



EMPLOYMENT TRIBUNALS

Claimant: Mr P Nechita

Respondent: Epidaurus Limited (t/a Barracuda Restaurant)

Heard at: East London Hearing Centre (in public, by video)

On: 3 and 4 November 2021

Before: Employment Judge Moor

Members: Ms A Berry
Ms J Land

Representation

Claimant: in person
Respondent: Mr Hussain, consultant

JUDGMENT having been sent to the parties on **8 November 2021** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant was a worker at the Barracuda Restaurant from 3 March to 26 March 2020. He brings claims for unpaid wages, unpaid holiday pay, and race discrimination based on his nationality. He is Romanian.
2. The hearing was held remotely by video. Through no fault of his own the Claimant had difficulty connecting to the hearing. On the first day we adjourned until noon to allow him to attend the hearing centre, where he connected to the video hearing. There were no further connection difficulties until before oral judgment.
3. The Claimant speaks and understands English. Although it is not his first language, we were satisfied he was able to understand and participate fully in the proceedings. As is usual with litigants in person, EJ Moor assisted the Claimant by explaining the procedure and helping him with questions for witnesses where necessary.

Issues

4. At a Preliminary Hearing (in public) on 7 December 2020, EJ Russell found that the Claimant was a worker at the Respondent. The Respondent did not attend that hearing.

5. At the start of the hearing, we clarified the issues with the parties.

6. Unpaid Wages: the Claimant claimed that he had worked more hours at minimum wage than he had been paid for. Before the start of the hearing, the Respondent paid to him £142.12, the sum he claimed in his claim form. We are satisfied this sum has been paid and therefore dismiss the unpaid wages claim.

7. Unpaid holiday pay: the Claimant claimed accrued but untaken holiday pay. After some difficulty with calculations, on the first day of the hearing the Respondent paid to the Claimant the sum of £162.00, which was more than any outstanding holiday pay owing. We therefore dismiss the holiday claim.

8. Race discrimination. The questions we must ask in that claim are as follows.

9. Was the Claimant treated less favourably in the following ways:

9.1. Paid less than the minimum wage;

9.2. Not put on the PAYE system so that no NI or tax was paid for him;

9.3. Not told he could take paid holidays;

9.4. Not provided with a written contract/statement of particulars at the beginning of his employment;

9.5. Made to work more hours than 48 hours per week, beyond the Working Time Regulations maximum;

9.6. Sworn at and insulted and not treated with respect;

9.7. Dismissed;

9.8. Not given 1 week's notice of dismissal.

10. If so, was there different treatment with others with a different nationality in the same or not materially different circumstances as the Claimant?

11. If so, was that because of his nationality (Romanian)?

12. We heard evidence on liability first, informing the parties that we would aim to give oral judgment and then deal with remedy evidence if it became necessary.

Findings of Fact

13. Having heard the evidence of the Claimant, Ms Zinonos, director and owner, Mr Karakaras, chef and director, and Mr Castelo, waiter, and having read the documents referred to in the evidence, we make the following findings of fact. Where there is a dispute of fact, we have decided it by considering the evidence

and asking ourselves, 'What was more likely to have occurred?'

Background

14. Ms Zinonos runs the Barracuda Restaurant. She is British and of Greek heritage. She was born in the UK. Both her parents emigrated to the UK. Her partner and chef, also a director, Mr Karakaras, is Greek.

15. The Claimant has worked in the UK since 2018. He also, at times, ran his own cleaning business.

16. The Respondent had employed 4 Romanian workers before the Claimant. None were dismissed. Some worked for some years. After his employment, the Respondent has employed another Romanian/Moldovan in front of house.

17. Earlier in the year the Claimant worked some shifts for the Respondent via an agency. The Claimant was later engaged directly as a kitchen porter. He started work on 3 March 2020. He was dismissed 26 March 2020.

18. At time the Claimant worked at the restaurant, there were 2 waiters, one front of house, and a chef. One waiter, Mr Castelo, was Hispanic and the other waiter spoke Arabic. On occasion the Respondent used an agency chef who was Hungarian. When it engaged agency workers, the agency was responsible for their pay.

19. Prior to his dismissal the government announced that all restaurants had to close because of the Coronavirus pandemic. The restaurant carried on a take-away business but closed until early July 2020. One worker continued in employment to do the take-away business, but the other waiter was furloughed. The Respondent told an agency worker they were no longer needed.

Pay and hours

20. Staff were paid weekly. At the end of the week the staff would gather and inform Ms Zinonos or Mr Karakaras of their hours and they would then be paid their wages. This payment would sometimes be in cash and at other times by bank transfer. This depended upon what was in the Respondent's bank account and likely also depended on how many customers had paid in cash that week. Ms Zinonos kept a rough check on hours because she could see when staff arrived and left but also trusted the worker informing her of the correct hours.

21. In the 3 weeks the Claimant worked, all staff were paid in cash.

22. We all agree that, when the Claimant started, Mr Karakaras told him that he would be paid the minimum wage. The particular figure was not referred to. The minimum wage at that time was £8.72 per hour.

23. Now we have heard full evidence, we find it likely that the Claimant started work at 11.00am and worked until 10.00pm, about 1 hour after the end of service. We find it likely there was a 2-hour break after the lunch service. He worked 6 days a week. It is likely there was some variation in that depending on how busy the restaurant was. We find it likely the wait staff did similar hours and that no member of staff was asked to sign an opt-out.

24. The Claimant, like everyone else at end of each week, told the one of the directors his hours and was paid at minimum wage for those hours. He was not given a record of what he was paid or the hours worked. This was true of all who were paid in cash at the time, although those on PAYE were given such a record once Ms Zinonos had provided the details of what she had paid them to the accountant.

25. During his employment, the Claimant did not claim he had been wrongly paid. In last part-week of work he was paid £100 in cash. This was then followed up with text messages on 27 March where he gave his bank details and identified the outstanding amount of wages which the Respondent then paid to him. This was the first time he provided the Respondent with his bank details. Also at that time Ms Zinonos asked him for an invoice for the money he had received.

26. His claim now is that he was not paid for the full hours he worked. Ms Zinonos contends his hours included a 2-hour unpaid break. But we do not need to decide this claim because, in any event, the Respondent has paid for those additional hours in order to avoid lengthening the hearing and presumably because they did not keep a record of the hours he said he worked each week.

27. We find, in the short period he worked, Ms Zinonos did ask the Claimant for his details: address, bank and NI number. We prefer Ms Zinonos to the Claimant on this because Mr Castelo's evidence that he overheard her doing so is credible: it was a small restaurant and she was likely to have been overheard. The Claimant's evidence was he did not give his details, despite been employed before, knowing his NI number and that this was necessary to get him on the PAYE system. He did not know why he did not do so, even though he complains about not being put on PAYE now. His evidence was therefore less credible.

28. Thus the Respondent could not have put the Claimant on PAYE in the short period he worked.

Written statement

29. The Claimant was not provided with a written statement of his terms and conditions.

30. While there is no direct evidence of what was given to others, we find it likely that no other staff were given such a statement: this is because the administration of the Respondent was somewhat casual.

Paid Holiday

31. The Claimant was not informed about paid holidays. Mr Castelo had not taken any paid holidays. Mr Karakaras did not tell anyone about paid holidays. We think it unlikely therefore the Respondent informed any of its staff about paid holidays when they started.

Treatment

32. We find that there was an incident when Mr Karakaras went into the prep room and the Claimant was there. Mr Karakaras saw water up the walls and on the ceiling, and near an electricity panel. He was annoyed.

33. The Claimant alleges Mr Karakaras swore at him calling him a mother fucker, fucking stupid and a fucking idiot. Mr Karakaras denies this. Mr Castelo did not hear it.

34. It has been difficult to decide between these accounts. On one side, the Claimant was consistent in his description and it was raised on his claim form. On the side, he did not complain about this treatment in the texts that followed his dismissal.

35. On balance we find it unlikely that the Claimant was spoken to in this way. Mr Karakaras was annoyed and scared but busy. We found him to be a credible witness in his description of the event and the Claimant did not press him on the point. There was no background evidence that Mr Karakaras would speak to staff like this. It appeared to be a relatively happy workplace. Even if we are wrong, however, and he did swear at the Claimant on that occasion, we would have found that it was obviously because of the dangerous situation he saw, not the Claimant's nationality, which was not mentioned.

36. Ms Zinonos spoke forcefully to the Claimant about leaving a knife in the sink. We do not consider she did so with any lack of respect. She had an understandable concern about safety.

37. We accept what Ms Zinonos said about her father having friendly feeling towards Romania. And also that, when she discovered she and the Claimant shared the orthodox religion, she therefore shared food with him during the Lenten fast. She told us, as daughter of migrants, she understood how difficult that was at times. She talked about her mother's difficulties. We accept Mr Karakaras' statement that he has only lived in the UK 8 years and that he understands how difficult it can be for a person moving to the UK, having to speak a different language and being in a new place. We therefore do not accept that either of them disliked the Claimant because he was Romanian. Nor do we accept that they sought to exploit the Claimant because of his nationality.

Dismissal

38. On 26 March 2020 Ms Zinonos dismissed the Claimant. She told him it was because the restaurant had to close and there was no work. We are clear that this was reason for dismissal. We accept it was a difficult and frightening time. Ms Zinonos read the government guidance and did not think the Claimant was eligible for furlough because he had not worked long enough. (She was right about this - see later).

39. We find the criticisms of the Claimant about safety and his capability have been made too much of in the Respondent's misguided attempt to defend the claim. It is true there were some concerns, but this was during the period the Claimant was learning on the job. The true reason for dismissal stands out to us as the closure of the restaurant because of the pandemic and resulting loss of income.

40. The Claimant was not given notice of dismissal. We accept Ms Zinonos's reason: she thought there was no obligation to give notice given he had only worked 3 weeks. (She was right about this.)

Law

41. We briefly summarise the relevant legal principles.
42. To determine whether there has been nationality discrimination we ask whether:
 - 42.1. There was less favourable treatment, to his detriment;
 - 42.2. different to someone in the same or not materially different circumstances;
 - 42.3. and, if so, whether that treatment was because of nationality.
 - 42.4. A party does not succeed if he can show unfair or even unlawful treatment. He must show that the unfair treatment was different to others and because of his nationality.
43. We recognise that race discrimination not often admitted. We must consider whether on the facts there could be discrimination, including what inferences we could draw from the primary facts. It is also sometimes useful to ask the 'reason why' question: in other words we ask what was the reason for the treatment.
44. Under the Employment Rights Act 1996 the following legal principles arise.
 - 44.1. A worker can be self-employed and can be on PAYE. The category 'worker' covers the middle ground of zero-hours workers and those thought to be self-employed but not running their own business.
 - 44.2. At the time of these events, a worker did not have an entitlement to a written statement of particulars. This only arose on 6 April 2020.
 - 44.3. Workers have no protection from unfair dismissal. In any event, employees need to have 2 years' service before they are protected from an unfair dismissal.
 - 44.4. Only *employees* with more than 2 years' service are entitled to a redundancy payment.
 - 44.5. Only *employees* with more than 1 month's service are entitled to notice of termination.
45. There is no fair procedure that an employer must legally follow for dismissing employees or workers with less than 2 years' service. If a person is dismissed for misconduct it is good practice to follow ACAS Code on discipline.
46. As at 26 March 2020, the furlough rules were as follows: to be eligible to be furloughed the worker had to be on PAYE and had to have been working on 28 February 2020. (This date only changed later in April 2020. It would not have been known to the Respondent at time.) Therefore, even if the Claimant had been on PAYE, he would not have been eligible to be furloughed on 26 March 2020. He was very unlucky in this regard.

47. The Working Time Regulations 1998 provide for a 48-hour maximum per week, not including breaks. Workers must sign an opt-out if they agree to work more than this.

Application of facts and law to issues

48. We will deal with each allegation of unfavourable treatment in turn.
- 48.1. We have found the Claimant was paid the minimum wage. He was paid for the hours he originally informed the Respondent he had worked at the minimum wage. We therefore do not find he was deliberately underpaid. When he claimed that he had worked more hours, this was ultimately paid.
 - 48.2. The Claimant was not put on PAYE. This was to his detriment in the sense he could not show a record of his work via Real Time Information. It was different treatment to some other staff. But we are clear the reason for this was not his nationality but because he had not given to the Respondent the necessary details after request.
 - 48.3. On holidays we have found that he was not informed about paid holidays. But this was not different treatment to the other staff because no member of staff was informed about their right to take paid holidays.
 - 48.4. The Claimant was not given a written statement of particulars. But this was not different treatment because no other member of staff was likely given one. In any event, there was at the time no legal obligation to give him one because he was a worker.
 - 48.5. On hours we have found it likely that the Claimant was required to work over the 48 hour maximum with no written opt out. This was a detriment. But it was not different treatment to any other worker.
 - 48.6. We have found as a fact the Claimant was not sworn at or treated with disrespect. In any event if was sworn at, that was because of a dangerous incident at work not because of his nationality.
 - 48.7. We agree that his dismissal was different treatment to others. But we have decided that this was not because of nationality but because of the closure of the restaurant due to the pandemic. It was thought (correctly) that he was not eligible to be furloughed: as at 26 March he had not worked from 28 February 2020 and that was the rule at the time.
 - 48.8. The Clamant was not given notice of dismissal but there was no obligation to do so and that was the reason for not giving notice. It was not because of nationality.
49. We acknowledge that some businesses take advantage of non-English speakers and relatively new migrant workers because of the assumption that they do not know their rights and their need for the work. We understand that dynamic and have considered carefully whether it was at play here. But we have found it

was not the reason for the complaints here for the reasons we have given. The Respondent understood the difficulties of new migrants and was not likely to abuse them.

50. For all those reasons, the nationality discrimination claim therefore does not succeed.

Guidance

51. We give the Respondent the following guidance for the future.

51.1. We are glad to hear they no longer pay in cash. If they were to do so in future, then they must ensure that written payslips are given to all staff (whether employees or workers) at the time. These could be handwritten, showing hours and pay. A formal payslip, showing tax and national insurance, can then be made up by the accountant later.

51.2. It is very important now for all staff, apart from agency workers, to be given written particulars at the start of the engagement. (We remind the Respondent that workers can be self-employed individuals.). This is an important document ensuring that staff are in no doubt about their rights and obligations. It also ensures all are clear from beginning about the key terms and avoids uncertainty and conflict.

51.3. It is important that employees and workers are told of their right to paid holidays and that they take them. This is a health safety provision.

51.4. If staff are asked to work more than 48 hours per week then they must agree. This agreement to opt-out of the Working Time Regulations weekly maximum be written down and signed by each worker.

**Employment Judge Moor
Date: 2 December 2021**