



THE EMPLOYMENT TRIBUNALS

Claimants: Mr A Bohill
Mr T Dickinson
Miss N True

Respondent: Reds True Barbecue Ltd

Heard at: Newcastle, by video **On:** 24 February 2021

Before: Employment Judge Moss

Representation:

Claimants: In person (Ms E Bohill attended as McKenzie Friend for Mr A Bohill)

Respondent: Mr A Mellor

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The respondent was in breach of contract by dismissing Miss True without notice and the respondent is ordered to pay to the claimant damages of £239.48 for that breach.
2. Mr Dickinson's claim for notice pay is not well founded and is dismissed.
3. Mr Bohill's claim for notice pay is not well founded and is dismissed.
4. Miss True's claim for holiday pay is dismissed upon withdrawal.
5. Mr Dickinson's claim for holiday pay is dismissed upon withdrawal.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic and all issues could be determined in a remote hearing.

REASONS

Claim and issues

1. The claimants each brought a claim for notice pay alleging that the respondent had failed to give any notice of termination of their employment in breach of contract. Mr Dickinson and Miss True also brought a complaint seeking payment of holiday pay but they sought to withdraw those claims during the hearing.
2. The issues for me to determine were:
 - 2.1 Whether Mr Dickinson and Mr Bohill were entitled to receive any period of notice during the first month of their employment. If so, what would be a reasonable period of notice in the circumstances.
 - 2.2 What period of notice Miss True was entitled to receive.
 - 2.3 Whether the respondent had made an overpayment to Miss True, in an amount equivalent to a week's pay, and if so whether that should operate to extinguish any claim for damages.

Evidence and findings of fact

3. I heard evidence from the claimants and from Mr Mellor, Managing Director, for the respondent. There were witness statements from Mr Bohill and Mr Mellor but not from Mr Dickinson or Miss True, though Miss True had set out her position in an email dated 27 September 2020. Mr Mellor stated that the email had not been received prior to the hearing and I allowed time for the email to be forwarded again and read before I started hearing evidence.
4. The primary facts in this case were not in dispute and can be summarised as follows.
5. All of the claimants were employed by the respondent to work at one of its restaurants in Eldon Square, Newcastle Upon Tyne, until their employment was terminated without notice on or about 13 January 2020.
6. Miss True was employed from 21 October 2019 as a waitress. Mr Mellor accepted on behalf of the respondent that the claimant was entitled to one week's notice pay. As an hourly paid employee with no set contractual hours the correct sum would be calculated by reference to average hours worked over the preceding twelve weeks.
7. The respondent's position as far as Miss True is concerned is that she received wages over and above those due for the month of January and is not therefore entitled to further payment.

8. Mr Dickinson was employed from 16 December 2019 as Assistant General Manager. He claims that reasonable notice should have been given and contended that four weeks would be reasonable in the circumstances.
9. Mr Bohill was employed from 08 January 2020 as Head Chef. He had only attended his induction training before being told the restaurant was to close. He claims that reasonable notice should have been given and contended that four weeks would be reasonable in the circumstances.
10. The contract of employment as far as Mr Dickinson and Mr Bohill are concerned provides as follows in relation to notice:

Notice:

After being employed by the Company for a minimum of one month you are required to give the following notice in writing to terminate your employment.

More than one month but less than four years' continuous service: four weeks

More than four years' continuous service: one week for each complete year of service up to a maximum of 12 weeks after 12 years' service.

You are entitled to receive the following notice of termination of employment in writing from the Company:

More than one month but less than four years' continuous service: four weeks

More than four years' continuous service: one week for each complete year of service up to a maximum of 12 weeks after 12 years' service.

11. The claimants' position is that the contract is silent in respect of any entitlement to notice during the first month of employment and they asserted that reasonable notice ought to be implied.
12. The respondent's position is that the wording is unambiguous and that it is clear the notice provision only applies after the employee has been employed by the company for a minimum of one month.
13. I find that there are two stark possibilities in respect of the claimants' first month of employment if the contract was to be terminable at all. Either the contract is to be construed so as to infer an entitlement to some notice or it is interpreted to mean that no entitlement arose during the initial month.
14. As far as the parties' understanding at the time the contracts were entered into is concerned, I accept Mr Mellor's evidence that they were standard contracts issued to all salaried employees across the business and that the intention was for notice to only 'bite' at the one month point. It is clear that neither claimant had contemplated only being employed for a matter of days or weeks. They had both left jobs to take up the employment and expected to continue in their new roles for some time. Mr Bohill's evidence was that he was stunned at being informed the restaurant was closing and that he would not have resigned from his previous job had there been any uncertainty about the restaurant's future.

It is evident that the claimants had not addressed their minds to the issue of notice during that first month, perhaps understandably in the circumstances. Indeed, Mr Dickinson stated in evidence that he should maybe have read the contract better, suggesting that he has perhaps only thought about it after the event.

15. It is not the case that the contracts are completely silent on the issue of notice in the sense of omitting to include a clause pertaining to notice. There is an express contract term which is clear and unambiguous in so far as one month of employment and beyond is concerned. The parties agreed that it is a question of how that notice clause ought to be interpreted as regards any entitlement to notice during the initial month.
16. The evidence did diverge when it came to the issue of what exactly the payment made to Miss True in January was comprised of.
17. Miss True's evidence was that her average weekly pay was £239.48, that she had looked at her last payslip and it did not correlate with having been paid a week's notice pay. It showed that she had been paid £467.97 for 57 hours. Miss True accepted that January is a quieter month than some others but said that she would have worked at least 20 hours per week. She stated that she had holidays booked from 12 to 17 January. She could not say whether Saturday 11 January had been a holiday or confirm either way whether she had been paid for that day.
18. Mr Mellor's evidence was that the company used salaried staff more in January. He stated that a rota system was in place for hourly paid staff and Miss True had only worked one day in the first week of January. As far as her final week was concerned Mr Mellor said that she had been paid for shifts on the Thursday and Friday but that he was confused about the position on the Saturday. He stated that there was a drop in her hours according to the rota for the week of the closure. All staff had been paid their usual hours for the week and hours worked in January were less than 52.5. He said that Miss True's last working shift was 11 January 2020 but that she was paid up to 18 January 2020 and that she had effectively had payment in lieu of notice.
19. I was referred to a print out showing the number of hours Miss True was paid for during any given period. For the month of January 2020 it showed that she was paid for 57 hours at a rate of £8.21 per hour. The print out states that there were 3 weeks in that particular period and that Miss True's average hourly week was 29.17 (rounded up).
20. It is agreed that Miss True did not actually work for 3 weeks during the period in question because her employment was terminated on or around 13 January 2020. However, I find that the basis on which her final payment was calculated is far from clear. None of the monies could have represented notice pay because the respondent's original stance in these proceedings was to deny that Miss True was entitled to any period of notice. It was not clear from the evidence whether payment made during the relevant period related solely to hours worked or whether it included holiday pay or whether it might have even

been an ex gratia payment. Mr Mellor seemed to be working backwards and doing his best to work out what the records meant.

21. The position is further complicated by the fact that average weekly income based on 57 hours over 3 weeks at £8.21 works out as £155.99 whereas a week's notice pay would amount to £239.48. If the lower figure is explained by January being a quiet month, that would not entitle the respondent to avoid paying the higher sum as the equivalent of a week's notice. Overall I am not satisfied that any overpayment, had there been one, is ascertainable with any certainty.

Legal framework

22. Section 86 of the Employment Rights Act 1996 provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice if his period of continuous employment is less than two years. In the absence of a more generous express provision, the statutory notice period is implied into the contract. By virtue of s86(3) ERA a party may waive his right to notice or accept a payment in lieu of notice.
23. At common law, every employee is entitled to notice of the termination of his or her contract of employment, regardless of how long he or she has worked for the employer. The amount of notice that must be given will normally be found in the express or implied terms of the contract. A contract which contains no express provision for its determination is generally subject to an implied term of reasonable notice of termination, such implication being necessary if the contract is to be capable of termination at all. Reasonable notice must not be less than the statutory minimum prescribed by section 86 ERA, though it may be greater depending on the circumstances.
24. An employment contract should be interpreted in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It is not open to a Tribunal to imply a term into the contract based on an assessment of what it thinks would be a fair bargain. A term can only be implied if it can be presumed it would have been the intention of the parties to include it, not because it is a reasonable one or the agreement would be unfair without it.
25. Unless an employee is in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice. Failure to give proper notice amounts to breach of contract and will give rise to a claim for damages for wrongful dismissal.
26. In the event of a claim succeeding, damages are capable of being reduced or extinguished where it can be ascertained with certainty that the respondent had made an overpayment to the claimant **Ridge v HM Land Registry [2014] UKEAT 0485/12**.

Conclusions

27. Mr Dickinson and Mr Bohill, having not been continuously employed for a month or more, were not entitled to statutory notice under s86 ERA.
28. Their contract of employment provided for 4 weeks' notice to be given by either side after they had worked for the respondent for a minimum of one month. The contract did not make any express provision for notice to be given by either party where they had worked for less than one month and I have concluded that the notice clause should be interpreted as meaning that notice rights were only to be triggered after a minimum of one month's employment.
29. I have concluded that a reasonable person possessed of the background knowledge that the parties could reasonably be expected to have at the relevant time would infer from the wording of the notice clause that the claimants were not entitled to be given notice until they had worked for a minimum of one month. Had the contracts not contained a clause pertaining to notice at all, reasonable notice would be implied in accordance with common law principles. However, there is an express contract term as to notice. In my view it would be too simplistic and disjointed an approach to imply an automatic inference to reasonable notice during the first month where the contract only makes express provision for notice beyond that point. Silence about the position during the first month is to be interpreted in the context of very clear provision being made for the period thereafter.
30. I have concluded that the natural inference to draw from the wording of the notice clause is that there was to be no entitlement to notice, or indeed obligation to provide any, during the first month of employment. It would have been most straightforward to have specified a period of notice up to the one month point had that been intended and the most logical explanation for it not having been done is that none was intended. Otherwise, the conclusion I am being asked to draw from the explicit wording used is that either there was no right to terminate the contract by either side during the first month or that further agreement would need to be reached as to what might be an appropriate notice period should the situation arise. I take the view that to reach either of those conclusions would amount to me implying a term that contradicts or overrides what is set out in the notice clause. As has been said, a term can only be implied if it can be presumed it would have been the intention of the parties to include it. I do not make such a presumption on the facts of this case.
31. No period of notice was expressly agreed in respect of Miss True and she is entitled to reasonable notice. This must not be less than the statutory minimum notice provided for by section 86 ERA which in her case is one week. I conclude that reasonable notice would be the same as statutory minimum notice for the claimant in her position as a waitress. I conclude that she was entitled to one week's notice and, in the absence of her having agreed to waive notice or to receive a payment in lieu of notice, the respondent was in breach of contract by not giving her notice of termination.

32. In the event of an overpayment having been made by the respondent, I have some discretion to offset that against any award of damages. However, the amount to be offset would need to be ascertainable with certainty. As I have stated in my findings, I am not satisfied that there was an overpayment made by the respondent to Miss True, or at least one that is ascertainable with certainty. I have therefore concluded that Miss True should be paid damages equivalent to one week's net pay.
33. As an hourly paid employee with no set contractual hours the correct sum would be calculated by reference to average hours worked over the preceding 12 weeks. Tax is payable on an award for notice pay, so I conclude that the amount of damages should be the gross amount of wages for one week which, after deduction of tax, should leave the claimant with the correct amount of compensation. The gross average weekly pay was £239.48 I therefore order the respondent to pay damages to Miss True for breach of contract of £239.48.
34. Miss True will be responsible for any income tax or employee national insurance contributions which may become due on these damages.

Employment Judge Moss
EMPLOYMENT JUDGE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

01 April 2021

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