



EMPLOYMENT TRIBUNALS

Claimant: Ms Y Shek

Respondent: Orion Catering Services Limited

Heard at: East London Hearing Centre

On: 30 November 2023 and 5 December 2023

Before: Employment Judge Yale

Representation:
Claimant: Mr M. Padley (Solicitor)
Respondent: In person

JUDGMENT having been sent to the parties on 13 December 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

The Claims:

1 The claimant worked for the respondent as kitchen staff in a restaurant called “Aquila”, not to be confused with a company called “Aquila Restaurant Limited”, which the respondent says tried to take over the business. The claimant began working there on 27th August 2022 and, she says, finished working there on 9th February 2023. The respondent says that her employment was transferred to Aquila Restaurant Limited on 1st November 2022 and, from then on, that company, not the respondent, was responsible for the claimant’s pay and conditions. This is denied by the claimant.

2 It is accepted the claimant was at least a worker, which is required for each of her claims. Even if this was not accepted, it is clear she falls within the definition of at least being a worker. She brings claim number 3201169/2023 alleging unlawful deductions from wages, failure to pay holiday pay and failure to provide written particulars. She also claimed interest on the sums owing but this case does not fall within those limited classes of case in which the Employment Tribunal can award interest, which is conceded and not pursued by the claimant.

3 At the start of the hearing, the issues were agreed as follows:

- a. Whether the claimant's claim was filed in time

- b. Whether the Aquila restaurant had been transferred to Aquila Restaurant Limited and, if so, on what date
- c. The number of hours for which the claimant fell to be paid
- d. The claimant's hourly rate
- e. The payments made (all agreed save two on 27th and 29th August 2022, totalling £230)
- f. The claimant's entitlement to holiday pay
- g. Whether there was a failure by the respondent to provide the claimant with written particulars of her employment

4 The claimant gave evidence, as did Mr Edwards, on behalf of the respondent. There were no other witnesses. Each gave evidence through a Cantonese interpreter, although Mr Edwards chose to answer some questions in English. The claimant is also deaf and, with the agreement of the parties, in the absence of an interpreter who could sign, the translation for her had to take place in writing.

Law:

5 Section 23 of the Employment Rights Act 1996 provides as follows:

23 Complaints to employment tribunals.

- (1) A worker may present a complaint to an [F1 employment tribunal]—
 - (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
 - (b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),
 - (c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or
 - (d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).
- (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

6 Section 13 of the Employment Rights Act 1996 provides as follows:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

7 Section 1 of the Employment Rights Act 1996 provides as follows:

1 Statement of initial employment particulars.

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) Subject to sections 2(2) to (4)—

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker,

(b) the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work including any terms and conditions relating to—

(i) normal working hours,

(ii) the days of the week the worker is required to work, and

(iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay,

(ia) any other paid leave, and

(iii) pensions and pension schemes,

(da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,

(e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f) the title of the job which the [F14worker] is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga) any probationary period, including any conditions and its duration,

(h) either the place of work or, where the [F16worker] is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,

(k) where the worker is required to work outside the United Kingdom for a period of more than one month—

(i) the period for which he is to work outside the United Kingdom,

(ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv) any terms and conditions relating to his return to the United Kingdom.

(l) any training entitlement provided by the employer,

(m) any part of that training entitlement which the employer requires the worker to complete, and

(n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.

8 Section 38 of the Employment Act 2002 provides:

38 Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment

particulars or of particulars of change or (in the case of a claim by an worker) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the [F6worker] and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by a worker) under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

Findings of Fact:

Time Limit:

9 The respondent claims that the claimant's claim is out of time. The claimant's employment ended on 9th February 2023, she engaged ACAS on 10th May 2023, an ACAS certificate was provided dated 30th May 2023 and proceedings were begun on 30th June 2023. The time limit for unauthorised deductions from wages, where there is an alleged underpayment, runs from when the payment was due. The claimant said she was paid at the end of each month. If this is correct, the claim is in time. The respondent said the claimant was paid at the end of each shift. If this is correct, the claim is out of time.

10 Mr Edwards included in the bundle a document purporting to be the claimant's employment particulars, which he said were provided to the claimant when she started. The claimant said she does not remember receiving them. In those employment particulars, which I do not accept were provided to the claimant, for reasons I shall set out later, it says the claimant should be paid by direct credit transfer into the claimant's bank account at the

end of each month. The respondent sought to rely on these particulars to some extent but claimed that some of the provisions were not intended to apply to the claimant, despite it being allegedly addressed to her in an English name she uses, "Sarah". The respondent said the pay policy was not intended to apply to her as she already had a job and did not want to go onto PAYE because she did not want her other employer to find out.

11 I have considered the bank statements the claimant has provided. There were payments from "Aquila Restaurant" on 20th February 2023 and some further payments into her account in March 2023. There are no payments in February 2023 before the 20th of the month. If payments were being made immediately after her shift in cash, the presence of transfers from the respondent, Mr Edwards and Aquila, payments having been made into the claimant's bank account in each of those names, make no sense.

12 The evidence is not consistent with payments being made immediately after her shift in cash, as claimed by the respondent, and I find that payments were made in arrears by bank transfer. Payments appear to have been ad hoc at different times of the month but were always in arrears. On the balance of probabilities, I find payment fell due on the last day of each month but the actual making of the payments was erratic, causing some payments to be made earlier. In any event, the earliest payment in February 2023 was 20th and therefore, in my judgment, the last of the payments fell due no earlier than that date. Even taking 20th February 2023 as the date the last payment fell due, the claim is still within time.

Transfer of the Business:

13 The claimant began working at the Aquila restaurant on 27th August 2022. It is conceded that, at that time, the respondent owned and operated that restaurant. The claimant said she was unaware of any transfer, she was never notified of a transfer and, as far as she was concerned, the business continued to be run by the respondent. It is of note that Aquilla has been dissolved whilst the respondent is still registered at Companies House. The claimant maintains she worked for the respondent throughout the period she worked at the restaurant. She maintained she was never aware of the transfer and she continued to deal with Mr Edwards, who operated the respondent business. However, the respondent's case, certainly initially, was that the business was transferred to another company, Aquilla Limited, on 1st November 2022, run by someone other than Mr Edwards.

14 Mr Edwards gave inconsistent evidence about this alleged transfer. In the bundle, the respondent provided a document purporting to be a letter addressed to the claimant. Mr Edwards said that this letter, dated 31st October 2022, had been passed to the claimant on 30th October 2022 at a meeting. The effect of this document was that, from 1st November 2022, the claimant would be employed by Aquila Restaurant Limited. The claimant denied ever having seen the letter.

15 In that letter, it was said the business would transfer from the respondent to Aquilla on 1st November 2022 and that the claimant's wages would be processed by Aquilla thereafter. This did not, in fact, occur, and the claimant's bank statement clearly shows a payment from the respondent on 21st December 2022. There were also payments to another of the claimant's bank accounts directly from Mr Edwards himself in December 2022. The first payment from Aquila Restaurant Limited was not until 20th February 2023, after the claimant had left the business.

16 However, the inconsistencies did not end there. Whilst the claimant said she did not receive her own letter, she did have a letter sent to her husband. That letter bore the same date, yet said the transfer would take place on 1st May 2023, after the claimant's employment had ended. In a document dated 30th October 2023 sent by Mr Edwards to the Tribunal, and which he asked form part of his evidence, in the absence of a formal witness statement, Mr Edwards said the business was transferred from the respondent on 1st November 2022, yet in evidence Mr Edwards said the transfer never, in fact, took place. In evidence the respondent said that he knew the new owner and had persuaded them to act, on occasion, in favour of the claimant. He said Aquila Restaurant Limited was owned by someone called "Ng".

17 On the evidence before me, I find that there was no transfer of the business from the respondent to Aquilla Restaurant Limited and the respondent remains liable for any outstanding moneys owed to the claimant.

Unlawful Deductions from Wages:

18 The claimant's evidence as that she kept a diary of when she worked and she provided a schedule in the bundle of documents provided to the Tribunal. Mr Edwards did not challenge the dates she provided in evidence, nor the shifts recorded in that document, and said he was happy to accept them. His complaint was that she had not deducted breaks from the times she had claimed she worked.

19 Mr Edwards was cross-examined on this because the schedule the claimant provided, where the shifts were long enough, did appear to show 30 minutes or 60 minutes being deducted. On some occasions where there was no time deducted, she has specifically annotated the document that she did not take a break that day. On other occasions there were two entirely separate shifts in a day. Mr Edwards was asked in cross-examination what he had to say about that. Mr Edwards maintained the claimant had not deducted breaks but, in my judgment, did not adequately explain the hours that had been deducted if these were not breaks. On that evidence, I find, on the balance of probabilities, that the claimant's schedule of the hours she worked is accurate.

20 The next area of dispute was the hourly rate. The claimant said that she was to be paid £10 per hour from August 2022 to October 2022 and £11.50 per hour from November 2022 to December 2022. She said that in February 2023 that her pay was to increase to £12 from January 2023, which Mr Edwards had told her in a WhatsApp message of 2nd February 2023.

21 Mr Edwards says the WhatsApp messages should not be relied on. He says they are incorrectly translated and that some have been deleted. He gave an example of where one of the messages was incorrectly translated, saying one of the messages contained a word translated as "transfer" (in the context of money) and that should have been translated as "pass". In my judgment there is no material difference. Mr Edwards had not provided alternative translations for the WhatsApp messages or any specifics as to what he said had been deleted. His evidence on the WhatsApp messages was, again, inconsistent. He accepted being a party to some messages but said he had left the work telephone for the new company when the transfer took place. Some of the messages to which Mr Edwards, in evidence, accepted he was a party, were dated after the date upon which he said the transfer took place, 1st November 2022. He now accepts there was no transfer. He claimed he could not have been party to messages in February, although with reference to the

messages about the pay increasing, he said he had persuaded the new owners of the business to increase the claimant's pay because it was too low. In an earlier part of his evidence, Mr Edwards said he had been party to messages on 4th March 2023, after the alleged date of transfer, saying he still had access to the phone because the transfer process could take up to 6 months. I find that there is no evidence to suggest the WhatsApp messages have been manipulated, edited or mistranslated. I find it is entirely safe for me to rely on them.

22 Whilst the message of 2nd February 2023 does not specify the dates when the claimant was to receive each of the pay rises, it does refer to £10, £11.50 and the pay rise to £12 in January. Further, it actually appears to suggest the claimant would be paid for her breaks. The message refers to £1.50 of the £11.50 being paid in cash. I find that confirms my finding that at least the bulk of the money was not paid in cash but by bank transfer. For those reasons, I accept the rates of pay set out in the claimant's statement.

23 The payments actually made to the claimant were, in essence, agreed, with two limited exceptions. There were two payments on 27th and 29th August 2022, totalling £230, which were not agreed. The respondent says these were paid in cash. The claimant said she did not receive them. Looking at the schedule of shifts the claimant worked, at the time Mr Edwards said he paid the claimant the £230 in cash, she had not worked for sufficient hours to earn that money. She had only worked enough hours to earn £200. A payment was made on 7th September 2023 for £200. She had not done £430 of work by that date, which supports my finding that £230 cash was not paid. In a WhatsApp message there was an agreement on 1st September 2022 that the claimant was owed £200 for hours worked in August. This accords with the claimant's records. At that time, the respondent would have been in charge of the phone. The records cannot be reconciled with Mr Edwards' claim that a further £230 was paid in cash. Further, as it is clear the vast majority of the money was paid via bank transfer, there appears to be no reason for these payments to have been made in a different way and this was before the pay rose to £11.50, £1.50 of which was to be paid in cash, I find, on the balance of probabilities, that those payments were not made.

24 It is now agreed tax and NI was paid, as per the payslips submitted by the respondent, enquiries having been made into the claimant's PAYE account during the hearing. However, these payments were made at a very late stage, on Mr Edwards' own admission, to regularise the position once he found out a complaint had been made by the claimant to the Citizen's Advice Bureau, as he knew PAYE and NI should have been being paid all along.

25 Before the hearing, the claimant provided an updated Schedule of Loss, which, helpfully, set out the losses for each of the different permutations of the final hearing. That updated Schedule of Loss has not been disputed and I accept the claimant's calculations for the sums owing, having taken into account the Income Tax and National Insurance paid.

Holiday Pay:

26 It is not in dispute the claimant took only two days' holiday throughout the period she worked for the Aquilla restaurant. She was entitled to 5.6 weeks per year, in accordance with the relevant legislation. That must be paid leave and there cannot simply be payment in lieu of leave, until the claimant left the respondent's employment. The respondent seeks to rely on the provisions of the alleged particulars of employment. Those provisions apply

a percentage increase to the base hourly rate for leave, effectively in lieu of leave, rather than setting out the provisions for paid leave. The only time payment can be made in lieu of paid leave is on termination of employment.

27 Therefore, I accept the claimant, on termination of her contract, was entitled to outstanding payment in lieu of any outstanding holiday not yet taken. Calculations were provided to me in relation to the proportion of the year she had worked and her average weekly pay. Two days at the relevant rate were then deducted. These figures were not disputed by the respondent, and I accept those figures.

Particulars of Employment:

28 The final matter I need to deal with is the failure to provide written particulars. For the reasons I have already set out, the paperwork provided by the respondent in this case is unreliable and should not be assumed to be accurate. There are documents purporting to be letters on the same topic to different employees containing contradictory details. There are documents suggesting the business was transferred when it now transpires, and is accepted by Mr Edwards, the transfer never took place at all. The respondent accepted creating payslips and, on his account, getting Aquila Restaurant Limited to do the same, to make it appear the claimant was being paid PAYE throughout her employment, when, in fact, this was only done when the claimant sought advice in relation to bringing a claim. The particulars of employment refer to payslips, yet it is accepted none were created until the claimant approached the Citizen's Advice Bureau.

29 Other than the evidence of Mr Edwards, there is no evidence that this document was ever provided to the claimant, such as the claimant's signature being on it or an e-mail to her enclosing it. Despite the respondent claiming the document was provided, Mr Edwards then sought to claim that not all the clauses within it applied to the claimant. Further, the document was only provided by Mr Edwards some months after proceedings were first commenced.

30 For all those reasons I do not accept that employment particulars were provided to the claimant. In the circumstances, I find it just and equitable to award 4 weeks' pay instead of 2 weeks' pay. The respondent did not make timely payments to the claimant, payments were ad hoc, there were a number of issues in this case that arose specifically because the working relationship was not clearly set out, such as the date pay fell to be paid, the method of payment and the rate of pay, and therefore this case goes right to the very heart of the provisions requiring employment particulars to be provided. There were also provisions in the document that the respondent said did not apply to the claimant in any event, such as the provision of payslips. Regular, and timely, payslips would have been of great assistance in this case. I further consider it just and equitable to order the higher amount, given my finding that, despite the respondent providing written particulars of employment to the Tribunal in an effort to purport to comply with the provision, they were not provided to the claimant at the appropriate time. In short, this was not a mere failure to provide a written document where the working relationship was clear but one where the absence of clarity, of itself, caused issues.

Conclusion:

31 I therefore find that the respondent has made an unlawful deduction from the claimant's wages in the gross sum of £584.85, has made an unlawful deduction from the

claimant's wages (representing holiday pay) in the gross sum of £841.99, and failed to provide the claimant with a written statement of employment particulars, in respect of which the respondent should pay the claimant £1,310.52 (representing 4 weeks' pay).

32 The respondent is ordered to pay the claimant the total sum of £2,737.36.

Employment Judge Yale
Dated: 22 January 2024