Case Number: 2302289/2021

THE EMPLOYMENT TRIBUNAL

Claimant:	Mr Mihai
Respondent:	Eight Holyrood Limited t/a Nine Lives Bar
Heard at:	London South Employment Tribunal (video hearing)
On:	9 November 2022
Before:	Employment Judge Robinson

Representation
Claimant: Ms Richardson (Friend of the Claimant)
Respondent: Mr Gage, Director

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was an employee for the purposes of the Working Time Regulations 1998 and the Employment Rights Act 1996.

2. The Respondent was in breach of contract for dismissing the Claimant without notice. The Respondent is ordered to pay the Claimant £245.80 being damages for breach of contract.

3. The Respondent failed to comply with regulations 13 and 13A of the Working Time Regulations 1998 in relation to accrued but unpaid holiday pay. The Respondent is ordered to pay the Claimant £1,755.01.

4. The Respondent is ordered to pay the Claimant additional compensation of £491.60 pursuant to section 38 of the Employment Act 2002, for failure to provide a written statement of employment particulars.

REASONS

5. The Claimant worked for the Respondent as a bartender from 18 September 2019. His last shift for the Respondent was in December 2020 and, after a break down in relations and communication between the parties, the Claimant treated himself as dismissed on 12 April 2021.

6. From the outset of the working relationship, the Claimant was asked to register as self-employed and paid by invoice from September 2019 until December 2020.

7. ACAS early conciliation started on 23 May 2021 and ended on 3 June 2021. The claim form was presented on 28 June 2021. No response form was received by the Tribunal.

Claims and Issues

8. The claim is about employment status, notice and holiday pay. The original Respondent's defence (Sweet & Chilli Limited) was that it did not employ the Claimant.

9. By consent, at a Case Management Hearing on 14 July 2022, it was agreed that the correct Respondent is Eight Holyrood Limited t/a Nine Lives Bar.

10. The substituted Respondent's defence is that the Claimant was engaged on a self-employed basis.

The Complaints

11. The Claimant is making the following complaints:

    a. Non-payment of notice pay;

    b. Non-payment of holiday pay.

Issues to be decided

12. The issues to be determined were as follows:

    a. Employment status

        i. Was the Claimant an employee or worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

    b. Wrongful dismissal/Notice pay

        i. What was the Claimant's notice period?

        ii. Was the Claimant paid for that notice period?

        iii. If not, was the Claimant guilty of gross misconduct or did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

    c. Holiday Pay (Working Time Regulations 1998)

        i. What was the Claimant's leave year?

ii. How much of the leave year had passed when the Claimant's employment ended?

iii. How much leave had accrued for the year by that date?

iv. How much paid leave had the Claimant taken in the year?

v. Were any days carried over from previous holiday years?

vi. How many days remain unpaid?

vii. What is the relevant daily rate of pay?

d. Remedy

i. How much should the Claimant be awarded?

ii. When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars?

iii. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

iv. Would it be just and equitable to award four weeks' pay?

Procedure, documents and evidence heard

13. The Respondent had not complied with the Case Management Orders and had not submitted any Response Form or other documentary evidence.

14. The Claimant, expecting the Respondent to not attend this hearing, had applied for a default judgment.

15. However, given the Respondent *did* attend the Hearing, the Tribunal considered it in the interests of justice and the overriding objective to proceed with the claim on the basis of the Respondent's oral evidence. The Respondent was content with that approach.

16. The Claimant submitted the following documents as evidence:

a. An 81 page bundle

b. A Schedule of Loss

c. Bank statements

17. The Respondent accepted the contents of the bundle as accurate.

18. I heard oral evidence from Mr Gage (Director) for the Respondent and from

the Claimant.

19. I have carefully considered the documentary evidence provided, together with the parties' oral evidence and closing submissions.

Fact findings

20. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached.

Employment status

21. Both parties' evidence aligned on the question of how the Claimant came to start working for the Respondent. The Claimant undertook a trial shift and was then offered a job verbally by Mr Cicala. There was no written contract, but Ms Cueva provided administrative support to the Claimant in advising him how to set-up as self-employed. He was advised to obtain a UTR (Unique Taxpayer Reference) number from HMRC. Ms Cueva also helped the Claimant by producing invoices on his behalf.

22. The Claimant explained in evidence that he had never before, or since, had a bartending job where he was self-employed. He did not really understand what he was being asked to do, or why, but simply understood that he needed a UTR number in order to be paid. At the time of starting work for the Respondent, the Claimant understood on a superficial level that the Respondent wished to treat him as self-employed but not what the implications of that would be.

23. Both parties accepted that the verbal terms of the contract were that the Claimant would work between 40-60 hours per week and not work for anyone else.

24. The Claimant gave evidence, which the Tribunal accepts that, he was required to clock-in and clock-out very accurately on an app for his shifts, and that he was also warned on more than one occasion about being late.

25. On 8 August 2020, the Claimant raised the issue of his employment status with the Respondent and said he thought he was really an employee and therefore entitled to various employment rights.

26. On 13 August 2020, the Respondent replied to the Claimant, thanking him for his email and offering him a written contract to "make your position official".

27. That contract provided for an annual salary but the Claimant did not sign it because he considered it would amount to a pay cut compared to his hourly rate of £10.

28. The Respondent accepted in evidence that the role and responsibilities provided for in the written contract did not differ from the practical reality of what the Claimant had been doing in his job up until that point. The Respondent also explained that the intention behind the contract was to provide things such as holiday pay and sick pay entitlement to the Claimant.

29. On 21 November 2020, a revised written contract was offered to the Claimant which provided for an hourly rate. It was revised partly to reflect the fact that the Claimant was now studying part-time and so wished to work only part-time. It also included revised holiday allowance terms. The Claimant chose not to sign that contract either because he considered that the holiday terms, which included a requirement for manager consent to carry forward leave from previous years, would deprive him of the holiday he had already accrued since starting work with the Respondent.

30. For the remaining months of 2020, the Claimant carried on working on a part-time basis. His last shift was on 15 December 2020 and his last payment from the Respondent was on 22 December 2020.

<u>The end, and duration, of the employment</u>

31. There was then a further period of Covid-19 related lockdown in the hospitality sector, from December 2020 until April 2021. The Claimant had not received any message from the Respondent that he was no longer required and so had expected to be offered shifts again in April once the hospitality sector was able to reopen. However, the Claimant was told that he would no longer be receiving any more shifts when he contacted the Respondent on 12 April 2021 and so considered that to be a dismissal and the employment relationship at an end as of that date. The parties both accepted in their evidence that the Claimant was not given, nor paid for, any notice period. The Claimant then began the ACAS early conciliation process.

32. I therefore find that the period of employment was from 18 September 2019 (the date the Claimant was successful in his trial shift) until 12 April 2021 (the date the Claimant was told he would not be given any further shifts after the Covid-19 lockdown). He therefore had 1 years' completed service; but not 2 years.

A weeks' pay

33. For the last 52 weeks of his work for the Respondent (from the January 2020 invoice until the December 2020 invoice inclusive), I have added all of those invoices together and calculated the Claimant's total pay was £12,781.66. This amounts to an average monthly pay of £1,065.14 and an average weekly pay of £245.80.

Annual leave

34. The parties agreed that the Claimant had never been paid for any annual leave during his employment.

35. Given the Claimant's start date of 18 September 2018, his leave year runs from that date each year until the following 17 September.

Relevant Law

Employment status

36. Section 230 of the ERA provides the definition of employee, employment and worker as follows:

> "(*1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
>
> *and any reference to a worker's contract shall be construed accordingly.*
>
> *(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
>
> *(5) In this Act "employment"—*

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and

"employed" shall be construed accordingly…"

37. The Supreme Court in *Autoclenz Ltd v Belcher and others [2011] ICR 1157* ("*Autoclenz*") set out the 'irreducible minimum' for a contract of employment comprises:

    a. Control;
    b. Personal performance; and
    c. Mutuality of obligation.

38. In *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening) 2014 ICR 730* and *Hospital Medical Group Ltd v Westwood 2013 ICR 415* it was established that the following are necessary for an individual to fall within the definition of 'worker':

    a. There must be a contract, whether written or oral and whether express or implied;

    b. The contract must provide for the individual to carry out personal services; and

    c. Those services must be for the benefit of any other party to the contract who must not be a client or customer of the individual's profession or business undertaking.

39. The key factors to be taken into account in determining whether an individual is an employee are:

    a. The degree of control that the employer has over the way in which the work is performed;

    b. Whether there is mutuality of obligation between the parties – i.e. was the employer obliged to provide work and was the individual required to work;

    c. Whether the employee has to do the work personally; and

    d. Were the other terms of the contract consistent with there being an employment relationship?

40. Other relevant factors include:

    a. The intention of the parties;

    b. Custom and practice in the industry;

    c. The degree to which the individual is integrated into the employer's business;

    d. The arrangements for tax and national insurance;

    e. Whether benefits are provided; and

    f. The degree of financial risk taken by the individual.

41. When deciding questions of employment status, a Tribunal can look beyond what is written in the contract between the parties and consider how the relationship worked in practice (*Autoclenz*).

42. The Supreme Court in *Uber BV and others v Aslam and others [2021] ICR 657* held that a written agreement is not decisive of the parties' relationship and is indeed not even the starting point when it comes to deciding employment status.

<u>Notice pay</u>

43. Section 86 of the ERA provides that:

    "*The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*

    (a) *is not less than one week's notice if his period of continuous employment is less than two years,*".

<u>Holiday pay</u>

44. Regulations 13, 13A and 14 of the Working Time Regulations 1998 ("WTR") give workers a statutory right to 5.6 weeks' paid holiday per year, *and* a right to payment in lieu for any outstanding holiday entitlement when the employment relationship ends.

45. Regulation 13(5) provides for pro rata accrual where the Claimant has only worked for part of the year.

46. Regulation 14(3)(b) provides a formula for calculating the payment due under regulation 16 where there is no written contract of employment.

47. Regulation 30 provides that a worker has the right to bring a claim if they are denied the entitlement to paid holidays.

48. In *Smith v Pimlico Plumbers Ltd 2022 IRLR 347*, the Court of Appeal confirmed that a worker can carry over a right to payment for four weeks' annual leave into subsequent leave years if they have been prevented from taking annual leave, or have only taken unpaid annual leave. The Court suggested that the following wording be read into regulation 13:

"*Where in any leave year an employer*

(i) fails to recognise a worker's right to paid annual leave and
(ii) *cannot show that it provides a facility for the taking of such leave,*

the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years."

49. Regulations 16(3A) and (3B) require sections 221-224 of the ERA to be read as if references to 12 weeks were references to 52 weeks for the purpose of calculating holiday pay.

<u>Failure to provide employment particulars</u>

50. Where a Tribunal finds:

    a. in favour of an employee in a complaint of unpaid holiday, and

    b. that the employer has failed to provide the employee with a written statement of employment particulars,

    the Tribunal must award the employee an additional 2 weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable.

51. Furthermore, the Tribunal may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusion

52. In relation to each of the issues I make the following conclusions.

<u>Issue A: Employment status</u>

53. I have taken account of the following factors in considering whether the Claimant was self-employed or an employee or worker:

    a. He was working full-time hours (until he started his higher education course at least),

    b. He did not work for anyone else,

    c. He could not send anyone else to carry out his shifts for him,

    d. He had no choice in how the work was carried out;

    e. There was a significant degree of control by the Respondent in terms of his management and being kept to his shift times via the app, and being given warnings in relation to lateness,

    f. There were other bar staff performing essentially the same job who were employees,

    g. The written contract eventually put forward by the Respondent did nothing to change the nature of the relationship or the roles and responsibilities of the Claimant. It essentially just put the status quo into writing.

54. All of which indicate that the relationship was not one of a self-employed person; but an employee. I conclude he was an employee.

<u>Issue B: Notice pay</u>

55. As an employee, and in the absence of a written contract, the Claimant is entitled to notice pay in accordance with section 86 of the ERA.

56. Given he had worked for 1 year but not 2, the Claimant is entitled to 1 weeks' notice pay. He was not paid for that notice period and the Respondent was not entitled to dismiss him without pay. The Claimant is therefore entitled to 1 weeks' notice pay, which is £245.80.

<u>Issue C: Holiday pay</u>

57. All employees are entitled to 5.6 weeks leave per year. For the Claimant, this applies to his leave year which ran from 18 September to the following 17 September.

58. In his final leave year (18 September 2020 to 12 April 2021), by the time of his resignation, the Claimant had only been employed for part of the

leave year. He is therefore entitled to a pro-rata amount for that period (29 of the 52 weeks of the year, or 56% of the year). He is therefore entitled to 56% of 5.6 weeks = 3.14 weeks. At a weekly rate of £245.80 this equals £771.81.

59. Following the ruling in *Smith v Pimlico Plumbers Ltd 2022 IRLR 347*, the untaken and unpaid annual leave in previous leave years can be carried forward. However, this only applies to the 4 weeks of EU-derived leave under regulation 13 of the WTR; not the additional 1.6 weeks of additional leave under regulation 13A.

60. This means that for the preceding full leave year from 18 September 2019 to 17 September 2020, the Claimant is entitled to 4 x 245.80 = £983.20.

61. Combining the totals above means the Claimant's total award for holiday pay is £1,755.01.

Issue D: Failure to provide employment particulars

62. The Claimant has succeeded in his holiday pay claim. An award of additional pay under section 38 of the Employment Act 2002 is therefore possible.

63. I concluded that the Claimant was an employee of the Respondent. He was therefore entitled to a written statement of employment particulars. Both parties agreed that the Claimant was not given a written statement of employment particulars at the start of his employment. I find no reason why it would be unjust or inequitable to order the Respondent to pay an additional amount of 2 weeks' pay for this failure. However, I do not consider it just an equitable to increase that award to 4 weeks.

64. The Respondent is therefore ordered to pay an additional two weeks' pay (2 x £245.80) = £491.60.

Employment Judge Robinson

Date 21 November 2022