



EMPLOYMENT TRIBUNALS

Claimant: Miss Emily Andrews

Respondent: Mr. Martin Peter Byrne

Heard at: Bristol ET via VHS **On:** 9 November 2022

Before: Employment Judge G. King

Representation

Claimant: Ms. Helle Andrews

Respondent: In person

JUDGMENT having been sent to the parties on 16 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. By her claim form, which was received by the Tribunal on the 14 June 2021, the Claimant brings claims of breach of contract in respect of notice pay, unpaid holiday entitlement, and failure to provide a written contract.
2. The Claimant's case is that she had a verbal contract with the Respondent to work a minimum of 30 hours per week. She contends that her holiday entitlement of 5.6 weeks, based on 30 hours per week and calculated at a rate of £9.00 per hour, amounts to £1,512.00.
3. She states that she has received £708.25 in respect of holiday pay, leaving a shortfall of £803.75.
4. The Claimant also claims that her notice pay was only paid for 104 hours, when it should have been for 120 hours, and therefore she claims 16 hours at £9.00 per hour, which comes to £144.00.
5. The Respondent has submitted a letter ("the letter") which the Respondent says is from his accountant. The letter explains that the Claimant's holiday entitlement was being used while she was on furlough to "top up" her

furlough pay. The letter of was disclosed to the Claimant prior to witness statements being exchanged, in line with the Tribunal's directions.

6. The Claimant's challenges the validity of this letter, citing that it is not signed nor is it on headed paper with the name, address, and particulars of the Respondent's accountant. It is therefore for this Tribunal to determine if the letter is a genuine letter from the Respondent's accountant.
7. If the letter is genuine, and the figures in the accompanying spreadsheet are found to be from the Respondent's accountant, Claimant's witness statement confirms that she accepts (notwithstanding that she says she did not agree to her holiday pay being used to "top up" her furlough pay), that she has been paid 142.55 hours of holiday pay. In this instance, her claim is for 25.45 hours of holiday pay, which is the difference between 142.55 hours paid and the 168 hours she claims she is entitled to on a 30 hour per week contract. In monetary terms, this is a shortfall of £299.05.
8. The validity of the letter does not affect the Claimant's position in respect of her claim for a notice pay.
9. The Claimant position, as set out in her witness statement, is that if the Tribunal finds that the letter is not a genuine letter from Respondent's accountant, then her claim is as stated in her ET1 and summarised at paragraphs 2 – 4 above.

The Issues

10. The issues for the Tribunal to decide are therefore:
 - a. Was the Claimant's contract with the Respondent for a minimum of number of hours per week?
 - b. If so, what was the minimum of number of hours?
 - c. Did the Respondent fail to pay the Claimant's correct holiday entitlement? Can the evidence of the letter be relied upon?
 - d. Did the Respondent fail to pay the Claimant's correct notice entitlement?

The Facts

11. It is agreed that the Claimant was an employee of the Respondent, working in the Respondent's public house. The Claimant had previously worked for the Respondent, but left to find employment elsewhere. It is also agreed that in December 2019, the Claimant contacted the Respondent to ask if he had any job vacancies available, as she wished increase her working hours and could not do so at her current place of employment.
12. The Respondent, approaching a busy time of year for the hospitality industry, said that he had a part-time position available. The Claimant replied that she was looking for full-time work. Subsequently the Respondent sent a message to the Claimant stating that he now has a full-

time position available. There was no discussion of what “full-time” meant and this remains an issue in dispute between the parties.

13. The Claimant accepted a position with the Respondent and started her employment on 20 December 2019. Her initial rate of pay was £8.30 per hour; however, this was increased to £9.00 per hour from around August 2020.
14. The Respondent’s business was closed on 20 March 2020, due to the COVID pandemic, and the Claimant was placed on furlough. On returning to work from furlough, the Claimant decided to give notice to the Respondent at the end of July 2020. The Claimant and Respondent had a discussion in relation to this, which resulted in the pay increase referred to above.
15. The Respondent, due to financial pressures caused by the COVID pandemic, informed the Claimant that her contract would be coming to an end at the end of February 2021. The Claimant was paid notice pay based on a month of 104 hours.

The Law

Terms of the contract

16. The Tribunal has the power, under s.11 of the Employment Rights Act (“ERA”), to determine contract terms. These terms are then as if given by the employer, pursuant to s.12 ERA:

S.11 ERA - References to Employment Tribunals.

(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an Employment Tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where—

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and]

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part, either the employer or the worker may require the question to be referred to and determined by an Employment Tribunal.

(3) For the purposes of this section—

(a) [omitted]

(b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as

to the accuracy of an amount stated in any such particulars.

(4) An Employment Tribunal shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made—

(a) before the end of the period of three months beginning with the date on which the employment ceased, or

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.

(5) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) also applies for the purposes of subsection (4)(a).]

S.12 ERA Determination of references.

(1) Where, on a reference under section 11(1), an Employment Tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the worker a statement in which those particulars were included, or referred to, as specified in the decision of the Tribunal.

(2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an Employment Tribunal may—

(a) confirm the particulars as included or referred to in the statement given by the employer,

(b) amend those particulars, or

(c) substitute other particulars for them, as the Tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the worker in accordance with the decision of the Tribunal.

(3) Where on a reference under section 11 an Employment Tribunal finds—

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9, the Tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the Tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the Tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

Holiday pay

17. Employees are entitled to a minimum of 5.6 weeks' leave per year. This is made up of 4 weeks' leave under the Working Time Directive, derived from EU law ("EU leave") and an additional 1.6 weeks' leave under the Working Time Regulations 1998 ("WTR").
18. Regulation 14 of the WTR provides for any compensation an employee is entitled to where his/her employment is terminated during the course of the year:

Regulation 14 WTR

(1) Compensation related to entitlement to leave

This regulation applies 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(1) 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(1);

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.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Failure to provide written particulars of employment

19. The relevant law is s.1 of the ERA and s.38 of the Employment Act 2002 (“EA”):

S.1 ERA - Statement of initial employment particulars.

- (1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.
- (2) Subject to sections 2(2) to (4)—
 - (a) the particulars required by subsections (3) and (4) must be included in a single document; and
 - (b) the statement must be given not later than the beginning of the employment.
- (3) The statement shall contain particulars of—
 - (a) the names of the employer and worker,
 - (b) the date when the employment began, and
 - (c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
- (4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—
 - (a) the scale or rate of remuneration or the method of calculating remuneration,
 - (b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
 - (c) any terms and conditions relating to hours of work including any terms and conditions relating to—
 - (i) normal working hours,
 - (ii) the days of the week the worker is required to work, and
 - (iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,
 - (d) any terms and conditions relating to any of the following—
 - (i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
 - (ii) incapacity for work due to sickness or injury, including any provision for sick pay,
 - (iia) any other paid leave, and
 - (iii) pensions and pension schemes,
 - (da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,

- (e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,
 - (f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,
 - (g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,
 - (ga) any probationary period, including any conditions and its duration,
 - (h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,
 - (j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,
 - (k) where the worker is required to work outside the United Kingdom for a period of more than one month—
 - (i) the period for which he is to work outside the United Kingdom,
 - (ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,
 - (iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and
 - (iv) any terms and conditions relating to his return to the United Kingdom,
 - (l) any training entitlement provided by the employer,
 - (m) any part of that training entitlement which the employer requires the worker to complete, and
 - (n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.
- (5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—
- (a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and
 - (b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.
- (6) In this section "probationary period" means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—
- (a) commences at the beginning of the employment, and
 - (b) is intended to enable the employer to assess the worker's suitability for the employment.

(1) This section applies to proceedings before an Employment Tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the Employment Tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change)

the Tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the Employment Tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996,

the Tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of [a worker]⁹ shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

(6A) The provisions referred to in subsection (6) shall apply for the purposes of that subsection—

(a) as if a reference to an employee were a reference to a worker; and

(b) as if a reference to an employee's contract of employment were a reference to a worker's contract of employment or other worker's contract.

Deliberation

20. The Tribunal first considered the letter submitted by the Respondent which the Respondent says is from his accountant. I have been able to access the meta data in the properties of this document and I can see that it was produced by Marie Burnard on 26 March 2021. The same electronic copy of this letter was sent to the Claimant, so the same meta data is available to her. Marie Burnard, of One Plus One Accounting, is the name given by the Respondent as the name of his accountant. The Tribunal is satisfied that this letter does come from Marie Burnard, and accepts that it is a genuine letter, even in the absence of a letter head and signature.
21. The Claimant says no discussions took place in respect of her holiday pay being used to “top up” her furlough pay. The Respondent has provided as statement from Darren Horton, in which Mr. Horton says a discussion was had between the Respondent and all staff and all staff agreed to holiday pay being used to “top up” furlough pay. I give little weight to the statement of Mr. Horton, as he is not here and his evidence cannot be tested. Whether this was discussed with the Claimant is not the issue and so the Tribunal does not make any findings in relation to a discussion about holiday pay being used while on furlough. The Claimant has not sought to challenge the calculations contained in the letter and accepts that some holiday pay was paid while she was on furlough. I can see from the payslips that have been submitted, that some holiday pay was paid to the Claimant, and the Claimant has accepted this.
22. The most important question for the Tribunal to consider is, was this a contract for a minimum of 30 hours per week? The Tribunal has the power, under s.11 ERA, to determine contract terms. These terms are then as if given by the employer, pursuant to s.12 ERA.
23. The Claimant says this was a full-time employment contract, and that a minimum of 30 hours was agreed in a discussion between her and the Respondent prior to her accepting the job. The Claimant has stated that she signed the contract to this effect, but neither party has produced this contract. The Respondent’s case is that the Claimant never signed a contract and what was signed was in fact a new starter form.
24. Pursuant to s.1 ERA, the Claimant is entitled to be provided with written particulars of her employment. There is however no provision to bring a stand-alone claim for this. Under s.38 EA, the Claimant is entitled to receive either two or four weeks’ pay for the Respondent’s failure to provide her with the written contract, but this is subject to her being successful in another head of claim.
25. The Respondent evidence is that this was a contract for variable hours, with a minimum of 25 hours. The Respondent contends that his definition of full-time working, in respect of the workers in his business, is that full-time workers do 25 hours as a minimum, and part-time staff do around 16 hours.

26. What is full-time versus what is part-time will vary from business to business, and will be based on hours that the difference types of staff work. There is no definition in law of what is full-time employment.
27. The Claimant has accepted that she worked varying hours, sometimes well in excess of 30 hours, but also accepted that her hours were variable. When questioned, she said that she could not recall a specific agreement on minimum wages or hours.
28. The Tribunal accepts the evidence of Respondent, which has not been challenged by the Claimant, that staff hours were recorded by timesheets and that staff were paid for actual hours worked, rather than being paid a fixed amount per week.
29. The Tribunal has considered the Excel spreadsheet provided by the Respondent. The Tribunal notes that the spreadsheet also contains meta data in the properties confirming that it was produced by Marie Bernard on 28 July 2021. The Tribunal finds that this is a genuine spreadsheet produced by the Respondent's accountant, and has therefore considered the figures contained in that spreadsheet.
30. The Tribunal accepts that in August, September and October 2021, the Claimant did work on average more than 30 hours per week, but when this is brought into the calculation of averages over the year, which includes months on which the Claimant was on furlough, the Tribunal finds that this brings the average down to a yearly average of 26.58 hours per week.
31. The Tribunal accepts these figures are genuine and are an accurate reflection of the Claimant's worked hours. There is no evidence to support that a minimum of 30 hours was agreed, and the Claimant specifically said when questioned that she could not recall such an agreement. The Tribunal finds that this was a variable contract with a 25 hours per week minimum.
32. The Claimant's holiday entitlement, as per the spreadsheet provided, and based on her hours of 26.58 per week, is 151.75 hours of annual holiday, and the Tribunal finds that this was paid over the year and in her final pay packet. The Claimant's claim for unpaid holiday there fails.
33. As per the Tribunal's findings of no minimum of 30 hours per week being a term of the contract, the Tribunal finds that the Claimant's final notice pay of 104 hours, considering the yearly average of 26.58 hours, to be in line with the Claimant's contract. The Tribunal finds that the Claimant was paid the correct amount of notice pay, and the Claimant's claim for notice pay therefore fails.
34. As the Claimant has not succeeded on any other head of claim, the Tribunal cannot make any award in respect of the Respondent's failure to provide a written contract.

Case Number: 1402154/2021

Employment Judge King
Date: 8 December 2022

Reasons sent to the parties: 14 December 2022

FOR THE TRIBUNAL OFFICE