EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107053/2019 Hearing at Edinburgh on 19 September 2019

Employment Judge: M A Macleod

Jon Smiles	Claimant Represented by Mrs E Smiles Mother
Brewhemia Limited	Respondent Represented by Ms C Kennedy Payroll Manager

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The respondent wrongfully dismissed the claimant;
2. The respondent is ordered to pay to the claimant the sum of **Five Hundred and Ninety Four Pounds (£594)** by way of damages; and
3. The respondent did not fail to provide the claimant with an itemised pay statement in terms of section 8 of the Employment Rights Act 1996, and that claim is dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 23 May 2019 in which he complained that the respondent had wrongfully dismissed him and unlawfully deprived him of holiday pay.

2. The respondent submitted an ET3 response in which they denied that the claimant was dismissed, wrongfully or otherwise, but suggested that they would be willing to make a notice payment to him in any event. They also denied that the claimant had not received his full holiday pay.

3. A hearing was fixed to take place in this case on 19 September 2019. The claimant was represented by his mother, Mrs E Smiles, and the respondent by Ms C Kennedy, Payroll and Personnel Manager.

4. The claimant presented some documents which were referred to during the course of the hearing.

5. Both the claimant and Ms Kennedy gave brief evidence.

6. Prior to the hearing, the claimant received a payment from the respondent in relation to holiday pay, and that part of the claimant was dismissed, having been withdrawn, by Judgment of the Employment Tribunal dated 19 September 2019.

7. The issues for the Tribunal to determine were:

   (i) Was the claimant wrongfully dismissed?

   (ii) If so, what payment should be awarded to him in compensation?

   (iii) Did the respondent fail to provide the claimant with an itemised statement in respect of pay?

8. Based on the information presented and the evidence elicited, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 7 June 1992, commenced employment with the respondent as a door steward on 7 July 2017.

10. The claimant's role was to occupy the front door of the nightclub owned and managed by the respondent in Market Street, Edinburgh, to keep customers and staff safe, carry out patrols and secure the premises appropriately.

11. The claimant answered directly to Lee Rutherford, Head Doorman, and Daniel Wylie was the manager of the nightclub, to whom Mr Rutherford answered.

12. Security staff were expected to work additional hours over the Christmas and New Year holiday period due to the increased level of activity in the nightclub over that period.

13. With that in mind, Mr Rutherford texted the claimant (via Facebook Messenger) on 26 December 2018 at 1517 (4) to ask, *"You available rest of week and NYE [New Year's Eve] buddy? X".*

14. The claimant replied: *"Hey mate hope your Christmas was good. Aye I'm good for rest of week mate but New Years gonna be a problem because of what they pay, wasn't sure if danny was gonna try get us double time or not? X".*

15. Mr Rutherford confirmed that the respondent would not but said *"It's time and half after midnight. I can't moan because they pay better than everywhere else the rest of the year buddy…"* The claimant's response was to say *"Okay mate I'm gonna give it a miss this year, I worked last year to (sic) so gonna have the New Years with Sarah x".*

16. There was no further discussion about the matter but the claimant continued to work as rostered for the remainder of the week until 30 December 2018. On that day, Mr Rutherford texted the claimant (5): *"Danny just called. He's expecting you in tomorrow pal. He's really not happy we're short like. Can you please come in? it's gonna save a whole heap of drama x".*

17. The claimant replied: *"Hey mate I've already booked tickets for somewhere I understand Danny is expecting everyone to work but unfortunately I'm not wiling to give up my new year with my girl friend and family to be paid peanuts. I feel terrible for you because you'll be getting shit off him but he's the one that should be making sure his staff are paid so can only apologise to you x".*

18. Mr Rutherford texted again: *"I've just spoken to him again. We get paid for holidays and breaks and a better rate throughout the year which is 10 fold what we'd usually get. He says it's still shit not to get double pay but it's what HO [Head Office] pay. I put you on Opium last year to get double after 12 but obviously can't do that this year [emoji]. He says if you aren't gonna be in on the one night we're all needed then not to come back in. I'm stuck here Jon. Don't know what else to do. You're getting paid hundreds extra throughout they (sic) year for the sake of missing out on £30 or something [emoji] x".*

19. The claimant's response was *"Hey mate apologies for the wait. I've decided I'm gonna stand my ground here nothing personal to you or any of the boys but Danny saying I either come in or don't come back has made the choice for me. Happy new year when it comes to you man we've been through a lot, like I say I hope no hard feelings between us. X"*

20. Mr Rutherford then sent three further texts:

"Ok buddy. I can't force you. Obviously my hands are tied. Tried to put it through without questions being asked but couldn't [emoji]. I am gonna take it personally tbh, I've spent so much time trying to keep everyone happy and together to my own cost and it's never enough. I don't ask for much in return and I think leaving us short on a couple of days notice (that I text you about) was a bit shitty pal and I couldn't lie about that to him. Don't know who said Danny would try get us double time but you've been misinformed there. It's been the same for years and why I put you at Opium last year so as you got the wee bit extra."

"But no, no hard feelings buddy. It is what it is. So fuckin sad to see you go. Gutted in fact but you've gotta do what you think is right. Personally think you're sacrificing a whole lot of cash for pittance mate but that's just my personal thoughts. Don't be a fuckin stranger though eh [emoji] x."

"I'm gonna have one last crack it. I'll give you the extra myself Jon. I don't want to lose you [emoji] x"

21. Having received these texts, the claimant responded:

"I'm sorry you feel that way Lee, honestly mate it is not personal and I know how much you've done for me personally and I'm really grateful of it. I would never take extra money from you like that and it's really not even about the money anymore. Sorry it is shit but my mind is made up mate. X"

22. Mr Rutherford agreed to let the matter be. However, he texted him again to confirm that if the claimant could drop off his uniform that would mean he would receive his pay. The claimant agreed to do that that evening (7).

23. On 5 January 2019, Mr Rutherford texted the claimant again (9A) to ask if he would be willing to come back again if he sat down and discussed with Danny. The claimant said that he was "up for that", but could not start immediately as he had an operation on 9 January and would not be available to return until the "next again week".

24. However, having discussed the matter with Danny, Mr Rutherford texted the claimant again on 7 January 2019: *"Danny is a no mate. He wants you back but think it would send out the wrong message out to the rest of the guys and in case everyone decides to do the same thing next year and we are really fucked then [emoji]. I've tried mate. I can't do any more now [emoji]."*

25. The claimant replied: *"No problem mate tell him I only went and turned down an interview [emojis] x",* and later, *"I needed another job so had an interview but never went because I thought he was gonna say yes x".*

26. On 5 February 2019, having sought the advice of the Citizens' Advice Bureau (CAB), the claimant emailed the respondent's HR department (13) to say:

"I was employed by your company in the role of door steward from July 2017.

I was instantly dismissed on 31/12/2018 via Facebook message.

I therefore request a written document detailing the reasons for my instant dismissal. I also would like to request a signed copy of my employment contract.

I was informed again by phone Facebook message to return my uniform in order to be paid the right amount for the hours I previously worked…"

27. Ms Kennedy looked into the matter on behalf of the respondent, and replied to the claimant on 5 February 2019 (14):

"Hi John,

I can confirm that your employment was terminated on 30th December 2018.

After correspondence with Lee Rutherford, Head Steward, it was discussed that you were required to work Monday 31st December 2018 and that no time off would be authorised for this shift given that it was too late notice to find cover and that it was Brewhemia busiest trading nights. You made it quite clear that unless you were paid double time you would not be working. Unfortunately our company policy is that staff get paid time and a half after midnight and this policy would not be altered. You then stated that out of principle you would not be working. Lee Rutherford then explained that you would be required to work. Daniel Wylie had informed Lee that if you did not work then the company would start disciplinary proceedings for unauthorised absence given the importance of the night. You stated that you were going to stand your ground and by being told to either work or don't come back made the decision for you to leave. You were informed that if you were not coming back then to ensure your uniform was returned to avoid a uniform deduction from your final pay. The payroll cutoff was 30th December 2018 and when you returned your uniform to Mark Swanson, he again wanted to make sure that you were making the correct decision not only to not work 31st December but that you were also prepared to leave your job as a result of losing out on £13.75. Again you stated that you would not work 31st December 2018.

We took your refusal to work and handing back of your uniform that you were terminating your employment with no notice.

Payroll was processed and you have been paid for all hours worked.

I am afraid I am not in the office today however I have taken an excerpt from the T&Cs from the handbook with regards to termination of employment.

No notice is due from the company as it is our opinion that you terminated your employment. You were not dismissed.

Kind regards,

Cat"

28. The claimant responded on 18 February 2019 (15). He confirmed that he disputed the respondent's account of events. He asserted that he had not refused to work, but had declined extra work offered, and that it was clear that his employment was being terminated. He also said that he was not informed that disciplinary procedures would be taken in relation to unauthorised absence, and that the text message telling him "work or do not come back" made it impossible for him to dispute any disciplinary action.

29. He went on to assert that he believed he was "wrongly dismissed" and entitled to a notice payment.

30. A copy of a statement of terms and conditions which the parties agreed may have matched those provided to the claimant was produced (20).

31. Paragraph 9 reserves the right of the respondent not to apply the disciplinary procedures to any employee who has less than two years' continuous service with the respondent.

32. Further, an extract from the respondent's handbook was produced (21) in which the disciplinary procedure was set out. Among the provisions of the procedure were:

- *"No disciplinary action will be taken against any employee until the case has been fully investigated…*

- *The employee will be advised of the nature of the complaint against them and will be given the opportunity to state their case before any decision is made…*

- *An employee will have the right to appeal against any disciplinary penalty imposed…"*

33. The claimant presented a number of examples of his payslips provided by the respondent to him (17-19).

34. The claimant's payslip dated 4 January 2019 displayed two boxes, "Payments" and "Deductions". Under payments, the word "Basic" appeared, and confirmed the hours worked and the hourly rate payable, giving a total gross payment of £1,064.25. The payslip then set out the deductions made, comprising PAYE tax, National Insurance contributions and pension payments. The figure of £840.23 was then displayed as the net pay figure.

35. The payslip also had sections showing the up-to-date totals for the financial year to date, including the gross taxable figure, PAYE tax and national insurance, and payments in respect of student loans, tax credits, SSP or other payments (none of which appeared to apply to the claimant); the employer up-to-date totals and the holiday hours for the relevant period.

Submissions

36. Parties made very brief submissions.

37. For the claimant, Mrs Smiles confirmed that notice payment has been offered but not paid by the respondent, but due to the way in which matters had been handled, the claimant was seeking a further payment in respect of wrongful dismissal. The claimant is concerned about damage to his reputation within the security industry in Edinburgh.

38. For the respondent, Ms Kennedy said that it would not be company policy for Mr Rutherford to have handled matters the way he did, which was certainly ambiguous. She also assured the claimant that he would not receive a bad reference from the respondent if he asked for one.

Discussion and Decision

39. The first two issues for the Tribunal to deal with in this case may be taken together: was the claimant wrongfully dismissed, and if so, what payment should be made to him.

40. The claimant's employment came to an end in a very unusual manner. The claimant was communicating via a social media messaging service with his direct line manager, Mr Rutherford, with whom he clearly enjoyed a good friendship. The terms of the messages were informal and friendly. He had no direct contact with the manager of the club, Daniel Wylie (or Danny, as he was better known), and the Tribunal did not hear from either Mr Rutherford or Mr Wylie in evidence.

41. The respondent suggests that while it was perhaps ambiguous, the claimant actually resigned, and was not dismissed. In my judgment, that is incorrect. When Mr Rutherford texted the claimant on 30 December to say *"He says if you aren't gonna be in on the one night we're all needed then not to come back in"*, referring to Mr Wylie, that fell into the context of a discussion about whether or not the claimant was willing to work on New Year's Eve. The claimant had, during the course of those exchanges, made it clear that he was not prepared to work that shift if he was not to be paid double time.

42. Mr Rutherford was telling the claimant, in unambiguous terms, that if he did not wish to do the shift, he was not to return to work. The case of **Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT**, is authority for the proposition that where an employee receives an ambiguous letter from his employer, the interpretation of what is said to him should not be a technical one but should reflect what an ordinary, reasonable employee would understand by the words used. In my judgment, it was clear to the claimant (and he interpreted them this way) that the words used

by Mr Rutherford were telling him that maintaining his position with regard to the shift would mean the end of his employment. "Not to come back in" is, in my judgment, a clear statement that his employment would end if he did not carry out the shift.

43. As a result, I accept that the claimant reasonably interpreted the message on 30 December 2018 as having brought his contract to an end.

44. Was the claimant therefore wrongfully dismissed? In this case, where the claimant was dismissed without notice, he was wrongfully dismissed if the employer was not justified in summarily dismissing him.

45. Although the respondent reserved the right, in the contract of employment, not to rely upon its disciplinary procedures where an employee has less than two years' continuous service, it is my view that they did not rely upon that right in this case. Ms Kennedy's letter to the claimant in response to his assertion that he was in fact dismissed stated that *"Daniel Wylie had informed Lee that if you did not work then the company would start disciplinary proceedings for unauthorised absence given the importance of the night."* While it is possible that Mr Wylie did tell Mr Rutherford that, nobody said anything to the claimant about disciplinary procedures, nor were any steps taken to engage with those procedures. As a result, since the respondent asserts that it did rely upon the disciplinary procedure (by making reference to "disciplinary proceedings), it has not sought to reserve the right not to rely upon those procedures where the employee, as here, had less than two years' service.

46. The respondent failed to take any steps to treat with the claimant in terms of its own procedures. There was no investigation – or at least no evidence of any investigation – and no opportunity for the claimant to state his position. His employment came to an end when he refused to carry out the work requested.

47. It may well be that the respondent could have justified dismissal on the basis that the claimant failed to comply with a reasonable management

instruction, but the Tribunal cannot embark upon a speculative exercise when no attempt was made to confront the claimant with such an allegation.

48. As a result, having failed to comply with their own disciplinary procedures, the respondent was not justified in dismissing the claimant without notice, and therefore the claimant was wrongfully dismissed.

49. It is necessary to consider what award should be made to the claimant in these circumstances. The respondent has offered a payment equivalent to the claimant's notice pay, namely one week's pay. The claimant seeks a greater payment to take account of the circumstances in which his contract of employment was brought to an end.

50. In this case, the breach of contract consists not only of a failure to pay the claimant's notice, but also in failing to comply with a contractual procedure. The case of **Gunton v Richmond-upon-Thames London Borough Council 1980 ICR 755** is authority for the proposition that where the employer has failed to comply with a contractual procedure, the correct measure of damages would be to compensate the employee for lost salary from the date of the unlawful notice until the expiry of one month's notice served on the day when the proper disciplinary procedure could have been concluded.

51. In this case, where the allegation relating to the claimant was a relatively straightforward one, it appears to me that it would have been possible for the respondent to have convened and concluded a disciplinary process within 21 days of the date upon which the claimant's employment was ended without notice.

52. It is my judgment, therefore, that the respondent must pay to the claimant the sum of 3 weeks' pay, to include one week's notice. The total sum payable to the claimant by the respondent is therefore £594, his weekly pay being £198.

53. The third issue is whether the respondent failed to provide the claimant with itemised payslips.

54. Under section 8(2) of the Employment Rights Act 1996, an itemised pay statement must include the following details:

- The gross amount of the wages or salary: in this case, the payslip showed this information;
- The amounts of any variable or fixed deductions from that gross amount and the purposes for which they are being made: again, the payslip showed this information;
- The net amount of wages or salary payable: this was set out on the payslip to the claimant; and
- Where different parts of the net amount are paid in different ways, the amount and method of each part-payment: there is no basis to suggest that this was a method followed in this case, nor that the payslip would not have shown it if necessary.

55. In my judgment, therefore, the respondent did not breach its statutory obligation to provide to the claimant an itemised pay statement.

Date of Judgement: 3rd October 2019

Employment Judge: M MacLeod

Date Entered in Register: 4th October 2019

And Copied to Parties