EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Hamilton Franca de Souza	**-v-**	Classico Italiano Limited t/a Divino Italian Restaurant

Heard at: Leeds **On:** 20 January 2020

Before: Employment Judge Evans (sitting alone)

Representation
For the Claimant: in person
For the Respondent: Ms Twine of Counsel

JUDGMENT

1. By the consent of the parties the name of the Respondent is amended from Divino Italian Restaurant to Classico Italiano Limited t/a Divino Italian Restaurant.

2. The Respondent unlawfully deducted £330 from the Claimant's wages. The Respondent was in breach of its duty under section 1 of the Employment Rights Act when these proceedings began. According the award of £330 is increased by two weeks' pay pursuant to section 38 of the Employment Act 2002 to £660 and the Respondent is ordered to pay the Claimant that amount.

3. The Respondent failed to pay the Claimant the amount due to him under Regulation 14 of the Working Time Regulations 1998. The Respondent is ordered to pay the Claimant £455.73 in this respect.

REASONS

Preamble

1. The Claimant was employed by the Respondent from 5 February 2019 until a date in August 2019. Following the termination of his employment, he presented a Claim to the Employment Tribunal on 9 September 2019 for "holiday pay", "arrears of pay"

and "compensation for not giving me terms and conditions of employment". In due course the Respondent presented a Response defending all the claims.

2. The claims came before me at 2pm on 20 January 2020. The Claimant represented himself. He gave evidence but called no other witnesses. The Respondent was represented by Ms Twine of Counsel. The Respondent called one witness, Mr Garapetian, a director of the Respondent.

3. The Respondent had lodged various documents with the Tribunal prior to the hearing. I added a copy of the Response to those documents, paginated them, and had copies prepared for the Claimant and the witness table. The bundle so produced ran to 49 pages. I asked the Claimant whether there were any additional documents which he wished to rely on and he said that there were not.

4. The hearing on 20 January 2020 had been listed for a 1 hour hearing. In fact, sorting out the bundle, identifying how each party would put their case, and hearing evidence and submissions took three hours. It was therefore necessary for me to reserve my decision.

The claims and the discussion of the issues at the beginning of the hearing

5. At the beginning of the hearing before me, the Claimant explained that his claims were as follows:

   5.1. **Unlawful deductions from wages:** the Claimant alleged that at the beginning of his employment he and the Respondent had agreed that his weekly pay would be £420 after tax per week. The Claimant alleged that the Respondent had failed to pay him wages in respect of the two weeks that he had worked after resigning prior to his employment terminating on 3 August 2019. Accordingly, the Claimant alleged that he was owed £840.

   5.2. **Holiday pay:** the Claimant alleged that he was owed 14 days' pay in respect of accrued but untaken holiday pay under the Working Time Regulations 1998 ("the WTR"). He said that ACAS had told him that he should have received £1125 (before tax) but did not know how this calculation had been done.

   5.3. **Section 1 of the Employment Rights Act 1996 ("the ERA"):** the Claimant alleged that he had not received a statement of terms and conditions as required by section 1 of the ERA and that accordingly the compensation to which he was entitled in respect of the deductions from his wages and holiday pay should be increased in accordance with section 38 of the Employment Act 2002.

6. The position of the Respondent in relation to these claims was somewhat confused at the beginning of the hearing, principally because the case Ms Twine had on the day of the hearing been instructed to put forward did not appear to reflect the Respondent's case as set out in the Response. We therefore adjourned for 10 minutes so that Ms Twine could take further instructions and clarify the Respondent's position. Following that adjournment, the Respondent's position was explained to be as follows:

   6.1. **Unlawful deductions from wages:** the Respondent conceded that it had made unlawful deductions from the Claimant's wages. The Claimant had resigned on 3 August 2019. He had worked a further four days, five hours each days. Those twenty hours were for the Claimant a week's work. The Respondent therefore accepted that it owed the Claimant a week's pay but it contended that a week's pay was 20 hours at £8.25/hour, i.e. £165. Ms Twine for the Respondent expressly recognised that the fact that the Respondent contended it was owed £750 by the Claimant was no defence to the unlawful deductions claim.

6.2. **Holiday pay**: the Respondent had provided the Claimant with holiday pay during his employment although he had not taken the holiday. Consequently the Claimant was not due any payment under the WTR in respect of accrued but untaken holiday pay on the termination of his employment. I asked Ms Twine how that contention could be squared with the prohibition of payments in lieu of holiday contained in Regulation 13(9) of the WTR. Ms Twine stated that her instructions were as stated but she accepted that the Respondent was in some difficulty.

6.3. **Section 1 of the ERA:** Ms Twine did not address this issue at the beginning of the hearing but in her closing submissions, which I summarise below, conceded that the Respondent had not provided the statement as required by the ERA.

7. The parties agreed that the Claimant was paid "a week in hand", i.e. on each Friday he was due the wages not for the week that concluded on that day but for the week which had concluded on the previous Friday.

8. In light of this discussion, the following issues arose to be determined:

8.1. On what date did the Claimant's employment with the Respondent terminate?

8.2. What was the amount of a week's pay of the Claimant?

8.3. Did the Respondent owe the Claimant one week's pay (as it contended) or two weeks' pay (as the Claimant contended) in respect of the period prior to the termination of his employment?

8.4. What amount was due to the Claimant on the termination of his employment under Regulation 14 of the WTR and should that amount be reduced by any payments made in respect of holiday pay during his employment?

The Law

Unlawful deductions

9. Section 13 of the ERA provides that an employer may not make a deduction from the "wages" of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

10. "Wages" means any sums payable to a worker in connection with their employment, including any fee, bonus, commission, holiday pay or other emolument referable to their employment, whether payable under their contract or otherwise (section 27 of the ERA).

11. Where a Tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and also order the employer to pay the worker the amount of any deductions made in contravention of section 13 (section 24 of the ERA).

12. Where a Tribunal has ordered an employer to repay a worker an amount deducted in contravention of section 13, the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount (section 25(4) of the ERA).

Holiday pay under regulation 14 of the WTR

13. Regulations 13 and 13A of the WTR provide between them that a worker is entitled to a total of 5.6 weeks' annual and additional annual leave in each leave year.

14. Regulations 13(9)(b) and 13A(6) of the WTR provide that leave to which a worker is entitled under each of those regulations may not be replaced by a payment in lieu except where the worker's employment is terminated.

15. Regulation 14 of the WTR gives a worker whose employment is terminated during the course of a leave year a right to a payment in lieu of accrued but untaken leave calculated in accordance with regulation 14(3). A claim for a failure to pay the amount due under regulation 14 may be brought under regulation 30.

Section 38 of the Employment Act 2002

16. Section 38 of the Employment Act 2002 applies to proceedings before an Employment Tribunal under any of the jurisdictions listed in Schedule 5 to that Act. Such jurisdictions include a claim for unlawful deductions under section 23 of the ERA and a claim under regulation 30 of the WTR for an amount due under regulation 14 of the WTR.

17. If the employer was in breach of its obligations under section 1(1) of the ERA to give a written statement of initial employment particulars, or under section 4(1) of the ERA to give particulars of change to such a statement, when proceedings to which section 38 applies were begun, this will normally affect the compensation to be awarded if those proceedings are successful. This is because the Tribunal must (subject to section 38(5) of the Employment Act 2002) increase the award made in such proceedings by an amount equal to two weeks' pay or, if no award would otherwise be made in such proceedings although the Tribunal has found in the employee's favour, make an award of an amount equal to two weeks' pay (in either case capped at the amount provided for by section 227 of the ERA).

18. Further, the Tribunal may increase any award by up to four weeks' pay (again capped) or, as the case may be, make an award of up to four weeks' pay, if it considers it just and equitable in all the circumstances to do so.

The hearing and the evidence

19. The only documents which purported to relate to the employment of the Claimant which were contained in the bundle were:

    19.1. payslips between pages 13 and 41. The first of these was dated 15 March 2019. There was then a payslip for each week until 23 August 2019. However the last two payslips (dated 15 August and 23 August 2019) showed payments of holiday pay only;

    19.2. a document entitled "zero hours contract" with the Claimant's name and date 5 February 2019 written on the front. The document was unsigned by the Claimant.

20. The bundle also contained witness statements by Mr Garapetian (who described himself as the managing director of the Respondent), Mr Mehran Kaghazkamani (who described himself in the statement as the manager at Divino Restaurant), Mr Wieslaw Szuba (who described himself in the statement as a chef who had been employed at restaurants run by Mr Garapetian) and Mr Djamal Aouane (who described himself in the statement as the head waiter at the Divino Restaurant). Mr Kaghazkamani, Mr Szuba and Mr Aouane did not attend the hearing to give

evidence. The contents of their statements were not agreed. Consequently I have given very little weight to them.

21. The oral evidence of the Claimant and Mr Garapetian in relation to relevant matters may reasonably be summarised as follows. The Claimant had not provided a witness statement. I therefore asked him non-leading questions to obtain his evidence in chief. He said that he had given two weeks' notice on Friday, 19 July 2019. He said that he had not then been paid on 26 July but that Mr Garapetian had said that he would be paid his last two weeks' pay in the following week. However, this had not happened. On the following Saturday Mr Garapetian had shouted at him and kicked him out. He had said that he would complain to the police but Mr Garapetian had told him that the police would not be interested and he would have to go to an Employment Tribunal.

22. The Claimant said that at the beginning of his employment he had agreed with Mr Garapetian that he would work from 11:30 am to 10 pm between Tuesday and Thursday and until 11 pm on Friday and Saturday (he did not expressly mention Sundays). He would work about 60 to 65 hours a week and he would be paid £420 after tax per week for these hours. The Claimant said that he had asked about payslips and a contract. Mr Garapetian had always said that he would provide payslips "next month" and that their contract was oral. The Claimant was always paid in cash. He had never previously seen the payslips or contract contained in the bundle.

23. When cross-examined, the Claimant stuck to his account as set out above. He denied that he had in fact resigned on 3 August 2019. He denied that he had only worked for four days after he had resigned. He denied that he only worked around 20 hours a week. When asked about payslips, he said that he had never seen these before. He was also asked about a loan which it was said that Mr Garapetian had made to him for £750 when he had begun his employment. The Claimant denied that he had received any such loan. Rather he said that Mr Garapetian owed him £200 from work which he had done at a restaurant in Harrogate and he had told Mr Garapetian to give that money to the chef who had organised a room for him in Leeds (at the rate of £200 a month). He denied that he had said that he did not need a written contract when offered one.

24. Mr Garapetian had provided a written witness statement. In answer to supplemental questions he corrected what he had said in its paragraph 14: he had said "the claimant, then in the last week in July gave two weeks notice". However, in his oral evidence he said that to the best of his recollection the Claimant had resigned around 3 August 2019.

25. Mr Garapetian was cross-examined by the Claimant. The Claimant, whose command of English is far from perfect, struggled to ask clear and relevant questions. I clarified a considerable number of his questions with him and then put them to Mr Garapetian myself more succinctly. In answer to questions asked in cross examination, Mr Garapetian denied that the Claimant had not been provided with payslips throughout his employment and, also, denied that the Claimant had not been provided with a written contract when he had asked for one. Mr Garapetian said that in the period in question the restaurant was very quiet. He said that he had not paid the Claimant for his last week of work because the Claimant owed him £750 in respect of the deposit on his accommodation in Leeds.

26. In answer to questions that I asked Mr Garapetian, he said that employees would sign for their payslips using a standard document which would be kept for a week or so. When I asked Mr Garapetian whether the Claimant worked the same days and hours each week he said "it varied depending on the evening, the booking". When I asked how many hours in total per week he answered "it would vary around about

20". When I asked (by reference to payslips) why the Claimant was paid 20 hours each week if he worked different hours each week Mr Garapetian and said "20 hours maximum, quiet restaurant". This did not seem to be an answer to my question so I asked "but why pay him for 20 hours each week if hours varied" to which Mr Garapetian answered "he always worked 20 hours – but daily shift varied. Long hours at weekend but short in week." At the end of his evidence it became apparent that Mr Garapetian was rarely at the restaurant and that the reality was that he did not know exactly when the Claimant would arrive and leave.

27. I asked Mr Garapetian why the payslips of the Claimant showed his holiday pay as having been paid on 16 and 23 August 2019 if in fact the holiday pay had been given to the Claimant on earlier dates. Mr Garapetian said that he assumed that this was what the accountants had advised.

Submissions

28. Ms Twine's submissions were brief. She said the Respondent conceded that no written contract been provided and that therefore, in light of the concession in relation to the unlawful deduction of wages, the Respondent conceded that the award for the unlawful deduction of wages could be increased as provided for by section 38 of the Employment Act 2002. However, given the short nature of the employment, any increase in award made pursuant to section 38 should be at the bottom end.

29. So far as the amount deducted was concerned, Ms Twine submitted that I should accept the Respondent's account that the Claimant had not worked for the whole of his notice period but rather just the first four days and consequently the amount deducted was just £165. The Claimant's argument that he was paid £420 a week was unsupported by any evidence and did not reconcile with the payslips provided.

30. So far as the claim for holiday pay under the WTR was concerned, Ms Twine noted that the Claimant had received payments in lieu of holiday during his employment but that regulation 13 (9) meant that the Respondent was "in difficulty".

31. In his own submissions, the Claimant limited himself to saying that at no point during his evidence and had he lied and that the reason he had been unable to provide any documents in support of his claim was that the Respondent had not provided him with any.

Findings of Fact

32. I am bound to be selective in my references to the evidence when explaining the reasons for my decision. However, I wish to emphasise that I considered all the evidence in the round when reaching my conclusions.

33. Throughout this case the Claimant and the Respondent have both thrown mud at the other in relation to numerous matters arising from the employment. However, the scope of the claims that I need to describe is limited (as is their value). Accordingly, the areas in relation to which I need to make findings of fact are also limited to the following:

    33.1. The agreed weekly hours and pay of the Claimant;
    33.2. When his employment terminated;
    33.3. Whether he had not been paid for only the last 4 days of his employment or whether in fact he had not been paid for the last two weeks of his employment.

34. The evidence of the Claimant and the Respondent conflicted in relation to each of these matters. Since to a considerable degree the evidence of each boiled down to little more than the witness evidence of the Claimant and Mr Garapetian, I make the following brief credibility findings.

35. Turning first to the Claimant, the lack of a detailed account (whether in the Claim Form or in a written witness statement), and the lack of significant documentation against which to compare that account, ultimately limited my ability to assess his credibility. However, doing the best I can with the limited evidence available to me, I found the Claimant to be a more credible witness than Mr Garapetian. This was in particular because the account which he set out in the Claim Form was consistent with the account which he gave at the hearing. His account has not evolved over time. For example, both in the Claim Form and at the hearing he said that his employment had ended on 3 August 2019, that he not been paid for the last two weeks of his employment, and that he had asked for both a contract of employment and payslips and received neither.

36. By contrast, the account of Mr Garapetian and of the Respondent (of which he is managing director) had evolved over time. For example:

    36.1. In relation to the issue of the Claimant's resignation, in the Response the Respondent stated that the Claimant had resigned on 26 August 2019 (paragraph 4), but that he had then left on 3 September 2019 as a result of an altercation (paragraph 8). Mr Garapetian said in his witness statement that the Claimant "then in the last week in July gave two weeks notice" (paragraph 23). At the beginning of the hearing in answer to supplemental questions he corrected this to 3 August 2019 and said the Claimant had just worked for four days after that;

    36.2. In relation to the issue of why he had withheld the Claimant's pay, in the Response the Respondent stated that £165 notice pay had been retained because £750 which the Claimant had borrowed had not been returned. In his witness statement Mr Garapetian said in relation to this issue "the claimant did not work his Notice. He assaulted both me and the manager and fled. He would rightly have been dismissed but he had already left". However, the case put forward on his instructions at the hearing was that in fact the Appellant had worked for four days after handing in his notice.

37. Overall, therefore, I prefer the evidence of the Claimant to that of the Respondent in relation to when the Claimant resigned and when his employment ended. Accordingly, I find that he resigned on 19 July 2019 and thereafter worked for two weeks until 3 August 2019 on which date his employment terminated. I find, however, that he was not paid for these two weeks. I preferred the evidence of the Claimant in these respects because:

    37.1. For the reasons set out above, he was on balance a more credible witness than Mr Garapetian;

    37.2. His account in relation to these particular issues was consistent throughout whereas that of the Respondent was not;

    37.3. His account in relation to the date of termination was more consistent with the limited paperwork provided than the Respondent's. In particular, the last payslip (ignoring the two relating to holiday pay only) is dated Friday 9 August 2019. The evidence of both the Respondent and the Claimant was that the Claimant worked a week in hand so that payslip would have been in respect of work done in the week ending 2 August 2019. This last payslip therefore suggests that (as the Claimant contends) his employment ended on or around 3

August 2019. (However the Respondent concedes that the amount shown on that payslip was not paid and my finding above is of course that the amount shown as paid in the previous payslip of 2 August 2019 was not paid either.)

38. Turning to the question of the Claimant's hours and how much the Claimant was paid each week, I find on the balance of probabilities that the agreement between the parties was that he was paid £165 in cash a week for working around 20 hours. I make this finding for the following reasons:

    38.1. Although the Respondent's evidence was not entirely clear in relation to this issue, it was essentially consistent: the Claimant had worked around 20 hours each week and had been paid 20 hours per week;

    38.2. This was consistent with the payslips. They showed the Claimant as working and being paid for 20 hours each week. Although I have born in mind that the payslips might not reflect the reality of the employment, taking the evidence in the round, I have concluded that it is appropriate to give some weight to them;

    38.3. Above all, I concluded that it was improbable that Mr Garapetian would have agreed to pay the Claimant a *guaranteed* gross salary of around £27,000 a year (the amount which a net weekly payment of £420 per week would produce) for a job involving waitering and, perhaps, unskilled work cleaning and receiving stock, in a small Italian restaurant. By the Claimant's account and that of Mr Garapetian, the other workers were the chef and the Manager plus a young woman who would from time to time help out in the bar. It was by any reckoning a small operation;

    38.4. I find that the three previous points cumulatively outweigh the fact that I found the Claimant to be a more credible witness than Mr Garapetian generally. As I have indicated above, the nature and extent of the evidence in a case which was meant to last for one hour has limited my ability to assess credibility.

Conclusions

39. Turning first to the unlawful deduction claim, the Claimant was not paid his last two weeks' wages and the Respondent must therefore pay him £330.

40. Turning to his claim under regulation 14 of the WTR, the Claimant worked for the Respondent from 5 February 2019 to 3 August 2019. That was a period of 180 days. He did not take any holiday during that period. The number of weeks' pay due under regulation 14 of the WTR is therefore 180/365 x 5.6 = 2.762 weeks, which at £165 per week amounts to £455.73. The Respondent has provided no particulars of amounts allegedly paid during his employment but in any event the effect of regulations 13(9) and 13A(6) is that it would in any event receive no credit for them. The Respondent must therefore pay the Claimant £455.73 in respect of holiday pay.

41. Ms Twine for the Respondent conceded that it was in breach of its obligations under section 1 of the ERA when these proceedings began (and I would have so concluded if the concession had not been made because I am satisfied that no section 1 statement was ever given to the Claimant prior to these proceedings beginning). I therefore increase the award to the Claimant in respect of his unlawful deductions claim by two weeks' pay, that is to say by £330. In all the circumstances of the case, including the brevity of the employment, I conclude that it would not be just and equitable to increase the award by four weeks' pay.

42. In total, therefore, the Respondent must pay the Claimant £1115.73

43. At the end of the hearing Mr Garapetian was fulminating against the Claimant and announced his intention to bring a claim against him for £750. It is therefore appropriate in these circumstances to remind the Respondent of the effect of section 25(4) of the ERA. I have summarised that section above.

Employment Judge Evans
Date: 28 January 2020