



EMPLOYMENT TRIBUNALS

Claimant:
Mr E Altamirano

Respondent:
Cherwell Boathouse Limited

v

Heard at: Reading (by CVP)

On: 4 January 2021

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr J Verdin (director)

JUDGMENT having been sent to the parties on 11 January 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

Introduction

1. Mr Altamirano started this claim on 18 September 2019. Cherwell Boathouse Limited submitted a response to the claim on 23 October 2019.
2. The main hearing of the claim took place by video (CVP) on 4 January 2021. Both Mr Altamirano and Mr Verdin provided the tribunal and each other with electronic copies of the documents they wanted to refer to.
3. I heard evidence from Mr Altamirano. For Cherwell Boathouse Limited, I heard evidence from Mr Verdin, a director, and Mr Bell, a chef. They had all prepared witness statements. Both Mr Verdin and Mr Altamirano then made closing comments. After considering the case, I gave judgment, explaining my findings of fact and the conclusions I had reached.
4. Reasons were requested by Mr Altamirano; I apologise for the delay in proving these reasons, this was because I have been on sick leave.

The points I have to decide, and the law

5. A preliminary hearing took place by telephone on 5 May 2020. The respondent accepted that the claimant was engaged on a two week trial

period and that he was dismissed on 20 August 2019 during the trial period. Employment Judge Anstis clarified that the points I have to decide are:

- (i) Did the claimant commit an act of gross misconduct during the discussion on Tuesday 20 August 2019; and
 - (ii) If not, what compensation is he entitled to for breach of contract (his claim limited to the initial two week period).
6. I started with the second of these issues, and considered whether the terms of the two week trial period entitled Mr Altamirano to be paid for the full two weeks, and if not, whether he had any entitlement to notice of dismissal given during the two weeks trial period.
7. Section 86 of the Employment Rights Act 1996 sets out that some employees are entitled to a legal minimum notice period. Sub-section (1) starts by saying:-
- “(1) The notice required to be given by an employer to terminate the contract of a person who has been continuously employed for one month or more –
- (a) is not less than one week’s notice if his period of continuous employment is less than two years...”
8. Employers and employees can agree to have a notice period even if no legal minimum notice period applies. Where a legal minimum notice period applies, they can agree to have a notice period which is longer than the legal minimum.

Facts

9. I have to decide what happened (the facts). I do that by considering the evidence I have heard and the documents I have been shown, and deciding what I think is most likely to have happened. My decision about what happened in this case is as follows.
10. Mr Altamirano worked for Cherwell Boathouse as a chef, from 13 August 2019 to 20 August 2019. He was not given a written contract of employment. There was a verbal agreement that he would be paid hourly. In the hearing before me, Mr Altamirano said that when his employment started that he was not told that he would be on a two-week trial period. I find that he was told that he would start on a two-week trial period, but there was no agreement that he could not be dismissed during this period, or that a particular period of notice would be required for dismissal during the two week trial period.
11. In the week of 12 August 2019 Mr Altamirano worked 5 days and had two days off. On around 19 August 2019 a rota was put up which set out staff shifts for the coming week. It said that Mr Altamirano would work on 19, 20 and 21 August 2019, then have two days off, then work on 24 and 25 August 2019.

12. Mr Altamirano worked on 19 and 20 August 2019. On 20 August 2019 Cherwell Boathouse Limited dismissed Mr Altamirano. There was a conversation between Mr Altamirano and Mr Bell, the head chef. Mr Bell said he thought Mr Altamirano was struggling. During the discussion, Mr Altamirano called Mr Bell a wanker.
13. Mr Altamirano was paid for the days he had worked. He did not work and was not paid for 21, 24 or 25 August 2019.

Conclusions

14. After deciding the facts, I consider the law (summarised above), and then reach conclusions on the points I have to decide.
15. Mr Altamirano said that he should have been paid for the rest of the week of 19 August 2019. The claim is about whether Cherwell Boathouse Limited was entitled to dismiss him before the end of the week, if so whether he was entitled to be given any notice of dismissal and if so how long that notice should have been.
16. Mr Altamirano's evidence before me was that there was no discussion about a two week trial period at the start of his employment. I decided that Mr Altamirano was told that he would have a two week trial period. I considered whether this meant that notice of dismissal could not be given during the first two weeks, or that Mr Altamirano must be paid for the full two weeks. I have decided that there was not an agreement to that effect.
17. This is for two reasons. First, it was agreed that Mr Altamirano would be paid hourly, not weekly or a flat rate for the two weeks. Being paid hourly suggests that Mr Altamirano would be paid for the hours he worked, not for the whole two week period. Secondly, a trial period during which it is not possible to give notice of dismissal would be strange, as the purpose of a trial period is to give both parties time to see whether they like working together. An arrangement which forced a trial period to continue even if one party did not want it to would not make sense as a trial period.
18. I have decided that the fact that Mr Altamirano was told that he would be on a two week trial period did not prevent him from being given notice of dismissal during the two week trial period.
19. As to whether Mr Altamirano was entitled to notice of dismissal if dismissed during the two week trial period, the legal minimum notice period for an employee who has been employed for one month is one week. Employees who have been employed for less than one month do not have any right to a legal minimum notice period. Mr Altamirano had not been employed by Cherwell Boathouse for one month so he did not have any right to a legal minimum notice period.

20. An employer and an employee can agree that an employee will have an entitlement to notice which is more than the legal minimum. This can be in writing, for example in a contract, or verbally. There was no agreement at the start of Mr Altamirano's employment that Mr Altamirano would have an entitlement to a notice period. There was no written contract. There was no verbal agreement about notice period.
21. Mr Altamirano suggested that after the publication on or around 19 August 2019 of the rota setting out his shifts for the week, he was entitled to be paid for the whole week. For that to be the case, there would have to have been a legal agreement that once the rota was posted, Mr Altamirano (and all staff) would always be entitled to work or be paid for the shifts it displayed. I have decided the rota did not amount to a legal agreement itself or to evidence of a legal agreement of that nature. It was a practical administrative step to tell staff their shifts for the week. The publication of the rota did not prevent staff from being dismissed before the end of the rota.
22. In light of my conclusions about the terms of the two week trial period, I do not need to consider whether Mr Altamirano committed an act of gross misconduct on 20 August 2019.
23. In conclusion, I have decided that Cherwell Boathouse Limited was entitled to dismiss Mr Altamirano without notice on 20 August 2019, not because of his performance or because of anything that he said or that happened in the discussion with Mr Bell on 20 August 2019, but because he was an employee who had worked for less than one month and had no right to the legal minimum notice, and he and Cherwell Boathouse Limited had not agreed anything different to that.
24. For these reasons Mr Altamirano's claim does not succeed and is dismissed.

Employment Judge Hawksworth

Date: 8 March 2021

23 March 2021

Sent to the parties on:

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For the Tribunal Office

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