



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4108403/2022

**Final Hearing held in Glasgow remotely by Cloud Video Platform
on 9 March 2023**

10

Employment Judge A Kemp

15 **Mr Lewis Hewitt**

**Claimant
In person**

20

Buf Ayr Ltd

**Respondent
Represented by:
Mr G Paton,
Director**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 **The respondent made unlawful deductions from the wages of the claimant,
and is in breach of their contract with him, and the claimant is awarded the
sum, net of any tax if due, of ONE THOUSAND EIGHT HUNDRED AND
EIGHTY EIGHT POUNDS THIRTY ONE PENCE (£1,888.31), payable by the
respondent.**

35

REASONS

Introduction

1. This was a Final Hearing held remotely. The claims are for unlawful deductions from wages, firstly for pay and secondly for accrued annual E.T. Z4 (WR)

leave, and separately for the balance of notice given by the claimant that he claims the respondent did not permit him to work, as a claim for breach of contract. The respondent disputes the claims and argues that no sum is due.

5 **Evidence**

2. The claimant had prepared and intimated documents that he wished to rely on in accordance with case management orders issued. The respondent on the day before the Final Hearing sought to add, late, one further document, which was not opposed. Evidence was heard from the claimant, and from Mr Graeme Paton for the respondent. Mr Paton is its sole director. Before the hearing commenced as neither party was legally represented or experienced I explained about the giving of evidence, the conduct of the hearing, cross examination, and that all evidence a party wished to lead required to be provided now, as doing so later was allowed only in exceptional circumstances.

10

15

Issues

3. The issues were identified at the start of the hearing and are:

- (i) Has there been an unlawful deduction from wages in relation to pay in October 2022, and for accrued annual leave due to the claimant, under section 13 of the Employment Rights Act 1996?
- (ii) Was the respondent in breach of contract in relation to the termination of the contract?
- (iii) If the claims, or either of them, succeed to what remedy is the claimant entitled?

20

25 **Facts**

4. The following facts, material to the issues before the Tribunal, were found to have been established:

5. The claimant is Lewis Hewitt.

6. The respondent is Buf Ayr Limited. It is a company incorporated under the Companies Acts. It operates a sports bar and grill in Ayr (“the restaurant”). Its sole director is Mr Graeme Paton.

30

7. The claimant was employed by the respondent as one of two Head Chefs at the restaurant. He started on 19 July 2022, as did the other Head Chef. He worked for four days per week normally, although in the initial two weeks of employment worked for seven days per week. His normal hours of work were 10am to 8.30pm. The claimant received a written statement of particulars, which was not before the Tribunal.
5
8. The days he worked varied according to requirements of the business and other members of staff. The other Head Chef, Ross Butler, also worked four days per week, and took his days off on occasion consecutively being three at the end of one week and three at the start of the next, so as to have six in a row in order to visit his girlfriend in Manchester. On one occasion the claimant also took six days off consecutively on a similar basis, as his rest days. The claimant did not take any holidays during his employment with the respondent.
10
9. The claimant and respondent had a generally good relationship, with the claimant working the hours required and being flexible on that, and the respondent regularly giving him loans against future wages.
15
10. The claimant was paid on the basis of a gross weekly wage of £653.85, paid monthly. His net weekly wage was £521.98.
11. On or around 28 September 2022 the claimant informed both Mr Graeme Paton, Director of the respondent, and Mr Chis Cole, General Manager, orally that he was giving four weeks' notice of termination of employment as he had decided to relocate from Ayr to Glasgow. At that stage he did not have another job to go to, but intended to use his last wage, and accrued holiday pay, to fund the move when it took place. Their meeting was an amicable one. Mr Butler also gave notice of termination similarly on or around the same date.
20
25
12. On 30 September 2022 the claimant sent a further message to Mr Cole suggesting that he may reconsider.
13. On or around 5 October 2022 the claimant and Mr Butler were called to a meeting with the respondent, conducted by Mr Kevin Finnie, another manager of the respondent. It was held at the kitchen of the restaurant.
30

Mr Finnie told them that the respondent wanted a clean break and that they should leave employment that day. The claimant protested that, as he wished to work for the remainder of the notice period, but Mr Finnie did not agree to that. The claimant's employment with the respondent terminated on 5 October 2022 as a result of Mr Finnie's instruction.

5

14. Neither the respondent nor the claimant wrote to the other with regard to the claimant's notice or the termination of employment.

15. On 5 October 2022 at 19.52 the claimant sent a message to one of his friends referring to that meeting and stating that his "plan was fucked now". By that he meant that as he did not have the funds to move to Glasgow and no current job his plan to do so was in jeopardy. The claimant also contacted a former employer to seek employment. The claimant also contacted a former employer that day to seek employment.

10

16. The claimant sold his motorcycle thereafter to generate funds for the move.

15

17. The claimant received a payslip from the respondent for the period to 31 October 2022. It did not contain any accrued holiday pay. It had a payment for hours worked in October 2022 of £390.38 net. The claimant did not receive a P45 from the respondent.

20

18. The claimant started a new role in early November 2022.

19. Mr Paton has a total of five businesses. He attends the restaurant about three days per week.

20. The claimant commenced Early Conciliation on 9 November 2022. The Certificate is dated 21 December 2022. The Claim Form was presented on 22 December 2022.

25

Submissions

21. The parties made brief submissions, with the claimant arguing that he had given notice and asked to leave against his wishes, with an underpayment of wages and no payment of holiday pay, and Mr Paton arguing that the

claimant had wanted to leave to go to another job, and his position later changed.

The law

22. The Employment Rights Act 1996 (“the Act”) provides for a right not to have unlawful deductions made from wages under section 13. Wages are defined in section 27 to include pay and holiday pay. A claim may be taken to the Tribunal under section 23. There is an entitlement to annual leave under the Working Time Regulations 1998. The Regulations implement the Working Time Directive 2003/88/EC and require a purposive interpretation in that regard so far as they do so. The Directive is retained law under the European Union (Withdrawal) Act 2018. The entitlement to holidays is set out in Regulation 13 as four weeks, implementing the Directive, and in Regulation 13A as an additional 1.6 weeks, which is a UK measure. The total is to 5.6 weeks for the full year. There is an entitlement to payment for leave accrued but untaken as at the date of termination of employment under Regulation 14. The amount is related to the actual week’s pay, and amounts to a proportion of the full year taken where the period of employment is less than a year. It may be an unlawful deduction from wages if not paid, or a claim may alternatively be made under Regulation 30.
23. A claim may be made under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 for a breach of contract where that arises or is outstanding on termination.

Discussion

24. I considered that the two witnesses each sought to be honest in their evidence. I had to decide matters on the basis of reliability. I concluded that the claimant’s evidence should be accepted. There are a number of reasons for that.
25. Firstly, there was no dispute but that he had given four weeks’ notice initially on 28 September 2022 both to Mr Paton and Mr Cole. Matters at that stage were amicable.

26. Secondly, the respondent claims that on 5 October 2022 the claimant said that he wanted to leave that day as he had found a new job, but the claimant disputed that. The person who was best able to give that evidence on behalf of the respondent, Mr Finnie, still an employee of the respondent, but did not appear before me. Mr Paton accepted that he was not at that meeting. Mr Paton's evidence of what Mr Finnie told him was hearsay. That is competent evidence (made clear in Rule 41) but it is less good evidence than from a witness who was there. No explanation for not calling Mr Finnie to give evidence was given. Whilst I accept that Mr Paton genuinely believed what he had been told he was not present at the meeting on 5 October 2022, and was not always on site given his other business interests. His evidence is I consider materially less reliable in this regard than that of the claimant.

27. Thirdly, the message the claimant sent to a friend that same evening does not I consider bear the meaning Mr Paton sought to ascribe to it, which was to the effect that the claimant had had a job initially on 5 October 2022, when he is alleged to have asked to leave that day, but that it had later that day fallen through. The message is in my view entirely consistent with the evidence the claimant gave, which is that he did not have a job to go to when he gave his notice, but that he was planning to pay for the move to Glasgow by pay for the last four weeks and holiday pay, and that that plan could not be put into effect when Mr Finnie told him to leave that day. That is also supported by his contacting a former employer to seek work and selling his motorcycle to seek funds for the move in light of the fact that the money he expected was not to be forthcoming. It is true that on 30 September 2022 the claimant sent a message to Mr Cole indicating that he may reconsider, but there was no evidence of Mr Cole responding, and the next event was the meeting on 5 October 2022. What Mr Finnie is alleged by the claimant to have said is consistent with Mr Paton's evidence of an impression the respondent formed from the 30 September 2022 message that the claimant was not committed to the restaurant. It appears to me that that aspect of the evidence favours the reliability claimant's description of Mr Finnie saying that the respondent wanted a clean break.

28. Fourthly the respondent has not paid any holiday pay at all, which is I consider a breach of its statutory duties. No defence to that was put forward in evidence. It was simply said that payroll was conducted by the accountants. It was or certainly ought to have been obvious that holiday pay was due. That it was not does not assist the respondent's position as to reliability.
29. Fifthly the respondent did not confirm its position on or around 5 October 2022 by letter or email to the claimant, a P45 was not sent to the claimant (his evidence was that it had not been received, and no P45 was with the documents before me, although Mr Paton said that one had been sent to the claimant). Mr Paton did not spend more than three days per week at the restaurant, and he said in evidence that he had told his managers that matters should be documented, but no such document to support the respondent's position was put by the respondent before me.
30. Finally I considered from the manner in which the claimant gave evidence that it was likely to be reliable, as he responded clearly and candidly to the questions put to him by Mr Paton, denying that he had ever had a job to go to on 5 October 2022.
31. Taking all of the evidence I heard into account, I preferred the claimant's evidence over that of the respondent. I held that the respondent had effected the termination of employment on 5 October 2022, and that there had not been the consensual termination on that date as the respondent contended. I held that the respondent had made unlawful deductions from wages under Part II of the Employment Rights Act 1996, and that it was in breach of contract in terminating the claimant's contract on 5 October 2022, and not at the end of the notice period the claimant had given on 28 September 2022, that being 26 October 2022. There was no suggestion in the evidence that he had not been entitled to give that notice, or that four weeks' notice was what the written terms, which were not before me, required.
32. I turn to the issue of remedy. There was no detailed evidence from the respondent as to how it had calculated the October 2022 payslip. I accepted the claimant's evidence that he had worked for one week in

October 2022. There was an underpayment in his pay that month of £31.60 being the normal net weekly pay less the net payment made in October 2022 of £390.38. The notice given by the claimant was for the period to 26 October 2022. He was not paid for three weeks of that period, when he was willing to work for the respondent. He did not do so as they, in effect, terminated the contract early and the basis of their seeking to do so I have not accepted. That is I consider a breach of contract, and I award three weeks' wages as damages for that breach, which is the net sum of £1,265.94. The claimant did not work during that period but did seek to mitigate his loss.

33. The final aspect is the claim of unlawful deduction from wages for accrued holiday pay. The claimant worked for the period 19 July 2022 to 5 October 2022. That is a total of 13 weeks. He is entitled to one quarter of the annual entitlement of 5.6 weeks, being 1.4 weeks. At the net weekly rate the amount is £590.77.

Conclusion

34. I find that the respondent did make unlawful deductions from wages, and did breach the contract with the claimant. The total award for those claims is the sum of £1,888.31. For the avoidance of doubt it has been calculated net of any tax or other statutory deductions, and the award is therefore stated to be "net" on that basis. Should tax or other statutory deductions be due on the award, which is possible as there is some ambiguity as to how such payments on termination are to be treated for tax purposes, that is payable by the respondent in addition.

Employment Judge: A Kemp
Date of Judgment: 14 March 2023
Entered in register: 22 March 2023
and copied to parties