



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4110566/2021

Hearing Held by Cloud Video Platform (CVP) on 1 December 2021

10

Employment Judge Murphy

Mr T Ambrozy

15

**Claimant
In Person**

Omni Taverns Ltd

20

**Respondent
represented by
Ms E Evans-Jarvis,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

25

(i) the claimant's claim for unauthorized deductions from wages in respect of accrued untaken holiday pay is dismissed pursuant to Rule 52 of the Employment Tribunal Rules 2013, the claimant having withdrawn the claim in the course of the hearing on 1 December 2021;

30

(ii) the claimant's claim for breach of contract in respect of his notice period is dismissed pursuant to Rule 52 of the Employment Tribunal Rules 2013, the claimant having withdrawn the claim in the course of the hearing on 1 December 2021; and

35

(iii) the claimant's claim for unauthorized deductions from wages in respect of the reduction in his hourly rate in the period between June 2020 and 10 May 2021 is not well founded and does not succeed.

REASONS

Introduction

1. This final hearing took place via Cloud Video Platform (CVP), there being no
5 objection to that format by either party. An interpreter, Ms Kubikowska,
provided interpretation services for the claimant throughout the hearing.
2. The claimant brought a claim for unauthorized deductions from his wages in
respect of holiday pay which he said was underpaid throughout the period of
his employment. In the course of the hearing, the claimant informed the
10 Tribunal that this claim was withdrawn. He also brought a claim for breach of
contract in respect of notice pay. During the hearing, the claimant additionally
confirmed this claim was similarly withdrawn.
3. The claimant brought a claim for unauthorized deductions from his wages in
respect of a reduction in his hourly rate of pay which applied between June
15 2020 and 10 May 2021 when his employment ended. Following the
withdrawal of his other claims as set out above, this was the only substantive
claim which remained to be determined at the hearing. The claimant said he
was not provided with written particulars of changes to his Statement of Terms
and Conditions as required by section 4 of ERA. In the event that his
20 substantive wages claim were to succeed, he sought an uplift in
compensation under section 38 of the Employment Act 2002.
4. The claimant gave evidence orally on his own behalf. The respondent did not
lead any evidence. The respondent lodged a bundle of productions which was
referred to by the claimant during his evidence. The claimant also lodged a
25 small number of documents to which limited reference was also made.

Findings in Fact

5. The following facts were found to be proved on the balance of probabilities.

6. The claimant was employed by the respondent as a chef from 1 November 2008 to 10 May 2021.

7. As at February 2020, the claimant's contractual basic rate of pay was £12 per hour. His working hours varied, but in the period from March 2019 to February 2020, the claimant worked, on average, 37.2 hours per week.

8. In March 2020, the Covid 19 pandemic struck and the respondent's business was affected by successive Government lockdowns. The claimant was placed on furlough leave and did not work for the respondent from April 2020 until the last week in July 2020. He was paid furlough pay throughout this period calculated as 80% of his average earnings in the 12-month period from March 2019 to February 2020.

9. On 29 June 2020, Anne Still, director of the respondent, sent the claimant an email in anticipation of reopening the restaurant in July 2020. It was in the following terms:

Hi Tom,

As we are working on the rotas now and we will be opening less hours and with no live music and no Edinburgh festival, we know this isn't going to be easy when we open the doors again.

Our staffing costs are a real issue for us and you are a valued employee that we want to keep and get back on the rota however I have to request that you take a pay cut from £12.50 ph to £11ph.

This would really help us through this tough time..

This will be the only change to your terms and conditions and it won't affect your furlough as that is based on the previous 12 months so your furlough pay will remain the same until it ends in October.

...

Can you let me know asap Tom?

10. The claimant replied by email the same day: “yes ... I agree ...”.

11. He returned to work in the last week of July 2020. He worked 27 hours that month. In August 2020 he worked 215 hours. In September 2020, he worked 170 hours and in October 2020 he worked 50.25 hours. Thereafter he worked
5 no further hours until April 2021 because of a further lockdown. In that month, he worked just one hour. During the hours he worked from July 2020 to April 2021, the claimant was paid £11 per hour. For the remainder of the time, the claimant was on furlough leave and paid a furlough rate.

12. The claimant resigned without notice on 10 May 2021. He did not work any
10 further hours for the respondent before the termination of his employment.

Observations on the Evidence

13. There was no material dispute between the parties. The claimant gave his
15 evidence in an honest and straightforward fashion. Certain payslips he had received from the respondent had not shown a breakdown of holiday payments and furlough payments which had caused him uncertainty. The respondent’s productions, lodged at the eleventh hour before the hearing, included a spreadsheet which broke down the holiday hours paid in the
20 relevant months. The claimant was afforded an opportunity of studying these during an adjournment and was, thereafter, able to agree the sums paid and the allocations as between holiday pay and furlough pay.

Relevant Law

25 *Unauthorized deductions from wages*

14. Under the section 13 of the Employment Rights Act 1996 (“ERA”), a worker has the right not to suffer unauthorized deductions from his wages. Under s.13(3), where the total amount of wages paid is less than the total amount ‘properly payable’, the amount of the deficiency shall be treated
30 as a deduction. Under section 23 of ERA, a worker may complain to an

employment tribunal that an employer has made a deduction from his wages in contravention of section 13. Where a tribunal finds such a complaint well founded, it shall make a declaration to that effect and order the employer to pay the amount of the deduction (section 24 ERA).

5

Failure to provide written employment particulars

15. Section 38 of the Employment Act 2002 provides that where a tribunal finds in favour of a claimant in respect of a claim to which the section applies and the respondent was in breach of his duty when the proceedings were begun to provide a statement of particulars of employment or of changes to the particulars, the Tribunal must increase the award by two weeks' pay and may increase it by four weeks' pay. This requirement applies unless there are exceptional circumstances which would make an award or increase unjust (s.38(5)). Section 38 applies to claims for unauthorized deductions from wages, among other types of 'substantive' claim.

Discussion and Decision

Unauthorized Deductions from Wages

16. The claimant accepted in his evidence that he had written to the respondent by email and had agreed to the proposed change to his hourly rate on 29 June 2020. The claimant argued that he only agreed to this reduction because he feared losing his job. He explained he had spoken to co-workers and that nobody wanted to accept the reduction but that they felt compelled to do so because of fears about job security in a time of great uncertainty.
17. Nevertheless, the claimant did provide his express consent to the change. There was no evidence that he was improperly pressured to do so or that the respondent threatened him with dismissal in the event that he refused. The claimant may well have been unhappy about the reduction and was doubtless influenced to accept it by concerns over his future job security. Be that as it

may, he consented to the change without expressing such reservations. His contract of employment was validly varied with effect from 29 June 2020 with respect to the term relating to his rate of pay.

5 18. The rate which was introduced of £11 per hour did not fall below the National Minimum Wage incorporated by legislation into the claimant's contract of employment and was not unlawful.

19. The claimant was paid in accordance with the revised rate of pay for hours worked from and after 29 June 2020 when his contract was varied by agreement.

10 20. The claimant was, therefore, paid the wages which were properly payable to him for the purposes of section 13 of ERA and no unauthorized deduction was made by the respondent in the period from July 2020 to May 2021. The claimant's claim under section 23 of ERA is, therefore, dismissed.

Failure to give statement of employment particulars

15 21. It was not disputed that the respondent failed to give the claimant compliant statements of changes to his employment particulars as required by section 4 of ERA. However, as the claimant does not succeed in his 'substantive' claim, no award can be made or increased in consequence of this failure.

20

Employment Judge: Lesley Murphy
Date of Judgment: 02 December 2021
Entered in register: 03 December 2021
25 and copied to parties