



EMPLOYMENT TRIBUNALS

Claimant: Dev Bahadur Khadka

Respondent: Saiham & Soikat Trading Ltd

Heard at: Exeter **On:** 09 October 2020

Before: Employment Judge Housego

Representation

Claimant: In person, with the assistance of Nicola Jepp

Respondent: Emamul Kabir, director

JUDGMENT

1. I order the Respondent to pay to the Claimant the sum of £968.58 holiday pay.
2. I order the Respondent to pay to the Claimant the sum of £1017.90 notice pay.
3. The total is **£1986.48**.

REASONS

Hearing and issues to be decided

1. Mr Khadka had requested a Nepali interpreter, but none was available. He was given notice of some days before the hearing but wished to proceed without one. He was accompanied by a McKenzie friend, Nicola Jepp, who had also assisted him before the hearing. I checked with her periodically that there was no further assistance she felt Mr Khadka needed, and there was not.
2. No-one from the Respondent attended at 10:00. I told Mr Khadka that I would delay the start of the hearing from the scheduled 10:00 am start to 10:15 in case they were delayed and checked with the Employment Tribunal's Bristol

office whether there had been any email or telephone call from the Respondent. There had not. There had been an email on 08 October 2020 from the office to Mr Khadka about the absence of an interpreter, asking him whether he wished to proceed. This had been copied to the Respondent. Mr Khadka had replied that he wished to proceed and that also had been copied to the Respondent. Mr Kabir then arrived at 10:10.

3. Mr Khadka filed his claim on 26 June 2019. At a hearing on 07 October 2019 Mr Khadka withdrew a claim of discrimination on the grounds of religion or belief, and EJ Goraj dismissed claims of sex discrimination and for paternity pay.
4. The remaining claims are for notice pay and for pay for holiday accrued but not taken. These were out of time, but EJ Goraj decided that it was not reasonably practicable for them to be presented in time and that they had been presented in a further period that was reasonable, and so permitted them to proceed.
5. The claim for holiday pay requires me to decide how much holiday had accrued and what was taken, and if not all the entitlement had been taken to calculate the value of the holiday accrued and untaken.
6. There were no witness statements and no documents. Both Mr Khadka and Mr Kabir gave oral evidence. Each produced documents as they went along. There were text messages to and from the two of them, and the P45 was on Mr Khadka's mobile phone. Mr Khadka produced his payslips to December 2018. As all these were to or from the two witnesses and to one another, and not disputed, I allowed them as evidence. I declined to read documents from both which were prepared after the hearing before EJ Goraj which were attempts to settle the matter.

Findings of fact

7. On 01 May 2018 the Claimant started his employed by the Respondent in its restaurant in Babbacombe, Torbay. The restaurant is run by Mr Kabir.
8. Mr Khadka's wife gave birth to their son on 11 December 2018.
9. Mr Kabir states that Mr Khadka ceased attending work on 08 December 2019, but that they paid him to 31 December 2019. Mr Kabir says that he asked Mr Khadka to work a Friday and Saturday (25/26 January 2019) and then finish, but that he did not work those dates.
10. Mr Kabir's accountant provided a P45 to Mr Khadka. It is dated 24 January 2019 and shows a leaving date of 31 December 2018.
11. Mr Khadka says that in his claim form he put that date as the last date he was employed because he followed the P45, but that he had about a week off when his son was born, and then worked until he got the text message on 22 January 2019.
12. The text messages support Mr Khadka's case. The message of 22 January 2019 is one of dismissal. It said:

"I am sorry to hear that you were having problems for your son's health. Anyway you are very much in tension with work and family, so if you can do this Friday and Saturday and finish this week. Thanks"

I find that Mr Kabir dismissed Mr Khadka on 26 January 2019.

13. I accept Mr Khadka's evidence that he worked for all of the time save a short period of paternity leave, for which he was entitled to be paid. My reasons for so finding are the various text messages saying that Mr Khadka would not be in work, for example by reason of his baby son being in hospital, or because he had a cold. There are no messages from Mr Kabir asking where he is or why he is not at work. There were no rotas showing the people who were working at the restaurant. Mr Kabir simply accused Mr Khadka of lying and said that because he (Mr Khadka) had produced no supporting evidence that he was working he should not be believed. Mr Khadka gave evidence on affirmation – there was a case to rebut, but Mr Kabir provided no evidence at all to do so. Mr Kabir's oral evidence was that he dismissed Mr Khadka as he found him unreliable. Mr Khadka had made himself unavailable for some shifts, and this was indeed the reason for the dismissal. There was no overall reduction in hours worked. No payslip was provided for January 2019.
14. Mr Kabir did not lead any evidence that Mr Khadka had taken any paid holiday, and I accept that none was taken.

Holiday pay

15. Mr Khadka was employed for 9 months (01 May – 26 January 2018), which is 3/4 of a year. His gross pay was £1017.90 a calendar month. That means his yearly pay was 12 times that amount, which is £12,214.80. His weekly pay was 1/52nd of that amount, which is £234.90. The whole year's entitlement is 5.6 weeks holiday. 3/4 of that is 4.2 weeks. 4.2 x £234.90 is £986.58.

Notice pay

16. Mr Khadka was paid monthly and so was entitled to a month's notice. He was paid £1017.90 a month and so this is the amount of his claim for notice pay.
17. Mr Kabir does not say that there was any gross misconduct by Mr Khadka. The response form is far from easy to understand, and in it the Respondent states that Mr Khadka was rude to customers and there is reference to staff taking home fish from the restaurant, and that this was not permitted. This was not developed at all in the hearing – it was solely the issue of non attendance. In oral evidence Mr Kabir said that it was the tandoori chef who had been taking the fish and Mr Kabir had dismissed him. I find that there was no gross misconduct by Mr Khadka.
18. Accordingly Mr Khadka was entitled to notice. Mr Kabir says that Mr Khadka was working at the Curry Lounge and not at his restaurant but provided no evidence of this. He says that Mr Khadka stopped attending for work and that he paid Mr Khadka to the end of December 2018 as he had a new baby. I found for Mr Khadka in this conflict of evidence, for the reasons given above.

19. Four days' notice was given, on 22 January 2019 by the text message. Mr Khadka says that notwithstanding the absence of a payslip he was paid in cash for the work he did in January 2019 (as he was all the time, weekly, with payslips at the end of the month) so that he had only arrears of pay when he got the text message, which was paid. There was no written contract of employment (no claim was made about this). The payslips are monthly, and both Mr Khadka and Mr Kabir referred to monthly pay in the claim and response forms. I find that Mr Khadka was entitled to a month's notice. He was not paid for the four days to 26 January 2019, so his notice pay is the one month's pay, which Mr Kabir gives as £1017.90.
20. Accordingly I order the Respondent to pay to the Claimant the sum of £968.58 holiday pay and a further £1017.90 notice pay. The total is **£1986.48**.

Employment Judge Housego

Date 09 October 2020

AMENDED JUDGMENT & REASONS SENT TO THE PARTIES ON
21st January 2021
By Mr J McCormick

FOR THE TRIBUNAL OFFICE