



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Farooqui

Respondents: ABCC Ltd trading as Bombay Curry Club

Heard at: Newcastle (by video link)

On: 10 December 2020

Before: Employment Judge S Shore

Appearances

For the claimant: Mr S Healy, Counsel

For the respondent: Mr B Williams, Managing Director

RESERVED JUDGMENT ON LIABILITY AND QUANTUM

1. The claimant's claim of unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996 is not-well founded and fails.
2. The claimant's claim of breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is well-founded and succeeds. The respondent will pay the claimant **£4,836.00** less tax and National Insurance in compensation.
3. The claimant's claim for non-payment of holiday pay contrary to the Working Time Regulations 1998 is well-founded and succeeds. The respondent will pay the claimant **£1,711.20**.

REASONS

Introduction

1. The claimant alleged he was employed as a Manager by the respondent from 15 April 2018 to 2 October 2019. The claimant started early conciliation with ACAS on 2 December 2019 and obtained a conciliation certificate dated 16 January 2020. The claimant's ET1 was presented on 13 February 2020. The respondent is a company operating a takeaway restaurant in Middlesbrough serving Indian and Bangladeshi food.

2. The claimant presented claims of:
 - 2.1. Unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996;
 - 2.2. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and;
 - 2.3. Non-payment of holiday pay contrary to the Working Time Regulations 1998.
3. On the face of the papers, this case seemed very complicated because the takeaway restaurant at the heart of the case had been owned by a number of different limited companies over a relatively short period of time. Those companies had been owned and operated solely or in a combination of the three main actors in the case; the claimant, Mohammad Alim and Bruce Williams. Messrs Alim and Williams are the directors of the respondent in this case and Mr Williams represented it today.
4. This case was originally listed for a final hearing on 12 June 2020, but that hearing was converted to a private preliminary hearing, at which Employment Judge Aspden discussed the case with the claimant (who was representing himself at that time) and the respondent's representative, who later withdrew from representing the respondent. EJ Aspden made case management orders and relisted the final hearing for 24 August 2020. The case was subsequently postponed to today.
5. On reading the papers for this hearing, I noticed that no list of issues had been produced or agreed. I therefore drafted a list and sent it to counsel for the claimant and Mr Williams on the morning of the hearing. The following issues were amended and agreed by the parties' representatives:

1. **Employment status**

- 1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?
- 1.2 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?
- 1.3 Did the claimant transfer to the respondent by TUPE?

2. **Notice pay**

- 2.1 What was the claimant's notice period?
- 2.2 Was the claimant paid for that notice period?
- 2.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

3. **Holiday Pay (Working Time Regulations 1998)**

- 3.1 What was the claimant's leave year?
- 3.2 How much of the leave year had passed when the claimant's employment ended?
- 3.3 How much leave had accrued for the year by that date?
- 3.4 How much paid leave had the claimant taken in the year?
- 3.5 Were any days carried over from previous holiday years?
- 3.6 How many days remain unpaid?
- 3.7 What is the relevant daily rate of pay?

4. **Unauthorised deductions**

- 4.1 Were the wages paid to the claimant less than the wages he should have been paid?
- 4.2 Was any deduction required or authorised by statute?
- 4.3 Was any deduction required or authorised by a written term of the contract?
- 4.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 4.5 Did the claimant agree in writing to the deduction before it was made?
- 4.6 How much is the claimant owed?

Housekeeping

- 6. The parties produced an agreed bundle of 172 pages. If I refer to pages in the bundle, the page number(s) will be in square brackets.
- 7. The claimant gave evidence in support of his claim and adopted a witness statement [86-90] that ran to 17 paragraphs upon which he was cross-examined. The respondent produced statements of four witnesses:
 - 7.1. Bruce Williams a director of, and the person with significant control of the respondent. His witness statement [129-131] ran to 15 paragraphs.
 - 7.2. Mohammed Alim is a director of the respondent. His statement [132-135] consisted of 23 paragraphs.

- 7.3. Maria Cocker is a Senior Administrator for Price Right Properties Ltd and gave evidence about negotiations between the claimant and Mr Williams in summer 2019 and her attendance a meeting with the claimant on 27 August 2019. Her witness statement [136-137] consisted of 5 paragraphs.
- 7.4. Mark Holt is a Senior Administrator for Price Right Properties Ltd and gave evidence about the meeting on 27 August 2019. His witness statement [139] consisted of 2 paragraphs.
8. As a preliminary issue, Mr Williams advised that Ms Cocker was unable to attend the hearing because her son had had an operation the previous day and she was looking after him. He applied for an adjournment of the hearing because her evidence was important as to what the claimant was alleged to have said about his future intentions for working for the respondent. Mr Healy opposed the application.
9. I noted that Mr Holt had not logged into the hearing. Mr Williams said that he could not attend because of work. I took note of the fact that the application for adjournment had been made on the morning of the hearing; there was nothing from Ms Cocker herself about her son's operation or her need to care for him; no indication of why she could not join the hearing from wherever she was and no medical evidence, such as a letter from the hospital or GP to corroborate the application.
10. I was mindful that this was the third date that had been allocated to the final hearing and that Mr Holt could cover the same evidence as Ms Cocker. He was the respondent's witness and I found that it was possible to ask him to log in at a specific time to give his evidence, which would probably take no more than an hour at most.
11. Mr Williams asked for time to contact Mr Holt to check his availability, which I was happy to give, and then confirmed that Mr Holt would log in at a specified time, which he did. I refused the application for an adjournment. The respondent's three witnesses were cross-examined on their witness statements. I could give little weight to Ms Cocker's evidence because she did not attend the hearing. The three witnesses for the respondent who appeared were cross-examined.
12. At the end of the evidence, I heard closing submissions from Mr Williams and Mr Healy. The hearing was conducted by video on the CVP application, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of a number of technical glitches.
13. I was conscious of the tight timetable that we would be facing and asked the representatives for estimates of how long evidence would take. Mr Healy said he would be approximately 45 minutes with each of the respondent's two main witnesses, but would not be long with Mr Holt. Mr Williams thought he would be approximately 45 minutes with the claimant. Those estimates were fairly accurate, but the evidence and closing arguments did not finish until 3:40pm and I did not think I could consider the evidence and draft a judgment and reasons in the time remaining in the day, so decided to reserve my decision. Because of the nature of the claims presented by Mr Farooqui, I felt I would be able to deal with liability and remedy (if required) without the need for a further remedy hearing.

Findings of Fact

14. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine.

AZ (NE) Ltd

15. The claimant and Mohammed Alim operated the takeaway that traded as Bombay Curry Club through AZ (NE) Ltd, of which they were both directors and equal shareholders. AZ (NE) Ltd was incorporated on 7 December 2015 and was dissolved on 14 January 2020. Mr Alim resigned as a director of the company on 12 May 2016, but continued to work in the business. I find that whether he knew of his resignation/removal as a director of the company is irrelevant to my consideration of the issues in this case. I also find that the fact that AZ (NE) Ltd returned accounts for a dormant company to Companies House in 2016, 2017, 2018 and 2019 to be irrelevant for the purposes of these proceedings, because the company is not a party or even an actor in the issues that I have to determine, except as I have recorded below.

16. Mr Williams invested £15,000 in AZ (NE) Ltd through the Small Enterprise Investment Scheme, on 14 June 2016 in exchange for a 15% share in the company. I prefer Mr William's evidence on this point over the claimant's assertion that Mr Williams was never a shareholder of the company, because Mr Williams produced a confirmation statement for AZ (NE) Ltd dated 16 December 2016 [103-108] that records him as a 15% shareholder.

17. It was clear from the documents and oral evidence that there was not a lot of love lost between the claimant and Mr Williams (and vice-versa). The claimant resented what he saw as the interference in the running of the business by Mr Williams. This caused tension between the claimant and Mr Alim, but they continued to work together until Spring 2018, when the accounts of the claimant, Mr Alim and Mr Williams all differ in their recollection of what happened and the emphasis that they each place on the various aspects of what happened when a new company, BC (NE) Ltd, was formed.

18. I find that as a director and shareholder in the business, the claimant had a significant role in running the takeaway business when it was operated by AZ (NE) Ltd. I do not find Mr William's evidence that throughout the time he knew the claimant, whichever the company, the claimant was mainly a delivery driver, meets the balance of probabilities. I make this finding for a number of reasons:

18.1. Mr Williams himself stated that he saw the claimant doing other things like taking orders, cashing up drivers and helping around the kitchen "as you might expect of a co-owner";

18.2. By his own admission, Mr Williams was not a very frequent visitor to the takeaway;

- 18.3. The claimant's evidence that he picked up the staff, did the fresh food shopping, supervised the preparation of the food, organised the cleaning of the kitchen prior to service, cooked, took orders, packed food, dealt with complaints and drove when needed was credible as he was indisputably a director and owner of the business and was not really challenged on that evidence, and;
- 18.4. Mr Alim confirmed that the claimant did all the things I have listed in the previous sub-paragraph, under cross-examination.

BC (NE) Ltd

19. The operation of Bombay Curry Club passed to BC (NE) Ltd on 5 April 2018.
20. I find it to be most relevant to record what is evidenced by the documents in the case, as these are unchallengeable [110-119]. A new company, BC (NE) Ltd, was incorporated on 5 April 2018. Mr Alim was the sole director of the new company and was issued with 62% of the shares. Mr Williams was issued with 23% of the shares and Shahid Fraz Rashid was issued with 15% of the shares. Mr Rashid was never mentioned in these proceedings. The claimant was never a director and never held any shares in the new company. It was formed by Beaumont Accountancy Services ("Beaumont") and its office address was used as the registered office and correspondence address of all three shareholders. I mention this only because the role of Beaumont becomes contentious later in this case.
21. It is agreed that BC (NE) Ltd took over the running of the takeaway on 5 April 2018. I find that the claimant continued to do all the work he had done under the previous company because his evidence was credible and was corroborated by Mr Alim.
22. I also find that AZ (NE) Ltd remained as leaseholder of the business premises of Bombay Curry Club, despite the transfer of the operation of the business to BC (NE) Ltd, as this was never disputed.

The Claimant's terms and conditions

23. The claimant says that he entered into a contract with BC (NE) Ltd dated 5 April 2018 [69-75]. I find that the claimant has shown on the balance of probabilities that this contract was entered into by the claimant and BC (NE) Ltd because:
 - 23.1. I preferred the claimant's evidence on the point. The evidence of Messrs Alim and Williams was internally inconsistent, implausible and was not consistent with one another. Their oral evidence was not consistent with their written evidence or that of each other;
 - 23.2. The scenario that the respondent put forward: that the respondent had produced a batch of blank contracts that Mr Alim signed and the claimant then got hold of one of them and signed it was simply not credible for a company with just two employees;
 - 23.3. Mr Alim confirmed it was his signature on the document [74];

- 23.4. He also confirmed the claimant's duties as being largely consistent with those set out in the contract;
- 23.5. I do not find that there is anything suspicious about the fact that claimant did not immediately produce page 3 of the contract [75]. The page that was supplied later fits precisely with the rest of the document, and;
- 23.6. The other circumstances and findings in the case corroborate the claimant's position, particularly his rate of pay.
24. I find that the core elements of the claimant's contract for the purposes of this case are:
- 24.1. His continuous employment began on 17 June 2014;
- 24.2. His job title was General Manager;
- 24.3. His basic salary was £19,344 per annum (or £1,612 per month, or £372 per week);
- 24.4. His holiday year ran from 1 January to 31 December;
- 24.5. His annual holiday entitlement was 20 days per annum plus "the usual public holidays in England and Wales";
- 24.6. On termination of employment, the company could require the claimant to take holiday during any notice period, and;
- 24.7. Both parties had to give three months' notice to terminate the claimant's employment.
25. The claimant's case on the issue of the contract is further corroborated by his production of a letter from HMRC dated 21 June 2020, which records that he was paid a total of £10,416.00 gross from the start of the tax year 2019/2020, which is exactly 28 weeks at £372 per week. The 28-week period ended on the date that the parties agree that the claimant's employment ended.
26. He also produced pay slips that are consistent with these figures. I accept his explanation that he has not kept his early pay slips from BC (NE) Ltd and that Beaumont have not been able to access them because of an update to their Sage software.

ABBCC Ltd

27. ABBCC Ltd was incorporated on 26 June 2019. Its directors were Mr Alim and Mr Williams. Mr Williams is the sole shareholder.
28. I find that the respondent, ABBCC Ltd took over the operation of Bombay Curry Club on 27 August 2019. Mr Williams said that the company purchased the assets of BC (NE) Ltd on that date and also took the transfer of the lease on the business premises [30], but I find it highly unlikely that a new limited company would buy the

assets of what it says was a failing business and assume liability for a lease, without being able to take the trading profits. This is particularly so as Mr Williams was the sole shareholder of ABBCC Ltd, having been a minority shareholder of BC (NE) Ltd.

29. I reject Mr Williams' evidence that there was only an asset transfer and that a transfer of the lease that would end the claimant's interest in the business. Mr Williams said he was an experienced businessman and investor, so his evidence that the claimant would walk away from the business is not credible. It is also not credible that if that was the deal, Mr Williams did not seek to put it in writing. He produced no evidence of the transfer of the trading of the business from BC (NE) Ltd to ABBCC Ltd.
30. This is particularly so, given the claimant's evidence (which was corroborated by Mr Alim) that the claimant continued to work in the business after 27 August 2019. I find it highly unlikely that if Mr Alim and, particularly, Mr Williams thought that the claimant had agreed to leave the business in return for ABBCC Ltd taking on the liability for the business lease, neither of them would have done anything about the fact that the claimant continued to turn up for work and receive the same wages as he had done before for over a month.
31. I find that the claimant continued to turn up for work because of his evidence as corroborated by Mr Alim. I find that he continued to be paid to 18 October 2019 because of the HMRC letter dated 21 June 2020 [76-77].
32. It was agreed that the transfer from BC (NE) Ltd to ABBCC Ltd was one to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied. Mr Williams placed great stock in the fact that when he met with a representative of Beaumont to discuss the transfer, he was told that BC (NE) Ltd had two employees who would TUPE across and that neither of them was the claimant.
33. He produced no independent document from either the claimant or Beaumont that corroborated his assertion. His own witness evidence was that Mr Alim confirmed that BC (NE) Ltd had two employees.
34. Having made a finding that the claimant was employed as General Manager by BC (NE) Ltd (the transferor), I therefore find that, whatever representations may have been made to ABBCC Ltd by Beaumont or Mr Alim, the claimant transferred his employment from BC (NE) Ltd to ABBCC Ltd (the transferee) on 27 August 2019 under TUPE.
35. It is trite law, but bears repetition, that regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 operates to automatically transfer all contracts of employment from transferor to transferee.
36. I find that it is possible that Mr Williams may not have believed that the claimant was an employee of BC (NE) Ltd or that he transferred to ABBCC Ltd, but that this is not a relevant consideration in determining whether he actually was an employee or that he transferred under TUPE.
37. There were discussions between Mr Williams and the claimant about the lease. Their evidence was diametrically opposed. Mr Williams said that the rent was in

arrears. The claimant said it was not. However, that is not an issue that affects my findings on the issues in this case.

Termination of employment

38. Mr Williams' evidence in chief was silent on the date or circumstances of when and how the claimant left the business. He attempts to undermine details of the claimant's case as set out in his ET1, but makes no assertions as to what happened, except to say that he thought the claimant had agreed to cease all involvement on the assignment of the lease on 27 August. As I have already indicated, I find that position untenable, given that the claimant continued to work in and be paid well into October 2019.
39. Mr Williams' evidence was undermined by that of Mr Alim, who said that the claimant was only meant to drive for the business once the lease had been transferred, but continued to have access to the cash till, retained a bank card and "would not stop interfering in the business" (§14 of his witness statement). Mr Alim says that in mid-September 2019, he told the claimant his services were no longer required. I find that evidence to be credible, as it fits with the generality of the claimant's evidence. That conversation may not have taken place on the date that the claimant suggested it did.
40. Mr Alim also said that he told Beaumont, who were still processing payroll, to stop payroll on 4 October 2019 (§18), but they continued to pay until 18 October 2019. I find that date matches with the letter from HMRC that he was paid by BC (NE) Ltd to 18 October 2019. It is not incredible that payroll was still being met by BC (NE) Ltd to 18 October 2019, even if the running of the business had transferred.
41. The most cogent and logical account of what happened is the claimant's, so I find that at a date in September, Mr Williams saw the claimant in the business, took Mr Alim to one side and spoke to him, after which, Mr Alim spoke to the claimant and told him to go home for two weeks, whilst he "sorted things out" with Mr Williams.
42. I also find that Mr Alim then spoke to the claimant approximately two weeks later and told him he was dismissed with immediate effect.
43. I find that the claimant took no holiday between 1 January 2019 and 18 October 2019 because Mr Alim said he did not take a day off when cross-examined on the point. I find that the claimant's annual gross pay was £19,344.00 and that he was paid £74.40 per day gross.

Discrepancies in evidence and EDT

44. This is a case where neither side has produced a completely cogent and consistent account of events.
45. I find that the claimant said to Mr Holt in the presence of Ms Cocker that he had no intention of working for Mr Williams. However, what someone says they will do and what they actually do are not always the same thing. I have made the finding that the claimant continued to work at the business until mid-September and was not dismissed until approximately two weeks later. Given that the claimant was paid to

18 October and both parties agreed that this was his effective date of termination, I find that the claimant's effective date of termination was 18 October 2019.

46. Mr Williams suggest that the wage slips produced by the claimant are not genuine because they carried an employee number 7, when two employees who started after him were numbers 5 and 6. That is an issue, but is outweighed by the other evidence. The respondent has had since the end of February 2020 to gather its evidence.
47. Mr Williams was critical of the claimant's reluctance to provide pay slips on which his NI number was not redacted, but the copies I saw were unredacted. I have dealt with the missing page of the contract.
48. The fact that the HMRC letters were addressed to Beaumont is not a material defect in the Claimant's case.

Applying Findings to the Issues and Law

49. I find that the claimant was an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996.
50. It is, therefore, not necessary for me to determine whether the claimant was a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996.
51. I find that the claimant transferred to the respondent by TUPE.
52. The claimant's notice period was three months.
53. The claimant was not paid for his notice period of three months.
54. The claimant did not do something so serious that the respondent was entitled to dismiss without notice.
55. The claimant's leave year was 1 January to 31 December.
56. Ten months and 18 days of the leave year had passed when the claimant's employment ended on 18 October 2019.
57. 22.4 days' leave (rounded up to 23 days) had accrued for the year by that date.
58. The claimant had taken no paid leave in the year.
59. There were no days carried over from previous holiday years.
60. 23 days remain unpaid
61. The relevant daily rate of pay was £74.40 gross.
62. I find that the claimant was paid to his effective date of termination, so the wages paid to the claimant were not less than the wages he should have been paid.

63. I do not need to make any other findings on the unauthorised deduction of wages.
64. The claimant is owed three months' notice pay, which I calculate to be 13 weeks x £372.00 gross = £4,836.00 plus 23 days' holiday pay, which I calculate to be 23 days x £74.40 = £1,711.20 gross.
65. The total payable by the respondent to the claimant is £6,547.20 (gross) less tax and National Insurance.

Employment Judge Shore
21 December 2020