



EMPLOYMENT TRIBUNALS

Claimant: Mr J. Hughes
Respondent: Venture Restaurants Ltd (R1)
Venturehospitality (R2)

HELD AT: Wrexham (remotely – by CVP video) **ON:** 16th July 2020

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr Hughes represented himself (a litigant in person)

Respondents: Ms a Wyatt, a director of both respondent companies.

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The claimant was a worker engaged by the 1st respondent from a date on or about 1 November 2018 until his resignation, following a period of agreed notice, on 22 August 2019; he was an individual who entered into or worked under an implied and oral contract whereby he undertook to do or perform personally the work of head chef for the 1st respondent whose status was not by virtue of that contract that of a client or customer of any professional business undertaking carried on by him;
2. The claimant was not an employee or worker engaged by the 2nd respondent at any material time;
3. There was no transfer of an undertaking, business or part of an undertaking or business by the 1st respondent to the 2nd respondent where there was a transfer of an economic entity retaining its identity subject to the provisions of the transfer of undertakings (protection of employment) regulations 2016 (TUPE);
4. As at the date of his resignation, effective 22 August 2019, the claimant was a worker engaged by the 1st respondent.
5. Entitlement to accrued holiday pay in the sum of £1,600 (one thousand, six hundred pounds) having been agreed between the parties subject to liability:

- a. The 1st respondent failed to pay to the claimant holiday pay that had accrued to 22nd August 2019 and
- b. The 1st Respondent shall pay to the claimant £1,600 in respect thereof.

REASONS

1. **The Issues:** The following issues were identified at a preliminary hearing held on 15th January 2020 before Employment Judge Brace:

1.1 Status of the claimant

- a. Is the claimant an employee or a worker under reg 2(1) Working Time Regulations 1998 (“WTR”) entitling him to bring a claim for unpaid annual leave under the Working Time Regulations 1998?
- b. Is the claimant an ‘employee’ under reg 2(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)

1.2 TUPE

- a. Whether the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) applied to transfer the ‘contract of employment’ of the claimant from the first respondent, Venture Restaurant Ltd (R1) to Venturehospitality Ltd (R2) and if so, when?

This will include consideration of whether the claimant was an ‘employee’ under reg 2(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”).

- 1.3 Unpaid annual leave – Working Time Regulations 1998 (in view of the parties’ agreement, subject to the status and TUPE issues above, as to quantum I did not have to resolve issues ii – vii below):

- a. If the claimant was an employee or a worker under WTR:
 - i. What were the dates of the claimant's leave year?
 - ii. How much of the leave year had elapsed at the effective date of termination?
 - iii. In consequence, how much leave had accrued for the year under Regulations 13 and 13A WTR?
 - iv. How much paid leave had the claimant taken in the year?
 - v. How many days remain unpaid?

- vi. What is the relevant net daily rate of pay?
- vii. How much unpaid holiday pay is outstanding to be paid to the claimant and by which respondent?

2. The Facts:

2.1. Pre-engagement: It is common practice for chefs to be engaged either as employees, workers or independent contractors for whom the proprietor of a restaurant is a customer of the chef's business (the latter referred to during the hearing as "free-lance"). The claimant (C) had worked as an employee and as a worker prior to involvement with Ms Wyatt and either respondent company. He had not been a "free-lance chef" although he had planned to be and prepared a CV for use in such an eventuality. He was looking to become involved in a new restaurant venture and to have a financial stake in it.

2.2. R1: Ms Wyatt is the sole director of R1 which owned and managed a restaurant trading under the name "Bocca" when C met her to discuss him working with her. It has since closed. It was an Italian restaurant and pizzeria. The parties agreed that this is niche cuisine. Bocca was open Tuesday – Saturday evenings in the Spring/Summer season, and otherwise Thursday – Saturday evenings. There was no lunchtime or any day time trade; they had no bar trade.

2.3. R2: Ms Wyatt wanted to open a new venture with her personal partner, a new restaurant and bar. She wanted to open a restaurant with a varied and contemporary cuisine that was not niche like Bocca. She wanted a bar restaurant, unlike Bocca. She wanted to open for lunch and day-time trade for 6 or 7 days per week. Ms Wyatt was interested in C joining the new venture which was initially to run alongside (not in proximity) to Bocca but under a different corporate guise; that plan evolved such that Bocca closed so that Ms Wyatt could concentrate on the new restaurant/bar called Tapestri. At one stage it was intended that this would offer a variety of tapas dishes but eventually that plan evolved such that its cuisine is more generally southern European, Mediterranean and north African (Moroccan). Ms Wyatt is the sole director of R2, set up to own and manage Tapestri.

2.4. Recruitment:

2.4.1. The main attraction to C, and reason for him becoming involved with Ms Wyatt and R1, was that he would be able to work fewer hours per week than he had been until that time elsewhere; he would benefit from having time off on Sundays and Mondays each week. He also sought to be involved in the new venture setting up Tapestri.

2.4.2. There was a lot to do setting up R2 and converting a building for use as Tapestri, which projects were managed by Ms Wyatt and her partner (and C was never a director of either R1 or R2). C was consulted about Tapestri and its proposed menus; he had some limited direct and indirect dealings with third parties in respect of Tapestri but his main activity during the lead-in period was working as head chef at Bocca. His

particular value to R1, before Tapestri was ready to open, was his work as head chef at Bocca. Apart from anything else it freed up some of Ms Wyatt's time to deal with planning and managing the new project. Tapestri opened on 2nd August 2019 but as a bar only; it opened its restaurant on 13th September 2019 (C having left R1 on 22nd August).

2.4.3. C only worked three shifts at Bocca in October 2018 after which he pursued other interests including an overseas Welsh Culinary Team promotional trip. From December 2018 until his resignation on 22nd August 2019 C worked full-time at Bocca as head chef.

2.4.4. C was never given a contract or written statement of employment particulars by R1 or R2. There was no document regulating or defining the working relationship between the parties. They agreed terms orally and over time by implication such that the working arrangements were as set out below.

2.5. Supervision:

2.5.1. C was allowed to open and close the premises at Bocca daily and often did in the period December 2018 – August 2019 in liaison with Ms Wyatt.

2.5.2. Ms Wyatt would call into Bocca to supervise on most but not every day. She would liaise on the telephone daily and C would report in. Ms Wyatt was not expected to attend Bocca every day especially as she was busy at, or dealing with, the new premises on behalf of R 2. She delegated some managerial duties to C but she oversaw his performance of them and she set the tone, policies and procedures to follow.

2.5.3. R1 had its own established suppliers although on occasion C suggested others, such as a vegetable supplier who was tried but with whom Ms Wyatt dispensed because of cost.

2.5.4. Ms Wyatt would attend Bocca when the claimant was present especially when it was busy, and at weekends. When on site Ms Wyatt assumed control.

2.5.5. Ms Wyatt set up and insisted on the use of her filing and accounts systems, and the use of her professional contacts.

2.5.6. Ms Wyatt and C managed the staff together and this was in line with the expectations of a head chef, although the ultimate authority was Ms Wyatt. She had the final say and absolute discretion in who was employed and how they were deployed. C was not entitled or expected to provide a chef or others to work instead of him or alongside him.

2.6. Pay:

- 2.6.1. Most of the staff at Bocca were paid monthly but four or five employees were paid weekly.
- 2.6.2. C was paid weekly for the hours he worked, initially in cash and then into his bank account directly. He was always paid by R1. C was never paid by R2. He was not given an itemised, or any, pay statement.
- 2.6.3. C believed that he was being paid at the rate of £12 per hour net. Ms Wyatt's evidence was that she was paying him gross and I accept that she intended the payment to be gross. There was no discussion or agreement between them as to whether the payment was net or gross, or as to the incidence and payment of tax/NI. There was no intention to defraud HMRC.
- 2.6.4. C's partner is not a British subject and her visa is means tested such that C required evidence of his wages; he considered the payments that he received to be net wages and not gross fees. He asked for the payments to be documented and he provided R1 with his National Insurance Number for this purpose. Ms Wyatt does not recall the initial request from C and provision of that data, but she recalls a later occasion when she asked for his National Insurance Number in connection with his planned formal engagement by R2. There was no explicit agreement that C would make his own income tax arrangements in the future with R2 either; C did not expect or understand that he would have to do so and believed he was being paid £12.00 net of statutory deductions. Ms Wyatt is adamant that she could not have afforded to pay C at that gross rate; she maintains that R1 was paying £12 net.
- 2.6.5. C was not required, nor did he ever, produce an invoice for payment by either R1 or R2. A colleague at Bocca who worked as a chef (LF) is required to provide invoices (which Ms Wyatt prepares for him now that he works for R2 at Tapestri).
- 2.6.6. C never had any financial stake, commitment, liability or risk in or to R1 or R2.
- 2.7. Hours: From December 2018 until his resignation in August 2019 C worked 5 days per week exclusively at Bocca as Head Chef and for no one else and never on his own account elsewhere. The parties a little vague about C's working pattern in November 2018 but they agree on the situation December 2018 – August 2019. During that time he was consulted by Ms Wyatt about Tapestri as mentioned above.
- 2.8. Kit: As is common in the profession, regardless of status, C used his own set of knives. He also had his own kitchen whites and shoes. He used R1's kitchen equipment, materials, ingredients and worked on the menus agreed with Ms Wyatt. R1 provided aprons although C had some of his own too.
- 2.9. Holidays:

- 2.9.1. C would request holidays and on occasion they were refused by Ms Wyatt. In April or May 2019 C requested a day off on 7th July 2019. Ms Wyatt said “no staff could take holidays Easter and Summer. It is in the contract”. In March 2019 he requested holidays in September/October 2019 to visit USA but Ms Wyatt objected and refused; she was taken aback that C had even asked bearing in mind the planned opening of Tapestri and she doubted C’s commitment to his job. They agreed that he could take that leave in November, but as things transpired C had by then resigned.
- 2.10. Discipline: On one occasion, neither party knew the date, C was disciplined (given an oral warning) for apparently breaching safety and security policies and procedures when it was thought that he had failed to lock-up Bocca as required by R1. There had been a mistake and the warning was withdrawn.
- 2.11. Sickness absence: C was only absent once and that was for an operation when he was unable to work for 2 days. R1 closed Bocca because of C’s incapacity. A replacement chef was not engaged. C was not paid. C did not recommend or introduce a chef to work in his place; on other occasions he had suggested and introduced staff to work with him, including as additional chefs, but not in his place. He did not delegate his duties.
- 2.12. Miscellaneous: In his evidence C confirmed that he had only claimed that he was a worker, and only from December 2018; he did not consider himself to be an employee. Ms Wyatt did not think that C was an employee. They both understood that C’s work was required at Bocca but neither believed that they were obliged to each other, either that C was obliged to work for R1 or R2, or that Ms Wyatt, as director of either R1 or R2, was obliged to provide him with work and to pay him when work was not available for him or he was unfit to perform work.
- 2.13. Termination of relationship: C tendered his notice of resignation to Ms Wyatt on Tuesday 6th August 2019; he offered what he believed to be statutory notice and referred to it as such. He wished to terminate the engagement on Tuesday 13th August 2019. Ms Wyatt was put out; his departure would cause difficulties at Bocca and a Bank Holiday weekend was imminent. Ms Wyatt explained that Bocca would have to close if C left, which meant that his colleagues would be unable to work. C felt pressured by these comments and “held to ransom”; in any event he agreed to extend his notice period to Thursday 22nd August (short of the Bank Holiday). C understood that he was obliged to give Notice and assumed that what he referred to as Statutory Notice (1 week in his case) was the correct duration; that said and for persuasive reasons put forward, he extended the notice period and Ms Wyatt felt obliged to accept that.

3. The Law:

3.1. Employment Rights Act 1996 s230:

3.1.1. (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

3.1.2. (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

3.1.3. (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

3.1.3.1. (a) a contract of employment, or

3.1.3.2. (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

3.1.4. (4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

3.1.5. (5) In this Act “employment”—

3.1.5.1. (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

3.1.5.2. (b) in relation to a worker, means employment under his contract;

and “employed” shall be construed accordingly.

3.2. Working Time Regulations 1998: regulation 2 (1) defines a worker as an individual who has entered into or works under a contract of employment or any other contract whether express or implied and (if it is expressed) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another person to the contract whose status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual. Furthermore, the employment in relation to a worker, means employment under their contract, and “employer”, in relation to a worker, means the person by whom the worker is employed.

3.3. TUPE: regulation 2 (1) provides that an “employee” is an individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services; a contract of employment means an agreement between an employer and its employee that determines the terms and conditions of employment.

3.4. Employment Status generally:

3.4.1. In establishing status there is no strict checklist allowing for a mechanical tick box exercise; I am to “paint a picture” from an accumulation of the findings I make and to evaluate the overall effect of those findings, viewing the painted picture from a distance to make an “informed, considered, qualitative appreciation of the whole” (**Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171.**)

3.4.2. There are four preconditions for a finding that there is a contract of employment (concentrating on what actually happens rather than mere labels or token wording (written or oral):

3.4.2.1. An employee provides their own work and skill in the performance of a service for payment; and

3.4.2.2. An employee is subject to a sufficient degree of control by the employer when performing that service; and

3.4.2.3. There must be “mutuality of obligation”, an obligation on the employee to do the work, perform the service, offered and the employer is obliged to make that payment, and sometimes to provide work; and

3.4.2.4. The terms of the contract must not be otherwise inconsistent with it being a contract of employment.

3.5. TUPE transfer: These regulations provide protection to employees where the business in which they work is transferred. The regulations apply, amongst other circumstances not relevant to this case (service provision changes where there is contracting in or out), where there is a transfer of an undertaking, business or part of an undertaking or business... to another person where there is the transfer of an economic entity which retains its identity. Protection is given to employees employed immediately before the transfer.

4. Application of law to facts:

4.1. C worked for R1 as Head Chef at Bocca throughout the period December 2018 – 22nd August 2019 on a full-time basis taking home pay at the rate of £12 per hour (the net sum). He worked every day that the restaurant was open between Tuesday – Saturday (inclusive) each week. He was not

entitled to, nor did he, provide a substitute and in fact when he was not available the restaurant closed; when he sought holidays, he was refused subject to the needs of the business and re-arranged his leave; the realistic prospect upon his tendering notice was that Bocca would close. This was based on an oral and an implied agreement between the parties. He assumed that he was subject to R1's discipline, its holiday request and notice requirements, policies and procedures. The contract with R1 was that he would perform head chef duties at Bocca personally.

- 4.2. Whilst working at Bocca as a chef he was consulted and gave some advice on the setting up of Tapestri but he was never paid by R2 nor did he enter any contract to perform duties as Head Chef at Tapestri; he did not perform any work in the bar at Tapestri when it opened. He had ceased any involvement with Ms Wyatt and her companies by the time Tapestri opened as a restaurant.
- 4.3. Many of the findings of fact above are indicative of an employment relationship between C and R1. Whilst in most respects the relationship appears to be one of employment neither party felt any mutuality of obligation. Both were explicit about this in their evidence. That being the case I cannot purport to impose that condition retrospectively. C accepted a disciplinary warning; agreed to vary his holiday dates and agreed to extend his notice of termination; he spoke only of moral pressure and persuasion and not that he was obliged to accept Ms Wyatt's objections and submissions. Ms Wyatt never insisted on these matters or expressed them as instructions but was forthright as to the consequences for the business if C did not relent and aimed to persuade him.
- 4.4. For the above reasons I find that C was a worker engaged by R1. He was not an employee. As a worker he was entitled to holiday pay.
- 4.5. The parties agreed that Bocca and Tapestri were very different businesses and that Bocca was niche ("a small Italian restaurant") which is a known culinary entity. C explained that he wanted something else on his CV because he would almost have to explain away his time at Bocca, not in a derogatory sense in relation to the quality of Bocca, but because professionally a small Italian restaurant and pizzeria is recognised as a genre. The restaurant and bar at Tapestri was a wholly different culinary concept; the architectural style, location, ambience, cuisine, and bar trade made it, in my words, more expansive. It was the type of restaurant business that C contrasted with "a small Italian" and was the type of business he would not have to explain away to prospective employers. For all those reasons I do not consider that R1 transferred an economic entity maintaining its identity to R2; other than that R1 and R2 owned and managed restaurants, there was no similarity. It was not the same business; they were different catering and fine-dining businesses. There was no transfer of undertaking affected by TUPE Regulations. In any event C did not work at Tapestri.
- 4.6. The parties have agreed that, if the claimant was entitled to holiday pay (as I have found by virtue of his worker status) then the amount of accrued holiday

pay to which he was entitled as at 2nd August 2019 was £1,600. I have not therefore calculated the sum due according to the WTR. The parties agreed quantum subject to liability and liability has now been determined.

4.7. In the above circumstances R1 shall pay to C £1,600 accrued holiday pay.

Employment Judge T.V. Ryan

Date:03.08.20

JUDGMENT SENT TO THE PARTIES ON 5 August 2020

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FOR THE TRIBUNAL OFFICE