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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101556/2022

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Held by Cloud Based Video Platform (CVP) on 17 June 2022

Employment Judge Neilson

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Michael Smith

**Claimant
Represented by
Ms Scott-Gray**

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SBC Empire Limited

**Respondent
Represented by Mr
Andrew Burgess**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that (1) the claim for unfair dismissal is dismissed; (2) the respondent shall pay to the claimant the following sums:-

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- (a) £650 less appropriate tax and National Insurance in respect of the claim for breach of contract for the notice period;
- (b) £1,345.54 less appropriate tax and national insurance in respect of the claim for accrued holiday pay;
- (c) £1,851.60 less appropriate tax and national insurance in respect of the claim for unlawful deductions from pay; and

(d) £2,176 in respect of the failure to provide written statement of particulars.

REASONS

1. This was a final hearing held by CVP. The claimant attended and was represented by his mother, Ms Scott-Gray, an HR Consultant. The respondent had not lodged an ET3 but Mr Andrew Burgess, trainee solicitor, attended on their behalf. The Employment Tribunal reminded Mr Burgess that as no ET3 had been lodged any involvement by him in the proceedings was at the discretion of the Employment Tribunal in accordance with Rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“the ET Rules”).
2. Before any evidence was heard the Employment Tribunal raised with the claimant and Ms Scott-Gray that one of the claims that had been made was for unfair dismissal. The claimant had accepted that he did not have two years continuous service. However in correspondence with the Employment Tribunal on 2 May 2022 from the claimant and on 31 May 2022 from Ms Scott-Gray the claimant had sought to put forward a case based upon an allegation of discrimination on the grounds of sexual orientation. This was a new issue that had not been set out or referred to in the ET1. The Employment Tribunal explained that if the claimant wished to put forward such a case it would be necessary for the claimant to seek permission to amend the ET1 to include that claim. There was likely to be an issue of time bar in relation to that aspect of the claim and the Employment Tribunal would need to consider that as part of the process. If the claimant wished to make an application to amend then the Employment Tribunal was willing to consider that as a preliminary issue. However in the event that such an application was made and was allowed then it was likely that the Employment Tribunal would then adjourn the hearing to allow the amended case to be served on the respondent. The Employment Tribunal adjourned the case to allow the claimant and his representative to discuss whether or not they did wish to make an application to amend. Following the adjournment Ms Scott-Gray confirmed that the claimant did not wish to make an application to amend. The claimant accepted the unfair

dismissal claim could not proceed and did not want to incur further delay in respect of his other claims by seeking to bring in the discrimination claim at this time. However Ms Scott-Gray did want it recorded that the kind of behaviour alleged against the respondents was unacceptable. Accordingly the Employment Tribunal dismissed the unfair dismissal claim as the claimant does not have the requisite service.

3. The issues to be determined in the case were those set out in the ET1 (a) breach of contract in respect of notice pay; (b) non-payment of accrued holiday pay; (c) unlawful deductions from pay in respect of non-payment of overtime and (d) failure to provide a written statement of terms and conditions. This latter claim was not separately itemised in the ET1 but there was a clear reference to it in the body of the claim form (para 8.3) and the claimant confirmed he did want to pursue that as an aspect of his claim.
4. Evidence was led from the claimant and a former colleague, Mr Jacob Zielinski. The claimant had lodged with the Employment Tribunal copies of weekly timesheets from 6 September 2021 through to the end of the week commencing 6 December 2021.

Findings in Fact

5. The Employment Tribunal made the following findings in fact.
6. The claimant was employed by the respondent as a chef at their premises at Oscars Bar and Kitchen in Shawlands.
7. The claimant's employment commenced on 6 September 2021.
8. The claimant's employment was terminated by the respondent without notice on 24 December 2021.
9. The claimant was employed on a salary of £33,800 per annum. This represented 48 hours per week at approximately £13.54 per hour. A weekly salary of £650.

10. The claimant was contracted to work 48 hours per week and was entitled, under his contract, to be paid overtime for any hours worked in excess of an average of 48 hours per week whilst he was employed.
- 5 11. Shortly after commencing employment the claimant asked the respondent for written terms and conditions of employment. He asked for these to be provided on a number of occasions.
12. The claimant's mother, an experienced HR professional, drafted up a written statement of term and conditions of employment for the respondent to use. These were provided to the respondent's manager, Mr Romancci.
- 10 13. At a meeting, in or about October 2021, with Mr Romancci the written statement of terms and conditions was discussed between Mr Romancci and the claimant.
14. At no stage did the respondent issue a written statement of terms and conditions to the claimant.
- 15 15. The claimant did not take any holiday during his employment with the respondent.
16. The respondent agreed with the claimant that he was entitled to time off in lieu of the extra hours he was working. The respondent agreed to pay overtime to the claimant for hours worked over 48 per week – but setting off
20 any hours below 48 in weeks where he worked less hours.
17. In the period from 6 September 2021 through to the end of the week commencing 6 December 2021 the claimant worked a total of 136.75 hours more than an average of 48 hours per week.
18. Following the termination of his employment the claimant was told by the
25 owner of the business, Mr Shafey, that he would be paid in respect of all outstanding notice, holiday pay and overtime.
19. The respondent has not paid to the claimant his notice pay, accrued holiday pay and outstanding overtime.

Submissions

- 5 20. The claimant seeks payment of his wages for the notice period, his accrued holiday pay, the overtime he worked (about 150 hours) and he is complaining about not receiving his written statement of terms and conditions.

The Law

- 10 21. Under Section 86 of the Employment Rights Act 1996 ("ERA") an employee is entitled to a minimum notice period of 1 week if employed for less than 2 years.
- 15 22. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a claim by an employee for breach of contract can be brought before an Employment Tribunal provided the claim arises or is outstanding on the termination of the employment. Such a claim is subject to a cap of £25,000.
- 20 23. Under Regulation 14(2) of the Working Time Regulations 1998 ("the WTR") where a workers' employment is terminated during a leave year and the proportion of leave taken by a worker in a leave year is less than the proportion of the leave year which has expired an employer is obliged to make a payment to a worker. The amount is to be calculated in accordance with regulation 14(3). Under regulation 30(1)(b) of the WTR a worker may present a complaint to an employment tribunal where there has been a failure to make a payment under regulation 14(2). Where there has been such a failure the Employment Tribunal shall order the employer to pay to the worker the amount which it finds to be due to him. Following the decisions in *Bear Scotland -v- Fulton 2015 IRLR 15* and *East of England Ambulance Service NHS Trust -v- Flowers 2019 IRLR 798* regular overtime should be included in the calculation of accrued holiday pay – for the first 4 weeks of any holiday entitlement.
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24. Section 23(1)(a) of the ERA provides a "worker" with the right to make a complaint to an Employment Tribunal that an employer "has made a deduction from his wages in contravention of section 13". Section 13 ERA provides a worker with a right not to suffer unauthorised deductions.
5 Specifically, Section 13(3) states "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the
10 workers' wages on that occasion."

25. Section 24(1)(a) ERA provides "Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer.. (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of
15 section 13,.."

26. Under section 38 of the Employment Act 2002 where an Employment Tribunal, in respect of certain proceedings, either finds in favour of an employee and makes no award or makes an award and in either case the employer was in breach of a duty to provide a written statement of particulars
20 under section 1 of the ERA then the Employment Tribunal must make or increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, make or increase the award by the higher amount. The minimum amount is two weeks' pay. The higher amount is four weeks' pay.

25 **Discussion & Decision**

27. The claimant was entitled to one week's notice of the termination of his employment. The claimant was dismissed with no notice. The claimant is accordingly entitled to one week's gross pay of £650 in respect of the breach of contract in not receiving his notice to which he was entitled.

28. In respect of accrued holiday pay the claimant was entitled by virtue of the WTR to 5.6 weeks holiday per annum. The claimant took no holiday in the period of his employment between 6 September and 24 December 2021. Applying the formula in Regulation 14(3) of the WTR provides a period of
5 1.72 weeks accrued leave. The claimant worked regular overtime during his employment. In accordance with the decisions in *Bear Scotland -v- Fulton 2015 IRLR 15* and *East of England Ambulance Service NHS Trust -v- Flowers 2019 IRLR 798* regular overtime should be included in the calculation of accrued holiday pay. For the 14 weeks for which we have
10 records the claimant worked on average 9.77 hours of overtime. Accordingly a normal weeks pay for the claimant will be £782.29. The total accrued holiday pay will be £1,345.54.

29. In respect of the overtime claim the Employment Tribunal was satisfied on the evidence of both the claimant and Mr Zielinski that the weekly time
15 records produced by the claimant were an accurate reflection of the hours worked by the claimant in the 14 week period from 6 September 2021 through to the end of the week commencing 6 December 2021. The Employment Tribunal was also satisfied that based on the evidence of the claimant that it had been agreed he would be paid for hours over 48 hours
20 per week as overtime at an hourly rate of £13.54. The Employment Tribunal was also satisfied that it was agreed between the respondent and the claimant that the claimant would take time off in lieu of his overtime – thus reducing his entitlement to claim overtime by the number of hours under 48 in any week. In total the overtime hours were 136.75 (a point made by Mr
25 Burgess when asked to comment). That amounted to an unlawful deduction of £1,851.60.

30. Finally in respect of the failure to provide a written statement of terms and conditions the Employment Tribunal was satisfied that both no statement was provided and that this was a case where it was appropriate to award
30 the higher amount under Section 38 of the Employment Act 2002 in light of the repeated attempts by the claimant to obtain a written statement and the fact that an offer of support to provide the written statement was made by

the claimants mother, an experienced HR professional. The evidence points to this being a deliberate decision by the respondent not to issue a written statement. In these circumstances the higher amount is appropriate. The capped amount of a weeks pay is currently £544. The higher amount is accordingly £2,176.

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Employment Judge: Stuart Neilson

Date of Judgment: 21 June 2022

Entered in register: 21 June 2022

10 and copied to parties