



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4107988/21**

**Held on 1 October 2021**

**Employment Judge J M Hendry**

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**Mr M Paz Garcia**

**Claimant  
In person**

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20 **Lombarda Ltd**

**Respondent  
Represented by  
Mr A Williams,  
Peninsula**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 **The Tribunal finds that the claimant was an employee of the respondent company.**

### **REASONS**

- 35 1. The claimant in his ET1 contended that he had been employed by the respondent company from 26 July 2020 as a supervisor in their bar/restaurant premises. The respondent denied this and contended that the claimant was not an employee. Their position was that he was on a “zero hours” contract and no employee/employer relationship existed.

**E.T. Z4 (WR)**

2. The issue for the Tribunal at the preliminary hearing was whether or not the claimant was an employee or not. Parties lodged a joint bundle prior to the hearing. The Tribunal heard evidence from the claimant and also from Mr N Naoum the owners of the business. I made the following findings in fact.

### Facts

3. The claimant is a student studying architecture in Aberdeen. He gained experience in the food and drink industry in his spare time. He was working at other premises in Aberdeen when, through an acquaintance he was put in touch Mr Naoum who ran the respondent business.
4. The respondent is a limited company. It trades as La Lombarda. It is owned and operated by Mr Nabil Naoum and his wife Jennifer. It is a restaurant and bar/disco.
5. The claimant is part of a group of bar tenders in the Aberdeen area who communicate with each other and provide information in relation to job opportunities. This is hosted by Facebook. Someone known to the claimant as Pedro posted a job opportunity with La Lombarda. The claimant spoke to Pedro who told him that the owners of the La Lombarda wanted someone with experience in the licenced trade.
6. At this time, the summer of 2020, the claimant was looking for a more senior position with responsibility that would last until his degree was completed.
7. The claimant arranged to meet with Mr Naoum in about July to discuss the job opportunity They met twice at the restaurant. There was no discussion in relation to specific hours or wages at the first meeting. The claimant had provided a C.V. Mr Naoum explained that he needed help in the restaurant particularly because the current supervisor had left on an extended holiday. He wanted someone to both supervise the restaurant but also be responsible for alcohol sales and hold appropriate certification under the Licensing

Scotland Act to serve alcohol. He also wanted the person employed to train staff.

- 5 8. Mr Naoum explained that the business was managed overall by his wife Jennifer. They would remain in overall charge and tell the claimant what they wanted him to do. The claimant explained that he was a student and that he could devote full-time to working in the business during holidays but this would have to be cut back during term-time. On this basis it was arranged for the claimant to start work. It was envisaged that he would train other less  
10 experienced staff in licensing law. Mr Naoum was impressed that the claimant had experience in the Licensed Trade and the qualification to train his current and new staff. In the event the claimant was not asked to train staff.
- 15 9. The claimant had a second meeting a couple of weeks later with Mr Naoum to be introduced to some of the staff and shown the premises. It was agreed that the claimant would be paid £11 per hour and be referred to as Supervisor. It was agreed that the claimant would be provided work until he completed his university course namely until 2025. He started work on the 27 July.
- 20 10. The respondent did not implement the agreement with the claimant. The claimant was not rota'd to work full-time.
- 25 11. It was accepted by the respondent that staff could 'swop' shifts if convenient as long as there was sufficient staff on duty. The claimant began working for the respondent. He was paid through the PAYE system and received Pay Slips (PHBp9).
- 30 12. The respondent's business was closed for lockdown between 5 August 2020 until 28 August 2020. The claimant found it difficult to work with the previous supervisor who had returned. The other supervisor, Andrea, would not accept that the claimant had been appointed to be in charge of both the bar and restaurant. (Reference is made to the new starter payroll form completed by the respondent which refers to the claimant's job title as "F & B Supervisor

Department Bar and Restaurant” and which confirms pay rate of £11 per hour).

5 13. The claimant returned to work after the lockdown and encountered difficulties with Andrea the original supervisor. It was not clear whether he or Mr Naoum were completing rotas. The claimant e-mailed Andrea on 7 November asking for rotas. Andrea’s response was that there were no rotas. The rotas had been the same “for months”.

10 14. The claimant claimed that his salary was not being paid at the correct rate. He also found there were difficulties with the rota. He found he was not being rota’d to work despite being available at times when he only had to attend University two days per week. The claimant believed that Andrea had been instructed by Mr Naoum to complete rotas. When the claimant contacted  
15 Andrea he would blame Mr Naoum for not putting the claimant on rotas. Mr Naoum would say that Andrea was completing the rotas. This led the claimant to resign on 2 December. He was given a P45 by the respondent (PHBp10).

20 **Witnesses**

15. The Tribunal found the claimant to be a credible and reliable witness. He gave his evidence in a clear and straightforward fashion.

25 16. The Tribunal was not impressed by Mr Naoum’s evidence. It was wholly at odds with the claimant’s evidence that he had in fact been asked to take over a managerial role in the restaurant. I formed the view that it was self-serving. It was interesting to note that the claimant was referred to as “F & B Supervisor” in the new starter payroll form but that in the ET3 at paragraph  
30 16 it was simply stated that the claimant was engaged on a zero hours contract and Mr Canini the Supervisor was contracted as an employee on a full-time basis. This seems odd given that the title the claimant was given on

the new starter form and the role which he was employed to fill namely that of a supervisor and one in overall charge with responsibilities to provide training in licensing laws to more junior staff. His evidence also contradicted the claimant's position, which I accepted, that he was looking for a regular senior position to allow him to work during the currency of his course.

### Submissions

17. Mr Williamson's submissions were short. The claimant was not an employee. He was employed on a casual basis. He had a zero hours contract. It was clear that this was in fact the factual position and that evidence was accepted by the claimant. There was no mutuality of contract. The respondent did not have an obligation to continue to give the claimant work. In addition staff could substitute why he changed the rotas without reference to Mr Naoum. The situation indicates the claimant was properly a casual worker rather than an employee.

18. The claimant's position was that he was employed. That was his understanding. The job was envisaged to last until he finished his degree. He was to be the person in charge. He would work full time during holidays and cover busy times like weekends. He understood his status to be that of employee although he accepted that the way things worked out he was not rota's to work that way and he ended working only as an when required.

### Discussion and Decision

19. In the UK there are various types of worker each legally defined by their own criteria. The worker with the most rights is the employee and only employees can claim unfair dismissal and other rights reserved for employees such as redundancy payment. It is not easy for a non-lawyer to navigate around these legal differences as the term employee and employer are used in common

parlance to cover every worker and employer without regard to the legal niceties required to determine their exact legal status.

20. The law requires certain elements in the relationship to exist before an employee/employer relationship exists. A starting point is often the case of **Ready Mixed Concrete Ltd v Minister of Pensions [1968] 2 QB 497**. The outcome of that case was that a driver was held not to be an employee. The Court found that whether a contract creates an employee/employer relationship is determined on the basis of contractual rights and duties. An employment contract called a contract of service exists when:

*“a person agrees to perform a service for a company in exchange for remuneration; and*

1. *a person agrees, expressly or impliedly, to subject himself to the control of the company to a sufficient degree to render the company his “master,” including control over the task’s performance, means, time; and*
2. *the contractual provisions are consistent with ordinary contracts of service.”*

21. It is sometimes difficult to work out in practice if these conditions are fulfilled and various other tests have been deployed though the years sometimes referred to as “badges” of employment. They are used to assess the overall relationship.

22. In the present case the claimant applied for work with the respondent. He was not some specialist contractor working on his own behalf such as an Architect in private practice who might be when commissioned to design a building. He was a student who had certain skills and experience in the Licensed Trade that the respondent thought valuable. I found it significant that when he was recruited the relationship was envisaged as lasting as long as the claimant was at University, working full time during holidays and part time during term time. There is no doubt that the parties sought to create a long term mutually

beneficial relationship. Things appear to have changed with the return of the previous supervisor.

23. It was unfair to say the claimant agreed to a zero hours contract. He did not. It turned out that he was just not rota's for the work envisaged leading to zero or few hours being given.
24. It was also suggested that staff swapped shifts and that this showed that there was a right of substitution. The claimant accepted that in practice that would often happen and the arrangement would benefit both staff and the employer with the employer ensuring that he had sufficient staff on duty rather than a staff member having to pull out and leaving it to the employer to rearrange. This arrangement does not detract from the personal duty to provide service as it was clear that the right to substitute was very limited with only other staff (presumably vetted and employed by the respondent) filling in. In any event no one could substitute for the claimant in relation to the envisaged training as no one else had the qualification he possessed and it was clear from the interview process that the respondent was looking for someone with particular skills, experience and qualifications.
25. It was clear that a relatively long term relationship was envisaged and this was the basis of the claimant being asked to join the staff with the promise of full time work during holidays and regular shifts during term time. He was to remain under the supervision of Mr Naoum and his wife. There was no reference in the discussions he had or in the New Starter form to indicate he was not an employee. The claimant had no idea that he was not an employee and was being regarded as an independent contractor. Considering the whole matter in the round there is sufficient in my view to constitute an employer/employee relationship.
26. The respondent for whatever reason appears to have broken their arrangement with the claimant. One difficulty the claimant has is that he does not have sufficient service to claim unfair dismissal. He has not made a claim for breach of contract (not getting the promised hours work) although this is

his factual position rather he is claiming for a failure to provide him with adequate payslips and unpaid holiday pay. These matters should now progress to a short hearing to determine the merits of these claims. The claims themselves appear relatively minor and given the terms of this Judgment parties might wish to consider coming to a compromise to dispose of them without the need for a further hearing. That is of course a matter entirely for them.

10 **Employment Judge James Hendry**  
**Dated: 13 December 2021**  
**Date sent to parties: 13 December 2021**