



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr W Leung

V Oriental Gourmet Catering Ltd t/a Hot Wok Kitchen

Heard at: Watford by CVP

On: 2 December 2020

Before: Employment Judge Loy (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mrs Cheung, Director

JUDGMENT

1. The judgment of the tribunal is that the claimant's claims for breach of contract/unlawful deduction from wages are not well founded and are dismissed.

REASONS

1. These reasons were requested by the claimant.

The claims

2. The claimant was a part-time waiter at the respondent's Chinese restaurant from 9 August 2018 until his resignation on 25 January 2020.
3. After a one-day period of early conciliation on 10 March 2020, the claimant presented a claim form to the tribunal on 8 April 2020. The response form was received by the tribunal on 7 May 2020.
4. The claimant claims breach of contract and /or unlawful deduction from wages for seven days spanning December 2019 to January 2020 amounting in total to £456.75. He also claims wrongful dismissal. He claims that the respondent has not paid him the notice period to which he was entitled by statute. The claim is for one week's pay in the amount of £157.25.

5. The claimant also complained of unfair dismissal. That claim was rejected by the tribunal on the basis that the claimant did not have the requisite two years' qualifying service.
6. The claimant also made a claim under s.11 Employment Rights Act 1996 and / or s.38 Employment Act 2002 that the respondent had failed to give him employment particulars as required under the Employment Rights Act 1996. The tribunal did not allow the claimant to pursue that claim at this hearing. It is not referred to in his claim form and he has made no application to amend. The respondent has had no opportunity to respond to that particular complaint and it would not be just and to allow the claimant to pursue a claim in those circumstances. For these reasons the tribunal did not allow the claimant to pursue this particular complaint.
7. The respondent's position is that the claimant has been paid everything to which he was entitled under the contractual relationship between the parties. Put simply, the respondent says that the entire arrangement between the parties was of a casual nature based at least on fluctuating business needs. Work was offered to the claimant (and other waiters) as and when required by the respondent. There was never any minimum number of hours or days of work. Flexibility suited both parties.
8. The claimant's case is based on the contention that he was employed under an oral contract of employment under which he was required to work three days per week, Thursday, Friday, Saturday starting in the afternoon and ending when the restaurant closed for the evening. He claims that the respondent therefore guaranteed him these three days work per week. The seven days wages that the claimant claims are for days within this guaranteed period, which were not in fact offered to him, which he did not work, and in respect of which he was not paid in lieu.
9. It was common ground that there was no written contract or any written evidence of the relationship. The respondent says that the oral contract was informal and casual. It was to be based on business needs. The claimant was not given any guaranteed hours or days, and certainly not arrangement whereby the respondent was obliged to pay the claimant if his Thursday, Friday or Saturday were not available for any particular reason.
10. The respondent employs a number of waiters of whom the claimant was one. The respondent was aware that the claimant had another job. His job as a waiter was very much supplementary to his primary occupation.
11. The claimant produced a witness statement, schedule of loss and a schedule of pay statements. The respondent did not produce any documents.
12. The claimant affirmed, and his statement was taken as read. Mrs Cheung cross examined him on his statement. Mrs Cheung's evidence was taken orally and Mr Leung cross examined her upon it.

Fact finding

13. In August 2018 the claimant had a conversation with Mrs Cheung. He had worked for her before at a restaurant. Mrs Cheung was aware that the claimant was only available for part-time work and that Thursday, Friday and Saturday were the most convenient days of the week to him. The relationship was casual, which suited both parties.
14. On a Sunday, Mrs Cheung sent weekly schedules to her pool of waiters/waitresses by SMS from her mobile. The schedules were drawn up weekly based on business needs. It was not the case that the claimant worked and/or was paid for every Thursday, Friday and Saturday regardless of business need. Mrs Cheung gave evidence, which the tribunal accepted was entirely truthful, that there were many weeks when she did not require the claimant to work Thursday, Friday and Saturday. Mrs Cheung explained that there were a variety of reasons why Thursday, Friday and Saturday could not necessarily be offered each week. Principally it was business need, but there were also holiday reasons.
15. When that happened, the weekly SMS would not identify all three days to the claimant. The respondent did not pay the claimant on any occasion for any of the days that it did not require him to work. The claimant made no claim to any such payment until January 2020.
16. More specifically, the claimant was not allocated his alleged usual days for the weeks commencing: 13 August 2018, 20 August 2018, 24 December 2018, 4 February 2019, 22 July 2019, 29 July 2019, 18 November 2019, 23 December 2019 and 30 December 2019. It was not until January 2020 that the claimant took issue with these arrangements.
17. It is against that background that the claimant's claim for seven days in December and January is to be considered. When the claimant received Mrs Cheung's weekly SMS for the week commencing 16 December 2019 he was only offered work for Friday 20 December. At that stage the claimant made no complaint, just as he had not done in respect of the previous occasions referred to above. Significantly, he did not at the time make any claim at all to be paid the Thursday or the Saturday which had not been offered to him.
18. In the week commencing 13 January 2020 Mrs Cheung did offer Thursday, Friday and Saturday to the claimant. The claimant in reply declined the Friday, as he had another commitment. That commitment transpired to be that he was picking up a friend from Gatwick Airport. Significantly, the claimant did not ask Mrs Cheung for permission to have a day off. He proceeded on the basis that he was entitled not to accept the work if it was offered to him. He proceeded on the basis that he was at liberty to accept or reject work that was offered to him. He made no claim to be paid in respect of that day. For her part, Mrs Cheung did not question the claimant's offer to come into work late, and found a full shift from another available worker for that particular day.

Conclusions

19. The tribunal finds that the nature of the relationship between the parties was characterised by informality. At no stage did the respondent offer the claimant a guarantee in respect of any level of work or pay. The claimant accepted that that was the nature of the relationship.
20. This was a relationship where the respondent was not duty-bound to offer a particular amount of work, and there was no obligation on the claimant to accept it. This was a flexibility that suited both parties. This can be seen by the claimant's own conduct when he declined to work a Friday during January because he had alternative arrangements to collect a friend from the airport. The claimant's conduct on that occasion was not consistent with someone who believed he was obliged to work any particular day. On the contrary, it is only consistent with the position that he was not obliged to accept any work that was offered.
21. In these circumstances, the tribunal finds that there was no overarching contract between the parties. Each contract was formed only at the point when the respondent offered certain days of work which were then accepted by the claimant. Those contracts expired when the work for the particular day had been completed. There was simply no contract at all during the periods in between the days that were offered and worked by the claimant.
22. In the circumstances, the claimant has no contractual right to be paid for any of the seven days that he claims. Nor is the claimant entitled to any damages for wrongful dismissal. The claimant resigned his employment and was not wrongfully dismissed.

Regional Employment Judge Foxwell

Signed on behalf of Employment
Judge Loy pursuant to Rule 63

Date: ...3 March 2021.....

Sent to the parties on:

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For the Tribunal:

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