



EMPLOYMENT TRIBUNALS

Claimant: Ms A-E Boros

Respondent: CL 14 Ltd, trading as Tish Bar and Restaurant

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (in private; by video)

On: 27 January 2021

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: In person

For the respondent: Ms L Caiden (employee of the respondent)

JUDGMENT

The claimant's claims that unlawful deductions were made from her wages, and that she was due compensation for untaken holiday entitlement are dismissed.

EXTENDED REASONS

Conduct of this hearing

- (1) The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way, and the parties had consented.
- (2) In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
- (3) The parties were able to contribute to the discussion and to hear what the tribunal heard and see the witnesses as seen by the tribunal.
- (4) No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

- (5) The respondent produced a bundle of documents. The claimant gave evidence on her own behalf and Ms Caiden gave evidence for the respondent, both on oath.

The claim

- (6) The Claimant was employed by the respondent, which normally runs a restaurant in Belsize Park, as a receptionist/greeter, from 11 February 2019 until her employment was terminated by her resignation with effect from 17 August 2020. By a claim form presented on 3 November 2020, following a period of early conciliation, the claimant brought complaints of unlawful deduction of wages and failure to pay untaken holiday entitlement.

Issues

- (7) Unlawful deduction from wages
- (i) Was the claimant paid for the hours she worked for the respondent from 25-28 February 2019? The claimant claims that she worked for 29 hours, at an hourly rate of £10.50, totalling £304.50, for which she was never paid. The respondent says that the claimant was paid for this work on 15 March 2019.
 - (ii) If not, did the respondent inform the claimant that she would be paid this money at the conclusion of her employment with the respondent?
 - (iii) If not, has the claim been brought within time?
- (8) Holiday pay (Reg 14 Working Time Regulations 1998)
- (i) It is common ground that the claimant was entitled to 18 days' holiday during the period from the commencement of the respondent's holiday year, 1 January 2020, until the termination of the claimant's employment.
 - (ii) Was the respondent entitled to require the claimant to take this holiday while she was on furlough, or is she entitled to be paid in lieu of untaken holiday entitlement?

Facts

- (9) The claimant's employment with the respondent began on 11 February 2019. She was given a contract of employment on 4 November 2019 which included the following at clause 5:

"[The respondent] reserves the right to....require you to take holidays over certain periods due to business and/or operational purposes, such as the recognised Jewish holidays. Any holidays you are required to take by Tish will come out of your annual leave entitlement."

The contract concluded:

“If we do not receive a signed copy of this Contract back from you and you commence work at Tish, you are deemed to have accepted the terms as set out in this Contract.”

The claimant did not sign the contract, but she did not object to its terms, and continued to work. The tribunal therefore concluded that she had accepted the terms of the contract by conduct, so that the terms were binding on both parties.

- (10) The respondent pays its restaurant staff at two-weekly intervals. On 1 March 2019 the claimant was paid for the period 10-24 February 2019, the pay roll being processed on 26 February 2019. On 15 March 2019, she was paid for the period 25 February-10 March 2019, the payroll being processed on 12 March 2019. The claimant alleges that she was told by her manager Yuri, when she complained following her 1 March 2019 payslip that she had not been paid for 25-28 February, that she would receive this sum at the termination of her employment. There was no written record of this conversation. The tribunal concluded that the claimant must have misunderstood what her manager told her. The documents before the tribunal showing the payslips and the claimant's time cards for the relevant period indicate that she was in fact paid for the period 25-28 February 2019 on 15 March 2019.
- (11) The claimant was put on furlough for 108 days from 18 March 2020 to 15 July 2020. She was paid full wages during this time. On 18 March 2020 Mr Dan Levin of the respondent wrote to the claimant stating:
- “Dear Anca,
- As a valued member of the Tish team we would like to repay your dedicated service and commitment by supporting you through this turbulent time and assuring you that for the foreseeable future you will continue to be paid for 35 hours per week throughout this temporary closure. Although the restaurant is closed to guests, we anticipate there to be administrative and housekeeping work during the closure for which you will be required. These duties may include:
- management and administration work
 - answering the phone
 - marketing and preparation for reopening
 - showing activity in the restaurant to discourage intruders, potentially including overnight security assistance
- In return for us supporting your financial security we would gratefully appreciate your assistance in helping to support ours. Over the course of the year 2020 you are entitled to 28 days paid holiday. We are only able to cover the costs of salaries by using 23 days of your holiday over this period which would leave you with 5 remaining days. Once we re-open holiday requests will be subject to management sign off as per usual procedures, however further to this we would kindly ask that you do not take any holiday during the first month of re-opening and over the November – December Christmas period in order to assist in a much needed recuperation of our costs. In making this commitment to you, once we re-open we would like to be assured of a year long commitment from you to remain a loyal and trusted member of the Tish team.
- As aforementioned by David, your talents and commitment to the restaurant have been outstanding and we will be relying on you to help us re-start and re-build. We hope this letter is of some comfort during this unpredictable time. Should you have any further queries or would like to discuss anything please don't hesitate to email either Lara or myself.
- Please could you return a signed copy of this letter confirming both receipt and agreement for the terms outlined.
- With best wishes, Dan Levine”
- (12) The claimant objected to two elements in the letter – that she was required to commit to one year's future employment, and that she might be required to provide overnight security assistance. She replied on 19 March:

“Good evening Dan,

First of all, I want to mention that I am extremely grateful that you decided to keep me as part of Tish team. I have carefully read the letter you sent and I am concerned about two of the terms mentioned in the letter.

The first one refers to security assistance overnight, because I could endanger my life overseeing the restaurant at nights and it would be dangerous for me as a girl.

The second concern is related to my one year commitment. I can not guarantee that I could remain one year after re-opening, not because I intend to leave Tish, it is for some certain reasons such as, I plan to move to Liverpool next year at the end of March or April and as long as life is unpredictable, I can not assure you of my devotion for one year.

I can confirm and guarantee that I will be your trusted and dedicated member for at least six months. I am more than happy to offer my full support to the team whenever is needed.

I want to thank you for everything and I am extremely grateful that you support me in such a dramatic situation. I hope you understand my reasons and if all of the above can be changed, I am more than happy to sign the agreement and to ensure you that I am a dedicated member of Tish as I proved during our collaboration.

Your sincerely, Anca”

- (13) The claimant received assurances from Mr Levin on the two points which concerned her. On 27 March 2020 Mr Levin wrote to the claimant again, asking the claimant formally to consent to being put on furlough. She responded by email consenting to the terms of that letter.
- (14) Top up payments to the claimant during the furlough period were described as “top ups” and not as “holiday” which is how payments were described when, for example, the claimant had been required to take Jewish holidays off.
- (15) The claimant resigned from the respondent with effect from 17 August 2020.

Law

- (16) S13 of the Employment Rights Act 1996 (ERA) gives employees the right not to have unlawful deductions made from their wages. “Deduction” is defined to include no payment being made at all. S.23 ERA sets out the time limits for claims under s13 to be made, as follows:

(2)...an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments...

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(17) S 13 of the Working Time Regulations 1998 (WTR) in essence entitle employees to 5.6 weeks' holiday in any holiday year. For an employee who works 5 days per week, this amounts to a statutory entitlement of 28 days a year, including bank holidays.

(18) Reg 14 WTR sets out how untaken holiday leave should be compensated for by an employer on termination of the employee's employment:

"... a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave [is to be] 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(1);

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".

(19) Reg 15 WTR entitles employers in some circumstances to require employees to take holiday at particular times, as follows:

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13(1); or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

A relevant agreement includes a contract of employment.

Submissions

- (20) The respondent submitted that the claimant had been paid for the period 25-29 February 2019, so that no further payment was due, and that the contracts between the parties entitled the respondent to require the claimant to take leave during the furlough period. The claimant's position was that she had been told that she would be paid for the period 25-28 February 2019, at the end of her contract and that this had not happened – even if she had been paid in March 2019, this was a rolling omission so she should still be compensated for it now. She also stated that she had never consented to having to take holiday during furlough, so that she should be paid for the 18 days she was due, and that she was finding the whole situation very stressful.

Conclusion

- (21) On the issue of pay, the tribunal concluded, as set out above, that the claimant had in fact been paid for the period 25-28 February 2019. She made no complaint in her ET1 that she had not been paid for the final 4 days of her employment.
- (22) On the issue of holiday, Reg 15 WTR entitles employers to require employees to take leave at a particular period. The regulations set out details as to how this should be done, but specifically provide, at Reg 15 (5) that any right or obligation may be varied. The claimant's contract of employment, which she received, and accepted by continuing to work for the respondent without objection, varied the regulatory requirement and entitled the respondent to require the claimant to take certain days as holiday, without going through the formalities described in the WTR. Although it gave Jewish holidays as an example of when it might do so, there was no limitation on the circumstances in which it was able to make such a requirement. The respondent was therefore entitled to require the claimant to take leave at any time, not limited to Jewish holidays. It did not need her consent to the requirement.
- (23) By its letter of 18 March 2020, the respondent required the claimant to take 23 days' holiday during the furlough period. The letter also proposed certain changes to the claimant's contract, to two of which she objected. However, she specifically told the respondent that if those two issues were dealt with to her satisfaction, she would be happy to sign the agreement. She subsequently agreed in writing by email to being put on furlough. Thus, the respondent had exercised a right, in accordance with its contract of employment with the claimant, to require the claimant to take leave. That contractual right had varied the provisions of Reg 15 WTR. The claimant's consent to being required to take holiday was not required – either by WTR or by contract. In fact, the claimant informed the respondent that she would be happy to sign a letter referring to the requirement to take holiday, if two other issues were resolved (which they

were), and she later signed a letter consenting to be furloughed, by implication on the terms of the 18 March 2020 letter as varied by the claimant and her manager, but such consent had not been necessary in relation to holidays.

- (24) The claimant was paid in full for the whole of her furlough period. The fact that her payslips do not specifically refer to holiday is not material.
- (25) The tribunal therefore found that the respondent had been entitled to require the claimant to take 23 days' holiday during her furlough period, and that it had paid her for that holiday. 23 days was in excess of the 18 days to which she had been entitled during the part of the holiday year in which she had been employed. The claimant was therefore not entitled to any further payment in lieu of untaken holiday.
- (26) Both the claimant's claims are therefore dismissed.

Employment Judge Palca

27th Jan 2021

Sent to the parties on:

27/1/21.

For the Tribunal:

.....