EMPLOYMENT TRIBUNALS

First Claimant: Mr John Meszaros

Second Claimant: Mr Peter Davies

Respondent: AS Theo Limited

Heard at: Manchester via CVP On: 30 January 2024

Before: Employment Judge Fairhurst

Representation

First Claimant: In person
Second Claimant: In person
Respondent: In person

RESERVED JUDGMENT

1. The First Claimant's claim for unauthorised deductions from pay contrary to Part II of the Employment Rights Act 1996 is well-founded and succeeds. The Respondent is ordered to pay the gross sum of £2,031.90 to the First Claimant.

2. The First Claimant's claim for holiday pay is not well-founded and is dismissed.

3. The Second Claimant's claim for unauthorised deductions from pay contrary to Part II of the Employment Rights Act 1996 is well-founded and succeeds. The Respondent is ordered to pay the gross sum of £2,031.90 to the Second Claimant.

REASONS

Introduction

1. The Claimants presented their claim to the Employment Tribunal on 30 January 2024. The First Claimant and the Second Claimant claimed unpaid wages during the period from 26 May 2023 to 31 July 2023. The First Claimant also claimed payment in lieu of untaken holiday.

Procedural background

2. The claim was brought as a multiple claim by Mr John Meszaros (the First Claimant), Mr Peter Davies (the Second Claimant) and Ms Lorraine Moore (the Third Claimant).

3. The claims of the Second Claimant and Third Claimant were both listed to be heard separately.

4. The Second Claimant attended part of the hearing on 30 January 2024, but did not attend the whole of the hearing due to technical difficulties at the start of the hearing. During the hearing, the Second Claimant confirmed that his claim for unpaid wages is based on entirely the same facts as that of the First Claimant, and consequently the Respondent and the Second Claimant consented for this Judgment to apply to the Second Claimant.

5. The Third Claimant was not in attendance at the hearing on 30 January 2024 and her claim continues to be listed to be heard on 18 April 2024.

History of the claim

6. The Respondent owned a store where both the First Claimant and the Second Claimant worked. The business was known as “Aroma”. On 26 May 2023, the electricity was cut off in the Respondent’s place of business. The Respondent was unable to operate the business due to the lack of electricity.

7. The parties agree that the Respondent paid the First Claimant and the Second Claimant wages in respect of the time worked prior to the electricity being cut off on 26 May 2023, but then did not make any further payments to the First Claimant or the Second Claimant.

Issues

8. The issues in the case were as follows:

    a. Whether the Claimants’ contracts of employment were terminated on 26 May 2023 and, if not, at what point their contracts of employment ended.

    b. Whether the Claimants suffered an unauthorised deduction from wages due to their contracts of employment continuing after 26 May 2023.

    c. Whether the First Claimant had accrued holiday which was not taken when his contract of employment ended.

Evidence

9. The First Claimant and the Respondent gave oral evidence in this case. Witness statements were not provided in advance of the hearing by any of the parties.

Relevant findings of fact

10. The written material I have seen includes a series of Whatsapp messages, including messages from a group chat between the First Claimant, the Second Claimant, the Respondent and others. The key messages are as follows:
    a. On 26 May 2023, Mr Harry Weir (the manager of Aroma) says to the group *"Just to make everyone aware of the situation the shop will be closed from tomorrow until Thursday"*.

    b. On 31 May 2023, Nikita says *"Working tomorrow..??"* and Mr Harry Weir responds to say *"Not tomorrow unsure when we are"*.

    c. On 1 June 2023, Ben Johnson says *"any news on the shop reopening?" to* which Mr Harry Weir responds *"Should have a definite date on Monday"*.

    d. On 5 June 2023, Ben Johnson says *"are we reopening?"* and Andreas AROMA (a Director of the Respondent) says *"I waiting a call back today form energy company"*.

    e. Later on 5 June 2023, Andreas AROMA (a Director of the Respondent) says *"Hi All. Just an update for the shop. The energy company will not allow me to open as I am the same owner as Pizza Hut and in theory they will be restoring power to the hut as well. So the only option is when I sell the Hut and the new Pizza Hut guy comes in and he restores power we will get our power back. We have given the Pizza Hut buyer 4 weeks to complete so at the moment the re/open date is the 1st of July unfortunately. Apologies for the inconvenience caused."*

    f. On the same date, a picture is shared with the date written on the front door of the Aroma business, which states *"CLOSED RE-OPEN 01 JULY".*

    g. On 17 June 2023, a further message is shared in which the Respondent provides an update and says, amongst other things, *"…we are merging with Bread & Butties who currently have 4 other stores around Manchester"* and *"We are all set up from our side and all we waiting for now is for power to come back up. I will try and keep you updated and set a reopen date as soon as I know."*

    h. During the hearing, the Respondent provided a message from the same group chat stating: *"There is a lot of things in motion at the moment so nothings is nailed down. I don't have a set date yet. I have a meeting tomorrow which will give me a better understanding on timescales but again no guarantees. I understand everyone situation is different. I am not asking for you all to sit and wait for the store to reopen. I don't know how long it will be and I can't give you a date. Please do what's best for you and your family."* In oral evidence, the Respondent confirmed the date of that message to be 26 June 2023.

i. On 10 July 2023, in a separate exchange, the First Claimant says *"Hi Andreas, just to let you know as requested on team chat to PM you, that I had my holiday for this week authorised months ago and have built up 4.6 days since the new holiday year started in April / May before the closure of Aroma, I booked 5 days off therefore I will be due a week and a bit pay of approximately 23 hours this month, thanks John."*

j. On the same date, Andreas AROMA (a Director of the Respondent) says *"Hi John, The company that used to trade under aroma has ceased trading and it's getting liquidated and a new company will be set up going forward. Even your last wage there was no money in the account to pay you. I could have chose to not pay anyone however I am not that type of person and so I paid everyone with my own personal money. In regards to any holidays requested unfortunately I won't be able to make any payment for those. I am happy to honor what you have accrued and carry it forward with the new company when we start trading again. Apologies."*

k. On 31 July 2023, a message is sent by the First Claimant giving notice to terminate his employment. On the same date, the Respondent says *"Hi John, thanks however there is no need to give me any notice as the company which you were employed no longer exists. Thanks".*

11. In giving evidence and answering questions, neither party disputed the facts given by the other regarding the events surrounding the electricity being cut off on 26 May 2023 or the period after that when the above messages were exchanged between the parties.

12. The Respondent also did not dispute that the Claimants were available and willing to work during the period between 26 May 2023 and 31 July 2023. The Respondent did assert that the First Claimant had a second job, so his employment with the Respondent was not his only income.

13. In giving evidence, the Respondent confirmed that permanent closure of the Respondent's business happened in November 2023 when it became clear that negotiations with the landlord would not be resolved.

14. The Respondent's evidence, in summary, was that he made no guarantees on the timescales for reopening the business following the electricity being cut off on 26 May 2023, that he did not ask the Claimants to wait for the store to re-open or suggest they should not find another job.

15. With regard to the claim for holiday pay, the First Claimant initially provided evidence that he had accrued 4.6 days' annual leave which he considered he should be paid for. However, the First Claimant also stated that he had booked a holiday starting on 18 July 2023 using those days of annual leave prior to the electricity being cut off, and that he had taken that holiday.

16. The First Claimant later asserted that he had accrued further days of annual leave which were untaken and which he should be paid for, but he was not able

to provide any evidence to support this. The Respondent asserted that all holiday which was accrued had been paid. The Respondent provided a payslip from 31 March 2023 showing a payment in lieu of untaken holiday from the preceding holiday year.

Relevant legal principles

17. Pursuant to Part II and section 13 of the Employment Rights Act 1996, a worker has a right that the employer shall not make a deduction from their wages unless certain statutory criteria are fulfilled. Section 23 of the same Act gives the worker a right to apply to the Employment Tribunal if they wish to allege that wages have been unlawfully deducted or not paid at all, which is what the Claimants did in this case.

Section 13 of the Employment Rights Act 1996 is below:

> *(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.*
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
> *(a) 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*
> *(b) 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.*
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*
> *(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*
> *(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not*

operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

(8) In relation to deductions from amounts of qualifying tips, gratuities and service charges allocated to workers under Part 2B, subsection (1) applies as if—

(a) in paragraph (a), the words "or a relevant provision of the worker's contract" were omitted, and

(b) paragraph (b) were omitted.

18. The key question to determine is whether the Claimants' contracts of employment continued after 26 May 2023, thereby giving rise to a claim for unlawful deduction from wages.

19. In making a decision, I have referred to the cases of ***Glenboig Union Fireclay Company Limited V Stewart 6 ITR 14*** and ***A Whitworth (Applicant) V. Bilabbey Ltd t/a Beeline Taxis (Respondents) [1975] IRLR 206.*** In the former case, a permanent closure of the Claimant's workplace was sufficient to amount to a termination of the Claimant's contract of employment. In the latter case, a temporary closure of the Claimant's workplace was not sufficient to amount to a termination of the Claimant's contract of employment.

20. For completeness, no evidence has been provided in this case to suggest that: (i) the deductions from wages were authorised pursuant to section 13 of the Employment Rights Act 1996; or (ii) the deductions were exempt pursuant to section 14 of the Employment Rights Act 1996. As a result, I have not considered these issues in my findings.

Conclusions

21. I have not been provided with any evidence which I consider sufficient to amount to the Respondent directly notifying the Claimants of the termination of their employment.

22. I am satisfied that the shutting off of the electricity in the Respondent's place of business was not sufficient to lead to a termination of the Claimants' contracts of employment. I am satisfied that the Claimants and the Respondent expected that the store would reopen in the period directly after 26 May 2023 and that

the closure of the store would only be temporary. This is what led to the exchange of various messages regarding the date that the store would reopen.

23. By 26 June 2023, whether the closure should be considered temporary or permanent is less clear. The Respondent sent a message to the Claimants and others (through a group chat) in which he states "*I am not asking for you all to sit and wait for the store to reopen. I don't know how long it will be and I can't give you a date. Please do what's best for you and your family".* I am not satisfied that this evidence is sufficient to show that the closure was permanent, such that the closure would amount to a termination of the Claimants' contracts of employment. The Respondent's message says *"I don't know how long it will be"* suggesting there was still an expectation the store would reopen. In oral evidence, the Respondent also confirmed that it was not until much later (November 2023) that the closure became permanent.

24. I am satisfied from the evidence provided that the Claimants continued to be ready and available to work during the period between 26 May 2023 and 31 July 2023.

25. I have also considered the content of various messages provided in evidence relating to the status of the Respondent's business (for example, where the Respondent says in a message *"there is no need to give me any notice as the company which you were employed no longer exists"*). From publicly available records, I can see that the Respondent's business continues to exist so I find that these statements are not accurate.

26. In relation to the claim for holiday pay, I find that the First Claimant took the 4.6 days of leave he claimed he had accrued when he went on holiday in July 2023.

27. The First Claimant alleged in the hearing that he had accrued further leave which was untaken as at the date of his resignation, but this was not provided for in his claim and the details he provided about this in the hearing were very limited. I found the Respondent's evidence (that the First Claimant had taken the leave he had accrued), albeit that such evidence was also limited, more convincing on this point.

28. I find that the shutting off of the Respondent's electricity on 26 May 2023 (leading to the store closing) was insufficient to effect a termination of the Claimants' contracts of employment.

29. I find that between 26 May 2023 and 31 July 2023: (i) no action was taken by the Respondent which was sufficient to amount to a termination of the Claimants' contracts of employment; and (ii) the closure of the Respondent's business was not permanent at that time, such that it would amount to a termination of the Claimants' contracts of employment.

30. I therefore find that the Claimants' contracts of employment were not terminated until 31 July 2023. The Claimants suffered an unlawful deduction from wages during the period between 26 May 2023 and 31 July 2023.

31. As for the claim for holiday pay from the First Claimant, I find that the First Claimant took the leave he had accrued in July 2023 when his contract of employment was subsisting. As a result, the claim for pay in lieu of untaken holiday is dismissed.

32. I therefore give Judgment in favour of the First Claimant in the gross sum of £2,031.90. I give Judgment in favour of the Second Claimant in the gross sum of £2,031.90.

Decision

33. The First Claimant's claim for unauthorised deductions from pay contrary to Part II of the Employment Rights Act 1996 is well-founded and succeeds. The Respondent is ordered to pay the gross sum of £2,031.90 to the First Claimant.

34. The First Claimant's claim for holiday pay is not well-founded and is dismissed.

35. The Second Claimant's claim for unauthorised deductions from pay contrary to Part II of the Employment Rights Act 1996 is well-founded and succeeds. The Respondent is ordered to pay the gross sum of £2,031.90 to the Second Claimant.

Employment Judge Fairhurst
Date: 18 March 2024

JUDGMENT SENT TO THE PARTIES ON
27 March 2024

FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Case Nos: 2408954/2023
2408955/2023

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2408954/2023 & Other**

Name of case: **Mr J Meszaros** v **AS Theo Limited & Other**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 27 March 2024

the calculation day in this case is: 28 March 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.