



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100126/2020 (V)

Heard on the Cloud Video Platform (CVP) on 23 October 2020

Employment Judge S Walker

5 **Mr R Spence**

**Claimant
In Person**

10 **Olivia Catering Limited
t/a Village Steakhouse East Kilbride**

**Respondent
Represented by:
Mrs K Horner**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is dismissed.

REASONS

1 The claimant was employed by the respondent as head chef. He resigned his
employment and has presented a claim in respect of overtime which he says was
20 worked but not paid. He also claims a payment in respect of accrued annual leave
that he says was due when his employment came to an end. The respondent
denies the claim and says that all sums that were due have been paid.

2 The claimant and Karen Horner gave evidence. The respondent lodged various
documents including payslips, P45 and a holiday record sheet.

25 **Findings in fact**

3 I make the following findings in fact.

4 Before being employed by the respondent, the claimant worked for another
company alongside a colleague Robert Connor. Robert Conner had discussions
with Mark Horner about the restaurant being operated by the respondent at East

5 Kilbride. At that stage, Mr Horner was seriously unwell and there was a possibility he would give up the lease of the premises at East Kilbride when it came up for renewal in 3 months' time. Mr Conner was interested in taking over the lease if that happened and discussed the possibility with the claimant of them working together to take over the lease and then run the business together.

5 There was no written agreement reflecting Mr Conner's discussion with Mr Horner nor Mr Conner's discussion with the claimant.

6 The claimant and Mr Conner both started working for the respondent, Mr Conner as restaurant manager and the claimant as head chef. The claimant started
10 employment on 2 September 2019.

7 The claimant's hours of work were to be 35 hours a week at £12 per hour.

8 The claimant worked many hours over the 35 contracted hours. He was under the impression that he would be taking over the business in 3 months' time and was working hard to make the business as profitable as possible and to ensure that
15 all the practices and procedures were in order.

9 There was no written agreement setting out the terms and conditions of the claimant's employment.

10 The respondent employed an accounting company to deal with payroll. Wages were processed every 4 weeks. The claimant was paid £818.64 on 20 September
20 2019 for 2 weeks' work. He was paid £1557.84 on 18 October 2019 and 15 November 2019 each representing 4 weeks' pay (35 hours at £12 per hour).

11 There was an administrative procedure where employees filled in weekly timesheets. This was mainly for hourly paid waiting staff to ensure that they were paid for the hours worked. This also flagged any sick days or annual leave for the
25 accountants who did the payroll. If timesheets were not provided, Mrs Horner would confirm the position verbally with the restaurant manager or his assistant.

12 The claimant asked Mr Conner about payment for the hours he had worked over the 35 contracted hours. Mr Conner said he would raise it with Mr Horner and the answer came back that the overtime would not be paid as it was "not authorised".

However, the claimant did not raise it himself with Mr Horner. He continued to work additional hours.

13 The claimant took 40 hours annual leave over 11, 12, 13, 19 and 25 October 2019. Mrs Horner was advised of this and marked it on the claimant's holiday record sheet.

14 The business was doing well. Mr Horner told Mr Conner that he intended to renew the lease himself. The claimant was unhappy about this and the fact that he had not been paid for all the hours he had worked and he resigned. His last day working was 10 November 2019.

10 **Relevant law**

15 The claim is brought under section 23 of the Employment Rights Act 1996 for an unauthorised deduction from wages. This covers both the claim for overtime and the claim for accrued holiday pay.

16 The claimant has to establish that the sums "properly payable" under his contract have not been paid in full.

17 In relation to the holiday pay, the statutory entitlement is to 28 days per annum. This accrues pro rata and an employee is entitled to payment for any days of annual leave that have accrued but have not been taken.

Decision

20 18 The first question for me is what was "properly payable" to the claimant under his contract of employment. There is no automatic right for an employee to be paid for hours worked outside the hours in their contract of employment. I therefore need to be satisfied that there was an agreement between the claimant and the respondent that the claimant would be paid for overtime and if so, what the terms of that agreement were.

19 The claimant says this was unlimited and he is entitled to be paid for any additional hours worked at £10 an hour. The respondent says it does not generally pay overtime to chefs and that there was no such agreement in respect of the claimant.

20 There is a clear factual dispute which I had to resolve on the balance of probabilities – that means which account is more likely to be true on the evidence before me.

21 There is no written agreement between the parties that overtime will be paid at
5 all. The claimant has not provided any documents or witnesses to confirm that any overtime was paid. However, even if some overtime was paid on an ad hoc basis at £10 an hour, I do not consider it is likely that the agreement with the claimant was that the respondent would pay whatever hours the claimant chose to work without limit and without prior authorisation. As Mr Horner submitted, the
10 restaurant had a budget and they simply could not have operated on such a basis.

22 I consider it is also relevant that the claimant continued to work the additional hours once he had been told that unauthorised overtime would not be paid. Further, I consider it relevant that it would have been unlawful for the respondent to agree to the claimant working more than 48 hours a week without his written
15 agreement to do that (Working Time Regulations 1998 Regulation 4).

23 I accept the claimant's account that he worked hard and for many hours in excess of his contracted 35 a week. I accept that he and Mr Conner believed they were going to have the chance to take over the lease when it expired and run the business on their own account after 3 months. However, I can only make a
20 determination of what the claimant's contractual entitlement was for the period he was employed by the respondent.

24 I consider the claimant has not established that there was an entitlement to payment for unauthorised overtime.

25 I have also found that the claimant took annual leave of 40 hours while employed by the respondent. The claimant does not recall taking leave but again, I consider it more likely that the respondent's account is correct. The respondent has the advantage of paperwork to support their position. 40 hours exceeds the annual leave entitlement to which the claimant was entitled for the period of his employment

26 I therefore dismiss the claim as the claimant has not established that there was any deduction from the sums properly payable under his contract.

5 Employment Judge: Susan Walker
Date of Judgment: 23 October 2020
Entered in register: 18 November 2020
and copied to parties

10