



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr B MacKinnon

**Respondent:** Joseph South-gate Smith

**Heard at:** Teesside Magistrates Court      **On:** Thursday 6<sup>th</sup> February 2020

**Before:** Employment Judge Martin

**Members:**

***Representation:***

**Claimant:** Mr Hargreaves (Solicitor)

**Respondent:** In Person

## JUDGMENT

1. This Tribunal does not have jurisdiction to hear the claimant's complaint of breach of the working regulations (holiday pay) and/or unlawful deduction from wages (relating to holiday pay). His claims in that regard are hereby dismissed.
2. The claimant's complaint for unlawful deduction from wages relating to the bonus is not well-founded and is hereby dismissed.

## REASONS

1. The tribunal heard evidence from the claimant and respondent. The tribunal was provided with a bundle of documents by the claimant and a bundle of documents from the respondent.

### The law

2. The tribunal considered the following legislation:-

Regulation 13 (9) of the Working Time Regulations 1998 "leave to which a worker is entitled under this regulation may be taken in instalments but

- (a) it may only be taken in the leave year in respect of which it is due”
3. Regulation 13 A (7) WTR 1998 “a relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.”
4. Regulation 14 (1) WTR 1998 “this regulation applies where:-
- (a) a worker’s employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect (“the termination”) the proportion he has taken of the leave to which he is entitled in the leave year under Regulation 13 and Regulation 13 B differs from the proportion of the leave year which has expired”

Regulation 14 (2) WTR 1998 “where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph 3.”

5. Regulation 30 (2) WTR 1998 “an employment tribunal shall not consider a complaint under this regulation unless it is presented:-
- (a) before the end of the period of three months beginning with date on which it is alleged that the exercise of the right should have been permitted or as the case may be the payment should have been made;
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”
6. Section 13 (3) of the Employment Rights Act 1996 “where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion, the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”
7. Section 23 (2) ERA 1996 “an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with:-
- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made.
8. Section 23 (4) ERA 1996 “where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider

the complaint if it is presented within such further period as the tribunal considers reasonable.”

9. Section 27 (1) (a) ERA 1996 “in this part “wages” in relation to a worker, means any sums payable to a worker in connection with his employment, including:-

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise.”

10. Regulation 4 (1) of the Transfer of Undertakings Regulations 2006 (TUPE) “a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the persons so employed and the transferee.”

Regulation 4 (2) TUPE “on the completion of a relevant transfer:-

(a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee.”

Regulation 4 (4) TUPE “any purported variation of a contract of employment that is, or will be transferred by paragraph 1 is void if the sole or principle reason for the variation is the transfer.”

11. Regulation 4 (5) TUPE “paragraph 4 does not prevent a variation of the contract of employment if:-

(e) the terms of that contract permits the employer to make such a variation”.

12. Article 3 of the Extension of Jurisdiction Order 1994 “proceedings may be brought before an employment tribunal in respect of the claim of an employee for the recovery of damages or other sum:-

(c) if the claim arises or is outstanding on the termination of the employee’s employment”.

13. Article 7 of the Employment Tribunals Extension of Jurisdiction Order 1994 “an employment tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented:-

(a) within the period of three months beginning with the effect of date of termination of the contract

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented, within such further period the tribunal considers reasonable”.

The issues

14. In relation to the claim for holiday pay the Tribunal had to consider whether this was a claim under the working time regulations or a claim for a deduction of wages. The Tribunal had to consider whether the claimant was entitled to carry forward his holiday from the previous year. If so, the Tribunal had to consider when the outstanding sum in that regard was due and owing to the claimant and in what amount.
15. In relation to the claim for the bonus payment the Tribunal had to consider whether the claimant was entitled to any bonus; and, if so, whether any such bonus was due and owing to him and in what amount.
16. The Tribunal also had to consider whether the claimant's complaints were in time or presented within a reasonable time period thereafter.
17. Finally the Tribunal had to consider whether the claimant's claims of holiday pay and bonus had transferred to the claimant's new company under the Transfer of Undertakings Regulations.

Findings of fact

18. The claimant was employment as a chef and has worked at the Farmers Arms since 1999. The respondent took over the tenancy of that pub in September 2017. The claimant's employment transferred to him under the Transfer of Undertakings Regulations 2006.
19. In December 2017, the claimant was offered the position of Head Chef and Manager. In his evidence to the Tribunal, the claimant said that he agreed to that on the basis that he asked for a pay rise of £24,000. The claimant said that he was offered £22,000 with a five percent bonus. He said that the respondent had predicted that the business would be profitable and the claimant would comfortably be able to achieve that bonus. In his evidence to the Tribunal, the respondent said that he offered the claimant two options:- a salary of £20,000 with a ten percent bonus; or a salary of £22,000 with a five percent bonus. The respondent said that the figures projected for the bonus were only projected figures as he had only just taken on the business. He said he was offering the claimant a bonus with a view to ensuring that the claimant worked hard to achieve that bonus.
20. There was no agreement put in writing about the bonus. However the claimant subsequently referred to a number of texts he sent to the respondent about the bonus. The respondent has not disputed that the claimant would have been entitled to a bonus of five percent of the profit share. Both parties agreed that the bonus was to be five percent of net profit.
21. In January 2019, the respondent paid the claimant two separate payments of £500.00 which purported to be part of his bonus. The respondent said that he paid these monies to the claimant as the claimant was in financial difficulties at the time as he was off sick. The respondent said that this payment was paid in

advance. He said that he probably should not have paid this bonus, because the Farmers Arms did not subsequently make a profit.

22. The claimant's contract of employment dated 11<sup>th</sup> April 2011 states that holidays ran from January to December and that holidays could not be taken forward. The parties agreed that the holiday year was in fact April to March.
23. The respondent was intending to refurbish the premises of the Farmers Arms. This was initially due to take place in November 2019 but was then pushed back to the beginning of the following year. The claimant said he understood the refurbishment had been pushed back to February, whereas the respondent suggested that it was in January. When the premises were going to be refurbished the pub would have to be closed for a period of time. The claimant said in evidence that staff, including himself, agreed to keep their holidays and take them during the refurbishment. The claimant said that the refurbishment was then pushed back in February 2019 and was then due to take place at a later date. The claimant said that it was agreed with the respondent that he and other staff could carry forward their holiday for the proposed refurbishment which would now take place in the next holiday year. The respondent in his evidence, said that he could not recall agreeing to staff carrying forward their holiday. He said that the proposed refurbishment had been cancelled in January and that there was enough time for the claimant to have taken his holiday before the end of the holiday year. He said that the claimant had been off sick for a long period of time and he had been able to manage without the claimant, so if he had to take his holiday before the end of the holiday year then it would not have been a problem.
24. In May 2019 the respondent decided to leave the Farmers Arms. The claimant said that, at a staff meeting, the respondent informed the staff of the fact that he was leaving the pub. He told the staff that he would honour their holidays from the previous year. The claimant also said that the respondent said that he would pay the bonus that he had agreed to pay the claimant. In his evidence to the Tribunal, the claimant said that the respondent told him that he would pay the accrued holiday pay with the bonus payment. The claimant said that the respondent said that he needed to get the exit statement from the brewery and then liaise with his accountants and that he would pay the monies when he had received the exit statement.
25. The respondent paid all the outstanding holidays for that year when he left the pub. He did not however pay any of the accrued holiday pay from the previous holiday year to the claimant. The claimant was not able to explain in evidence why the respondent could not calculate what holiday pay was due and pay it at the time of termination nor why the respondent needed an exit statement in order to send the matter to his accountants to be able to pay those monies as opposed to the bonus payment. The explanation given by the claimant in his evidence was that that was what had been agreed. The respondent in his evidence said that he had not agreed to do that and indicated that there was no reason why he would do so.

26. The claimant said that he understood that the pub was profitable but not profitable enough for the respondent.
27. In his evidence, the respondent said that the Farmers Arms was not profitable. He produced copies of his tax returns for April 2017/2018 and April 2018/2019; the latter which he filed in January 2020. He also produced a balance sheet and profit and loss account. The respondent said, as is noted on his tax return that he had a net loss of £8,115.00 in 2018/2019 and a net loss of £18,988.00 in 2017/2018. He produced the profit and loss account for 2018 which shows the income and expenses for the Farmers Arms and a number of other outlets which were owned by him during that period. The profit and loss account shows that the income and expenses for the Farmers Arms, largely excluding taking account of any general expenses that would relate to all the outlets owned by the respondent, shows a net loss in relation to the Farmers Arms of £7,937.00. After those accounts were produced the claimant was only working at the Farmers Arms for a further two months. There was no indication or evidence produced that there would be any substantial increase in profit over that short period to mean that there would be a net profit for the Farmers Arms, rather than a net loss, by the time the claimant left the premises two months later.
28. In his evidence to the Tribunal, the respondent basically said that there was no profit in the Farmers Arms and therefore no sums were due to the claimant. He said that he had paid an interim sum on account of profit to the claimant in January 2019 which, in retrospect, he should not have paid, because no profit share / bonus was in fact due to the claimant.
29. On 3<sup>rd</sup> June 2019, the claimant took over the Farmers Arms which amounted to a transfer under the Transfer of Undertaking Regulations.
30. The claimant said that there was an agreement that the respondent would pay him his accrued holiday pay and profit share when the respondent received the exit statement. The respondent did not dispute in evidence that he would pay the bonus when he received the exit statement, but did not agree that he would pay the holiday pay which the claimant described, in his oral evidence, as some sort of bonus. Both parties understood that the exit statement would have been produced sometime around the time of the transfer in June 2019.
31. The claimant sent a number of texts to the respondent chasing an update. On 25<sup>th</sup> June 2019, the claimant texted the respondent about the final settlement and referred to his holiday pay and profit share (page 31 of the claimant's bundle). He did not get any response to that text.
32. The claimant and respondent met to discuss the claimant's business plan in July 2019. The claimant said that there was then a discussion about outstanding monies and that the respondent said he was still waiting for the exit statement. The respondent said that the meeting was principally about the business plan.
33. On 24<sup>th</sup> July 2019 the claimant sent an e-mail to the respondent regarding non-payment of profit share and holiday pay. He referred to his various telephone and text messages regarding outstanding holiday pay and profit share owed to

him. He also referred to the meeting with the staff when he said the respondent said he would honour the holiday entitlement for the previous year as all the staff had saved their holidays for the planned refurbishment of the pub in February of that year, which refurbishment did not then happen and all the staff lost their holiday. The claimant indicated that he had approximately twenty days holiday which was still unpaid. He went on to refer to the five percent profit share. He then indicated that he expected a response with details of outstanding holiday pay and profit share within seven days (page 58 of the claimant's bundle). He did not receive a response to that e-mail.

34. The claimant did not lead any evidence explaining why he did not issue proceedings at that stage or indeed at any stage following the termination of his employment until the point at which he issued proceedings. He said that the reason why he had not issued the proceedings earlier was because he understood that it had been agreed that all the monies would be paid when the exit statement was received.
35. On 3<sup>rd</sup> September 2019, the respondent texted the claimant to indicate that the exit statement had been received by him, but that it was wrong and he was disputing it (page 36 of the claimant's bundle).
36. The exit statement produced by the brewery sets out the valuation of fixtures and fittings and identifies what credit was due to the respondent from the brewery.
37. The claimant texted the respondent on the same day in September and asked the respondent if he could pay the holiday pay and then the profit share once it had been completed (page 36 of the bundle). Again the claimant received no response to that text. The claimant then contacted the respondent again by telephone and text.
38. On 1<sup>st</sup> October 2019, the claimant sent a further e-mail to the respondent which is at page 59 of the claimant's bundle. He refers to contacting the respondent by telephone and text message to discuss outstanding holiday pay and profit share. He refers to the agreement at the staff meeting when the claimant says that the respondent said he would honour the holiday entitlement from the previous year as all the staff had saved their holidays for the planned refurbishment of the pub in the February which did not take place and they lost their holidays. He then indicates that he has calculated that he is entitled to approximately twenty days holiday which is still unpaid and the five percent share he was offered. He then goes on to say again that he expects a response in relation to the outstanding holiday pay and profit share within seven days and, if not, he would be contacting ACAS.
39. On 9<sup>th</sup> October 2019, the claimant contacted ACAS. The early conciliation period ended on 23<sup>rd</sup> November 2019.
40. On 23<sup>rd</sup> November 2019, the claimant issued proceedings before this Tribunal claiming holiday pay and profit share. In addendum to the ET1, he refers to his claim for holiday pay and profit share, but does not state that the claim for holiday pay is some form of bonus although that is what he has indicated in his oral

evidence before the tribunal. He does say in the addendum to the ET1 that he was assured that the profit share and holiday pay would be calculated by his accountant once the exit statement had been received. He indicates that he understood that was only going to take a couple of weeks but he only received confirmation about that on 3<sup>rd</sup> September. He said that he had then asked for at least his holiday pay to be sorted out at that stage.

41. The claimant says that the only thing that stopped him from bringing his claim prior to November was that he understood the respondent would be paying him once he got the exit statement which was not received until 3<sup>rd</sup> September, but the respondent did not pay then, so by October he had decided to proceed with these claims.

### Submissions

42. The claimant's representative submitted that he was entitled to holiday pay. He submitted that it was a deduction of wages. He said that it was effectively a bonus payment that was due at the time of the exit statement.
43. The claimant's representative also submitted that the bonus was not a discretionary bonus. He said it had been paid in the past and that the claimant was entitled to payment of the bonus. He said that none of those payments transferred to the claimant him as the respondent had agreed to pay both of those payments.
44. The respondent submitted that both of the payments transferred to the claimant. Alternatively he submitted that the holiday pay claim was out of time. He also submitted that the claimant was not entitled to those sums of accrued holiday pay. He relied on regulation 13 (9) of the Working Time Regulations and the claimant's contract of employment. He said that he had not agreed to the claimant carrying over that holiday.
45. The respondent also submitted the claimant was not entitled to the bonus because there was no profit share to distribute and the claimant had been overpaid.

### Conclusions

46. The claimant's contract of employment with the respondent terminated on 3<sup>rd</sup> June 2019. At that time his contract transferred to a company owned by him.
47. The Tribunal prefers the claimant's evidence that the respondent agreed to allow employees, including the claimant, to carry holiday over from the previous holiday year. The claimant's evidence is supported by a number of documents in the form of texts and e-mails referring to that purported agreement, which the respondent never disputed or questioned. However, the Tribunal does not accept the respondent agreed to delay the payment of accrued holiday pay until a later date namely at the time of the exit statement as suggested by the claimant. Those sums relate to accrued holiday pay. Such sums could easily have been calculated without any involvement of the respondent's accountants



or indeed the provision of the exit statement. Further the claimant's own written evidence does not refer at any stage to the holiday pay being some form of bonus nor does it suggest any agreement by the respondent that those specific monies would be paid when the exit statement was received. In the two e-mails sent by the claimant in July and October, he does not refer to when those monies should be paid. Indeed in July, he indicates that the monies are effectively due and owing to him then and asks the respondent to respond within seven days.

48. This Tribunal finds that those monies were actually due and owing to the claimant, but they were due and owing to him at the time his employment terminated. In his claim form, he refers to the monies as holiday pay, which is exactly what they are. On that basis, they were due and owing at the time that the claimant's employment terminated.
49. The claimant's employment terminated on 3<sup>rd</sup> June 2019. He did not contact ACAS until 9<sup>th</sup> October 2019. He then issued proceedings on 23<sup>rd</sup> November 2019. The claimant had three months from the date of termination of his employment to bring his claim. That was the date when any wages or holiday pay were due and owing to him. He did not issue proceedings within that three month period or contact ACAS. He has not put forward any evidence to show that it was not reasonably practicable for him to have done so. For those reasons, this Tribunal does not consider that it has any jurisdiction to hear his claim for accrued holiday pay and/or unlawful deduction from wages relating to holiday pay.
50. The Tribunal finds that the claimant was entitled to a five percent profit share bonus, The Tribunal accepts the claimant's evidence in that regard. It does not accept that the bonus was discretionary. The Tribunal has taken into account that part of the bonus was in fact paid in advance and that there is documentary evidence which refers to a five percent bonus, which has never been disputed by the respondent. The Tribunal also accepts the claimant's evidence that that bonus was not due to be paid until the respondent had contacted his accountant to calculate those sums once he had received the exit statement. Indeed the respondent's own evidence would appear to be consistent with the fact that monies would not be payable until the exit statement had been received and his accountants had reviewed the figures. He himself contacts the claimant by text to tell him about receipt of the exit statement which is consistent with both of their oral evidence in that regard. It does not appear that the respondent himself knew whether a profit had been made until earlier this year. Therefore the claimant's claim in that regard is not out of time as those monies would not be due and owing until the exit statement was received. It was received on 3<sup>rd</sup> September 2019. The claimant issued proceedings in November 2019.
51. However the Tribunal accepts the substantial evidence produced by the respondent which shows that there was no net profit in the Farmers Arms, rather a net loss. Therefore no further bonus was due and owing to the claimant. Accordingly for those reasons, the claimant's claim for a bonus fails and is hereby dismissed.

52. The Tribunal should add that it does not consider that either the claim for accrued holiday pay or bonus payment transferred to the claimant when he took on the Farmers Arms. The Tribunal accepts the claimant's oral evidence which was also supported by way of the documentary evidence in the way of texts and e-mails that the respondent to pay both of those sums irrespective of the transfer of the Farmers Arms to the claimant.

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**EMPLOYMENT JUDGE MARTIN**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 28 February 2020**

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