



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106239/2022 (V)

Public Final Hearing held in Glasgow ET (by CVP) on 25 July 2023

10

Employment Judge Tinnion

Mr. Michal Biernat

Claimant
Represented by
Mr. Biernat (son)

15

Ostelice Ltd.

Respondent
Represented by
Mr. F. Minervini
(Director)

20

JUDGMENT

25

1. The Claimant's claim of unauthorised deductions from wages in breach of s.13(1) of the Employment Right Act 1996 in respect of wages earned during the period 1 - 13 August 2022 is well founded (in part) and the Claimant is entitled to a remedy.

2. The Claimant's claim of unauthorised deductions from wages in breach of s.13(1) of the Employment Right Act 1996 in respect of paid annual leave accrued but not taken during the period 7 March – 13 August 2022 is well founded and the Claimant is entitled to a remedy.

30

3. The Claimant's claim of unauthorised deductions from wages in breach of s.13(1) of the Employment Right Act 1996 for sick pay relating to the period 14 – 22 August 2022 is not well founded and is dismissed.

4. The Respondent shall pay the Claimant the total sum of **£2,334.78**:
 - a. £936 in respect of the claim referred to at para. 1 above; plus
 - b. £1,398.78 in respect of the claim referred to at para. 2 above.

5

REASONS

Statements of case

5. By an ET1 presented on 21 November 2022, the Claimant presented the following claims against the Respondent, his former employer for whom he had worked as a chef at its 'Osteria Restaurant': first, a claim regarding the Respondent's alleged failure to pay him the wages he says he earned during 12 shifts he worked in the period 1-13 August 2022; second, a claim that after he left his employment with the Respondent, the Respondent failed to pay him for the paid annual leave he accrued but did not take during the period 7 March 2022 – 13 August 2022; third, a claim regarding the Respondent's alleged failure to pay him wages equivalent to the sick pay he claims he was entitled to for the period 14-22 August 2022; and fourth, a claim of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 (which the Tribunal later dismissed following its withdrawal under Rule 52, it not being in dispute that the Respondent had not employed the Claimant for 2 years).
 6. In his Schedule of Financial Loss (undated), the Claimant claimed the sum of £1,584 (132 hours worked over 12 days x £12/hour) in respect of the first claim; the sum of £1,518 (11.5 days annual leave x 11 hours/shift x £12/hour) in respect of the second claim; and £96.35 in respect of his third claim.
 7. By its ET3—which it was given permission to lodge out of time and rely upon—the Respondent resisted all claims. In its ET3, the Respondent's key allegation was that on Saturday 6 August 2022, the Claimant – who had been found drunk outside the Osteria Restaurant smoking a cannabis cigarette - entered the kitchen, intimidating staff, who left, as a result of which the Respondent had to cancel all bookings for the next 4 days, causing it to lose £10,000 in takings, and after 6 August 2022 the Claimant never returned to

work. The Respondent originally attempted to bring a breach of contract claim against the Claimant seeking £9,000 in damages, but that claim was struck out as the Claimant had not brought a breach of contract claim against the Respondent (a prerequisite of an employer's breach of contract counterclaim). The ET3 did not address the Claimant's holiday pay claim.

Trial

8. The claim was heard on 25 July 2022. The Claimant was represented by his son, the Respondent by director/owner Mr. F. Minervini. The Tribunal heard oral evidence from the Claimant (who was assisted by a Polish translator), and for the Respondent oral evidence from witnesses Mr. Mohammed Benmoussa and Mr. Flavio Buetto. The Claimant relied on a 13 page production. The Respondent did not lodge a production. The trial was listed for 3 hours starting at 10am, and the translator was not available after 1pm, hence judgment had to be reserved.

15 Findings of fact

9. The Tribunal makes the following findings of fact on the balance of probabilities.

Parties

10. The Respondent runs a restaurant called 'Osteria Restaurant'. The Respondent employed the Claimant (whose first language is Polish) as a chef at the restaurant from 7 March 2022 until August 2022 on a date in dispute (the Claimant said his last day of employment was 13 August, the Respondent stated the Claimant's last day was 6 August).

Events

25 11. It is not in dispute that the Claimant began working for the Claimant on 7 March 2022. It is also not in dispute that the Claimant was paid £12/hour.

12. The parties disputed the length of the Claimant's normal shift: the Respondent alleged it was 8 hours (11am-9pm, 2 hour unpaid break), the Claimant alleged it was 11 hours (10am-10pm, 1 hour unpaid break). The Tribunal finds the Claimant's normal shift was on average 9.5 hours long (10am arrival/shift start to prepare in anticipation of 11am opening to public, shift ending at 930pm after restaurant closed at 9pm, 2 hour unpaid break).
13. During the period 7 March – 5 August 2022, no events of note occurred. The Claimant worked at the restaurant without incident, and did not take any annual leave.
14. The Tribunal accepts Mr. Buetto and Mr. Benmoussa's evidence that an incident occurred at the restaurant on Saturday 6 August (not 4 August) which resulted in the restaurant not being open that day and 3 further days' bookings having to be cancelled. The Tribunal does not accept that the Claimant did any work for the Respondent over those 4 days (6-9 August 2022).
15. The Tribunal does not accept 6 August was the Claimant's last working day. It is clear that on 13 August 2022 the Claimant experienced a health-related incident as a result of which he attended the Emergency Department, Glasgow Royal Infirmary at approximately 12.30pm. Contemporaneous clinician notes record that the Claimant reported that he had sudden-onset chest pain "*while at work*" which came on following heavy lifting. The Tribunal does not believe the Claimant would have made this account up when he stated it. The Tribunal infers that by no later than 10 August the Claimant was back at work, the restaurant was trading normally again, and the Claimant worked his normal shifts on 10-12 August 2022. The Tribunal finds that the Claimant likely worked no more than 2 hours on 13 August 2022 before he fell ill and left work to attend hospital.
16. After carefully explaining to the Claimant the difference between the Claimant's last working day and the date the Claimant's employment with the Respondent ended, the Claimant stated his employment ended on 13 August

2022. It follows that when the Claimant says he was off work on sick leave between 14-22 August 2022, he was no longer employed by the Respondent.

First claim: discussion/conclusions

5 17. The Tribunal finds that the Claimant worked his normal shift hours on 1-5 August (5 days), 10-12 August (3 days), and 2 hours on 13 August 2022 (930am-1130am), and accepts he was not paid for those shifts (it formed no part of the Respondent's case that he had been so paid).

10 18. The total sum the Claimant is owed in wages under this heading is therefore £936 (5 days x 9.5 hours x £12/hour, plus 3 days x 9.5 hours x £12/hour, plus 2 hours x £12/hour).

Second claim: discussion/conclusions

15 19. The Tribunal finds that over the period 7 March 2022 – 13 August 2022 (a total of 160 days) the Claimant accrued a statutory entitlement to 12.27 days paid annual leave under reg 14 of the Working Time Regulations 1998 (28 days multiplied by 160/365).

20 20. The total sum the Claimant is owed in wages under this heading is £1,398.78 (12.27 days x £114/day), it not being in dispute that the Respondent did not pay the Claimant anything in respect of his paid annual leave entitlement.

20 Third claim: discussion/conclusions

25 21. This claim is dismissed for two reasons. First, the Claimant's last day of employment was 13 August 2022. The Respondent was under no obligation to pay the Claimant sick pay relating to any period after his employment had ended. Second, there is no evidence the Claimant ever submitted a sick note, which would have been a prerequisite to being entitled to sick pay.

30 **Employment Judge: A Tinnion**
Date of Judgment: 25 July 2023
Entered in register: 26 July 2023
and copied to parties