EMPLOYMENT TRIBUNALS

Claimant: **Mr P Gibbs**

Respondent: **Valley Equestrian Centre Ltd**

Heard at **Mold** **On: 5 June 2018**

Before: **Employment Judge R McDonald**

Appearances

For the Claimant: Mr M Will (Ynys Môn CAB)
For the Respondent: Mrs P Maclean

JUDGMENT

The Judgment of the tribunal is as follows:

1. The claimant's claim that he was wrongfully dismissed succeeds.

2. The claimant's claim for pay in lieu of holiday accrued but untaken when his employment ended succeeds.

3. The respondent failed to provide the claimant with a statement of his terms and conditions as required by section 1 of the Employment Rights Act 1996.

4. The respondent shall pay the claimant the sum of £2049.36 without deduction of tax or national insurance. That sum consists of the following:

    a. £432 by way of remedy for wrongful dismissal, representing one week's notice pay.
    b. £639.36 for pay in lieu of accrued but untaken holiday.

c. £978 being two weeks' gross pay (capped at £489 per week) for failing to provide him with a s.1 ERA written statement of terms and conditions.

REASONS

1. The claimant worked as head chef at a hotel owned by the respondent from 1 February 2016 to 22 September 2017. He claimed that the respondent dismissed him in breach of contract. He also claimed that it failed to provide him with a written statement of terms and conditions. He claimed a week's notice pay; accrued holiday pay; and an award of two weeks' pay because the respondent had failed to provide a statement of his terms and conditions of employment.

2. At the hearing the claimant was represented by Mr Will, a CAB adviser. The respondent was represented by Mrs Maclean, a director of the respondent company. She and her husband were in charge of the hotel at which the claimant was head chef.

3. There was no agreed bundle of documents for the hearing. However, it was agreed that almost all of the respondent's documents were already included in the claimant's 84 page bundle. We therefore used the claimant's bundle at the hearing. In this judgment I've referred to it as "the bundle" and references to page numbers in this judgment are to pages in it.

4. Two of the respondent's documents were not included in the claimant's bundle. The first was a four page document headed "Valley Equestrian Centre - Contract of Employment". The first page of the document was included in the claimant's bundle at p.39 but Mr Will told me that the other three pages had not been disclosed by the respondent before the hearing. In these written reasons I refer to this document as "the 6 Feb contract of employment". The second document produced by Mrs Maclean at the hearing was a Maternity Certificate (MATB1) form for Kerrylee Owen. Mrs Maclean produced this to explain why Ms Owen could not attend the hearing in person to give evidence. In these written reasons I refer to that document as "the MATB1".

5. At the hearing I heard evidence from the claimant and from Matthew Birch. For the respondent I heard evidence from Mrs Maclean. I also read written statements from Logan Gibbs (for the claimant) and Kerrylee Owen and Emily Hawken (for the respondent). None of them attended to give evidence. I explained to the parties that their absence meant that I

could not give their written evidence as much weight as if they had attended to be cross examined.

6. At the heart of this case was a dispute of fact about what happened on 22 September 2017. The claimant set out one version of what happened and Ms Owen's and Ms Hawken's written statements set out another. The absence of oral evidence from Ms Owen and Ms Hawken was therefore a significant problem for the respondent's defence of the claimant's claim.

7. Mrs Maclean explained that Ms Owen could not attend because she was heavily pregnant with twins. She produced the MATB1 as evidence of this. That showed a due date more than 2 months away. However, Mrs Maclean said that the babies were due to be induced or delivered by Caesarean section much earlier that that due date. She did not produce any evidence to support that assertion. Mrs Maclean explained that Ms Hawken could not attend because she had had to take her grandfather to hospital. Again, no evidence was produced to support that assertion.

8. I explained to Mrs Maclean that she could apply to adjourn the hearing to enable those witnesses to attend and asked whether she wanted to do so. She said she would rather go ahead with the hearing relying on the written statements of Ms Owen and Ms Hawken.

9. The absence of Logan Gibbs, the claimant's son, was less significant for the claimant's case because his evidence corroborated that given orally by the claimant and Mr Birch. The claimant explained that his son was in the middle of exams and so could not attend.

10. As Mrs Maclean had not been involved in a tribunal hearing before I explained the process to her, stressing in particular that when cross examining she need to challenge any part of the claimant's evidence which the respondent disputed.

11. At the end of the evidence I heard brief oral submissions from Mr Will and Mrs Maclean. I then reserved my decision.

The issues in the case

12. There was no agreed list of issues. Having heard oral submissions and through discussions with the Mr Will and Mrs Maclean the issues I had to decide were as follows:
    a. Did the respondent dismiss the claimant in breach of contract ("the wrongful dismissal claim")?

b. If so, to what compensation was the claimant entitled for that wrongful dismissal? It was agreed that the claimant was entitled to one week's notice. However, there was a dispute about how one week's pay should be worked out:
    i. was it based on 40 hours per week or an average of the hours actually worked by the claimant (which varied depending on demand)
    ii. was the respondent entitled to deduct from that pay a sum to cover the cost of workwear which the respondent said the claimant had ordered without authority and failed to return at the end of his employment.
c. How much was the claimant owed for holiday accrued but not taken at the time his employment ended ("the holiday pay claim")?
d. Did the respondent give the claimant a written statement of his terms and conditions of employment as section 1 of the Employment Rights Act 1996 ("ERA") requires?
e. If not, should the tribunal increase any compensation awarded by 2 weeks' pay or by 4 weeks' pay as required by s.38 of the Employment Act 2002.

The relevant law

13. The claimant cannot claim unfair dismissal because he was not employed by the respondent for two years. His claim is for wrongful dismissal. That is, he claims that he was dismissed in breach of the terms of his contract of employment with the respondent. There is a dispute between the parties about whether the claimant had a written contract of employment. However, that makes no difference to his notice entitlement because his written contract says that until he had worked for the respondent for two years his notice entitlement was one week. That is the same as the statutory minimum notice period that applies under s.86 of ERA. Whether the 6 February contract of employment applies or not, therefore, the most the claimant can claim for his wrongful dismissal is one week's notice.

14. As I understand it, the claimant puts his claim in two alternative ways. The first is that telling him to "fuck off" if he did not like having to work until 9.30 p.m. was an express dismissal by the employer. The second was that speaking to him in that way (via Ms Owen) was a fundamental breach of contract which entitled him to resign. In other words, he was constructively dismissed. The respondent's defence is that the claimant simply resigned and that there is nothing entitling him to treat himself as dismissed.

15. Where there is a dispute as to whether there is a dismissal, the onus is on the claimant to show a dismissal. The standard of proof is on the balance of probabilities.

16. Where the words used by the employer are ambiguous (e.g. so that it is not clear whether it was intended to dismiss the employee or just tell them off) then the tribunal has to look at all the surrounding circumstances. If the words are still ambiguous, the tribunal has to ask itself how a reasonable employer or employee would have understood them in the circumstances.

17. In interpreting the words used, the tribunal will take into account the nature of the workplace. For example, in **Futty v D and D Brekkes Ltd 1974 IRLR 130** the claimant was a fish filleter. His foreman told him "if you do not like the job, fuck off". The claimant said this was a dismissal. The tribunal interpreted those words against the background of the fish dock and found they were not a dismissal but a "general exhortation to get on with the job".

18. In order to claim constructive dismissal, the employee must establish that:
    a. there was a fundamental breach of contract on the part of the employer
    b. the employer's breach caused the employee to resign
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

19. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, **Malik v Bank of Credit and Commerce International SA [1998] AC 20.** This is usually called "the implied term of trust and confidence".

20. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A**. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

21. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in **Malik** at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

22. There is no suggestion in this case that the claimant waived any breach of contract by the respondent.

23. There was no dispute that the claimant had accrued holiday which was untaken when his employment ended. There was a difference between the parties about how much entitlement he had accrued. Regulation 16(1) of the Working Time Regulations 1998 ("WTR") says that a worker must receive a week's pay for a week's holiday. A 'week's pay' for these purposes is to be calculated in accordance with sections 221–224 of ERA. Regulation 13 and 13A of WTR provide a total entitlement of 5.6 weeks' holiday a year.

24. On termination of employment, regulation 14 of WTR says a worker must be paid in lieu of untaken leave and additional leave (pro rata to the leave year). This is calculated by multiplying the worker's annual leave entitlement by the proportion of the holiday year which expired before the date of termination of employment and then deducting from that the holiday already taken by the worker in that holiday year.

25. Section 1 of ERA requires the employer to provide the employee not later than 2 months after beginning of the employment with a statement of particulars of employment. Under s.38 Employment Act 2002, a tribunal must make an award of 2 weeks' pay and may, if it considers it just and equitable, make an award of four weeks' pay where there is failure to comply with the requirement to provide the written statement of employment particulars required by s.1 ERA.

26. The obligation to make an award under s.38 applies if the tribunal finds in favour of an employee on a claim under any of the jurisdictions listed in Schedule 5 of the Employment Act 2002. That list includes a claim for wrongful dismissal like the one made by the claimant in this case.

Evidence and findings of fact

27. The respondent is a hotel and restaurant. Mr and Mrs Maclean run it and live in a house next to it. It is not in dispute that the claimant worked as head chef from 1 February 2016 until 22 September 2017. It is also not disputed that the claimant left his employment on that date but there is a dispute as to what happened and what caused him to leave.

28. The claimant's evidence was that on the evening of Friday the 22 September he was getting ready to start service in the restaurant with Mr Birch, who was his second chef, and his son Logan, who worked as a

kitchen porter. In answer to my question the claimant said that service in the restaurant started at 6 p.m. so he would usually get in around 5 p.m.

29. The claimant said Kerrylee Owen, the restaurant manager, came into the kitchen and spoke to him. His evidence is that she said "I've been told to tell you that we are open till half past nine tonight and if you have a problem with that you can eh-eh". His response was to say "They didn't say fuck off did they?" to which Ms Owen replied "Well, yes".

30. The claimant said that as he had been working on average just below a 48 hour week, this decision was a problem so (to quote his written statement) "I took there [sic] instructions to leave". His evidence was that he turned to Mr Birch and said "Sorry mate, it's out of my hands, call me later if you want." He then changed, collected his belongings and told his son Logan to do likewise. He then clocked off, taking a photo of his time card on his phone. The claimant's evidence was that all kitchen staff would regularly do that so they had a record of their hours worked. He said this was because they were regularly underpaid for the hours worked. At the hearing he produced his phone which had a photo of his time card on the date in question showing he left work at 6.24 p.m.

31. The claimant said he did not know whether it was Mr or Mrs Maclean who had said he could "fuck off" if he didn't like it – he had simply received the message via Ms Owen. His claim form, however, said it was Mr Maclean who held a meeting with front of house staff on the 22nd to tell them they would have to work half an hour extra per day (i.e. until 9.30 p.m.) and that it was his message Ms Owen relayed to him. He said neither Mr nor Mrs Maclean were in the hotel when the conversation with Ms Owen took place. In answer to my question, the claimant said that if he had simply been told to take orders until 9 p.m. (which would have meant working until 9.30 p.m.) he would have discussed that with the owners. It was the fact that he was told to "fuck off" which led him to leave the job.

32. According to the claimant's statement, as he went through reception he told Emily Hawken, the receptionist that night, that "It looks like I'm done, unless there's been a misunderstanding in which case give me a call and I'll come back. If not, tell them to get my wages correct for the week and I am including notice pay in that too if I have been dismissed, and I will pick up any paperwork Monday".

33. The claimant said that he and his son then left quietly. When they got to the car, the claimant said he realised that Logan was not happy leaving Mr Birch to handle the kitchen by himself. According to his statement, the claimant said to Logan "It's not fair for you to loose (sic) out on your job

because I've been sacked. Do you want to go back and finish his shift?" Logan did do that and the claimant waited in the car for him.

34. According to the claimant's statement, Mr Maclean came out of the hotel while the claimant was sitting in the car waiting for Logan. However, the claimant said that Mr Maclean turned his back on him and walked off "without saying a word" which the claimant said was unusual for him. About 9 p.m. the claimant said he returned to the hotel reception and was sitting talking to Ms Hawken when (to quote his statement) "[Ms Owen] came barging through the reception doors and accused [him] of putting words in other people's mouths." According to the claimant, she also said that his son "would do anything you say because he's scared of you". The claimant accepted in his evidence that at that point he lost his temper and began shouting back at Ms Owen. She then became upset and Ms Hawken said "you need to leave the hotel now you don't work here".

35. The claimant then went to the kitchen and told Logan they had to leave right away. He said that in the car on the journey home Logan said that Mr Maclean had been saying nasty things to him about the claimant and that he too wanted to leave.

36. The claimant said that having had no contact from the hotel "confirming they had no interest in my returning to work" he went to the hotel on the following Monday (the 25th September) to collect the paperwork he'd asked for, i.e. payslip, P45 and letter of dismissal). Mrs Maclean came to the reception counter and the claimant's evidence is that when he said "Hi, I've come to get any paperwork you have ready" she said "you will get it in the post, now get out of the hotel, it's been lovely not having you here, don't come back." The claimant said he saw Mr Maclean who again turned his back on him and walked away. He received his P45 and his payslip and a month later received a cheque for £246.29 which he did not cash "showing I did not accept the offer".

37. The cheque came with an invoice showing a deduction (of £208.73) for workwear. Mrs Maclean for the respondent explained that this was for workwear and boots which she said the claimant ordered without authority and which was not returned when his employment ended. The claimant's evidence was that he has sensitive skin and can only wear cotton which meant he could not wear the standard uniform which Mr Maclean had bought for all the kitchen staff. According to his statement, Mr Maclean said that he would "treat him to a nice jacket" and that jacket was left unopened in the hotel office when he left on 22nd September. He said that none of the other staff have had money deducted for their uniforms. In answer to my question, the claimant denied he had placed

the order without authority. He said Mr Maclean had asked him to put the order together and he presumed he had then put the order through.

38. In answer to my question, the claimant said he had not started a new job on the 29 September 2017 which is what it said at section 7 of his claim form. He said that he had had a trial on 29th but it had not worked out. He did now have another job and had recently been promoted to a Temporary Head chef position on a salary of £25000 a year.

39. Finally, the claimant's evidence was that he had never seen the 6 Feb contract of employment produced in full by the respondent at the hearing. He pointed out that it was not signed by him and had the wrong start date (6 February 2015 as opposed to actual start date of 1 February 2016).

40. So far as the claimant's witnesses are concerned, Mr Birch appeared at the hearing to give evidence. Mrs Maclean chose not to ask any cross examination questions. His written statement corroborates the claimant's version of the conversation with Ms Owen on the 22 September, including her confirmation that the owners had said if he didn't like it he could "fuck off". I asked him how close he was to the claimant and Ms Owen when the conversation happened and he said he was standing right next to the claimant. He confirmed that after the claimant had left he'd stayed in the kitchen by himself and then worked with Logan when he came back from the claimant's car.

41. In answer to my question he confirmed that he did not witness the altercation between the claimant and Ms Owen when the claimant came back into the hotel around 8.45 p.m. He also confirmed that he had never received a written contract of employment.

42. Logan Gibbs did not attend the hearing. In his written witness statement (p.42) he confirmed that he was present in the kitchen on the 22 September. His statement corroborates his father's version of events to a large extent. However, although his statement said that he heard Ms Owen say "I've been told to tell you that we are open until half past nine and if you've got a problem with that you can uh hu", it said he did not hear his father's response. This was because the claimant had leaned across the hot plate to Ms Owen with his back to Logan. Logan could only therefore corroborate the first part of the conversation. As he did not attend to give evidence and be cross examined I cannot give his evidence much weight.

43. According to Kerrylee Owen's undated written statement (p.44), the events resulting in the end of the claimant's employment started on

Thursday 21 September. In summary, her statement said that 6 residents arrived in the restaurant and placed their orders by 8.45 p.m. When she went to the kitchen to relay those orders she was told by the claimant that the kitchen was closed and he had turned everything off. The residents weren't happy and the restaurant is supposed to take orders until 9 p.m. Mr Birch made the residents some cheesy chips but the claimant was not happy about that and shouted at her "I told you that we are closed". In cross examination, the claimant denied this incident took place. Mr Birch was not asked about it.

44. Her statement goes on to say that on the following day the hotel was full so the restaurant was going to be busy. Her statement said that she arrived at 5 p.m. and Mrs Maclean took her to one side and told her the same 6 residents were in again and that she was "not happy about the situation" because the restaurant takes orders until 9 p.m. Mrs Macelan "asked [Ms Owen] to tell [the claimant] that we are to take orders until 9 p.m.

45. Ms Owen's statement does not set out what she said to the claimant in passing on this instruction from Mrs Maclean. Her statement moves straight from recording what Mrs Maclean told her to the claimant's reaction. He was "not happy about this, he said he wasn't going to serve until 9 pm because he wanted to be home by 9.15-9.30 p.m.". Her statement said she told the claimant to talk to Mrs Maclean and that he threatened to walk out before service in the restaurant had started and take Logan with him. She said the claimant had left by 6.15 p.m. and that she told Emily Hawken to tell Mr Maclean that he had left.

46. The final paragraph of Ms Owen's statement dealt with what happened when the claimant came back in to the hotel around 8.45 p.m. it said the claimant came and sat in reception and "asked everyone sarcastically if we had missed him". She replied that everything had gone smoothly and said that the claimant then turned on her and started shouting for the whole bar area to hear that she was "shit at her job" and "a shit mum". She said Ms Hawken then asked him to leave because he was causing a scene in front of guests.

47. Emily Hawken's statement (p.43) takes the form of an unsigned short letter to Mrs Maclean. Ms Hawken did not witness the conversation between the claimant and Ms Owen which is at the heart of this case so can't give any direct evidence about it. Her statement said that [the claimant] was not dismissed…but walked out because he was told he would be serving food until 9 p.m."

48. Ms Hawken was there when the claimant came back into the hotel reception at around 8.45 p.m. according to her statement, "[the claimant] started aggravating the waitresses and then hurling verbal abuse at one of them in particular – he was extremely rude and unpleasant". Her statement confirmed that she asked him to leave because he was creating a scene in front of guests.

49. Mrs Maclean gave oral evidence. She was not a witness to the conversation between the claimant and Ms Owen so could not give evidence about what was said. She said she could not remember the conversation she had had with Ms Owen on the 22nd September word for word but confirmed the restaurant takes orders until 9 p.m. Her evidence was that although she would check the evening service, she was not often in the kitchen – perhaps once or twice a day. She ate her own evening meal at home rather than in the restaurant. She denied that she would ever use foul language like that the claimant said Ms Owen used in passing on the message on the 22nd.

50. She maintained in her evidence that the claimant had ordered the chef's workwear without authority and that it had not been returned. She also said that when she had spoken to the claimant on the 25th September he had asked for his notice pay rather than just relevant paperwork, something he denied in cross examination.

51. Mrs Maclean's evidence about the 6 Feb contract of employment was that it was in the claimant's file. She said that the wages clerk would have prepared it. She could not explain why the copy produced had not been signed by the claimant. She also could not explain why the contract was dated 6 Feb 2015 when the claimant started work in 2016. She assumed the wages clerk had made a mistake. She confirmed that it would have been the wages clerk who arranged for any contract to be signed so she herself wasn't able to give evidence as to whether the claimant had seen and signed the contract.

52. Taking all the evidence in the round, it is clear that on the evening of the 22 September sometime around 6 p.m. Ms Owen went into the kitchen and spoke to the claimant. She told him that he had to accept orders until 9 p.m. That in practice meant him working until 9.30 p.m. It seems to me that Ms Owen would not have done that unless she had been told to either by Mr or Mrs Maclean.

53. I also find that as a result of that conversation with Ms Owen, the claimant left the kitchen, initially taking his son with him. It's not disputed that his son then returned to the kitchen while the claimant sat in his car until

around 8.45 p.m. waiting for him to finish work. It's also not disputed that the claimant came back in and sat in the hotel reception around 8.45 p.m. and that he had an altercation with Ms Owen during which, by his own admission, he lost his temper and told her she was "shit at her job". I accept that he was then told to leave by Ms Hawken. I don't need to decide whether he also criticised Ms Owen as a mum because that isn't relevant to the issues I'm deciding. Whatever was said, the claimant accepted that Ms Owen was upset and he acknowledged in his statement that it was "regrettable" that he had lost his temper.

54. What I do have to decide is what exactly was said between Ms Owen and the claimant. This is where the absence of Ms Owen from the hearing causes difficulties for the respondent. As I told Mrs Maclean, I could not give as much weight to Ms Owen's written statement as I could to the claimant's oral evidence. She assured me that both Ms Owen and Ms Hawken are honest and hardworking. However, their absence from the hearing meant I was not in a position to make my own assessment of their credibility which is what I would need to do in order to be able to give their evidence as much or more weight than the claimant's and Mr Birch.

55. In any event, Ms Hawken could not give any evidence about what was said in the kitchen. Ms Owen clearly could but in fact her written statement doesn't record what she actually said to the claimant. It could be said that her record of the claimant's reaction (i.e. focussing on being asked to work late rather than on being told to "fuck off if he didn't like it") is not consistent with his version of events. Since she did not attend there was no opportunity to ask her what exactly she did say to the claimant.

56. In those circumstances, I have little option but to give the claimant's evidence more weight unless it is itself inconsistent or otherwise not credible. Having heard his evidence and seen him cross examined I do not think that is the case. Since it is also corroborated by Mr Birch's evidence, I find as a fact that on the evening of 22 September at some point not long after 6 p.m., Ms Owen came into the kitchen and told the claimant that the kitchen had to take orders until 9 and that if he didn't like it he could "eh eh". I find that the claimant asked "they didn't say "fuck off" did they" and Ms Owen confirmed they had. I find that in response to that, the clamant left his work with the respondent.

57. There's another important finding of fact arising from that conversation. It seems to me that the way Ms Owen passed on the message to the claimant (using the euphemism "eh-eh") supports the conclusion that use of phrases like "he can fuck off" wasn't part of the day to day language used by the respondent to the claimant. That's supported by the

claimant's evidence in answer to a question I asked. He confirmed that it was not being told to work later that caused him to leave but the language used. If that language hadn't been used he said he would have gone to discuss the issue of the later opening with Mr or Mrs Maclean.

58. I also accept the claimant's version of what happened afterwards, i.e. that he initially told his son to leave with him then changed his mind; that he then waited in the car until his son finished his shift. I find that there was then an altercation between the claimant and Ms Owen in the hotel reception area around 8.45 p.m. – 9 p.m. during which the claimant lost his temper and told Ms Owen she was "shit at her job" but I do not accept that he also said she was a "shit mum". I find that Ms Hawken told the claimant to leave the reception area.

59. In terms of what happened next day, I prefer the claimant's evidence that he asked Mrs Maclean for his papers but did not ask for pay. Mrs Maclean's evidence I found to be rather vague. By her own admission, she did not remember the details of any conversation with Ms Owen on the 22nd and that lack of clear recollection was true of her evidence in general.

60. When it comes to the 6 February contract of employment, I accept the claimant's evidence that he had never seen it. Leaving aside the fact that it was unsigned by the claimant and had the wrong date, Mrs Maclean's own evidence did not directly suggest the claimant had seen it. At most, all she could say was that the contract was in the claimant's file so she assumed the wages clerk must have sorted it out when the claimant joined. I did not hear any evidence form the wages clerk. In contrast the claimant was adamant he had not seen the contract.

61. I find the 6 February contract of employment was never seen or agreed to by the claimant and its terms did not apply to his employment with the respondent. It follows that the respondent cannot rely on any terms in it to allow it to make deductions from the claimant's wages. In any event there is no deduction clause in the contract. The nearest is a clause headed "Company Property" saying that the employee is expected to be returned in good order when they stop working for the company and that it remained the property of the company. That's in contrast, for example, to the clause about holiday pay which says the Company has the right to recover any overpayment of holiday pay.

62. Finally, when it comes to the purchase of the chef's jacket and other equipment, I find that the clamant did not order it without authority. I prefer his evidence that he was asked by Mr Maclean to put together the

order. I also accept his evidence that the chef's jacket was not used and remains at the hotel office.

63. Although there was a dispute about how much holiday the claimant had accrued by the 22 September 2017, the parties were agreed that he had taken 6 days' holiday before his employment ended.

Discussion and conclusion

64. Dealing first with the wrongful dismissal claim. I have found that the respondent was told by his employer (via the restaurant manager) to work longer hours and that if he didn't like it "he could fuck off". Where it's not clear whether it was intended to dismiss the employee or just tell them off then the tribunal has to look at all the surrounding circumstances. If the words are still ambiguous, the tribunal has to ask itself how a reasonable employer or employee would have understood them in the circumstances.

65. In interpreting the words used, I need to take into account the nature of the workplace. I have found as a fact that the language used on the 22 September was not language usually used by the respondent to the claimant. On the evidence I heard this was not a workplace, like the fish dock in the **Futty** case, where language like that was a "general exhortation to get on with the job". This was also not a case of the phrase being used in the heat of the moment. In those circumstances I accept the claimant's case that the words were intended to dismiss him.

66. If, however, I am wrong about that I would have found that the respondent's conduct amounted to a constructive dismissal. That's because using that language to the claimant in the context of that workplace was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. A breach of the implied term is a fundamental breach of contract and the claimant resigned in response to it.

67. On either basis, the claimant was wrongfully dismissed in breach of contract because he was not given the one week's notice to which he was entitled.

68. There was no dispute that the claimant had accrued holiday which was untaken when his employment ended. He is entitled under regulations 14 WTR to payment in lieu for that accrued untaken holiday.

69. I have found that the claimant was not given the statement of terms and conditions required by s.1 ERA. Because his claim of wrongful dismissal

has succeeded, s.38 says I must increase his compensation by either 2 or 4 weeks' pay.

Remedy

The wrongful dismissal claim

70. I have found that the claimant was wrongfully dismissed. He is entitled to compensation for the period of notice he should have been given by the respondent to lawfully terminate his contract of employment.

71. Where, as here there is no contract of employment, the minimum notice the employer has to give to terminate employment is set by section 86 of ERA. For an employee who has continuous employment of less than two years it is one weeks' notice. Section 91(5) of ERA says that where an employer fails to give the minimum required notice, the rights set out in sections 87-90 of ERA should be taken into account in assessing the employer's liability for breach of contract.

72. Section 89 ERA explains how to calculate what an employer has to pay an employee for each week of notice where that employee has no normal working hours. It says that the employee is entitled to a "week's pay" for each week of notice. Section 222 of ERA explains how to work out a "week's pay" where there are normal working hours but the hours the employee is required to work vary from week to week and the pay varies from week to week. In such cases, a "week's pay" is worked out by working out the average hours worked over the 12 complete weeks before the "calculation date", i.e. in this case the date the day before notice would have started if properly given. That is then multiplied by the average hourly rate for those 12 weeks.

73. In the claimant's case that means working out the average hours he worked for the 12 weeks ending on 18 September 2017 (the last full week he worked). That average is 45.20 hours. Multiplied by the hourly rate of £12 the claimant was paid throughout the period that makes a gross "week's pay" of £542.40. However, since tax and NI would have been deducted from that amount had the clamant been paid or worked his notice the compensation has to take into account tax and National Insurance deductions. Once those deductions are taken into account the figure for compensation for one week's notice is £432.

The holiday pay claim

74. The claimant's holiday pay calculation (p.46) used the Gov.uk holiday entitlement calculation to work out the holiday entitlement from 1 April 2017 to 22 September 2017. Based on working 5 days per week, the Gov.uk calculation showed an entitlement to 13.4 days. The respondent's holiday pay calculation (p.45) was a handwritten one. It stated that the entitlement is 12 days holiday but there is no indication how that figure was calculated.

75. The entitlement to holiday under the WTR is calculated in weeks rather than days. From 1 April 2017 to 22 September 2017 is 175 days or 25 weeks. It represents 47.95% of the claimant's annual holiday year. Under the Working Time Regulations 1998 the annual minimum holiday entitlement is now 5.6 weeks a year. 47.95% x 5.6 weeks is 2.68 weeks (which at 5 days a week equates to the 13.4 days figure which the claimant arrived at using the gov.uk calculator). The claimant had taken 6 days holiday, which equates to 1.2 weeks. That means he is entitled to payment in lieu equivalent to 2.68 weeks - 1.2 weeks = 1.48 weeks.

76. Using the net week's pay figure of £432 that amounts to 1.48 x £432 = £639.36.

Failure to provide the s.1 ERA statement

77. The tribunal must order either 2 or 4 weeks' pay where there is a failure to provide a s.1 statement. Mr Will did not seek to argue that the higher award was appropriate. This was a relatively small employer with no internal HR resource. In the circumstances I agree with his submission that the appropriate award is 2 weeks' pay.

78. An award under s.38 is an award of gross week's pay which in the claimant's case is £542.40. However, for the year 2017-18, a week's pay for these purposes was capped at £489. The award is therefore 2 x £489 = £978.

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Employment Judge McDonald
Dated: 18 July 2018

639 JUDGMENT SENT TO THE PARTIES ON

……20 July 2018……..

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS