EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4123454/2018

Held at Edinburgh on 9 August 2019

Employment Judge: W A Meiklejohn

Mr Damian Wojcik	**Claimant** **In person**
Mr Scott Maxwell	**Respondent** **No appearance or representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is as follows -

(i) The respondent is ordered to pay to the claimant the sum of **THREE HUNDRED AND THIRTY FIVE POUNDS AND TWENTY PENCE** (£335.20) in respect of notice pay;

(ii) The respondent is ordered to pay to the claimant the sum of **SEVEN HUNDRED AND TWENTY POUNDS** (£720.00) in respect of unlawful deduction of wages;

(iii) The respondent is ordered to pay to the claimant the sum of **TWO THOUSAND EIGHT HUNDRED AND FIFTEEN POUNDS AND SIXTY EIGHT PENCE** (£2815.68) in respect of holiday pay; and

(iv) The respondent is ordered to pay to the claimant the sum of **ONE THOUSAND THREE HUNDRED AND FORTY POUNDS AND EIGHTY PENCE** (£1340.80) in terms of section 38 of the Employment Act 2002.

REASONS

1. This case came before me for a final hearing scheduled to start at 10.00 am on 9 August 2019. The claimant appeared in person. The respondent did not appear.

2. In his ET3 response form the respondent had not provided a telephone number or email address. He had not contacted the Tribunal to advise that he would not be attending the hearing. The claimant provided the clerk with an email address for the respondent and an email was sent by the Tribunal to that address (Scott.Maxwell@hotmail.co.uk) at 10.18 am asking the respondent to contact the Tribunal urgently and advising that, if the Tribunal did not hear from the respondent within ten minutes, the hearing would proceed in his absence.

3. The Tribunal having received no reply to the said email, the hearing commenced shortly after 10.30 am.

Procedural history of case

4. In his ET1 claim form the claimant gave the respondent's address as Jolly Harvester, Calside Road, Dumfries, DG1 4HB. The Tribunal's notice of claim and notice of final hearing (on 20 February 2019) was sent to the respondent at that address.

5. The respondent did not submit a response to the claim and a judgment in favour of the claimant was issued on 12 February 2019. This was based on information provided by the claimant in his letter to the Tribunal dated 29 January 2019 in response to a request from the Tribunal to provide a breakdown of how the sums he was claiming from the respondent were calculated.

6. By letter dated 28 March 2019 the claimant requested that the Tribunal should re-serve his claim against the respondent at the address (for the respondent) stated above. This was dealt with as an application for reconsideration (in terms of Rule 70 contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) which was granted and the judgment dated 12 February 2019 revoked in terms of the Tribunal's judgment dated 20 May 2019.

7. The claim was duly served on the respondent on 29 May 2019 and his ET3 response form was received by the Tribunal on 21 June 2019. The notice of claim sent to the respondent included notice of the final hearing set down for 10.00 am on 29 August 2019.

8. The Tribunal, by order dated 3 July 2019, ordered the respondent to provide information as to the identity of the claimant's employer. This was because the respondent referred in his ET3 response form to having previously run the Jolly Harvester and stated that he had had no involvement in "this organisation" since 8 March 2019. The respondent did not comply with the Tribunal's said order.

Claims

9. The claimant was pursuing the following claims against the respondent –

    (i) entitlement to notice pay;
    (ii) unlawful deduction of wages; and
    (iii) holiday pay.

    All of these claims were resisted by the respondent.

Applicable law

10. The right of an employee to receive a minimum period of notice from his employer is contained in section 86 of the Employment Rights Act 1996 ("ERA"). In terms of section 86(1)(a) that period is one week where, as in the case of the claimant, the period of continuous employment was less than two years. Failure to give an employee the minimum notice to which he was entitled would potentially be a breach of contract giving rise to a claim for damages. The Tribunal has jurisdiction to deal with such a claim in terms of paragraph 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

11. The right of an employee not to suffer unauthorised deductions from his wages is contained in section 13 ERA.

12. The right of a worker to annual leave and to payment in respect of periods of leave is contained in paragraphs 13 to 16 of the Working Time Regulations 1998 ("WTR").

13. The amount of a week's pay of an employee is calculated in accordance with sections 221-224 ERA. In terms of section 222, where the employee's remuneration varies according to the number of hours worked, a week's pay is calculated by reference to his average weekly remuneration in the applicable period of twelve weeks.

14. In terms of section 38(3) of the Employment Act 2002, where the employer is in breach of his duty under section 1 ERA to give the employee a written statement of initial employment particulars, and the Tribunal makes an award to the employee in respect of his claim, the Tribunal must increase that award by the minimum amount (two weeks' pay) and may, if it considers it just and equitable to do so, increase the award by the higher amount (four weeks' pay).

Findings in fact

15. I heard evidence from the claimant. I also had payslips and bank statements which the claimant had submitted to the Tribunal when lodging his claim.

16. The claimant was employed at the Jolly Harvester as a chef. His employment commenced on 15 March 2017. He worked there on a casual basis for a short time before that date. He was paid at the rate of £10.00 per hour. As evidenced by his payslips, the claimant's hours of work varied from week to week. He normally worked five days each week (excluding Wednesday and Thursday). He did not receive a statement of initial employment particulars.

17. Throughout the claimant's period of employment at the Jolly Harvester his employer was the respondent. The respondent had been given an opportunity to provide information as to the identity of the claimant's employer, if he disputed that he was the employer. By failing to comply with the Tribunal's order dated 3 July 2019 the respondent had not availed himself of that opportunity.

18. On 6 September 2018 the respondent dismissed the claimant in the course of a telephone conversation. The dismissal was with immediate effect. The claimant was not given pay in lieu of his entitlement to notice which, in view of his length of service of less than two years, was one week.

19. The claimant was paid weekly, in arrears. Each Friday, he would be paid not for the immediately preceding week but for the week before that. Accordingly, the pay which the claimant received on Friday 7 September 2018 related to the hours he had worked in the week ending (or at least containing) Friday 31 August 2018. At the time of his dismissal the claimant had worked a total of 22 hours on 3 and 4 September 2018 for which he expected to be paid on 14 September 2018. Notwithstanding that a payslip was generated by the respondent, the claimant was not paid for the said 22 hours. This was confirmed by his bank statements.

20. The claimant had obtained confirmation from HM Revenue and Customs that a tax refund of £731.47 to which he was entitled had been paid to the respondent. The claimant believed that this should have been paid to him on 31 August 2018. He

had expected to receive on that date a total of £851.47 being payment for twelve hours worked (£120.00) plus the tax refund (of £731.47). Again, notwithstanding that a payslip was generated by the respondent, the claimant was not paid the sum of £851.47. His bank statements confirmed that the actual amount paid to him was £351.47. Accordingly the respondent had underpaid the claimant by £500.00.

21. During his period of employment with the respondent the claimant took only two weeks of holiday, in July 2017. He was not paid for these two weeks. The Jolly Harvester was open for business on public holidays and accordingly the claimant worked these.

Calculation of a week's pay

22. I was satisfied from a review of the payslips which the claimant had submitted to the Tribunal that his hours of work varied from week to week and so, applying section 222 ERA, the amount of a week's pay required to be calculated by reference to his average number of normal working hours during the relevant period of twelve weeks (being the period between week ending 22 June 2018 and week ending 7 September 2018, both dates inclusive).

23. Based on the information contained in the claimant's payslips and bank statements, I calculated that the claimant's gross remuneration for the said period of twelve weeks was £4022.50. This equated to average gross weekly pay of £335.20.

Discussion and disposal

24. I found the claimant to be a credible witness. He answered questions in a straightforward way. I found no reason to doubt the accuracy of the information he provided. His evidence was supported by his bank statements.

25. I was satisfied that the respondent had dismissed the claimant without notice on 6 September 2018. In view of his length of service (less than two years) the

claimant had been entitled to one week's notice. The respondent's failure to give such notice was a breach of contract. The claimant was entitled to damages equal to one week's net pay. I decided that the respondent should be ordered to pay to the claimant the sum of £335.20 (from which, at the time of payment, being a week's gross pay the respondent should deduct the income tax and employee's national insurance contributions at the applicable rates).

26. I was satisfied that the respondent had not paid the claimant for the 22 hours he had worked on 3 and 4 September 2018. I was also satisfied that the respondent had withheld £500.00 when paying the claimant on 31 August 2018. Accordingly, the claimant had suffered unlawful deductions from wages in the amounts of £220.00 and £500.00, a total of £720.00. I decided that the respondent should be ordered to pay to the claimant the said sum of £720.00 (from which, at the time of payment, the respondent should deduct income tax and employee's national insurance contributions at the applicable rates).

27. I was satisfied that the claimant was entitled to 28 days' paid holidays in respect of each complete holiday year during his period of employment. This was because he worked five days per week and his annual holiday entitlement in terms of the WTR was 5.6 weeks. I was satisfied that the claimant had taken only two weeks of holiday in July 2017 for which he had not been paid. His holiday year ran from 15 March (in terms of Regulations 13 and 13A WTR) and so he was entitled to be paid in respect of 5.6 weeks' holiday for the holiday year commencing 15 March 2017 and 2.8 weeks' holiday for the holiday year commencing 15 March 2018.

28. These entitlements totalled 8.4 weeks. Multiplying the claimant's weekly pay of £335.20 by 8.4 produces a sum of £2815.68 and I decided that the respondent should be ordered to pay this amount to the claimant (from which, at the time of payment, the respondent should deduct income tax and employee's national insurance contributions at the applicable rates).

29. The respondent had not provided the claimant with a statement of initial employment particulars as required under section 1 ERA. This meant that, as the

claims fell within the jurisdictions listed in Schedule 5 to the Employment Act 2002, I had to award either the minimum amount (two weeks' pay) or the higher amount (four weeks' pay) in terms of section 38 of that Act.

30. I decided that, as there had been no compliance with the requirement to provide the required statement, it would be just and equitable to award the higher amount. The respondent could have avoided this by doing what the law requires and issuing a compliant statement of initial employment particulars. The award is therefore £335.20 multiplied by 4 producing a total of £1340.80 (from which no deductions should be made).

31. In summary therefore, the respondent is ordered to pay to the claimant (a) the sums of £335.20, £720.00 and £2815.68 less income tax and employee's national insurance contributions and (b) the sum of £1340.80 without deduction.

Date of Judgement: 13th August 2019
Employment Judge: W A Meiklejohn
Entered in Register: 14th August 2019
And Copied to Parties