



EMPLOYMENT TRIBUNALS

Claimant: Mr Stefano Tortelli

Respondent: STR 48 LTD

Heard at: London South – by video (CVP)

On: 11 October 2022

Before: Employment Judge Hamour (sitting alone)

Representation

Claimant: In person.

Respondent: Did not attend.

RESERVED JUDGMENT

The claimant's claims of unauthorised deductions from wages, and for notice pay and holiday pay succeed. The respondent is ordered to pay the claimant the sum of £7,491 (being £5,262 holiday, £1,899 notice and £330 expenses). This is calculated as a gross sum, and the respondent shall pay it subject (in the case of the holiday and notice pay only) to any appropriate deductions in respect of tax and national insurance.

REASONS

The Parties

1. The Respondent is a hospitality business which runs four restaurants.
2. The Claimant was employed by the Respondent as an Executive Chef. The parties do not agree on the exact dates of employment, but agree that his employment started in September 2020 and ended in March 2022.

Timing of Hearing & Attendance

3. The hearing was listed to begin at 2pm, for 2 hours. Neither party attended or was represented at that time. I am satisfied that both parties had been sent the Notice of Hearing.

4. Due to their non-attendance, the Tribunal clerk emailed and called both parties and was unable to reach either, but left messages where the facility was available.
5. At 3pm, the Claimant responded to the Tribunal clerk's email to apologise and say that he had mis-diarised the hearing date. There was still no reply from the Respondent.
6. The Claimant stated that he was working today and was on shift until 10:30pm, but had a break scheduled between 3:30pm-4:30pm and asked if the case could be heard then.
7. I agreed to hear the case at 3:30pm, as I was satisfied both parties had notice of the hearing today, and it was not in the interests of justice for the hearing to be further delayed, particularly as the Respondent had provided no reason for its non-attendance. The Tribunal clerk sent a further email to the Respondent to notify that the hearing would begin at the later time of 3:30pm today if the Respondent wanted to attend. There was no reply from the Respondent.
8. The hearing took place with only the Claimant present.
9. By an email timed at 3:46pm, the Respondent wrote to the Tribunal acknowledging the emails sent to the Respondent that day, but saying they had not been aware of the date of the hearing and that the Respondent was unable to attend.
10. By the time the Respondent's email was sent, the hearing was in progress and the Claimant was giving evidence, so the email was not before the Tribunal.
11. Following the conclusion of the hearing, I made appropriate enquiries with regard to the Respondent's email, and I am satisfied that the Notice of Hearing was sent to the Respondent and contained both the date and time of the hearing. I also note that the Respondent also had a further opportunity to attend, due to the hearing beginning at the later time of 3:30pm.

The Issues

12. The Claimant claims:
 - a. Holiday pay for holiday not taken and which the Claimant says he was given no opportunity to take;
 - b. Notice pay – it is agreed that the Claimant worked 3 out of 4 weeks' notice, but there is dispute as to whether he was paid, or fully paid, for the 3 weeks that he did work.
 - c. Wages – arrears of pay amounting to 17 days from the 27th of the month prior.
 - d. Expenses – incurred by the Claimant on behalf of the Respondent
13. Overtime – the ET1 refers, without particulars, to the Claimant working "more than 70 hours per week and no days off". The ET3 denies any breach of WTR provisions on rest period/breaks, or any entitlement to overtime pay. The Claimant confirmed in evidence that he was making no claim in respect

of overtime or the hours he alleged to have worked, except in relation to the issues set out at a-d above. This was consistent with the further particulars and calculations he provided in his email of 3 October 2022 (para 14). The matter of the Claimant's hours or overtime was not therefore considered at this hearing.

The Evidence

14. There was no hearing bundle or witness statements. I had before me the ET1, an ET3 with separate grounds of resistance, a letter of 26 Sept 2022 from the Tribunal to the Claimant asking for a breakdown of his claim, and the Claimant's reply by email of 3 October 2022 giving the breakdown.
15. The ET3 states that the claim is poorly pleaded and seeks further particulars. Such particulars were provided by the Claimant's response of 3 October 2022 to the Tribunal's letter of 26 September 2022.
16. The claimant gave oral evidence-in-chief.

Amounts Claimed by the Claimant

17. The Claimant stated in his email to the Tribunal of 3 October 2022 that he is owed the following sums:

Holiday

- a. 25 days untaken holiday accrued during 2020/2021, calculated at a rate of £110 per day = **£2750**; and
- b. 20 days untaken holiday accrued during 2021/2022, calculated at a rate of £134.62 per day = **£2692.40**

Notice pay

- c. 17 days' notice worked in February and March, but not paid - **£1,899**

Expenses

- d. £330 claimed but not paid by the Respondent.

The Facts

Holiday

18. The Claimant stated that he calculated his entitlements in para 17 above based on gross amounts, using figures taken from previous payslips. No payslips were before the Tribunal.
19. The Claimant was at some point put on furlough during the operation of the Coronavirus Support Scheme.
20. The Claimant raised the matter of his holiday with Luke Jenkins, Director of the Respondent, who assured him that the holidays would be frozen during the furlough period, so the Claimant would be able to take his leave later.

21. When the pandemic ended and the Claimant returned to working normal hours, he gave evidence that he worked for three months, Monday to Sunday, without a day off. The Claimant also gave evidence that the restaurant was understaffed so he was covering other positions as well, so there was no opportunity for him to take holiday.
22. The Claimant was entitled to 28 days holiday per year. During 2020-21, the Claimant took 3 days holiday, so 25 days were remaining.
23. The Claimant's salary was due to be paid on a monthly basis, usually around the 3rd or 4th of each month. Initially his salary was £45,000 per year. Then he was promoted to Executive Chef on a salary of £55,000 per year. The Claimant gave evidence that the promotion was with effect from March 2021, whereas the ET3 states that it was in June 2021.
24. The parties agree that the holiday year runs from 1 April to 31 March.
25. In 2021-2022, the Claimant took 8 days holiday, which left 20 days.
26. Four of the days that the Claimant took in 2021-2022 were in January, as he had sold a house abroad and was moving. The Claimant gave evidence that during those 4 days he received 25 emails per day from Luke Wilson asking work-related questions.

Notice

27. The Claimant gave evidence that he worked 3 of 4 weeks' notice, and left on 15 March 2022. The Respondent's ET3 agrees that the Claimant worked 3 of 4 weeks' notice, but states that he gave verbal notice on 25 February 2022 and that his employment ended on 11 March 2022.
28. The ET3 states that the Claimant has been paid for the 3 weeks' notice that he did work. The Claimant gave evidence that he has received no pay for the notice period, and no payslip to reflect this period.
29. The Claimant said that the reason he did not work for the 4th week of his notice period was because Mr Jenkins (Director) and Jason Wells (the owner) went on holiday at the end of the 3rd week of his notice, leaving him alone to manage 4 restaurants, as well as working all day as a chef in Richmond. Also, he had Special Constable training on a Saturday during his notice period, which Mr Jenkins and Mr Wells complained about him doing despite this having been booked 3 months in advance. The Claimant also said this was not booked time off, but had been incorporated into the rota system such that the Claimant was rota'd off work for the day of training. As a result of this response from Mr Jenkins and Mr Wells, and due to their absence and the excessive workload, the Claimant said that he would not return for the final week of his notice period.
30. The Claimant states in his email of 3 October 2022 that he has not been paid for the last 17 days that he worked for the Respondent, from 27 February to 15 March 2022. No documentation was before me to confirm the figures or days. The Claimant received no response from the Respondent to that email.

Expenses

31. The Claimant gave evidence that if any items were required or missing from the restaurants, then he would buy what was needed and then claim back the monies as expenses. He gave examples of buying petrol for the company van, or food from a butcher when there was a problem with the restaurant's usual supplier.
32. The Claimant's usual practice was that every one or two months, he would go through his receipts and then claim expenses by sending them electronically to Luke Jenkins, who would then repay the Claimant by bank transfer, usually within 2-3 days.
33. The Respondent's ET3 states that expenses were to be authorised in advance, receipts submitted to the Operations Director, and reimbursement paid on a monthly basis.
34. The Claimant's last expense claim was sent on 3 March 2022, but he says it has never been paid. The Claimant's ET1 states it was for £340, but the Claimant's email of 3 October 2022 refers to £330. As there is no other evidence before me as to which is the correct amount, I shall rely upon the lower figure of £330.
35. Prior to sending the email of 3 March 2022, the Claimant told Mr Jenkins the amount, and Mr Jenkins approved it by telephone, but asked for copies of the receipts to be sent to him. This was done, but the Claimant received no reply to the email. The Claimant's view is that the reason for non-payment of his expenses was because the Claimant had given notice at the end of the previous month.
36. The Claimant stated that most of the receipts sent were scans from his phone, together with some screenshots from his banking transactions. He said that he still had some of the scans, but others were only on the email to which he no longer had access. No receipts or screenshots were put before the Tribunal.
37. A copy of the 3 March 2022 email was not before the Tribunal. The Claimant said that it was sent on a business email account, to which he no longer has access. He gave evidence that once he said he would not complete his notice, his access to the business IT system was closed down within two hours. He lost access to emails, contracts, rotas, details of accrued holiday, and therefore does not have further documents to put before the Tribunal.
38. In the ET3, the Respondent states that it has paid all expense claims received from the Claimant during his employment, but does not confirm whether it received and/or paid an expense claim in the specific sum of £340 stated in the ET1. The Respondent seeks to put the Claimant to proof. The Claimant says any proof of the expense claim is in the Respondent's IT system.

Calculations

39. In the 2021-22 leave year, the Claimant has based his calculations on a full year's allowance, being 28 days. However, the Claimant did not work for a full year, as his employment terminated on either 11 or 15 March. His holiday entitlement for a full year was 28 days, so on a pro rata basis at the date of termination he had accrued either 26.50 days or 26.81 days, respectively. The Claimant used 8 days leave in 2021-22, which left either 18.5 days or 18.81 days, respectively. I shall apply the mid-point value to the Claimant's accrued, untaken leave, which is 18.66 days.
40. The day rate figures used by the Claimant in his holiday pay calculations in para 17 above do not accord with either of the annual salary figures given in para 23 above, which would give higher day rate figures than those used by the Claimant. The Claimant further stated that he calculated the holiday pay using gross figures taken from his payslips, so consideration of net income does not assist to explain the discrepancy in this calculation. As no documentation is before me to confirm the Claimant's salary, the date of increase, or the calculation of leave, I shall limit this Judgment to the figures put forward by the Claimant.
41. The Claimant therefore claims £2750 for 25 days holiday accrued during 2020/2021, He further claims payment in lieu of holiday for 2021-22 at a rate of £134.62 per day. For the 18.66 days which I have determined, this amounts to £2,512. The total value of the Claimant's holiday pay claim is therefore £5,262.

The Law

Holiday

42. Regulation 13 of the Working Time Regulations 1998 ("WTR") provides, as far as is relevant:
- (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—
- (a) [subject to the exception in paragraphs (10) and (11),]it may only be taken in the leave year in respect of which it is due, and
 - (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.
- 13A.— Entitlement to additional annual leave
- (1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).
- (2) The period of additional leave to which a worker is entitled under paragraph (1) is—
- (e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.
- (7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due

43. The Working Time (Coronavirus) (Amendment) Regulations 2020 (SI 2020/365) amended the WTR in respect of Regulation 13 leave to provide, as far as is relevant:

(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

44. Regulation 14 WTR— Compensation related to entitlement to leave, provides, so far as is relevant:

(1) [Paragraphs (1) to (4) of this regulation apply where

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13]2[and regulation 13A]3 differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$(A \times B) - C$

where—

A is the period of leave to which the worker is entitled under [regulation 13]2[and regulation 13A]3;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.

45. In *(Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu (C-684/16) EU:C:2018:874*, decided at the same time as *Kreuziger*

v Berlin (C-619/16) EU:C:2018:872), it was held that the employer is required to show, in particular, that it provided sufficient information to the worker about their holiday entitlement, and the potential loss of untaken entitlement at the end of the leave year. Similar conclusions were reached by the ECJ in *LB v TO (C-120/21) EU:C:2022:718*, which held that it was the employer that had the burden of ensuring that the paid annual leave was taken.

Wages

46. S.13 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

47. S.27 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

Analysis

48. I now apply the relevant law as I have set it out to my findings of fact.

Holiday

49. The Claimant's untaken 20 days holiday from 2020/21 should ordinarily, under Reg 13 WTR, have been taken during that leave year, and only the 1.6 weeks of “additional leave” under Reg 13A could have been carried over, if there were a “relevant agreement to do so. However, the Coronavirus amendment to the WTR (para 43 above) provides that all the untaken leave can be carried forward for up to 2 years. This was confirmed by the Respondent to the Claimant, and his 20 days' accrued but untaken holiday from the 2020/21 leave year were carried forward to 2021-22.

50. The Claimant's accrued but untaken holiday for 2021-22 should have been paid in lieu on termination, in accordance with Regs 13 & 14 WTR.

51. The Claimant's accrued but untaken holiday for 2020-21, which was carried forward to the 2021/22 leave year should also have been paid in lieu on termination, in accordance with Reg 14(5) WTR.

52. The Respondent did not pay the Claimant in lieu of his 38.66 days of untaken holiday, and the sum of £5,262 constituted “wages” within the meaning of S.27(1) ERA.

53. The failure by the Respondent to pay the amount of £5,262 to the Claimant was a deduction from the Claimant's wages by the Respondent.

Notice

54. I accept that the Claimant was not paid, or was not paid in full, for his notice period. The sum claimed of £1,899 is lower than can be calculated for the Claimant's claimed 17 days from the annual salary figures provided by the Claimant in para 23 above. However, for the same reasons I have given in para 40, I limit this Judgment to the amount claimed by the Claimant.

55. The sum of £1,899 constituted "wages" within the meaning of S.27(1) ERA.

56. The failure by the Respondent to pay the amount of £1,899 to the Claimant was a deduction from the Claimant's wages by the Respondent.

Expenses

57. I accept that the Claimant was not paid for his final expenses claim in the amount of £330 (as I have determined the amount to be in para 34 above). I also accept that the expenses had been approved by Mr Jenkins by telephone, and were due and payable to the Claimant.

58. The sum of £330 constituted "wages" within the meaning of S.27(1) ERA.

59. The failure by the Respondent to pay the amount of £330 to the Claimant was a deduction from the Claimant's wages by the Respondent

Deduction from Wages

60. In respect of the deductions made for holiday pay, notice pay and expenses (together, the "Deductions"), the Claimant had not consented, in accordance with S.13(1)(b) ERA, to the deduction from his wages.

61. There was no evidence before me of a "relevant provision of a contract" under S.13(1)(a) ERA, upon which the Respondent could rely as authority for its deduction, or of a statutory provision for the deduction.

62. For these reasons I find that the claims succeed and that the Deductions by the Respondent from the Claimant's wages were unlawful deductions from wages.

63. I therefore make an award in the amount of £7,491, made up of:

- a. £5,262 for 38.66 days holiday accrued and untaken at termination;
- b. £1,899 for unpaid salary/notice pay; and
- c. £330 for unpaid expenses.

Conclusion

64. The Claimant's claims for holiday pay, notice pay and unlawful deduction from wages succeed.

Employment Judge Hamour

Date: 28 November 2022