EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123449/2018

Held in Edinburgh on 9 April 2019

Employment Judge: J D Young

Mr Lukasz Swiszcz	**Claimant: In Person**
Papillon Edinburgh Ltd	**Respondent: Represented by Joanne Ramsay, Director.**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) The respondent shall pay to the claimant the sum of **Two hundred and eighty eight pounds and four pence (£288.04)** being the net sum due to him in respect of pay for holidays accrued to him but untaken at date of termination of his employment with the respondent;

(2) The respondent shall pay to the claimant the sum of **Three hundred and twenty pounds and seven pence (£320.07)** being the net amount due to the claimant in respect of failure to provide notice of termination of employment or payment in lieu thereof; and

(3) The respondent shall pay to the claimant the sum of **One thousand one hundred and fifty three pounds and eighty five pence (£1153.85)** as an increase in the award under s38 of the Employment Act 2002 for failure to provide a statement of employment particulars.

(4) The Tribunal has no jurisdiction to consider the claim of unfair dismissal which is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal against "Joanne Ramsay" in respect of employment as a Chef between 4 April 2018 and 4 September 2018 at Restaurants known as Café Tartine and Papillon Edinburgh. He complained:-

    (1) that he was unfairly dismissed
    (2) that he was owed notice pay in the sum of £384.61
    (3) that he was due holiday pay in the sum of £358.46.
    (4) That he was due an "uplift" for (i) not receiving notice; (ii) working without a contract; (iii) for working extra hours or shifts on his May day off and (iv) "for making me going through all this trouble which is a payment for leave notice and unused holidays".

2. In the ET3 response it was stated that the true employer of the claimant was Papillon Edinburgh Ltd and that the claimant had commenced employment with that entity from 1 August 2018 and that employment terminated 2 September 2018. It was stated that previous to employment with Papillon Edinburgh Ltd the claimant had "worked for Café Tartine Ltd until 31/7/18". It was stated that one week's notice was given to the claimant when his employment with Papillon Edinburgh Limited was terminated but when asked if he was willing to work out his notice "his answer was no, I will go now. Therefore he was only paid days worked and holidays due for the month of August and September".

3. It was also stated that the claimant had first come to work for a "sister company of mine called Café Tartine in April 2018 as a chef de partie" but due to difficulties in staffing he "finished up on the Tartine payroll on 31 July 2018 and then was started as a new employee on a trial basis at Papillon on 1/8/18". It was considered that he was not qualified for the position of sous chef there and his employment was terminated. It was also stated that at Café Tartine the "holiday calendar finishes on 31/7/18 and company policy states that no holidays are carried over that haven't been used, however I offered Lukasz as a gesture of goodwill that I would carry over 5 full days holidays so no holidays from Papillon's quota were used for this trip". The response indicated that the claimant had been "very well looked after in both companies whilst working for me and received 5 full days extra over and above anything he was actually by rights due".

4. The Tribunal fixed 9 April 2019 as a date for a Preliminary Hearing on the issues of (i) the identity of the true employer of the claimant given the terms of the claim form and response and (ii) whether in light of the length of employment the Tribunal had jurisdiction to hear the claim of unfair dismissal. However at that time it was clear that parties had appeared at the Tribunal with appropriate documentation to consider all issues. It seemed appropriate and convenient to treat the Preliminary Hearing as a Final Hearing. Rule 48 of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 allows a Tribunal to treat a Preliminary Hearing as a Final Hearing if it is satisfied that the Tribunal is "properly constituted for the purpose and if it is satisfied that neither party shall be materially prejudiced by the change". In this case each party wished all matters to be dealt with and consented to the hearing being a Final Hearing on the issues. I was satisfied that there was no material prejudice to either party as a consequence.

Documentation

5. The claimant lodged 2 "messenger" messages received by him from Joanne Ramsay (marked C1 and C2).

6. The respondent produced documents being:-

(1) "Punches report" for Papillon showing working hours of claimant in the period 1-5 August 2018 (R1)
(2) "Punches report" for Papillon showing working hours of claimant in the period 6-12 August 2018 – R2
(3) Copy handwritten sheet of staff hours 6-12 August 2018 (R3)
(4) "Punches report" for Papillon showing working hours of the claimant in the period 13-19 August 2018 (R4)
(5) Copy typewritten sheet of hours worked by staff between 13-19 August 2018 (R5)
(6) "Punches report" for Papillon showing working hours of the claimant in the period 20-26 August 2018 – R6
(7) Copy typewritten and handwritten sheet showing hours worked of staff between 20-26 August 2018 – R7
(8) "Punches report" for Papillon showing working hours of the claimant in the period 27 August-1 September 2018 – R8
(9) Copy typed sheet showing hours worked by staff between 27 August and 2 September 2018 – R9
(10) Proforma contract of employment of Café Tartine Ltd – R10
(11) Handwritten letter from Joanne Ramsay explaining why no ET3 submitted in time and seeking extension of time dated 9 January 2019 with completed ET3 – R11
(12) "Punches report" for Papillon showing working hours for the claimant in the period 1 August 2018 to 1 September 2018 – R12 **Preliminary Issue**

7. In respect of the claim of unfair dismissal made by the claimant it was explained that for the Tribunal to have jurisdiction in respect of that claim he would require to have had 2 years continuous service. The entire length of employment claimed by the claimant was for the period 4 April 2018 through to 4 September 2018 and so fell well short of the 2 year qualifying period. The claimant accepted that there was no

further period of employment upon which he might rely with either Joanne Ramsay; Café Tartine Ltd or Papillon Edinburgh Ltd and so the Tribunal had no jurisdiction to consider his claim of unfair dismissal. He acknowledged that claim would require to be dismissed for want of jurisdiction.

Issues

8. In those circumstances the issues for the Tribunal were:-

(1) whether the claimant was due any payment for notice pay
(2) whether the claimant was due any payment in respect of holidays accrued but untaken at date of termination of employment
(3) whether there were any "uplifts" due to the claimant for failure to provide a statement of terms and conditions of employment or otherwise
(4) if any payments were due who was liable for payment.

The Hearing

9. At the Hearing evidence was given by the claimant and by Joanne Ramsay. From the relevant evidence led, admissions made and documents produced it findings in fact could be made on the issues.

Findings in Fact

10. Joanne Ramsay and her husband had set up two restaurants in Commercial Street, Leith. The "award winning" Café Tartine traded from 72 Commercial Street, Leith and that business was operated by Café Tartine Ltd. The adjacent Papillon Restaurant traded at 84 Commercial Street, Leith and was operated by Papillon Edinburgh Ltd. Joanne Ramsay and her husband are the Directors and equal shareholders in each of Café Tartine Limited and Edinburgh Papillon Ltd. The dining styles in each are different with Café Tartine trading as a French brasserie and Papillon trading as a "gastropub" providing "high end pub food". Staff in each

business did "swap over" from time to time but each traded as a separate business entity.

11. Joanne Ramsay interviewed the claimant and he was offered and accepted the position as a chef de partie in Café Tartine from 4 April 2018. His hours were about 45 hours over 5 days a week (generally 11am – 8pm and occasionally being asked to do 6 days a week). He was paid at the rate of £20,000 gross per annum giving him a monthly net wage of £1,387.

12. At interview he indicated that he had a holiday booked in Poland for one week in August (18-22 August 2018) and it was agreed that holiday would be honoured.

13. The claimant was not provided with any Statement of Terms and Conditions of Employment. While a "proforma" contract of employment existed for Café Tartine Ltd none was provided to the claimant.

14. The head chef at the Papillon Restaurant took compassionate leave to deal with health issues and the claimant worked at the Papillon Restaurant to "cover" the position in around May 2018. In the meantime a new head chef was employed at Café Tartine. The claimant and that new head chef did not gel.

15. The head chef at Papillon did not return to work and it was agreed that the claimant would become sous chef at Papillon. The claimant was not certain of the date when he commenced work at Papillon but the "Punches report" information would suggest that was from 1 August 2018 (R1). Joanne Ramsay discussed the transfer with the claimant. At that time the head chef at Café Tartine was also head chef at Papillon but he had less contact with Papillon and so it was considered that the move would suit the claimant.

16. There was discussion on pay and the claimant was advised that the new role would mean more money but no extra pay was agreed or came to fruition.

17. No Statement of Terms of Conditions was issued to the claimant in respect of his employment at Papillon. No P45 was issued to the claimant in respect of any termination of employment at Café Tartine Ltd. No payment of any notice pay was given in respect of any termination of employment at Café Tartine Ltd. No payment of any holiday pay accrued but untaken in respect of any employment at Café Tartine Ltd was paid to the claimant on any termination of that employment.

18. The claimant had not taken any holidays in the period 4 April-31 July 2018. The position of Joanne Ramsay was that in terms of the contract conditions for Café Tartine Ltd the holiday year ran from 1 August to 31 July in each year and that employees must use their holiday entitlement within the holiday year and may not carry that holiday forward into the next holiday year. Strictly therefor she considered that there would be no holidays due to the claimant. However "as a gesture of goodwill" she considered it would be fair were the claimant to be allowed his 5 day holidays that he had booked in August 2018 and those holidays were taken. However no Statement of Terms and Conditions or information regarding holidays or the "holiday year" was ever provided to the claimant.

19. In August 2018 it was considered that the claimant's performance was not as it should be and a decision was taken to terminate that employment. The claimant was advised of that on 2nd September 2018. There was dispute as to the conversation which took place regarding termination. The position of the claimant was that when he arrived for work he was asked to speak with Joanne Ramsay and she said that his employment was being terminated. The claimant then said
"Do I have to work another week" and she said "No". He then said "Do I get my pay and holidays" and she said "Yes of course". He then gathered his possessions and left.

20. The position of Joanne Ramsay was that her husband had indicated that he would be able to "go in for the short term – he would be able to cover" for the claimant. However the claimant was "offered a week's notice and asked if wanted to work a week's notice" but he said "no". Accordingly he was paid to date of termination being 2 September 2018. It was also stated that thereafter he had been paid holiday pay

representing 2.33 days in respect of holiday accrued while working with Papillon Edinburgh Ltd (being the period from 1 August 2018-2 September 2018).

21. When the claimant had not received the payments that he anticipated would be paid he approached Citizens Advice Bureau and they "sent a letter" seeking holiday pay and notice pay. The responses received by the claimant by "Messenger" were at C1 and C2.

22. C1 indicated that it was not felt that the claimant had been unfairly treated and "just in case there was any confusion earlier I am happy to write to you to explain how we see things from our side plus I have also attached copy snippets of our company contract. This contract is used in both venues. Although I am aware that a contract hadn't been signed at Tartine and was yet to be signed at Papillon this is however to show company policy with regards to any notice that is expected from both parties plus any deductions the company is entitled to take towards costs incurred when an employee doesn't work out the notice given. There is also a standard 3 month probation contract that is attached to any new start that involves being monitored for suitability for the position and a proper contract will then be written up after the company is happy with the employee and wishes to confirm the position in writing. I also want to stress that you were an employee on the payroll of Café Tartine until 31st July where all holidays due were part of that company's allocation up to 31st July and are not by rights carried over past our year end of 31st July to employees who are still on the Tartine payroll past that date and therefore are lost if not used by this year end date. But as a goodwill gesture we carried across holidays you hadn't managed to take within the year's allocation while at Tartine to cover your trip in August even though you had already been transferred over to a completely different company to start at Papillon on 1 August. Regardless of what place of work you attended up to 31st July your holidays were part of your allocation at Tartine and only when you moved across to Papillon did holidays become due under Papillon's allocation. After one month on the Papillon payroll you were served one week's notice which is a standard amount of time that is required and it clearly states that if an employee fails to work out their full week

the company is entitled to take back costs incurred from any monies due once payroll is submitted. As you know you are not willing to work out your notice hence why any holidays due were lost".

23. The further message (C2) acknowledged that Citizens Advice Bureau had written on this matter to Joanne Ramsay. That message indicated that holiday entitlement had been paid of 2.33 days (for the month of work at Papillon Edinburgh) and that the matter was closed as no employee's notice periods had been paid unless they have "physically worked the notice period out".

24. In evidence at the Hearing the position of Ms Ramsay was that the appellant was required at the Papillon Restaurant and that she would have wished him to work the period of notice of one week. The evidence was confusing in this respect. She indicated that her husband had agreed to cover at Papillon. Also the "before and after" staffing at Papillon did not appear to demand that the claimant work his notice period. His position was that the staffing requirements at Papillon were such that another chef had been taken on so that it would appear "everyone knew" that his employment was to be terminated. In respect of the position before termination of the claimant's employment it appeared that the chef numbers were "Lucas" ; the claimant; and the commis chef named "Sala". Lucas left and was replaced by Daniel. Another chef de partie was employed named Jamie. It was stated that he was there "doing a trial shift" however that trial was successful and so he was employed from the time that the claimant left. Accordingly there did not seem to be any difference between the chef numbers before and after the claimant's departure which would lend credibility to the claimant's position that it was not the case that he would be required to work the week's notice to cover the position as arrangements had already been put in place for that cover to be effected.

25. The weight of the evidence suggested that the claimant had been told he had a week's notice but when asked if he required to work that notice was told that he did not and that he would receive his pay entitlements.

Conclusions Continuity of Employment

26. I do not consider that the analysis put forward by the respondent to the effect that when the claimant agreed to transfer and commence work at the Papillon Restaurant he had broken continuity of employment and his employment commenced afresh with Papillon Edinburgh Ltd as at 1 August 2018. I considered that the claimant had continuity of employment from 4 April 2018 because I consider that Café Tartine Ltd and Papillon Edinburgh Ltd are "associated employers". Thus continuity of employment is preserved whenever an individual might be transferred from one entity to the other without any break in the employment.

27. Section 218(6) of the Employment Rights Act 1996 preserves continuity of employment where employees are transferred between "associated employers". It states:-

> "If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer –
>
> (a) the employee's period of employment at that time counts as a period of employment with the second employer, and
>
> (b) the change of employer does not break the continuity of the period of employment".

This protection is intended to apply where an employer controls other employers and can move employees between them. It would obviously be unfair in these circumstances for an employee to lose his or her employment protection rights simply because he or she was artificially moved between employing companies which were all under the same ultimate control.

28. The definition in section 218(6) relates to "associated employers" and is not restricted to "associated companies". However the notion of a "company" comes in

as a result of section 231 of the Employment Rights Act 1996 which sets out the definition of "associated employers". Section 231 provides that any two employers are treated as associated if:-

- one is a company of which the other (directly or indirectly) has control – s231(a), **or**

- both are companies of which a third person (directly or indirectly) has control – 231(b).

"Control" is the key word in the definition of associated employers found in section 231. This is because in order to be associated the two employers in question must have an association between them whereby one is a company of which the other (directly or indirectly) has control **or** both are companies of which a third person (directly or indirectly) has control.

29. "Control" of a limited company in this context is based on a shareholding test, i.e. control by the majority of votes attaching to shares (**Secretary of State for Employment v Newbold and another 1981 IRLR 305**).

30. The courts have held that the controlling person does not have to be an individual but can be a group of persons. In **Zarb and another v British and Brazilian Produce Company (Sales) Limited 1978 IRLR 78** the Appeal Tribunal stated that 2 people who between them hold more than 50% of each of 2 companies could form a third person having control of the 2 companies. Whether they did or not depended on what happened in practice i.e. whether they actually did act jointly and in concert to control the 2 companies. This case has been followed in other Appeal cases such as **Harford v Swiftrim Limited 1987 ICR 439** where the view that was taken that "where the shareholders are the same in each company and they hold identical or near identical shareholdings common sense indicates an association". It was observed that common shareholdings created "a clear inference" that 2 companies were associated. Also that approach was followed in **Tice v Cartwright 1999 ICR 769**.

31. In this case the evidence was that Café Tartine Ltd and Papillon Edinburgh Ltd were both companies which were controlled by Joanne Ramsay and her husband being the only Directors and shareholders of each company. They were the "third party" who had control of those companies. They were the third party who directed day to day control (both being Directors of the company) and legal control (being the only shareholders in the companies).

32. The day to day control was clearly evidenced by the arrangements to have the claimant cover for the absence of the chef in Papillon Edinburgh when he was working in Café Tartine. Another example of control was to have the head chef at Café Tartine Ltd also have responsibility for Papillon Edinburgh Ltd.

33. Also on the issue of "control" if it was the case that it was believed the claimant's employment terminated as at 31 July 2018 when the claimant went from Café Tartine to Papillon Restaurant then he should have been issued with a P45 (and there was no evidence of that) as an employee whose employment had terminated. Additionally the question of notice of termination would arise and he should have been paid his holiday pay in respect of holidays accrued but untaken to that date as a statutory right unaffected by any contract of employment. The argument that an individual had to take holidays within the holiday year otherwise they "lost them" could only apply if the individual was maintaining employment with the same employer or had continuity with the succeeding employer. Otherwise he/she did not lose the right to holiday pay as that would require to be paid in respect of holidays accrued but untaken up to the date of termination of the employment i.e. in this case up to 31 July 2018. That did not happen. The agreement to preserve that holiday right into Papillon Ltd was an exercise in
"control" of each company.

34. In those circumstances when the claimant left Café Tartine Ltd to work full time in Papillon Edinburgh Ltd there was no break in the continuity of his employment.

Thus he had employment with Papillon Edinburgh Ltd in the period 4 April 2018 to 2nd September 2018.

Holiday Pay

35. There was no contract of employment and so the statutory provisions of the Working Time Regulations 1998 apply. In that respect the claimant's leave year would commence on the date on which his employment commenced (Regulation 13(3)). The entitlement is to 28 days annual holiday (Regulation 13(a)(3)).

36. Where a worker's employment is terminated during the course of his leave year then a calculation requires to be made according to the formula (A x B) – C. In that formula:-

- A is the period of leave to which the worker is entitled in the leave year
- B is the proportion of the worker's leave year which expired before termination and
- C is the period of leave taken by the worker between the start of the leave year and the termination date

37. In this case the claimant worked for 5 months of the leave year and took 5 days holiday.

38. Accordingly the holidays to which he was entitled at termination was:-

(28 days x 5/12ths) – 5 = 6.66

39. The evidence was that at termination of employment the claimant received 2.33 days holiday pay thus leaving a balance due to him of 4.33 days (Regulation 13; 13A and 14).

40. Where the amount of leave that has accrued includes a fraction of a day then the fraction is treated as a half day if it is less than a half day and a whole day if it is

more than a half day (Regulation 15A(3)). This applies during the first year of employment which is the case here. In this case then the amount of holiday pay accrued to the claimant and unpaid (taking into account the 2.33 days paid by the respondent) is 4.5 days. A worker who works 5 days a week should be entitled to 1/5th of a week's pay in respect of a day's leave. In this case the claimant worked generally a 5 day week. His net monthly pay was agreed at £1387. One week's net pay is £320.07. One day's pay is £64.01 and so 4.5 days net pay is £288.04. That is the sum awarded in respect of holidays accrued but untaken to date of termination. It is for the respondent to account to HMRC for the tax and NI due.

Notice Pay

41. The right to notice arises under section 86 of the Employment Rights Act 1996. If an employee is employed for more than one month and less than two years then the entitlement to notice is "not less than one week". The right to notice does not prevent "either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice" (section 86(3)).

42. In this case I consider that the circumstances were not that the claimant was waiving his right to notice but parties coming to an agreement that he did not have to work that notice. Specifically the claimant did not agree that he would forego his right to payment in lieu of notice. I consider that was more likely than not the import of him asking Joanne Ramsay if he would be paid his entitlements albeit not working the week's notice to which the response was "yes of course". Thus I consider the agreement between the parties was that he had a right to a week's notice but he did not have to work it. That did not deny him a payment in lieu of notice. It was suggested by Joanne Ramsay in support of the proposition that they needed him there to work the notice that they were short of staff but as indicated (a) it seemed as if there had been arrangements made prior to speaking to the claimant to the effect that Mr Ramsay could work as a chef to cover the period and (b) it did not seem there was any diminution in staff as a consequence of the claimant leaving according to the information provided. It did appear that the proprietors had decided that they did not need the claimant's services in that week.

43. In those circumstances the claimant would be entitled to a week's pay amounting to the net sum of £320.07 and that is the sum awarded. It is for the respondent to account to HMRC for the tax and NI on the amount.

Contract of Employment

44. The claimant makes a claim that he is entitled to an "uplift" in respect that he had not received a contract of employment. Section 38 of the Employment Act 2002 states that in proceedings "under any of the jurisdictions listed in Schedule 5" (and that is the case here) then:-

- if a Tribunal makes an award to the employee in respect of the claim and

- when the proceedings were begun the employer was in breach of his duty to provide a contract of employment then

- the Tribunal (unless there are exceptional circumstances which would make an award or increase unjust or inequitable) must increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances increase the award by the higher amount instead"

45. The "minimum amount" is an amount equal to 2 weeks' pay and the "higher amount" is to an amount equal to 4 weeks' pay.

46. There was no statement of employment particulars provided to the claimant. No statement was provided by Café Tartine Ltd as should have been the case and the claimant had continuity of employment with Papillon Edinburgh Ltd.

47. I do not consider that there are any exceptional circumstances which would make an award unjust or inequitable. It may have been an error not to issue a statement of terms but that would not be regarded as an "exceptional circumstance". It would seem just and equitable to make an award between the higher and minimum amounts of 3 weeks' pay. It would seem that the respondent in this case was seeking to rely on a contract which had never been provided to the claimant when he sought payment of holiday pay. It would seem reasonable therefore to make an award between the minimum and higher amounts. In this circumstance a "week's pay" is the gross amount payable. That amount is £20,000 x 3/52 = £1153.85. This amount is not subject to deduction of tax and National Insurance.

Payment for Extra Hours

48. There was insufficient information to be able to make any calculation of any pay due to the claimant for allegedly working extra hours or shifts. Specific information would require to have been given in this respect. It would also be necessary to have established that the claimant was entitled to overtime payments or payments for extra shifts or for working on a bank holiday before any payment could accrue and no reliable evidence was produced to substantiate the position.

Uplift for lack of notice; uplift for "trouble"

49. There is no statutory provision for compensation in relation to these matters.

Employment Judge: James D Young
Date of Judgement: 02 May 2019
Entered in register: 16 May 2019
And copied to parties