



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110374/2019

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Held via Cloud Video Platform (CVP) on 30 November 2020

Employment Judge R King

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Mr Emilio Giacometti

**Claimant
In Person**

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Toni's Pizzeria West End Ltd

**Respondent
Represented by:
Mr T Ralph -
Accountant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the respondent is ordered to pay the claimant the gross sum of £191.36 in respect of accrued but unpaid holiday pay but that his other claims are dismissed.

REASONS

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1. The claimant has presented claims that the respondent failed unlawfully to pay him salary, failed unlawfully to pay him a contractual bonus and failed unlawfully to pay him in respect of accrued but untaken annual leave on the termination of his employment. The respondent resists all of the claimant's claims.

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2. The claimant gave evidence on his own behalf. The respondent led evidence from Mr Tony Ralph, an accountant who is employed by Bookkeeping Scotland of 29 Broomley Drive, Glasgow, G46 6PD. The claimant lodged a bundle of documents.

Findings in fact

Having heard the evidence, the tribunal considered the following facts to be admitted or proved.

- 5 3. At all material times relative to this claim the respondent owned and operated a pizza restaurant at 23-25 Gibson Street, Glasgow, G12 8NU. As at the date of the hearing the premises are now closed and the restaurant is no longer trading.
- 10 4. The claimant was employed by the respondent as its head pizza chef between 2 July 2018 and 22 July 2019 on an agreed salary of £28,000 per annum. His normal hours of work were forty five hours per week and he was entitled to twenty eight days paid holiday each year, the respondents leave year being between 1 January and 31 December.
- 15 5. The reasons for the termination of his employment were not asserted to be relevant to these proceedings.

Preliminary discussions

- 20 6. Prior to the claimant becoming an employee of the respondent, certain preliminary discussions took place between him and the respondent's Giancarlo Celino about the terms and conditions upon which he would be employed. Those discussions included an e-mail that the claimant sent to Mr Celino on 15 June 2018. In this e-mail the claimant proposed the main terms and conditions of employment that would be acceptable to him if he were to commence employment with the respondent. At this point in time the claimant was still in employment with his previous employer and required
25 confirmation of the terms upon which he would be employed by the respondent before he handed in his notice.
7. In respect of pay and bonus, the claimant's proposal was that :-

"The work will be paid with a salary corresponding to 28,000 pounds a year.

The hours worked per week will be 45.

Additional hours per week that will be processed, for shop needs, remain to be agreed.

There is a production bonus of 2% on the volume of business that the shop will have excluded VAT.

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The bonus will be considered if the GP will be kept above 70%."

8. Mr Celino responded to that e-mail later that same day, confirming the respondent's position, which was that –

"I am replying to you with an offer of a job for Toni's Pizzeria.

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The salary will be £28k annually paid every 2 weeks for 45 hours.

Days off requests are ok but not guaranteed as it depends on the level of business.

Off requests for family business are granted.

Bonuses to be agreed. Bonus structure will relate to GP and kitchen wage costs.

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Resignation from Toni's pizzeria is 1 month."

9. On 17 or 18 June 2018, the claimant met with the respondent's Giancarlo Celino, Antoni Dobrenko and Adam Boyd to discuss his future employment. No final agreement was reached at that meeting in relation to the terms of any bonus that would be payable under the contract.

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10. On 20 June 2018, Leigh McDonald, a recruitment consultant with Primestaff Services Limited acting on behalf of the respondent, emailed the claimant with details of a job offer in the following terms:

"Hi Emilio,

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I am getting in touch to inform you that we would like to offer you a job at Toni's Pizzeria West End Limited, 23 Gibson Street, G12 8NU.

We are prepared to offer a salary of £28k per annum based on 45 hours per week. In the event that between 45 and 50 hours are worked, these hours would be banked. If over 50 hours are worked during one week, we would then pay an hourly rate.

5 *We are also prepared to pay a bonus, which will be based on GP and wage percentage targets and will be agreed after the start date.*

We would like to offer a start date of ASAP.

Thanks,

Adam”

10 11. The claimant agreed to accept the respondent's offer of employment on those terms. The agreed gross hourly rate before tax and national insurance was £11.96 per hour.

Holidays

15 12. During the holiday year 1 January 2018 to 31 December 2018, the claimant was entitled to twelve days paid holidays, being his pro rata share of his twenty eight days annual entitlement. Unfortunately for him the demands of the respondent's business meant that he was only allowed to use five days of his entitlement. In response to holiday requests the respondent repeatedly told him that *“it was not a good time to take holidays”*. The claimant also made repeated requests for confirmation of his 2018 holiday entitlement, which the respondent repeatedly failed to deal with, to the extent that he did not know where he stood. As a result, at the end of 2018, the claimant had still not used seven days of his paid holiday entitlement. There was no agreement between the claimant and the respondent to the effect that the claimant was permitted to carry unused holidays into the following holiday year.

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13. Between 1 January 2019 and the termination of his employment on 22 July 2019, the claimant accrued sixteen days paid holidays for the holiday year. However he had only taken seven days of that entitlement as at the termination of his employment. Despite the claimant's requests the

respondent failed to pay him on the termination of his employment for the nine days he had accrued but had not taken.

Occasions when the claimant worked in excess of 45 hours per week

- 5 14. During the claimant's employment, he regularly worked in excess of 45 hours per week. The total hours he worked over and above 45 hours per week during the course of his employment was 98.25 hours, for which he was paid an hourly rate, as agreed, of £11.96 per hour.
- 10 15. While the gross amount due and payable to the claimant in terms of that hourly rate calculation was £1,175.07, the gross amount the respondent actually paid him was £1,237.96.

Bonus

- 15 16. Although the claimant repeatedly sought the respondent's agreement to his proposal in respect of bonus, as outlined in his email of 15 June 2018, no agreement was ever reached. There was therefore no contractual agreement between the parties at all in relation to bonus. Specifically, there was no agreement that the claimant would be entitled to be paid a 2% bonus subject to his bringing in a gross profit of 70% from the restaurant.
- 20 17. The respondent's accounts for the year to 30 June 2019, which coincided with the claimant's period of employment, included sales in respect of pizzas and also burgers sold under the brand name "Naughty Burger". Those accounts showed that the respondent's gross profit for that year was 56%. Therefore even if the bonus arrangement asserted by the claimant had been agreed with the respondent he would not have reached his bonus target and therefore he would not have been entitled to any bonus payment whatsoever.

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Submissions

Submissions for the claimant

18. The claimant made a brief submission to the effect that he insisted on his claims. He was adamant that he had only taken a job with the respondent on the basis that the terms set out in his email of 15 June 2018 had been
5 accepted because that was the only basis upon which he was willing to leave his previous employment. During his employment he had repeatedly sought clarification of his terms and conditions of employment in order that he could make a decision as to whether to stay or go as he felt there was no point in staying if he wasn't getting paid the salary and bonus he had requested.

10 *Submissions for the respondent*

19. Mr Ralph also made a brief submission to the effect that the respondent's business was no longer trading and had left its previous restaurant premises at Gibson Street, Glasgow. He also submitted that the claimant's claim in relation to "banked hours" was time barred, the last occasion when the
15 claimant had worked an excess of 45 hours having been 18 March 2019.

Relevant lawPay and bonuses

20. Section 13 of the Employment Rights Act 1996 provides as follows:

13 *Right not to suffer unauthorised deductions.*

20 (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*

25 (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*

5 (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.*

21. Section 27 1(a) of the 1996 Act provides that “wages” includes:

10 “(a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*”

Holiday pay

22. Regulation 14 of The Working Time regulations 1998 provides –

15 **"14.—**

(1) *Paragraphs (1) to (4) of this regulation apply where—*

(a) *a worker's employment is terminated during the course of his leave year, and*

20 (b) *on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*

25 (2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

(3) *The payment due under paragraph (2) shall be—*

(a) *such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*

(b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

$$(A \times B) - C$$

where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) *A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.*

23. As a general rule, Working Time Directive leave (that is the four weeks leave provided for by Regulation 13 (1) of the Working Time Regulations) may only be taken in the leave year in respect of which it is due – Regulation 13 (9)(a). However there is nothing to prevent an employer and employee agreeing that the four weeks leave provided by Regulation 13 may be carried over. Leave under Regulation 13A, that is the 1.6 weeks leave under Regulation 13A, may also be carried forward into the next leave year in accordance with a relevant agreement such as a term in the employment contract or a collective agreement.

24. Where workers do not have an effective opportunity to take their working time holiday entitlement, they should be permitted to carry over unused statutory holiday to the next year – *Kreuziger v Berlin (C-619/16) EU:C:2018: 872.*

Discussion and decision*Holiday pay*

25. It was not in dispute that the claimant had used only five days of the twelve days holiday entitlement he had accrued in the holiday year 1 January to 31 December 2018. The tribunal was satisfied that he had attempted to take his leave but had been thwarted by the respondent who had failed to engage with his repeated requests to confirm his holiday entitlement and had refused his holiday requests. It was clear that the respondent had thereby failed to ensure the claimant had the opportunity to take his holiday in 2018 and had also failed to inform him, accurately and in good time, of the risk of losing his holiday entitlement if he did not use it during the 2018 holiday year. He did not therefore have an effective opportunity to use his working time holiday entitlement. In the circumstances, the tribunal finds that the claimant was entitled to carry over his unused statutory holiday in the amount of seven days.
26. The tribunal also finds that for the leave year 1 January to 31 December 2019, the claimant had accrued sixteen days paid holiday, but as at the date of termination of his employment had only used seven. That left him with nine days accrued but untaken holidays as at the date of termination of his employment for which he was not paid.
27. The tribunal therefore finds that the claimant is due to be paid for seven days unpaid holidays for 2018 and nine days unpaid holidays for 2019. This amounts to sixteen days holiday pay at a gross rate of £11.96, totalling £191.36.

Unpaid pay and bonus

28. The tribunal was satisfied that in respect of the claimant's claim for hourly rate pay for hours worked over and above 45 hours per week, he had been paid in full and therefore no award is due to him.
29. The tribunal was sympathetic to the claimant that his attempts to have the terms of his bonus arrangements clarified by the respondent were

unsuccessful. However ultimately there was no evidence of any agreement on bonus having been reached at all, far less an agreement along the lines claimed by the claimant, and for that reason, his claim for payment of a bonus must inevitably fail.

5 30. In any event, the tribunal was satisfied that even if the claimant had been able to establish that he was due a 2% bonus subject to the pizza restaurant making a 70% gross profit, the accounts produced by the respondent plainly show that the gross profit for the financial year in question was only 56% and therefore the claimant had not met the bonus target he asserted had been in
10 place.

31. The tribunal's judgment is that in respect of holiday pay, the respondent must pay the claimant the gross sum of £191.36 (from which appropriate deductions for tax and NI should be made), but otherwise his claims are dismissed.

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20 Employment Judge: Robert King
Date of Judgment: 8th January 2021
Entered in Register: 23rd January 2021
Copied to Parties