EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102123/2023

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Held in Glasgow on 24 May 2023

Employment Judge M Kearns

Mr G McLeish	**Claimant** **In Person**
Banner Burnett Hospitality Ltd **t/a The Colintraive Hotel**	**Respondent** **Represented by:** **Mr S Gilmour -** **RBS & Natwest** **Mentor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant was employed by the respondent as a sous chef at their hotel from 14 May 2022 until 11 February 2023. This claim concerns a dispute about notice pay. The claimant case is that he is due two weeks' notice pay, following his resignation. The respondent's case is that the claimant did not attend work for the first week of his notice period, despite having been on the rota and that he is not, therefore entitled to be paid for that week. With regard to the second week, the respondent submitted that the claimant had agreed to take part of his annual holiday entitlement that week. In the event that the Tribunal found that he had not agreed to take holiday for the second week of his notice period, the respondent's alternative position is that they were entitled to require him to take that week as holiday in terms of clause 6.5 of his employment contract and that they did require him to do so.

Findings in Fact

2. The following facts were admitted or found to be proved:

3. The respondent is a limited company trading as 'The Colintraive Hotel'. The hotel employs 14 members of staff. The claimant had two periods of non-continuous employment with the respondent as a sous chef. He was initially employed by them in 2021. After a period of sick leave, he left in or about May 2021. His second period of employment began on 12 May 2022 and ended on 11 February 2023. The claimant's contract was a 'zero hours contract' but he normally worked 37 hours weekly. He earned around £555 per week. At the time of his termination of the employment, the claimant was paid £15 per hour.

4. In or about early January 2023 the claimant spoke to Ms Banner and queried with her the accrued but untaken holiday payment he had received at the termination of his earlier employment in May 2021. He said he had been looking into it and he thought he ought to have been paid for holidays accrued whilst he was off sick. Ms Banner said she would look into it and get back to him.

5. The claimant's shift rota was prepared and distributed via an app called 'When I Work' by Joe Burnett, a director of the respondent who was also Head Chef. The rota for the week beginning 30 January 2023 was circulated via the app on 22 January. The claimant was initially on the rota for 43 hours between Monday 30 January and Sunday 5th February. The following week, beginning 6th February, the claimant was also on the rota for a full week.

6. The claimant resigned from his employment with the respondent by email on 23 January 2023 (J29), stating that his last day of employment would be 11 February. Although the employment contract required him to give one month's notice, the claimant gave two weeks and five days. In his resignation email the claimant stated: *"I will work the shifts that joe has published on when I work. My last shift will be Saturday 11th February…"* By return email the same day, Ms Banner said: *"We accept your resignation and confirm your final day to be the 11th of February 2023…. We will catch up tomorrow."*

7. On 27 January, the claimant had a conversation with Joe Burnett about his shifts for the remainder of his notice period. They discussed the claimant taking holiday and not working the allocated shifts in the week beginning 6 February. The claimant told Mr Burnett: *"You do what you have to do because you're going to anyway".* Mr Burnett took this as the claimant's agreement to take holiday in the week beginning 6 February and the claimant was notified on 26 January via the app that his shifts for that week had been cancelled and treated as holiday.

8. On Sunday 29 January 2023, Joe Burnett sent the claimant a WhatsApp message (J53) about the arrangements for the shifts for week beginning 30 January as follows: *"Hey…I'm going to work on Saturday so will take you off rota, making Friday your last day. Can give you Wednesday if you want? So shifts would be Tues – Fri."* The Saturday referred to was 4 February. The claimant did not reply.

9. In an email to Ms Banner dated 30 January 2023 (J44) the claimant stated:

"Dear Clare I am writing to raise a formal grievance.

I have a complaint regarding my notice. I said that I would work up till the 11th February 2023 you agreed to this in an e-mail on the 23rd of January.

Joe has now removed me from the rota for the week commencing the 6th and since messaged to say I am no longer required on the 4th of February but he can give me Wednesday 1st of February.

I have already had to move arrangements as I was told I would be working 1st till the 4th inclusive as he has now put me on Tuesday 31st.

I have evidence in the form of emails of cancelled off shifts and a WhatsApp message regarding Saturday the 4th of February a total of 63 hours that I was happy to work but I'm now being told I am not needed. I am entitled to be given payment in lieu of notice. I have spoken with ACAS this morning regarding this matter and feel I have no other option but to take this course action...."

10. Ms Banner responded by return email on 30 January (J30): *"Dear Graham I can meet to talk this formal grievance during your break tomorrow Tuesday 31st January at 3.30 pm. Please let me know if that works for you. With regards to Saturday – the question had been asked to you informally by message but no shifts have been removed on Saturday as you had not confirmed availability. I can confirm you can still have Saturday shift as agreed and in when I work."*

11. The claimant was unable to attend either the grievance meeting or his shifts on 31 January to 3 February inclusive because the ferries were cancelled. Ms Banner therefore telephoned him on 31 January. In the telephone conversation Ms Banner told the claimant she had looked into the issue he had raised about his holiday entitlement for his previous period of employment and that he was due 84.658 hours in total, once holiday for his previous employment was included. In calculating the sum the claimant would be due in payment of holiday when he left on 11 February, Ms Banner had expected that the claimant would work the shifts he had been allocated for the week beginning 30 January and that he would then take holiday in the week beginning 6 February. She included the week beginning 6 February in the holiday total.

12. As stated above, in the event, the claimant did not in fact attend work for his any of his shifts between 31 January and 3 February due to ferry cancellations.

13. On Friday 3 February the claimant managed to get across to the hotel for the postponed grievance meeting. He was accompanied by a colleague and a note was taken by Martyn Smith. Clare Banner chaired the meeting. So far as relevant, the note of the meeting (J32) stated: *"Notice was handed in, times were allegedly changed. Graham claims to have lost hours. A contract was shown for example of lea. Holiday pay was granted. 120 hours claimed wrong. Holiday will be counted by Clare. …It's thought there was an understanding with Joe about Graham's last weeks. Clare believes holiday would be more suitable for last week as they are due….Clare points out full notice was not handed or holidays."*

14. Following her meeting with the claimant, Ms Banner investigated his grievance and confirmed to him the outcome, which was that: (i) The claimant had been given shifts in the week commencing 30 January but had not come into work that week, despite having those shifts confirmed to him as not changed. He would not, therefore be paid for that week. (ii) Ms Banner considered that reasonable notice had been given to the claimant to change his shifts for the week commencing 6 February to holiday as provided for in his employment contract. His grievance was accordingly not upheld. The grievance outcome was communicated to the claimant in an email dated 15 February and he was offered a right of appeal, which he declined as it was to the hotel's accountant, who was Ms Banner's sister.

15. The claimant's shifts from Thursday 7th to Saturday 11th February were changed by the respondent from working shifts to holiday on or about 26/27 January and he was notified accordingly on that date.

16. The claimant's employment contract provides that the holiday year runs from 1 September to 31 August. The claimant had already taken two weeks of his holiday entitlement for the holiday year that began 1 September and he had approximately a week left pro rata for that year. Clause 6.3 of the contract provides as follows:

> *"6.3 You must take all of your holiday during the holiday year in which it accrues and carrying forward holiday is not permitted unless either agreed in advance by your Manager or where the law allows holiday to be carried forward.*
>
> *…..*
>
> *6.5 We reserve the right to require you to take holidays on particular dates including during any notice. If so, you will be given reasonable notice, which may be shorter than notice under the Working Time Regulations 1998.*
>
> *6.6 When your employment ends, you will be paid in lieu of any accrued but untaken holiday for that holiday year. In some cases the law allows*

untaken holidays to be carried forward from a previous year where you have been unable to take it due to long term absence, in which case the payment in lieu may also include untaken holiday carried forward from the holiday year prior to the last holiday year. You will be required to repay us if you have taken more holiday than your accrued allowance when your employment ends."

17. On or about 1 March 2023, the claimant was paid £1,269.87 (gross) in respect of *"Outstanding holiday 21 – 23".* A pay slip (J50) was sent to him confirming the payment. This amounts to 84.658 hours at £15 per hour, which was the claimant's correct holiday entitlement. It included payment for the holidays used in the week beginning 6 February along with the amount the respondent had agreed to pay in respect of holidays accruing for the previous 2021 employment. Although the sum paid was correct, the respondent's inclusion of holidays that had been taken along with those accrued but untaken at termination in one sum in the pay slip was liable to cause confusion.

Discussion and decision

18. The claimant was employed by the respondent on a zero hours contract. However, he normally worked 37 hours per week. On 23 January, he resigned from his employment, giving notice that his last day would be 11 February. Despite this notice being short in terms of the contract, it was accepted by the respondent. The claimant worked as normal and was paid for the week beginning 23 January and no issue arises in relation to that week. The claimant was allocated work for a number of shifts in the week beginning 30 January. However, he did not attend work for those shifts because of ferry cancellations. He is not entitled to payment for shifts he did not attend. With regard to the week beginning 6 February, the respondent's position is that the claimant agreed to take holiday that week; but that even if I concluded that the words he accepted in cross examination that he said to Mr Burnett on 27 January *("You do what you have to do because you're going to anyway")* did not amount to agreement, the respondent was entitled to require him to take holiday that week anyway under clause 6.5 of the contract.

19. Clause 6.5 of the contract says: 6.5 We reserve the right to require you to take holidays on particular dates including during any notice. If so, you will be given reasonable notice, which may be shorter than notice under the Working Time Regulations 1998." In my view, the claimant's response to Mr Burnett amounted to reluctant acceptance of the request to take holiday in the week beginning 6 February. However, even if I am wrong about that, Mr Burnett's requirement notified to the claimant on 27 January that the claimant should take holiday under clause 6.5 in the week beginning 6 February was reasonable notice, standing the terms of Regulation 15 of the Working Time Regulations 1998. The clause entitled Mr Burnett to require the claimant to take that week as holiday. Thus, the payment of £1,269.87 (before tax and NI) which the claimant received from the respondent on 1 March 2023 for outstanding holiday pay included his payment for the week beginning 6 February. The claimant has accordingly been paid all the money he is entitled to by the respondent and the claim is dismissed.

20. It remains for me to say that the respondent could not in fact have been compelled to pay the claimant for his outstanding holiday for a previous period of employment with them because any claim he had for this money was time barred. In my view, the fact that the respondent nevertheless paid it to him showed them to be decent employers.

Employment Judge:	**M Kearns**
Date of Judgment:	**05 June 2023**
Entered in register: and copied to parties	**08 June 2023**