



EMPLOYMENT TRIBUNALS

Claimant: Phoenix Green
Respondent: Heronston Investments Ltd T/A Heronston Hotel
Heard at: By video **On:** 15 December 2023
Before: Employment Judge S Moore

Representation:

Claimant: In person
Respondent: Ms C Powell, Manager

JUDGMENT having been sent to the parties on 16 December 2023 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background and Introduction

1. The ET1 was presented on 18 September 2023. This followed early conciliation with Day A being 14 August 2023 and Day B being 6 September 2023. The Claimant brings claims of unauthorised deduction from wages (wages and holiday pay) and notice pay.
2. The hearing took place on 15 December 2023, remotely by CVP. The Claimant and Respondent both represented themselves, with Ms Powell, General Manager representing the Respondent.
3. The parties had been directed to prepare written witness statements for the hearing. Neither had complied with this order. The Respondent had

provided a bundle which had been sent to the Claimant save for the What's app messages and the pay slips. The Claimant had copies of these.

4. I therefore took evidence in chief orally from the Claimant first and then Ms Powell was able to ask him questions. I then took evidence in chief from Ms Powell. The Claimant did not have any questions for Ms Powell.
5. Throughout the hearing where necessary documents were shared on the screen so that both parties could see the documents referred to.
6. At the start of a break after the Claimant had given evidence, after being specifically warned to mute microphones and switch off cameras during the break, the Claimant was heard stating "what a load of fucking balls". I asked the Claimant about this comment and whether it related to his evidence he had just provided to which he explained it had not and was said as he was feeling stressed about the hearing. I accepted his explanation.

Findings of fact

7. The Claimant commenced employment with the Respondent in October 2022. He was initially employed as a casual member of staff. He initially refused to sign a form confirming his casual status. This was because he had understood he had been employed either part-time or full time and required job security and consistent hours and he was not willing to accept the casual contract on that basis. Nonetheless he commenced employment and generally worked 3 shifts a week over Fridays, Saturdays and Sundays with the hours of 3pm to 11pm.
8. The Claimant subsequently completed a starter form which was signed by the Claimant on 25 November 2022. Someone had added a start date of 28 November but I find the Claimant started his employment before then. The Claimant had written out his email address on the form and the usual necessary starting personal details to allow him to be paid. Ms Powell told the Tribunal that the email should have been added to a system called SAGE who would then send the Claimant an email to enable him to access his pay slips.
9. There was no evidence that this had happened from the Respondent and the Claimant says he only got the pay slips after he had left and asked for copies of his pay slips. I accepted what the Claimant told me about that.
10. The Claimant initially recorded his hours worked on time sheets but was subsequently provided with a clocking in key which he later lost. There was no written agreement that the Respondent could deduct wages from the Claimant if he lost the clocking in key.

11. Before me was a two-page document titled "Contract of Employment". The Claimant accepted that he had completed the first section on the first page titled "Personal Information" and this was his handwriting. In the second part of the first page was a section titled "Job Information"; this was not completed by the Claimant as it was different handwriting. This specified his job title, start date and wage of £9.60 per hour. It stated "contracted number of hours per week" then someone had written the number 24.
12. The second page of this document was also in two sections. The first section was titled "Contract Information". It stated as follows:

"The Heronston Hotel agree (sic) to employ the above named in accordance with the terms shown above, and those laid out in the hotel's staff handbook. A copy of the handbook is available for perusal in the manager's office and staff room".
13. It was then signed below by Ms Powell on 27/1/23. As there was no text above it must have been referring to page 1 of that document. Underneath was a declaration which read as follows:

I agree that the terms of my employment with The Heronston Hotel include those set out above and acknowledge I have received a copy of the contract".
14. Underneath that declaration was a signature and handwritten date of 27/1/23. The Claimant disputed that was his signature and told the Tribunal he had not signed this section of document nor had he seen it before.
15. The Claimant could not explain how what appeared to be his signature was on the form. He did not go as far as to say that there had been fraudulent fabrication of his signature, moreover that he simply was unable to confirm how it came to be on the form.
16. The second part of the second page was also in the Claimant's handwriting with the same signature and date denoting that the Claimant had declined to work over 48 hours. This was also signed and dated 27/1/23.
17. I had sight of an absence request form that the Claimant had completed in January 2023 and the signature on the Contract Information form referenced above is identical. The Claimant has quite specific handwriting. I find that the signature on the second page of the Contract Agreement was the Claimant's signature as it was identical to another signature the Claimant agreed was his and also the handwritten date was in the same handwriting. It was also implausible that the Claimant would not have signed the top part of the agreement, yet dated the signature then signed the bottom part on the same date.

18. For those reasons I find that the Claimant did sign the form and that therefore the terms and conditions in the staff handbook were incorporated into his contract of employment and he is bound by them. At page 4, the handbook provided that it formed part of the contract of employment. At page 10 under "Hours of work" it stated as follows:

"Your normal hours of work will be outlined at your interview and confirmed in your appointment letter. You must make yourself available in order for a rota of work to be created. ...you will be paid to the nearest quarter of the hour following in your clock in/ rota' ed start time.... you will only be paid for the actual hours worked unless its an agreed absence i.e. holiday."

19. The Respondent had produced the Claimant's clocking in records. These recorded that the Claimant had clocked in late or finished early on 33 times between 17/2/23 until his last date worked. On each occasion he was docked 15 or on the odd occasion 30 minutes pay in accordance with the above term.

20. Turning now to the events in Summer 2023. The Claimant had booked authorised leave from 26 June 2023 to 16 July 2023 and he was therefore due to be back in for working on the weekend on 21 July 2023, which was a Friday.

21. The Respondent would generally have a back to work meeting for anyone that had a two week absence even a holiday. Whilst this may be an unusual arrangement it is one corroborated in the staff handbook and by the WhatsApp messages between the Claimant and his Line Manager, Mark Burgess. On 20 July 2023 the Claimant messaged Mr Burgess to say, "*sorry for the late update I was meant to be back this week but was late messaging you regarding my parents going on holiday*" and they needed him to look after their dogs and the property. He said he would be completely available going forward and apologised for the late notice and inconvenience.

22. By that time the rota for that particular weekend had already been drawn up.

23. There followed a series of WhatsApp messages between Mr Burgess and the Claimant. Mr Burgess said that he had not put the Claimant on the rota as he was waiting for his call and he consistently then asked him to ring him. On 21 July 2023 there were a further two messages, where Mr Burgess made it clear that he needed the Claimant to ring him so he could finish the rotas for the following week and reiterated that on 22 July 2023 also.

24. On 23 July 2023 the Claimant apologised for not contacting him saying he had personal issues. These were not shared with the Line Manager at the time other than a generic explanation.
25. On 27 July 2023 the Claimant sent a further message and said he was available for work and apologised for the confusion, Mr Burgess then rang the Claimant and left a voicemail. The Claimant acknowledged another text message but did not call Mr Burgess back as requested. On 1 August 2023 the Claimant messaged and Mr Burgess asked the Claimant to come and see him.
26. The Claimant did not go and see Mr Burgess. On 4 August 2023 he contacted Ms Powell who was on holiday in Florida and she asked him to contact Mr Burgess. At that point the Claimant messaged the Respondent to say that he would be finishing work due to the situation on Sunday 13 August 2023. He never returned.
27. The Claimant later was sent copies of all of his pay slips and claims he was underpaid by 96 hours over the time he had worked for the Respondent. The Claimant had not explained how he had calculated this amount or when the deductions had been made other than what was set out in his ET1 which was that 33.25 of those hours were at £9.60 per hour and 62.75 @ £10.52. The Claimant's wages were increased to the higher rate from April 2023. It would appear that the Claimant based his calculations on the 15 /30 minute deductions set out on his timesheets as detailed above.
28. On 8 September 2022 the Respondent paid the Claimant 48 hours for the two weeks he had been absent after holiday (weeks commencing 31 July and 7 August 2023).
29. The Claimant had incurred bank charges of £2.36 as a result of not being paid his holiday pay in the August pay run.

Holiday Pay

30. The holiday year runs from January – December. Employees are permitted 28 days per year pro rated for part time employees. The Claimant worked three days per week. The effective date of termination was 13/8/23 which means based on leaving part way through the holiday year he had accrued 10.5 days leave. He had carried over 3 days from 2022 and therefore was entitled to 13.5 days leave. He had already taken leave during the year and asserted that he was owed 5 day's holiday pay. (The Claimant had stated 6.5 days in his ET1 but had been paid 1.5 days in the September 2023 pay run).

31. At the start of her witness evidence Ms Powell accepted that the Respondent owed the Claimant 5 day's holiday pay. This was no longer in dispute.

The Law

32. S13 of the Employment Rights Act 1996 (ERA 1996") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.
33. A 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
34. S23 ERA 1996 sets out the definition of wages which includes pay, holiday pay and notice pay.

Conclusions

35. Contract Terms – unpaid wages
36. In my judgment the evidence plainly shows that the Claimant signed to agree the contract terms provided in the staff handbook. The signature was the Claimant's signature. There is no other plausible explanation. As he accepted the terms he is bound by them. This means that he accepted the terms that if he was late or finished early, the wages would be rounded down to the nearest quarter of an hour. It also means that he was not guaranteed to be paid 24 hours per week regardless as to whether he worked those hours or not. See my findings of fact above at paragraphs 17 and 18.
37. This term was both an express term of the Claimant's contract and as per my finding that the Claimant signed to say he agreed those terms, the deductions were lawful within the meaning of section 13. As such the claim for unpaid wages is not well founded.
38. In relation to the period between 21 July 2023 – 13 August 2023 I have concluded that a claim for wages during this period cannot succeed as the Claimant did not make himself available to work during this period. The

Claimant accepted in his initial text message on 20 July 2023 that he was late in letting the Respondent know he was available. Mr Burgess repeatedly tried to contact the Claimant and asked him to get in touch, but the Claimant failed to do so. In my judgment the messages show Mr Burgess had every intention of putting the Claimant on the rota but needed to know when he was available and he was getting confused and mixed messages from the Claimant as well as days with no responses at all. It cannot be fair to then complain that he was not paid for work when he did not communicate with his employer in a reasonable manner, was unavailable to work and did not perform any work.

39. The Respondent was not permitted to deduct £10 for a lost clocking in key as there was no such agreement or term of contract. I ordered the Respondent to pay this sum to the Claimant and the £2.36 bank charge.
40. Then notice pay claim is not well founded as the Claimant did not make himself available to work during the notice pay period and further, the Claimant was paid for two weeks' when he had not performed any work. As such this claim is not well founded.

Employment Judge S Moore
Dated: 19 January 2024

REASONS SENT TO THE PARTIES ON 22 January 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche