EMPLOYMENT TRIBUNALS

Claimant: Mr Brendan Rosekelly

Respondent: Mama Fuego Ltd

FINAL HEARING

Heard at: Croydon (remote public hearing by video)

On: 16 March 2021 (in chambers)

Before: Judge Brian Doyle

Appearances
For the claimant: In person
For the respondent: Mr Alejandro de la Vega, director

RESERVED JUDGMENT

1. The claimant's claim succeeds in part only.

2. The claim for unpaid expenses is dismissed upon withdrawal.

3. The claim for payment in lieu of time worked is not well-founded and is dismissed.

4. The claim for notice pay is well-founded and succeeds. The parties are invited to agree the sum due as a result of this judgment, failing which to ask for a further decision on paper or at a short additional hearing.

REASONS

Introduction

1. In this claim the claimant complains that the respondent has failed to pay him his proper period of notice pay (2 months rather than 1 week) and 8 days lieu days (for work over and above his 48 hours working week). He withdrew a complaint

regarding unpaid expenses as he accepted that he did not have the evidential material in his possession to support the complaint.

2. The hearing was conducted via the Cloud-based Video Platform (CVP). There was a technical interruption in the hearing while Mr Rosekelly was giving evidence, but after a short break the hearing resumed without further difficulty. I am satisfied that a fair hearing was assured. However, given the interruption, I reserved my judgment and reasons, which are now provided.

The evidence

3. I heard evidence and argument from Mr Brendan Rosekelly and from Mr Alejandro de la Vega. In addition to the ET1 claim and the ET3 response, I was referred to two contractual documents and various emails and texts.

4. Mr de la Vega placed particular emphasis upon the respondent's position set out in an email of 30 December 2019, to which I refer below. In particular, he rejects the suggestion that the claimant worked overtime hours. He relies upon either the claimant having worked unnecessary hours despite the respondent's instructions to the contrary and/or working fewer hours in some weeks that counter-balanced greater hours in other weeks. See the 7th paragraph of that email. I do not have satisfactory evidence of actual hours worked.

5. The claimant placed a different emphasis upon what happened after the restaurant had opened in September 2019. He says that he sat down with the respondent's directors to discuss salary and payment in lieu of additional hours worked. His view was that it was agreed that he would work 48 hours over a 5 days working week and that any extra hours/days would be compensated for as lieu time (that is, he would be paid extra or afforded time off). He agrees that this discussion resulted in the issue of a second employment contract, but he disagrees that this captured all that had been agreed in his discussion with the directors.

6. Nothing hangs upon the credibility of either witness, both of whom struck me as honest witnesses, doing their best to give me their account to the best of their recollections.

Findings of fact

7. I made the following findings of fact on the balance of probabilities. The burden of proof lay with the claimant.

8. The claimant was employed by the respondent company as a Bar Manager at its newly opened restaurant in North Greenwich. The respondent company appears to be owned and managed by three shareholder/directors: Alejandro de la Vega, Cloe de la Vega and Lynette de la Vega.

9. Mr Rosekelly's employment commenced on 9 September 2019 and it ended on 23 December 2019. He worked contractual hours that were said to be 48 hours in each working week and he was latterly paid a salary of £30,000 gross per year (originally £26,000 plus tronc).

10. Mr Rosekelly's original contract of employment provided at clause 2.1 that his appointment shall continue, subject to the remaining terms of the agreement, until terminated by either party giving the other not less than two months' prior notice in writing. The first three months of the appointment were deemed to be a probationary period, terminable at any time on one week's notice or payment in lieu of notice (clause 2.2). His normal hours of work were expressed to be a minimum of 48 hours per week worked in accordance with a rota and would involve day, night and weekend work, including such hours as were necessary for the proper performance of his duties and to keep the premises open during licensed hours.

11. His original salary was expressed to be £26,000 gross per year plus tronc (clause 7.1), reviewable annually (clause 7.2). Provision was made for paid holiday entitlement (clause 9), but not for additional hours worked. Indeed, it was agreed that his working time cannot be measured and that his employment fell within the scope of regulation 20 of the Working Time Regulations 1998 (clause 6). There was an "entire agreement" clause (clause 19). Clause 20 provided that no variation or agreed termination of the agreement shall be effective unless it is in writing and signed by the parties.

12. However, as at 23 October 2019, the respondent purported to replace the original contract of employment with a second contract of employment. That second contract of employment takes a different form and many of its clauses are less detailed or sophisticated than those in the original contract of employment. Notably and noticeably his salary was increased to £30,000 per year, but without any reference to the additional payment of tronc (clause 4). His hours of work were stated to be 40-48 hours per week, with an expectation of flexibility across a 7 days' operating week (clause 5). His three months' probationary period was dealt with in clause 6. No mention is made of additional hours or payment/time off in lieu

13. Clause 8 dealt with notice. Here there was a change. The respondent undertook to give him one week's notice for each completed year of service. In return, he was required to give four weeks' notice. This contract also contained an "entire agreement" clause (clause 19), which provided that it was in substitution for any previous contract, which shall be deemed to have been terminated by mutual consent. There was also a "unilateral variation" clause (clause 20).

14. Although the second contract was signed by or on behalf of the respondent, the claimant did not sign it. It had been sent to him by email by Cloe de la Vega on 23 October 2019 at 16:36. At 5.12pm Mr Rosekelly emailed her and referred to a meeting with Lynette de la Vega and Alejandro de la Vega in mid-September 2019 regarding pay, holiday, etc. He asserted that the 48 hours working week was based on a 5 days' working week and any extra hours were agreed to be days in lieu that could be taken at another time. He referred to a pay review at the end of the probation period. He queried whether his start date had been correctly recorded as 9 September 2019 rather than 2 September 2019.

15. Cloe replied at 17:16, promising to revert to him, but recording that he had been interviewed on 5 September 2019 and so he could not have started on 2 September 2019. Mr Rosekelly accepted that in reply at 17:50.

16. Mr Rosekelly did not receive the promised reply. He emailed Cloe on 4 November 2019 at 4.50pm. He referred back to his earlier email. He expressed himself happy to work extra days as the business required, but that he wished that time to be treated as days in lieu, "which was originally agreed". He asked for that to be written into the contract.

17. There was no further reply to that particular correspondence on behalf of the respondent. Mr Rosekelly continued to work for the respondent and, it is accepted, he was paid thereafter by reference to an annual salary of £30,000.

18. What then appears to have happened is that the restaurant was in financial difficulty. Its turnover was poor and it was losing money. There was also a difficulty within the de la Vega family regarding one family member's visa. Over the course of three meetings or communications in December 2019 (on the 1st or 2nd, the 8th and the 15th, the employees were warned and then advised and finally informed that the restaurant would close on 27 December 2019 and that it would not reopen thereafter, perhaps for some time. The decision to dismiss the staff was taken and communicated.

19. In a series of text messages to Cloe and Lynette between 2 and 6 December 2019, Mr Rosekelly again raised questions about working time outside his 5 days week and the issue of lieu days. It does not appear that he was responded to, at least not in any positive sense of being engaged with.

20. In an email to all staff at 23:08 on 15 December 2019, Cloe referred to a meeting that day. She gave staff one week's notice and that the restaurant would close on 22 December 2019. She explained the background to that decision.

21. On 19 December 2019 at 20:00 Mr Rosekelly emailed Alejandro regarding the final weekend and the closure of the restaurant. In a reference to redundancy, among other things, he said that he had sent two emails that week regarding holiday, lieu days and redundancy. He asked for confirmation of his accrued holiday entitlement (11 days) and 7 days lieu pay.

22. On 30 December 2019 at 9.13pm Cloe emailed Mr Rosekelly (with a copy to Alejandro). She referred to him being aware that his contract had a one week notice period, which he had been paid. She outlined that he had been given two contracts over the course of his employment, the second of which terminated the first. She referred to clause 19 (see above). The first contract outlined a £26,000 salary and a two months' notice period, but it was said that the second contract terminated the first contract by the introduction of an amended contract, created in order to amend his salary as agreed to an increase to £30,000. She said that he had accepted this salary increase offer without complaint and then continued to work under the new terms and the increased salary. Therefore, she argued, he implicitly agreed to the terms of the second contract. In her view, his signature on the second contract was not required as a matter of law in order for it to be binding. She said that "the knowing continuation of your employment by yourself under the terms and salary outlined in contract 2 means that it is an agreed contract by both parties and therefore is the one we will be adhering to." Her position was that by

continuing his employment after receiving the second contract, which terminated any previous agreements, and henceforth accepting the offer and payment of salary at the increased rate of £30,000, he accepted the terms, including the one week notice period. It was said that he did not at this time stop his employment due to any disagreement with these terms, which he could have done.

23. Regarding days in lieu, Cloe said that if his request for days in lieu of overtime worked was legally correct then it would be paid. However, Cloe said that, looking at his hours, "there was a big spike in hours around our opening period" and that "you were told to go home around then on days you were at work when you didn't need to be." It was said that Lynette "told you repeatedly to leave and take a day off and you remained at work despite being told to go, or you came in to work despite being told to take the day off." The hours were said to be "obviously not mandatory." She added that "We also told you and Persiana to refrain from rostering yourselves overlapping hours when it was entirely unnecessary and was causing you to work too many hours."

24. The reference to Persiana is a reference to Persiana Ivanova, from whom the Tribunal has a signed witness statement. She has not attended the hearing or been tested in evidence and so the weight to be attached to her statement is judged accordingly. What she says is that she witnessed a conversation between Mr Rosekelly, Alejandro de la Vega and Lynette de la Vega regarding their employment contracts. She said that it was agreed that they would work 48 hours over 5 days and that any extra days would be accrued as lieu days.

Relevant law

25. A contract of employment is not an example of a contract that must be reduced to writing or otherwise evidenced in writing. Provided an employer complies with the requirements of Part 1 of the Employment Rights Act 1996 on the provision and amendment of a statutory statement of specified employment particulars it has met its minimum obligations. Similarly, there is no requirement that a contract of employment should be the subject of the parties' signatures, whether to evidence receipt of the document or to signal agreement to its contents.

26. A contract of employment may be varied by mutual agreement, supported by consideration (although consideration might not be an issue that causes courts and tribunals too much concern); by a variation clause within the contract itself; or by unilateral variation arising from termination of one contract replaced by another. Strong evidence of mutual agreement is required to support a conclusion that there has been bilateral variation. The employee must be aware of what it is later said that he or she is agreeing to.

27. However, agreement might be capable of being implied (or, indeed, not implied) from the circumstances. Nevertheless, courts and tribunals have generally been reluctant to find that employees have consented to contractual changes in the absence of an express agreement to that effect. This is particularly so in the case of terms that do not have immediate effect and which are detrimental to the employee.

Discussion and conclusion

28. This case is not untypical of cases where the terms of employment are in dispute and where the oral and documentary evidence is contradictory or incomplete. The Tribunal does the best that it can to make appropriate sense of what has happened and what are the legal consequences of that.

29. The starting point is the first contract. That contract undoubtedly governed the initial working relationship between the parties. An important, and perhaps overlooked, provision in that document is clause 20, which provided that no variation or agreed termination of the agreement shall be effective unless it is in writing and signed by the parties.

30. It is clear that by mid-September 2019 both parties were discussing amendment of terms and a new or varied contract of employment. No doubt that took place against a background of a new business finding its feet after the original opening of the restaurant earlier that month and perhaps the early signs that the restaurant might not be as profitable or as solvent as its owners hoped for. Not surprisingly, therefore, there appears to have been an offer of an increase in salary such as to exclude payment of a share of tronc going forward. Equally unsurprisingly, the claimant wished to resolve the question of his maximum working hours and how he might be remunerated or compensated for hours worked above that maximum. In turn, no doubt, the respondent wished to row back on the mutually generous notice periods in the first contract.

31. What appears to the Tribunal, however, is either that no agreement or only incomplete agreement was reached on those matters, or alternatively, oral agreement was reached but not reflected in the written terms of the second contract. The Tribunal considers that, on the balance of probabilities, the former is the more likely rather than the latter.

32. Nevertheless, the difficulty that the respondent faces here is that the first contract could only be varied or terminated effectively if this was executed in writing and signed by the parties (clause 20). The second contract (clause 19) was presumably an attempt to comply with clause 20 of the first contract. However, it is clear that the claimant did not sign the second contract and its terms were in dispute.

33. Thus, the Tribunal concludes, the employment relationship remained governed by the first contract. The fact that the claimant's salary had increased and he continued to work at the restaurant is important, but not determinative, where the evidence is that clause 20 in the first contract had not been complied with and the claimant was disputing whether the second contract contained all that had been orally agreed in discussions with the respondent.

34. The result is that the claimant's claim for payment in lieu of additional hours worked fails. His contract (the first contract) made no provision for such payment or for time off in lieu.

35. However, his claim for two months' notice succeeds. That is what the first contract required. The Tribunal rejects any suggestion that his employment was terminated

under the probation clause. His probation period had expired on 8 December 2019. Notice of termination was given on 15 December 2019. He was given one week's notice, when his contract (the first contract) required two months' notice.

36. However, the claimant cannot pick and choose which terms of the first contract and which terms of the second contract (or a halfway house between the two) he wishes to rely upon. The first contract continued to govern his employment, including as to salary. His salary remained £26,000 per year plus tronc and not £30,000 per year without tronc. His notice entitlement is to be worked out on that basis, giving credit for any overpayment of salary that had been made.

37. The parties should now be able to agree the sum due for notice between themselves. If not, the matter can be referred back to the present judge either for a decision on paper or for a further short hearing.

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Judge Brian Doyle
Dated: 17 March 2021