in the payment and receipt of employee's remuneration under a contract of employment, the contract was turned into one prohibited by statute or common law and the employee was precluded from enforcing any employment rights which she might otherwise have against the employer. The essential question was whether the employee knowingly had been a party to a deception on the Revenue.

Discussion and findings

15. We found Mr Rad to be neither a reliable nor a generally credible witness. He frequently contradicted himself on the question of whether the claimant's hours were fixed or variable and he was unable to explain the discrepancies in his oral evidence and in his witness statement. We did not find his claim that the claimant worked on a self-employed basis in excess of 16 hours to be credible. Clearly paragraph 8 of his witness statement was written by his former representative, Mr Savage, because Mr Rad had no idea what an implied contract for services was notwithstanding that he had signed the statement of truth.
16. The claimant very clearly explained how he was paid. We had no reason to doubt his evidence on this. Apart from the one occasion when he was paid by bank transfer, he was paid in cash. He would take his money from the till at the end of his day's work and account for this. He would photograph the relevant notebook entry and the original would be given to Mr Rad. Mr Rad knew exactly how much the claimant was paid because the claimant had told him, and he passed the information to his accountant to prepare the payslips. For the reasons given below, the payslips did not reflect what the claimant was actually paid.
17. When we reviewed the documentary evidence relating to what the claimant provided to Mr Rad and what was eventually set out in the payslips, we were very concerned to see that there was a consistent pattern of under recording of the claimant's earnings. The document which Mr Savage relied upon was based on text messages that the claimant had sent him [32D]. This was built up from the contemporaneous note book records that the claimant compiled at the end of his working day and which he had carefully explained to us in his oral evidence. We noted that for 18 April 2017 to 24 May 2017 the claimant recorded that he was paid £828.60 in cash. However, the applicable payslips for that period record that he was paid £716.80 (£358.40 x 2). This is an overall discrepancy of £111.80 of under-recorded income. The discrepancies between what the claimant was paid and what was recorded on the payslips was also explored with the Mr Rad when he was cross examined. Between 16 September 2017 and 14 October 2017, the total amount of his wages was £610 for each month. The claimant's payslips showed that he was paid £451.20 [206]. Mr Rad was asked to account for the discrepancy to which he replied "the payslips are correct". That was patently untrue. The claimant's income for the period was under recorded by £158.80.
18. The claimant clearly knew what he had been paid because he told us that he took the money out of the till and made a note of that fact. Mr Rad also knew what the claimant was paid because the claimant told him and he had seen the notepad records prepared by the claimant. Mr Rad then told the accountant what to put in the payslips. Mr Rad must have known that the information in the payslips was wrong and that he was instructing the accountant to under record the claimant's income.
19. Furthermore, the claimant also knew that his income was under recorded. We say this for two reasons. First, he would have received his payslips and

he would have known or ought to have known that the figure was incorrect because he knew what he had taken from the till. Second, we note that the claimant also produced his tax records kept with HMRC which were exhibited in the bundle. The relevant entries for 29 April 2017 and 27 May 2017 show that the HMRC record of his taxable income is £358.40 on each date [46]. The same applies with the entry for 14 October 2017 [46] showing £451.20. This tallies with what is set out in the payslips. Furthermore, at the foot of the record we note HMRC states “tell us what to change if income from this employer or pension provider is missing or wrong”. We have seen no evidence that the claimant notified HMRC of the under recording of his income. He knew that he had been paid more than that decalred, but he did nothing about that by notifying HMRC as required

20. The evidence clearly shows that both the claimant and Mr Rad were parties to a deception on HMRC by under recording what the claimant had earned. They both participated in this venture and must have known what they were doing. This is an example of illegality of performance of an employment contract that was, on the face of it, legal. The claimant’s contract was tainted with illegality and any rights that he sought to enforce were rendered unenforceable. His claims must, therefore, fail and be dismissed.

Employment Judge A.M.S. Green

Date 14 June 2018