



EMPLOYMENT TRIBUNALS

Claimant: Mr William Britten

Respondent: The Lion Hotel (Berriew) Limited

Heard at: Welshpool ET **On:** 24th April 2023

Before: Employment Judge J Bromige

Representation

Claimant: Mrs Britten (Claimant's Wife)

Respondent: Ms Wood (Litigation Consultant)

JUDGMENT

1. The Claimant's claim for wrongful dismissal (notice pay) succeeds. The Respondent will pay the Claimant **the sum of £1235.26 (gross)**.
2. The notice pay is calculated on the basis of the Claimant's entitlement to 4 weeks notice pay. The Claimant was paid £615.38 per week (gross). This sum reflects the outstanding balance of the notice pay owed, giving credit for sums already paid.
3. The sum awarded is calculated gross of income tax and employee national insurance contributions, and the Claimant is responsible for any income tax or employee national insurance contributions which may become due.
4. The Claimant's claim for unlawful deduction of wages is not well founded and is dismissed.
5. The Claimant's claim for breach of contract (bonus) and for holiday pay under the Working Time Regulations are dismissed.
6. **The Respondent failed to provide the Claimant with a written contract of employment as per s.38(3) of the Employment Act 2002 and s.1(1) of the Employment Rights Act 1996. The Respondent will pay the Claimant the sum of £1142.00. No deductions for tax, etc, are required to be made on this sum.**
7. The recoupment provisions do not apply.

REASONS

Preliminary Matters

1. The above claim was heard at Wales Employment Tribunal, sitting at Welshpool Magistrates Court, on 24th April 2023. An ex-tempore (oral) judgment was delivered on the day, and the short form judgment sent to the parties on 26th April 2023.
2. On 28th April 2023, the Claimant's representative wrote to Cardiff ET requesting written reasons as the parties are entitled to under rule 62(3) of the Employment Tribunal Rules of Procedure 2023. Unfortunately, this request was not passed to the Employment Judge until 21st July 2023, and due to the Judge's other commitments since that date, this is the earliest the Judge has been able to prepare full written reasons. The Judge would like to record, formally at the outset of this judgment, for the delay.

Issues in the case

3. The Claimant issued his ET1 on 5th August 2022. He ticked various boxes at §8.2 of the ET1, indicating claims for notice pay, holiday pay, arrears of pay and 'other payments'. The Claimant stated that he had been employed by the Respondent as Head Chef from 17th May 2021 until 19th April 2022. He said he had been underpaid in his final salary payment on 30th April 2022 by 3 days, was entitled to 15 days of accrued but untaken holiday from 2021/22 and a further 1.5 days in the 2022/23 holiday year, his notice pay and payment for a previously agreed profit share. He also complained that he had not been provided with a written copy of his contract of employment.
4. The Respondent filed their ET3 on 20th September 2022. It was written by Michael Davies, the Director of the Respondent. He said that the Claimant had been invited to a meeting on 19th April 2022 to discuss his performance at work. Mr Davies wrote that *"after several previous reports of professional negligence and unprofessional behaviour occurrences, that were potentially threatening our business, I concluded that you would have to be dismissed for gross misconduct. Reports of your behaviour in the kitchen had come to a head and needed to be explained to you... you turned around on your heels and walked out within 20 seconds of the meeting"*.
5. It was therefore not clear whether the Respondent was saying that they had dismissed the Claimant for gross misconduct, or he had resigned on that day. In either scenario, notice pay might be payable, if the Claimant had been dismissed, and the Respondent could not establish that there had been a repudiatory breach, or if the Claimant had resigned but with notice, which the Respondent had refused to pay.
6. The ET3 went on to make nine particular allegations against the Claimant, including swearing at colleagues, sexual harassment against a 16 year old female member of kitchen staff, which the Respondent asserted was supported by *"signed statements to cover all the above incidents"*.

7. As to the issue of the contract, the Respondent said that a contract of employment had been issued, however the Claimant had refused to sign it. However, all monies owed, including time off in lieu and holiday pay, had been paid.
8. Unhelpfully, the parties had been unable to agree a joint bundle of documents, and so I was provided a bundle from each side. The Respondent's bundle ran to 38 pages, along with witness statements from Mr Davies, and Lee Kendall, the Respondent's General Manager. The Claimant's bundle was 39 pages, which incorporated his witness statement.
9. With the agreement of the parties, I clarified and set out the issues to be determined as:

Wrongful Dismissal/Notice Pay

- a. What was the Claimant's notice period?
- b. Did the Claimant resign without notice on 19th April 2022?
- c. If not, did the Respondent dismiss the Claimant on 19th April 2022?
- d. If the Respondent did dismiss the Claimant, was the Claimant guilty of gross misconduct (i.e. did the Claimant do something so serious that the Respondent was entitled to dismiss him without notice?)

Holiday Pay

- e. What was the Claimant's leave year?
- f. How much of the leave year had passed when the Claimant's employment ended?
- g. How much leave had accrued for the year by that date?
- h. How much paid leave had the Claimant taken in the year?
- i. Were any days carried over from previous holiday years?
- j. How many days remain unpaid?
- k. What is the relevant daily rate of pay?

Unauthorised deduction from wages

- l. Did the Respondent make unauthorised deductions from the Claimant's wages for the period 1st – 19th April 2022, and if so, how much was deducted?

Breach of contract

- m. Was there a term in the Claimant's contract of employment relating to a profit share/bonus scheme?
- n. If so, did the Respondent fail to pay such a profit share and/or bonus to the Claimant at the relevant time?
- o. Was that a breach of contract?
- p. How much should the Claimant be awarded as damages?

Failure to provide written statement of employment particulars.

- q. When the proceedings were begun, was the Respondent in breach of their duty to provide the Claimant a written statement of initial employment particulars as per s.1(1) Employment Rights Act 1996?

- r. If so, has the Tribunal made an award to the Claimant for any other claim as set out above?
- s. If so, whilst the Tribunal must make an award for the minimum amount to be paid, is it just and equitable in all the circumstances to award the higher amount?

Findings of Fact

10. In early 2021, the Respondent advertised for a Head Chef/Kitchen Manager role on the website indeed.com. The salary was listed as between £24,000 - £30,000 per annum (gross), with performance bonus and tips listed as additional pay. Under "benefits", the Respondent listed "*Company Pension, Flexible schedule, Profit sharing*". The advertisement did not say how many hours a week the job was for.
11. I accept the Claimant's evidence that he met Mr Davies on 9th May 2022 where it was agreed that the Claimant would work 40 hours per week for a salary of £30,000 (and this is confirmed at §5.1 of the ET3). His notice period would be one month. No other particulars, such as the bonus or profit sharing were discussed at this meeting. Mr Kendall offered the Claimant the job in writing on 11th May 2022, and the Claimant accepted the following day. The job offer was made "*on a 3 month trial basis*" which I infer was meant to be a probationary period.
12. In October 2021, the Claimant received a pay rise to £32,000.00.
13. The Respondent relied upon an unsigned contract in their bundle and asserted that the Claimant had refused to sign it on several occasions. The contract was for a salary of £32,000.00, with a start date of 17th May 2021 and for an average of 43 hours per week.
14. I have concluded that this is not an accurate document, nor that it was provided to the Claimant during his employment. In reaching this judgment, and reminding myself as to the civil standard of proof, I have concluded the following:
 - a. The Claimant received a pay rise to £32,000.00 in October 2021. This contract refers to that same annual salary. It therefore could not have been a document that was prepared in the first five months of the Claimant's employment;
 - b. It is inconceivable that the Respondent would have awarded the Claimant a pay rise, whilst the Claimant was, on their own case, unreasonably refusing to sign a contract of employment;
 - c. The contract makes no reference to the three month trial/probationary period;
 - d. I have already found that the Claimant negotiated a 40 hour working week, so there would have been no reason for the contract, even at the start of the employment, to refer to 43 hours.
15. Further, I am not persuaded that Mr Davies' evidence about this contract was truthful. Overall I find that Mr Davies was not an honest witness. In the ET3, he has made nine allegations against the Claimant, including a very serious one of sexual harassment. Despite asserting that there was signed witness statements to support these allegations, none have been forthcoming. The Respondent has been professionally represented in these proceedings and so will have been aware

of the importance of disclosing such documents if they exist.

16. Therefore in the absence of a written contract, I must therefore determine the terms of the contract. The Claimant negotiated a 40 hour week, with a four week notice period. No further specifics around the bonus scheme or profit share were negotiated between the parties and despite appearing in the advertisement, they did not form part of the Claimant's contract.
17. The parties agreed that the holiday year ran from 1st April – 30th March each year. The Claimant did not adduce any evidence to suggest that there was a contractual term entitling him to roll over some or all of his untaken accrued holiday from previous years and I do not find that this formed part of the contract.
18. On 19th April 2022, the Claimant arrived at work and was called into a meeting with Mr Davies and Mr Kendall. Mr Davies had on his account, received the 9 complaints I have already referred to concerning the Claimant, and had further concerns about the "kitchen side" of the business, including that there was a lack of Safer Food records which hadn't been completed for 5 weeks. Mr Davies told me that he had concluded the Claimant had committed gross misconduct. He also accepts that he used the term during the meeting "we have to part company".
19. The Claimant was also told on Mr Davies' account (which I accept), not to change into his Chef's whites. That indicates that the Claimant had an intention to work that day. On balance of probability, the meeting held by Mr Davies was to dismiss the Claimant. This is supported by the contemporaneous email that the Claimant sent on 20th April 2022, an account that was not challenged by Mr Davies until 4th May 2022.
20. The Tribunal prefers the evidence of the Claimant as to what happened on 19th April 2022, which is supported by the contemporaneous documentation and also the Respondent's pleading in the ET3. Mr Davies had concluded that the Claimant would be dismissed for gross misconduct, and he did dismiss him, without notice, at that meeting.
21. The Claimant's last working day was therefore 19th April 2022. Between 1st April – 19th April 2022 the Claimant worked 12 days (inclusive of 19th April) and also took a further 3 days as paid holiday, a total of 15 days.
22. With the holiday year commencing on 1st April 2022, the Claimant would have accrued 1.34 days of holiday.

The Law

23. The Claimant did not bring a claim for unfair dismissal under Part X of the Employment Rights Act, and in any event did not have qualifying service to bring such a claim. However, in the context of a factual dispute about a summary dismissal, and when the Tribunal has already found that the Respondent has not adduced evidence to support its contentions, it is important for the Tribunal to direct itself as to the need not to conflate the two types of dismissal claim. The concepts of wrongful and unfair dismissal are separate – the former being a matter of contract law and the latter a statutory construct under the ERA 1996. The Tribunal must be careful not to conflate the two issues, as per HHJ Serota QC in *Shaw v B&W Group Limited* UKEAT/0583/11/SM (at para [26]):

Although the Employment Tribunal was aware of the different concepts of wrongful dismissal and unfair dismissal, it appears to have conflated them. In our opinion, the phrase "due cause" must be construed in the context of an employment contract and one that permits immediate or summary dismissal without compensation. It is clear to us that due cause therefore must be something that would justify the premature termination of the contract; that is to say, some serious breach of contract on the part of the Claimant, which in shorthand we have described as gross misconduct. In our opinion, it is not sufficient simply to allege a reason for which one might have a reasonable belief if there is to be a valid dismissal on due cause; the Respondent must be able to prove the due cause.

24. Therefore the burden of proof for the wrongful dismissal claim is upon the Respondent to show that they had due cause to dismiss the Claimant without notice.
25. The Tribunal has also directed itself to s.1 ERA 1996 and s.38 of the Employment Act 2002, s.13 ERA 1996 and Regulation 14 Working Time Regulations 1998 dealing with the failure to provide written particulars of contract, unlawful deduction of wages and failure to pay accrued but untaken holiday pay respectively.

Conclusions

Wrongful Dismissal

26. The Respondent has not adduced any evidence to show that the Claimant has committed a repudiatory breach of contract (i.e. gross misconduct) and therefore the wrongful dismissal claim succeeds.
27. The Claimant had a one month notice period. He was paid £2666.66 (gross) per month. As this is a claim for wrongful damages, the Claimant is entitled to be paid that sum gross of tax. However, as set out below, some credit needs to be given for other sums received from the Respondent.

Breach of Contract

28. It seems that it may have been the Respondent's intention for there to be a profit share and/or bonus scheme for the Claimant, but there is no evidence adduced from either side as to how this agreement would have worked in principle, nor did it ever operate during the employment. If there was such an agreement, it was not enforceable during the employment and no award is made for this.

Unlawful deduction from wages

29. As the Tribunal has already found, the Claimant took 3 days holiday and worked 12 days, inclusive of 19th April 2022. This was a total of 15 days.
30. The Claimant's gross daily rate was £123.00 per day, or £98.50 (net). Therefore the Claimant should have received £1477.50 in terms of salary and holiday pay (net).
31. The Claimant received £3347.70 (gross) for his final payment, which was for the month of April 2022. After tax and national insurance, this was £2908.90 (net). He

has therefore received £1431.40 credit, toward the notice pay (wrongful dismissal) sum.

32. Accordingly the Claimant's unlawful deduction of wages claim is not well founded and is dismissed, since he was paid in full for the work done in April 2022. His amount of damages for the wrongful dismissal claim is £1235.26, after credit is given for sums already received.

Holiday Pay

33. There was no contractual provision entitling the Claimant to roll over his accrued but untaken holiday pay from the holiday year 2021/22. Therefore as per Regulation 14(1)(b) of the Working Time Regulations 1998, the Claimant's holiday pay claim is limited to the proportion of leave to which he is entitled in the leave year under Regulation 13(1), less the leave he had already taken.
34. 19 days of the 2022/23 holiday year had been completed. This means that the Claimant accrued 1.34 days of holiday as of 19th April. He had taken 3 days of holiday (between 1st – 3rd April 2022) and therefore was not owed any payment for holiday pay under the Working Time Regulations. The holiday pay claim is therefore dismissed.

Written particulars of employment

35. Because the Claimant has succeeded in at least part of his claims, he is entitled to a minimum of two weeks' pay as per s.38(3) Employment Act 2002. The Claimant's weeks' pay was £615.38 (gross) and so this sum is capped at the statutory maximum in force at the time of £571.00 (gross).
36. Whilst the Tribunal has recorded its finding as to the credibility of Mr Davies, there are no particular circumstances pertaining to the Claimant's employment and lack of contract of employment which aggravate the matter in the Tribunal's judgment, and so the Tribunal does not consider it just and equitable to make a higher award. Therefore the Claimant is awarded the sum of £1142.00 (gross).

Employment Judge **J Bromige**

Date: 13th September 2023

JUDGMENT SENT TO THE PARTIES ON 15 September 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

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