Case Number: 1401781/2018 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Robert Bunny**

Respondent: **Vintage Wine Bars Cornwall Limited**

Heard at: **Bodmin Employment Tribunal by CVP** **On: Friday, 30th October 2020**

Before: **Employment Judge Mr. M. Salter**

Representation:
Claimant: In person and not represented
Respondent: Ms. F. Penaluna, director.

JUDGMENT

1. Contrary to Section 13 of the Employment Rights Act 1996 the tribunal declares that the Respondent has made an unlawful deductions from the wages of the Claimant.

2. The Claimant is entitled to payment for accrued but untaken holiday pay and the Tribunal orders the Respondent pay the Claimant £2,125.00 for that.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons given orally at the final hearing on 30th October 2020. As explained at the hearing on that day, in accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") written reasons will not be provided unless they are asked for by any party at the hearing or by

a written request presented within 14 days of the sending of the written record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.

2. I also explained that if a request is made then the written record of the reasons may use more formal language than I use here, however the substance of the decision will remain the same.

3. On 3rd November 2020, written reasons were requested by the Respondent.

4. As explained at the hearing on 30th October 2020, the Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in his ET1

5. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 23rd May 2018, is in short, he was entitled to a sum of money for holiday accrued but untaken at the time his employment ended.

The Respondent's Response

6. In its Form ET3, received by the tribunal on 21st June 2018, the contended it had a right to withhold the Claimant's holiday pay on the basis he had not completed his contractual hours during his employment and so owed it around £4,000 for overpaid wages

Relevant Procedural History

7. The matter came before E.J Maxwell on 26th September, for a Preliminary Hearing during which the issues were identified at a case management hearing and these were refined by Regional Employment Judge Pirani on 17th February 2020, those issues were confirmed to me at the outset of the hearing a being accurate.

8. The Claimant states he took no holiday during his employment with the Respondent, the Respondents contend the last week of his employment was holiday. The Claimant does not wish to dispute this. So the issue for me was how much holiday did the claimant accrue and how much was he entitled to at termination of his employment.

THE FINAL HEARING

General

9. The matter came before me for a final hearing. it had a three-hour time estimate. The Claimant represented himself, the Respondent was represented by Ms Penaluna, a director.

10. As both parties were representing themselves I explained the need to put their cases to the other side and that if they fail to do so they would be deemed to accept the other sides case.

11. The hearing was conducted via Cloud Video Platform. I was satisfied that this medium did not affect my ability to conduct the hearing, hear the evidence or form a view on the matters to be determined. At no point did either party raise any concerns over the medium or their ability to take part in the proceedings.

DOCUMENTS AND EVIDENCE

Witness Evidence

12. I heard evidence from the Claimant and from the two directors of the Respondent: Mr Andrew Grant and Ms Freyja Penaluna. All gave evidence by way of written witness statements that were read by the me in advance of them giving oral evidence. All witnesses were cross-examined.

Bundle

13. To assist me in determining the matter I have before me today an agreed bundle consisting of some 38 pages prepared by the Respondent.

SUBMISSIONS

Claimant

14. The Claimant made brief closing submission that he could not see that the Respondent was able to offset any overpaid wages against the sum of holiday pay that was owed to him.

Respondent

15. The Respondent accepted it owed the claimant a sum of money for holiday but that they also had the entitlement to offset this against the sum they say were owed to him.

MATERIAL FACTS

General Points

16. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by Mr. Bunny, Mr. Grant and Ms Penaluna in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

17. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

Limitation

18. An initial point was taken as to tribunal's jurisdiction to hear this claim. Employment Judge Maxwell determined this and rejected an application for a reconsideration of this point. No appeal was forthcoming.

The Respondent

19. Is a wine bar, and it is an agreed fact the Claimant was employed by it as its Head Chef from 17 March 2017 until his employment ended on 30th December of that year. The claimant resigned, and there is no claim brough about that resignation.

The Claimant and his Contract

20. By an email of 14th March 2017 the Claimant received an email from Mr Moore and was offered a contract of employment. The terms of the employment offer are clear: he was to receive a salary of £24,000 for 48 hours a week over 48 weeks(1st March to 31st January).

21. The is no indication of his rate of pay being calculated hourly.

22. The email states:

> "In summer any extra hours worked above the agreed 48 hours will accrue 1:1. These will then be offset against quieter weeks during October, November & March"

23. The Respondent contends that the flexible nature of the contract was discussed at the meeting on 14th March 2017. The Claimant was clear that whilst the flexible nature of the contract was discussed there was no discussion of a claw back at the end of his employment for any pay made.

24. There is no term permitting the recovery of any salary payments from the Claimant at the end of his employment.

25. The parties agree that he would receive £500 a week gross, and throughout his employment the Claimant was paid £500 gross each week.

26. The Claimant accepted that employment by way of email of the same date [4] and on 15th March 2017 the Respondent gave "formal confirmation" of the new position and stated they shall "now draw up an employment

contract based on our offer that you accepted yesterday" [4] no such formal contract was ever drawn up.

27. There was reference also to an unpaid weekend off in lieu of the Claimant attended work prior to his formal start date on 20th March 2020 and I am told and accept the Claimant started work early on the 17th March.

28. The claimant was to receive 28 days holiday pro-rata's per annum. [3]

The Claimant's Resignation and Subsequent correspondence

29. The Claimant resigned on 30 December 2017 [4] with immediate effect.

30. It is accepted by the Respondent that The Claimant had undertaken 41 weeks employment with the Respondent. This would have taken the Claimant to the 29th December 2017

31. After his resignation, the Claimant requested pay for his accrued holiday, and this was acknowledged on 23rd February 2018 [5].

32. By correspondence dated 26th February 2018 [4] the respondent accepted the Claimant was entitled to £1,957.68, but for the first time it was alleged that he had been overpaid by the Respondent to the sum of £4,572.92 on the basis of the "flexible arrangement" that was in place concerning the Claimant's hours and the Respondent's opening times. If the claimant did not repay the outstanding sums, the Respondent would commence recovery proceedings.

33. The Respondents contend the Claimant only worked 37.3 hours a week and was paid for 40 hours a week, therefore he was overpaid, and they deducted his overpayments.

34. This overpayment was never mentioned at all to the Claimant during his employment, despite him receiving pay weekly.

35. There is an agreement the Claimant was owed holiday for two days in lieu for bank holidays in April and August. [11 and 12] and that the Claimant receive paid holiday on 16th 17th and 24th December.

36. The Respondent accepts the Claimant was owed for 199.9385 hours of holiday totalling some £2,082.68 [12]. The Claimant claims £2,500.00

THE LAW

37. So far as is relevant the Employment Rights Act 1996, states:

> **13 Right not to suffer unauthorised deductions.**
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> And
>
> **14 Excepted deductions.**
> (1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—
>
> (a) an overpayment of wages, or
> (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
>
> made (for any reason) by the employer to the worker.

38. Holiday pay is a wage within meaning of the Act: s27(1)(a).

CONCLUSIONS ON THE ISSUES

<u>General</u>

39. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine, I had to do the best I could, based on the material before me,

such solid findings of fact as I was able to make, and a careful consideration of how far those facts took me in terms of further inferences.

Findings on the Issues

Unpaid Annual Leave – Working Time Regulations

When the Claimant's employment came to an end, was he paid all the compensation he is entitled to under regulation 14 of the Working Time Regulations 1998?

40. It is accepted by the respondent that the Claimant was not paid for his holiday, indeed a lot of the matters relevant to the holiday pay claim were uncontroversial.

How much of the leave year had elapsed at the effective date of termination?

41. The parties accept the Claimant worked for 41 weeks of the 52 week year.

How much paid leave had the Claimant taken in the year?

42. The Claimant contends he did not take any holiday. The Respondent contends the claimant took 3 days holiday on 16, 17 and 24th December [12]. Indeed, the Claimant appears to accept he received payment for these three days [11].

How many days remain unpaid?

43. The Claimant claims they are entitled to 18 days holiday [see page 11 of bundle]. However, he does not appear to account for the holiday he did receive towards the end of his employment which he accepts was paid: 16, 17th and 24th December, this would make 15 days' pay.

44. Both parties accept the Claimant was owed two days in lieu for bank holidays so the Claimant's claim is for 17 days

45. The Respondent contends his calculation is based on hours and is 199.9385 hours [12] on 12 hours a day [12] this is 16.661 days.

46. It would, therefore, appear uncontentious that the Claimant was entitled to 17 days holiday.

What is the relevant net daily rate of pay?

47. The claimant claims a daily pay rate of £125 a day. The Respondent contends the Claimant undertook hourly work for 48 hours a week at £10.461 an hour. Making £500 a week.

48. It appears agreed the Claimant was entitled to be paid a rate of £125 a day. The Claimant says he was paid that daily rate [11], whilst the Respondent, in its Holiday pay accrual doc [12], calculated the Claimant's holiday pay at a daily rate for 12 hours (12 x 10.4166 or £124.992 per day).

How much pay is outstanding to be paid to the Claimant?

49. It is not disputed the Claimant was entitled to holiday. The difference in assessment is £42.33 being the difference between the claimant's claimed days at a daily rate of £125.00 against the Respondent admitted hours.

50. On the material I have before ethe Claimant's assessment is correct, he was a salaried worker entitled to a salary of £24,000 per annum. The contractual documentation confirms this as does the email of February 2018 I refer to above. I find he is entitled to 17 days holiday at a rate of £125 a day or £2,125.00.

51. Unauthorised Deduction from Wages

52. Clearly salary is a "wage" within the meaning of the act, as is holiday pay (s27(1)(a)). I reject the Claimant's suggestion that in law the an employer cannot deduct from an employee a sum of money from accrued holiday pay for overpaid wages. My rejection of this arguments does not mean, however that in this case, this employer could do that.

53. I first asked myself whether there was an overpayment to the Claimant. I needed to ask what was the claimant's rate of pay. The Claimant says he did not complete the Rota as he was salaried and did not consider he needed to. The Respondent says he was an hourly worker paid a rate of £10.41 per hour, with a weekly payment of £500 an hour and then a balancing exercise undertaken at some point to determine whether the claimant was owed further money or owed the Respondent money for a failure to meet the 48 hours a week

54. I looked at the contractual documents: the email offer states the Claimant is paid a salary of £24000 per annum for 48 weeks a year. This is the Respondent's document; I must hold any ambiguous words or interpretation against them

55. The Claimant was, therefore, it appears to me a salaried employee. There is no term that the claimant was in fact to be paid on an hourly basis, or term stating what that hourly rate was.

56. From the documents it appears he was entitled to be paid £500 a week gross for each week of employment, whether the Respondent has work for him or not. there did not appear to have been any questions raised with the Claimant during the term of his employment over reconciliations or informing him of this, not insubstantial, amount of hours he was building up with the Respondent, or action taken if the Claimant were not performing his contractual duties. Yet every week during this period the claimant received £500 gross a week for the duration of his employment.

57. He, therefore, was not overpaid his salary. He received what he was entitled to, namely £500 a week gross.

58. Section 14(1)(a) of the Era therefor does not apply: on my findings, the claimant's pay-packet contained what he was lawfully entitled to, £500 gross: he was not overpaid

59. I then turned to section 13 to see whether that gave the Respondent any basis for the deduction. I find it does not: there is no statutory provision entitling the deduction or any provision of the contract (there being no written contract between the parties) permitting this reconciliation at the end of his employment.

60. Whilst there was an agreed term for the respondent to be able to offset from the claimant any hours worked over the 48 hours when busy against any deficit in hours when the Respondent is quiet, there is not any term in the agreement that, upon the employment ending, the Respondent is able to conduct a reconciliation and deduct monies owed by it from the Claimant.

61. I find support for this finding as I am satisfied that the Claimant is correct in relation to the conversation prior to the email in March 2017, there was no discussion of a claw back at the end of the employment, indeed I should note that the Respondent's evidence in this regard did not go that far.

62. Further I find it surprising that it was not until February 2018 that this alleged claw back provision was first raised, when the amount of money is considerable: £4,500, and none of the contemporaneous documentation created at the time of the contract refers or eludes to this provision.

63. I find the Claimant has a lawful entitlement to £500 gross per week.

64. There has, therefore been no overpayment and so s14(1)(a) of the ERA does not apply.

65. There being no written contract to peruse, s13(1)(b) of the Era does not assist the Respondent

Conclusion

66. I have therefore determined the Claimant is entitled to 17 days holiday at a rate of £125, so £2,125.00, and the Respondent is not permitted to deduct this sum from the Claimant.

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Employment Judge Salter

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Date 10 November 2020