EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Miah	**v**	**Demi Power Limited**

Heard at: Watford Employment Tribunal
On: 28 March 2022
Before: Employment Judge French

Appearances
For the Claimant: In person
For the Respondent: Mr Husain, Solicitor

JUDGMENT

1. Judgment having been given orally on 28 March 2022, with the written record of Judgment sent to the parties on 7 April 2022, the claimant requested written reasons on 6 May 2022. This was refused by letter dated 4 July 2022, on the basis that the request was made outside of the 14-day period in accordance with rule 62 of The Employment Tribunals Rules of Procedure 2013.
2. On 14 July 2022 via the Citizens Advice Bureau, the claimant asked that the decision not to provide written reasons was reconsidered pursuant to rule 71 of The Employment Tribunals Rules of Procedure 2013. In that request it was indicated that, for reasons unknown, the claimant only received the Judgment on or around 4 May 2022.
3. This re-consideration request was not sent to EJ French until 31 January 2023. It is noted that the claimant has sent emails in November 2022 and December 2022 to chase the outcome of the reconsideration request that was made in July 2022.
4. Upon considering the re-consideration request, whilst the claimant was advised orally at the hearing that any request for written reasons would need to be made within 14 days of the written record of Judgment, it is noted that due to a formatting error the written record of Judgment did not repeat this information pursuant to rule 62(3) of The Employment Tribunals Rules of Procedure 2013.
5. As such the request to re-consider the decision not to provide reasons is granted and written reasons are provided below.

REASONS

1. This is a claim brought by the claimant by way of claim form dated 5 August 2019 for unauthorised deduction from wages relating to holiday pay, training pay and unpaid hours from November and December 2018 and a miscellaneous expense. He also claims wrongful dismissal and claims one weeks' notice pay.

2. Throughout the course of proceedings, the claimant referred to having been dismissed unfairly. In his ET1 he bought no claim for unfair dismissal but in any event, he lacked two years continuing employment to make such a claim having only been employed from 2 November 2018 to 15 May 2019.

3. In its response received 20 September 2019, the respondent denied the claim stating that all monies due to the claimant have been paid to him. They also state that he was not dismissed but had in fact resigned and this was done without notice so he was not paid the same.

Preliminary issues

4. There was an application by the respondent at the outset of the hearing to strike out the claim, on the basis that the claimant had failed to actively pursue the case which predominately related non-service of his witness statement. I refused that application on the basis that Mr Miah is a litigant in person for which English is not his first language. The respondent had been able to prepare the case based on the ET1 that had been presented and were aware of the claim against it based on additional evidence and clarifying information provided by the claimant.

5. I subsequently gave the claimant time to prepare a witness statement which was then provided to the respondent and time given for instructions to be taken. The case proceeded thereafter.

Evidence

6. I had a main bundle consisting of 98 pages and a supplemental bundle which took the total page count up to 111 pages. I also had a witness statement of Mr Richard Campbell, Restaurant, Operations & People Manager for the respondent and heard oral evidence from him in evidence. I also had the statement of the claimant that was prepared by him that morning and heard oral evidence from him. I also heard closing submissions from both parties.

7. At the outset of the hearing, I checked with the parties the documents that I had as referred to above and asked if there were any documents that were considered missing by either party. The claimant did not suggest that there was. However, during the course of the proceedings he attempted to rely on one or two text message conversations which the respondent's representative said had not been received, which did not form part of either bundle, and were not on the court file.

8. I had regard to the overriding objective and the need to deal with cases fairly. The claimant was attempting to produce evidence that had not previously been provided and which the respondent had not been able to prepare its case upon. Directions were clear regarding the exchange of documents as per the order of EJ Smail dated 26 June 2020 and the claimant had not complied with this. The claimant had already been afforded additional time to prepare a witness statement, despite the direction for him to do so beforehand. The court file also showed that the respondent had requested additional information from the claimant to better understand the case against them which had resulted in an unless order for him to provide this.

9. I was not willing to afford more time to the claimant to serve evidence during the course of the final hearing which would in turn necessitate further time for the respondent to consider the evidence and take instructions. The messages were between individuals that the respondent had not sought to speak to as part of the proceedings. The claimant had been referred to the evidence in the court's possession at the outset and did not indicate that there was anything further at that time. In that regard I had to be mindful of the one-day time estimate and the fact that the claimant had an interpreter which adds to the length of proceedings. I therefore did not allow the additional documents by way of evidence.

Issues

10. Is the claimant owed notice pay?
11. As to unauthorised deductions from pay the claimant made the following complaints:
    A) That he is owed 14 days holiday pay
    B) That he is owed 35.5 hours for working or completing training and it that regard the question is whether he attended the Dunstable store prior to his work at Stevenage, and, if so, is he owed wages for this?
    C) That he is owed £40 travelling expense linked to that training
    D) That he is owed pay for the months of November and December 2018.

Fact finding

12. The claimant was employed as a chef at the respondent's KFC franchise in Stevenage between 2 November 2018 and 15 May 2019.

13. I understand the claimant's case is that for the month of November and December 2018 he worked 56 hours per week. He states he has been underpaid wages as a result, although his claim in that regard was incredibly unclear and he was unable to confirm in is evidence at any stage how many unpaid hours he said there were.

14. The respondent says the claimant was only ever contracted to work 24 hours per week and that was what he did. I note the contract at page 48 to 53 of the bundle reflects that the claimant was contracted to work 24 hours per week and in his ET1 the claimant has stated that he worked 24 hours per week.

15. I heard from Mr Campbell for the respondent that the respondent has a clocking in and clocking out system which logs all hours worked by an employee. I can see evidence of such logs at pages 72 to 76 of the bundle, which shows the hours that the claimant logged in and out and it is the respondent's case that the log in system was how wages were subsequently paid. So, namely whatever was logged would subsequently be processed through payroll and paid. The claimant says that he struggled to use that system and often had to rely on others to do it for him, however confirmed in his evidence that he was aware of the importance of doing so. Notwithstanding his difficulties using the system, I find that clearly the claimant knew the importance of ensuring that his hours were logged on that system as this would then correspond to what he was paid and it would therefore be his responsibility to ensure that his hours were logged correctly.

16. Looking at those time records I can see no evidence that the claimant worked 56 hours per week as he states. Page 70 is the hours of November 2018 and shows a total of 37 hours worked. Page 71 details the hours for December and shows a total of 105 hours worked for the month. That would accord with the respondent's position that he was working 24 hours per week. On comparing the timesheets with his wage slips, at page 80 onwards of the bundle, the timesheets accord with what the claimant has subsequently been paid. Namely for November he was paid 37 hours and for December he was paid 105 hours. Therefore, on the evidence before me, I am not satisfied that there has been an underpayment of wages for the months of November and December 2018. The claimant has been paid for the hours that he has been logged as having worked.

17. The claimant states that prior to his job starting in the Stevenage branch on 2 November 2018, he went to the Dunstable store for training and seeks payment of 35.5 hours for this. I have had sight of the training record at page 67 of the bundle which shows a record of various training with the first on 31.12.18 running through to 12.2.19. There is nothing to suggest on that document that there was any training prior to 31 December 2018 or that such training as outlined by the claimant was provided.

18. The claimant says that this was because it was in-store practical training. The claimant was very clear that he went to that store for training along with two other new employees whom the claimant says were paid for the training. He provides two letters at pages 98 and 99 of the bundle in support of this, although I place no weight on those documents because they do not state the full name of the person giving them, they are unsigned and not supported with a statement of truth and they are in a typed format and could have been written by any individual and those witnesses were not present today.

19. Mr Miah has not provided any documentary evidence to support the fact that he was required to attend training at the Dunstable store by way of instruction letter or text message or otherwise and does not provide an account as to how he was instructed to attend this.

20. The respondent accepted that employees could be asked to attend another store for training but Mr Campbell in his evidence was very clear that he had searched for a record of this and no such record was found. His evidence was that there would have been a letter of instruction to do so. He also confirmed that had any training had been completed at another branch the timesheets would have been completed in the usual way. As such there would have been a time log to show that the claimant had 'clocked' into the Dunstable store. Again, there is no evidence of this. On the evidence before me, on balance I am therefore not satisfied that Mr Miah did attend this training because there is no instruction to do so and no time records which confirm he did.

21. Mr Miah seeks £40.00 expenses related to that training and the fact that I found that I cannot be satisfied that he attended that training causes me difficulties in terms of granting anything in relation to that expenditure. In any event, I can see nothing in the contract that would entitle him to claim such an expenses back. Mr Miah states that the £40.00 represents a tank of fuel. He states that he was told that he would be able to do this by his manager at the time but I find his account that he was told he could claim back a tank of fuel unlikely and not credible because usually where travelling expenses are allowed, that would be on the basis of a mileage claim based on actual distance and miles travelled.

22. The claimant also seeks notice pay as he says that he was dismissed by the assistant manager. The respondent denied this and states that the claimant resigned without notice and that is why no notice pay was paid. The respondent's evidence was that if he had been dismissed, they had policies in place to deal with such a dismissal. They would have had a disciplinary procedure and would have had a record of it. It is unfortunate that I do not have evidence from the assistant manager that dealt with the incident in question. This I understand is linked to the fact that there were changes in management at the time and despite requests by the respondent of the claimant to name who the responsible manager was for the dismissal, the claimant has been unable to do so.

23. Mr Campbell was able to assist to the extent that if such an incident had taken place, he would expect that a Human Resources record would indicate this and there was no such record of dismissal.

24. The claimant's evidence was that his dismissal was a heated one in which he was physically assaulted. He says he was dismissed by the assistant manager known as 'Kurtik' (full name unknown). He was not clear on the exact words that were used which caused him to believe it was a dismissal. He says he spoke to somebody about the incident in the branch he worked at but when this was not taken any further, he did not seek to write to the company, take it up with anyone more senior or raise a grievance. He also did not seek to challenge that decision and, in addition, having said he was forcibly removed, did not indicate that he had reported that force to police. In that regard I note that the appeal procedure is highlighted at page 50 of the bundle in the claimant's contract and the grievance procedure at page 51.

25. My overall assessment is that the respondent is a large company that I am satisfied has procedures in place for dealing with such a dismissal and I would have expected there to have been some sort of record of it based on sight of other records that the respondent has held. I accept the evidence of Mr Campbell that he has searched for such records and nothing has been found.

26. I do not find the claimant's account regarding this incident to be credible. I do not accept his evidence that he was physically assaulted because this was not followed up formally either with the respondent and the claimant offers no explanation as to why he did not do this, despite knowing the respondent's procedures for raising the same by way of grievance or challenge of the decision as outlined in his contract of employment. The claimant alleges he was assaulted but also took no follow up action with the police. Weighing up the evidence, I do not find that there was a dismissal. I therefore find that the claimant resigned and did so without notice to the respondent. I am therefore not satisfied that the claimant was entitled to notice pay.

27. Regarding the holiday pay, the claimant says that he was owed two weeks' pay although he does not state on what basis he says he is owed this. He appears to rely on the fact that he was told by the Citizens Advice Bureau that he was entitled to two weeks' pay. He denied that he was paid any holiday pay but his wage slips clearly indicate otherwise and show that holiday pay was paid. These are his wage slips and the claimant has not provided bank statements to suggest that the sums shown on the wage slips were not subsequently paid to his bank account. I have regard to the calculation of holiday pay at page 77 of the bundle and the hours due to him based on the part-time hours that he worked. This accords with what was subsequently paid to him in August 2019 which is shown on his wage slip at page 96 of the bundle. I find that the claimant was paid holiday pay.

The law

28. Section 13 of the Employment Rights Act 1996 states that an employer shall not make a deduction from wages of a worker unless the deduction is authorised. Section 13(3) of the Act states that 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 wages properly payable the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wage on that occasion.

29. Claims for holiday pay can be brought as complaints of unlawful deduction from wages, as complaints of breach of contract, or under the Working Time Regulations (WTR) 1998. The WTR give workers the entitlement to 5.6 weeks leave each leave year (including any bank holidays the worker is entitled to take). This is on a pro rata basis for part time employees. Employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment.

30. With regard to time limits for unauthorised deduction from wages claims, this is three months beginning with the date of the last deduction. For complaints under the Working Time Regulations in each case the normal time limit can be extended to take account of the early conciliation provisions and time may also be extended if it was not reasonably practicable to present the claim in time and it was presented within a reasonable time thereafter.

31. In relation to notice pay, if there is an express contract term as to notice (written or orally agreed), this will apply, provided this is not less than the period of notice required by s.86 Employment Rights Act 1996 (after the employee has been employed for at least one month, one week, then one week for each completed year of service up to a maximum of 12 weeks). The claimant's contract provides for 1 weeks' notice pay based on the fact that he had been employed for more than one month but less than two years.

Conclusion

32. The respondent states that in relation to the claim for training hours and the hours from November and December 2018 the claims are out of time. On the face of it I would agree, the claimant should have been paid these hours at the end of November and December 2018 respectively and three months from the end of December 2018 would have been March 2019. The claim was brought in August 2019 so was done so out of time. On the claimant's evidence he stated that he did not initially get his wage slips but accepted by December 2018 that he did have them. He was therefore aware of the shortfall of wages at that time.

33. I can however extend if I find that it was not reasonably practicable for the claimant to have submitted his claim. I do take into account that English is not his first language. He remained employed by the respondent company and I can see that he did seek to resolve the matter by way of text message evidence to them which appears in the supplemental bundle. He went on to take advice from the Citizens Advice Bureau and relied on that advice when they told him he was still in time. He then approached ACAS who delivered the conciliation certificate. I note that this was on the same day as notification and thereafter on the same date the claimant issued his claim form. I therefore find that he did subsequently present the claim as soon as practicable and I allow the claim to proceed.

34. Regarding the unauthorised deduction from his November and December 2018 wages, I am not satisfied that the claimant has proved his case. He has given three different figures throughout these proceedings in relation to the amount that he is actually owed for those months and when asked directly in questioning today he could not give an amount that he says he has been under paid. Ultimately, it is his claim and it is for him to prove it on the balance of probabilities.

35. In his ET1 he refers to 35 hours for training only and does not mention any underpaid wages form November and December 2018. At page 29 of the bundle being his schedule of loss/calculation submitted in support of the

claim, he refers to 365.5 hours as being the total amount underpaid and then at page 101 says it was 56 hours for a period of 6 or 7 weeks. There is no calculation of what he says he has been paid compared to the hours that he says he actually worked. And, as I have already stated, when he was asked in cross examination about what hours he was owed, he simply could not answer. The only evidence before me therefore regarding the hours and whether there was an underpayment is the time sheets and wage slips. The timesheets show the hours worked as 'clocked' by the claimant and the wage slips reflect that payment was made for that number of hours. In absence of anything else to the contrary, I accept that evidence. There has been no unlawful deduction from the claimant's wages for the months of November and December 2018 as he has been paid the amounts properly payable to him based on the hours worked.

36. Regarding the training the claimant says he attended, Mr Campbell did accept that it was not unusual for an employee to be asked to visit a different store for training. He was however clear that there would be evidence of this by way of instruction letter and that there would be logging in and logging out in the usual way at the other branch. The respondent's systems have been searched and I was told there is absolutely no record of this. I am therefore not satisfied again that the claimant has proved his claim. The claimant's oral evidence on the point is not supported by any written documentation. To the contrary, the written records of training indicate a number of training sessions completed which would not correspond to the claimant's account and shows no training completed in the Dunstable store. There are also no hours logged at this store. Therefore, no payment was due to the claimant in relation to training and there has therefore been no unauthorised deduction from his wages in that regard.

37. In terms of the related petrol expenses, they fall away by that finding in that I do not find that he travelled to attend that training. In any event, there is nothing in his contract to say that he would have been entitled to travelling expenses and I do not find that the oral agreement that he says he reached with the store manager to be a credible one because that would see him being paid for a tank of fuel however, ordinarily, expenses would be paid by way of actual miles or distance travelled. There is no supporting evidence as to the agreement.

38. Regarding the holiday pay, the claimant's account was that he was paid no holiday at all but, based on the findings that I have already given, that simply cannot be correct. I can see that holiday pay was paid to him in his wage slips at page 88 and 90 of the bundle. I can also see that a calculation then took place at page 77 in terms of outstanding holiday pay and a final payment was then made to him in August. This is demonstrated on his wage slip at page 96. I can see nothing to suggest that he was owed any days above and beyond what he had been paid. The holiday has been calculated in accordance with his contract of employment at page 49 which accords with the entitlement afforded by the WTR 1998. The calculation at page 77 accords with the contractual leave that he is entitled to and has been

calculated based on the fact that he was a part-time worker. I therefore find that there is no outstanding holiday pay due.

39. Regarding the notice pay, this is a breach of contract claim. The claimant's contract at page 51 provides for 1 weeks' notice pay based on the claimant's employment having been for less than two years. The claimant says he was dismissed without any notice. I am not satisfied that the claimant was dismissed. I accept the respondent's evidence that if he were policies were in place to deal with the same, that the disciplinary procedure would have been followed, and there would have been a record of it. I also find the claimant's inaction regarding the situation as he describes it as telling as to events that took place, namely that if an incident had occurred in the manner which he alleges, I consider that he would have taken strong action as a result. As I have already said, he did not seek to appeal that dismissal; he did not seek to take it up with someone more senior or raise a grievance. I am therefore not satisfied that this was a dismissal on the evidence before me as I do not find the claimant's account on the incident to be a credible one. I can therefore only conclude on my fact finding above that the claimant resigned, that this was with immediate effect, and that no notice pay was due.

40. Therefore, the claimant's claims are not well founded and they are dismissed.

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Employment Judge French

Date: ……7 March 2023

Sent to the parties on: 7 March 2023

For the Tribunal Office