Case No: 2500151/19

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Coates**

Respondent: **Montan Lago t/a Hash Bar and Kitchen**

Heard at: **Middlesbrough** **On:** **25 April 2019**

Before: Employment Judge A.M.S.Green

Representation

Claimant: In person assisted by his father, Mr J Coates
Respondent: In person per Mrs J Robson

JUDGMENT

1. The claimant's claim for accrued holiday pay on termination of employment under Working Time Regulation 1998, regulations 14(1) & (2) is upheld and the respondent shall pay the claimant £202.17.

2. The claimant's claim for failure to provide him with a written statement of particulars of employment is upheld pursuant to Employment Act 2002, section 38 and the respondent shall pay the claimant £104.60.

3. The claimant's claim for failure to provide him with itemised pay statements pursuant to Employment Rights Act 1996, section 8(1) is upheld and a declaration is made to the effect that the respondent failed to provide the claimant with itemised pay statements from 23 December 2017 until 21 September 2018.

4. The claimant's claim for notice pay, having been withdrawn by consent, is dismissed.

REASONS

1. The claimant was employed as a member of the respondent's bar staff. It was agreed that his employment dates were 23 December 2017 to 30 October 2018. The Respondent purported to dismiss the claimant with immediate effect for alleged gross misconduct. This was not tested in evidence and I make no finding of fact as to whether the claimant was guilty

of gross misconduct.

2. The claimant made the following claims:

    a. Failure to pay him his statutory minimum period of notice, being one week's pay.

    b. Failure to pay him accrued holiday pay on termination of employment.

    c. Failure to provide him with itemised pay statements from 23 December 2017 until 21 September 2018.

    d. Failure to provide him with a written statement of particulars of employment pursuant to Employment Rights Act 1996, section 1 ("ERA").

3. The claimant and his father arrived very late. They had gone to the North Shields hearing centre in error. They had no reason to do that because the claimant had been clearly notified that the hearing was to take place in Middlesbrough. The apologised and I accepted their apology. Mrs Robson produced a small hearing bundle.The claimant and Mrs Robson gave evidence. The Claimant's father assisted the Claimant throughout. I gave the Claimant and Mrs Robson an opportunity to make closing submissions. The Claimant had the last word.

4. The claimant withdrew his notice pay claim on consent. I dismissed that claim.

5. Mrs Robson conceded that the respondent had failed to provide the claimant with a section 1 written statement of particulars of employment within 2 months of the claimant commencing his employment. She did not understand that this had to be issued to him. She wrongly believed that he had to ask for it. It was a careless oversight on her behalf. I also noted that the respondent is a small family business and did not have professional HR advisors. I accepted Mrs Robson's evidence.

6. Mrs Robson also accepted that the respondent had substantially failed to provide the claimant with itemised pay statements until his first payslip dated 21 September 2018.

7. The issue with holiday pay was as follows:

    a. Mrs Robson accepted that the respondent was due to pay the claimant accrued holiday pay on termination of employment. There was no dispute that he had already been paid for 10 hours of holiday. It was agreed that the holiday year was 1 January to 31 December in the absence of a written contract between the parties being agreed with a different holiday year. The issue between the parties was how to calculate the remaining portion of the claimant's holiday entitlement.The claimant's position was that he worked irregular hours. If he had been given pay slips for the entire period that he worked over the holiday year, he could have accurately calculated his leave entitlement. Consequently, he relied on the pay slips that

he had received and calculated that he was entitled to 104 hours holiday leave.

b. Mrs Robson's position was that she had kept a tally of the claimant's pay that he received at the end of each shift. She produced her diary which included details of each day's takings and what the claimant had been paid. From this, she worked out the hours worked based on the fact that he was paid £5 per hour. She then produced a document called "Dylan's hours". This had three columns: date, payment and hours. When she gave her evidence, she categorically stated that it was correct. Mr Coates challenged this by stating that he had copies of the staff rota which did not tally with the table. Mrs Robson replied that the rota frequently changed and did not always reflect actual hours worked by staff. It could not be relied on. When the claimant was giving his evidence, the claimant clearly stated that on no occasion during 2018 did he challenge any of the payments that he received which were listed in the table I have just referred to. Given what Mrs Robson and the Claimant said, I believe that the table can be relied on as being a reliable record of the claimant's hours worked. I give it weight and I have used it to calculated the claimant's annual holiday entitlement.

c. There was no dispute over the hours recorded in the payslips that were issued. I have also used this information in calculating the claimant's annual holiday entitlement.

d. The claimant was paid £5 per hour until he reached his 18th birthday (18 October 2018). Thereafter his pay was increased to £5.90 per hour. The hourly rate also included an element for holiday pay. £4.20 was attributed to pay, £0.80 for holidays. However, it was conceded that this was not effective "rolled up holiday pay" given its lack of transparency. It was simply unclear to the claimant that he was receiving rolled up holiday pay in the absence of any agreement to that effect and no pay slips itemising it. Consequently, I have disregarded the holiday pay element in making my calculation below.

8. Under the Working Time Regulations 1998, regulation 13(9)(b) and 13 A(6) ("WTR") the general rule is that annual leave cannot be replaced by a payment in lieu. The main exception to this rule arises where a worker is owed outstanding holiday on termination of employment of his or her contract. Under regulation 14(1) and (2) WTR a worker is entitled to a payment in lieu where his or her employment is terminated during the course of the leave year and on the termination date, the proportion of the statutory annual leave he or she has taken is less than the proportion of the leave year that has expired. There is a statutory formula that is followed in the absence of a relevant agreement for determining the sum payable. In this case, there is no relevant agreement.

9. The claimant worked irregular hours. I have calculated his leave entitlement based on actual hours that he worked in 2018 leave year. This is derived from the table referred to above and the pay slips. The claimant worked a total of 366.75 hours. His gross holiday entitlement is 44 hours 16 minutes. He was paid for 10 hours. He took other holidays for which he was not paid. His net holiday entitlement is 34 hours 16 minutes. His final hourly rate of

pay was £5.90. He is entitled to £202.17 as payment in lieu of untaken holidays.

10. Employment Act 2002, section 38 applies to proceedings before a tribunal relating to a claim under any of the jurisdictions listed in Schedule 5. This includes proceedings for breach of WTR. If a tribunal upholds such a claim and the employer was in breach of ERA, section 1, the tribunal must award the claimant at least two weeks' pay and up to four weeks' pay if it is just and equitable. The claimant has succeeded with his WTR claim and is entitled to compensation for the respondent's failure to provide him with a section 1 statement.

11. In the claimant's case, it is accepted by the respondent that it did not issue him with section 1 statement. I have accepted the reasons given by Mrs Robson and do not consider it just and equitable to increase the amount beyond two weeks' pay. It was a careless oversight made in ignorance of the law. Furthermore, the respondent is a small employer. Because the claimant worked irregular hours, I have worked out his average week's pay by looking at the pay he received in the 12 weeks preceding his dismissal. He received a total of £627.60 which averages out at £52.30 per week. I am awarding him two weeks' pay which amounts to £104.60.

12. ERA, section 8(1) provides that employees have the right to be given by their employer, at or before the time at which any payment of wages or salary is made, a written itemised pay statement. An employee who has not been provided with an itemised pay statement has the right to refer the matter to a tribunal under section 11(1). If a tribunal finds that an employee has not received a pay statement, it must make a declaration to that effect under ERA section 12(3). It also has the power to make a monetary award if it finds that any un-notified deductions have been made (not the case here). The respondent accepts that it failed to provide the claimant with itemised pay statements until 21 September 2018. Consequently, I declare that the respondent has failed to provide the claimant with itemised pay statements between 23 December 2017 and 21 September 2018.

Employment Judge A.M.S. Green
Date 25 April 2019

Case No: 2500592/2017

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2500151/2019**

Name of case(s): **Mr D Coates** v **Montan Lago T/A Hash Bar and Kitchen**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **1 May 2019**

"the calculation day" is: **2 May 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.