



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ervik
Respondent: White Goose Bistro Ltd
Heard at: East London Tribunal Hearing Centre (by video)
On: 19 March 2024
Before: Employment Judge S Shore
Representation
For the claimant: In Person
For the respondent: No Appearance

FINAL HEARING JUDGMENT

1. The correct name of the respondent is White Goose Bistro Ltd. The Tribunal records will be amended accordingly.
2. I find that the claimant's claim for unauthorised deduction of wages is well-founded and succeeds. The respondent shall pay the claimant **£209.50** without deduction of income tax or National Insurance payments.
3. I find that the claimant's claim for holiday pay accrued but unpaid at the date of termination of employment is well-founded and succeeds. The respondent shall pay the claimant **£229.80** without deduction of income tax or National Insurance payments.

4. I find that the claimant's claim of breach of contract (failure to pay notice pay) is well-founded and succeeds. The respondent shall pay the claimant **£263.96** without deduction of income tax or National Insurance payments.
5. The total payable by the respondent to the claimant is **£703.26**.

REASONS

1. The Judgment above was sent to the parties on 26 March 2024. By an email dated 8 April 2024, the respondent requested written reasons for the Judgement as is its prerogative under Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

Background of Claim

2. The claimant claimed he was employed by the respondent, a company operating a bistro at 198, The Grove, London E15, latterly as a Café Manager from 22 June 2023 to 12 October 2023.
3. The respondent's case was that the claimant was employed as a Barista from 20 June 2023 to 11 October 2023.
4. The claimant started Early conciliation with ACAS on 12 October 2023 and obtained an Early conciliation Certificate from ACAS on 23 November 2023. He presented his claim form (ET1) on 5 December 2023. In his ET1, the claimant ticked the boxes at paragraph 8.1 claiming that he was owed notice pay, holiday pay and 'other payments'. In the narrative of his claim at paragraph 8.2 of his ET1, the claimant claimed his pay was increased from £11.00 per hour to £13.00 per hour from 1 September 2023. The claimant said he was and that he had been underpaid for:
 - 4.1 Holiday pay, which had been calculated at a rate of £11.00 per hour and on a weekly average number of hours that were lower than the actual average - £229.80.
 - 4.2 Notice pay, which had been calculated at a rate of £11.00 per hour and on a weekly average number of hours that were lower than the actual average - £263.95.
 - 4.3 Wages for hours worked in September 2023, which had been calculated at a rate of £11.00 per hour and on a weekly average number of hours that were lower than the actual average - £209.50.
5. On 29 December 2023, the Tribunal sent the parties a Notice of Hearing, and a Notice of Claim. The Notice of Claim advised the respondent that it had to file a response to the claim by 26 January 2024. The Notice of Hearing gave full instructions on how to attend the final hearing on 19 March 2024 and allocated

one hour for the hearing. The Tribunal also made case management orders that required:

- 5.1 The claimant must by 4 weeks from the date of this letter send to the respondent:
 - 5.1.1 a document setting out how much s/he is claiming and how the amount has been calculated;
 - 5.1.2 copies of all supporting documents and evidence.
- 5.2 The respondent must by 6 weeks from the date of this letter send to the claimant copies of all its relevant documents and evidence.
- 5.3 The claimant and the respondent must send in copies of all the documents and evidence to the hearing for their own use. They must also send a copy of the documents and evidence for the Tribunal to use.
- 5.4 The claimant and the respondent are responsible for making sure any relevant witnesses attend the hearing.
6. The parties were notified that they could submit written representations for consideration at the hearing. These had to be sent to the Tribunal and the other side at least 7 days before the hearing.
7. The respondent presented its response (ET3) to the claimant's claim on 25 January 2024. The main points of its response in the ET1 were:
 - 6.1 The claimant's pay had been increased to £13.00 per hour but this was contingent on two conditions:
 - 6.1.1 The claimant's performance would be of an "exceptional standard"; and
 - 6.1.2 "There would be no further breaches of our compliance policies."
 - 6.2 The claimant did not comply with the company policies.
 - 6.3 The claimant did not attend the end of probation meeting on 28 September 2023.
 - 6.4 The respondent found "no valid basis for implementing the wage increase so his holiday pay, garden leave and wages were paid at £11.00 per hour.
 - 6.5 The claimant's working hours were calculated by the respondent's accountants and are correct.
8. The respondent submitted an additional document with its ET3 that referred to the claimant's absences and allegations of dishonesty. The respondent's response was accepted (this means its receipt was acknowledged, not that the assertions made therein were accepted as being true) on 15 February 2024.

9. On 11 March 2024, the claimant submitted an email to the Tribunal (copied to the respondent) that attached his supporting documents.
10. On 12 March 2024, the respondent submitted an email to the Tribunal (not copied to the claimant) that attached:
 - 10.1 “A comprehensive explanation detailing the rationale behind the decision to no texted Mr.Ervik's contract, along with justification for not adjusting his remuneration.
 - 10.2 Copies of both the email and formal letter dispatched to Mr.Ervik, officially terminating his employment.
 - 10.3 A copy of the email dispatched to Mr. Ervik, extending an invitation for his attendance at the End of Probation Period Review meeting.
 - 10.4 Correspondence via email exchanged with Mr. Ervik, providing him with our accountant's detailed explanations of how the various calculations were made.
 - 10.5 Substantiating evidence demonstrating Mr. Ervik viewed several company documents sent to him.”
11. On 15 March 2024, the Tribunal sent the parties a revised Notice of Hearing that extended the final hearing on 19 March to 2 hours.
12. Before the hearing on 19 March 2024, I read the Tribunal’s digital file that included all the documents referred to above. I read the ET1 and ET1 with attachment and the documents produced by the parties. Neither party had produced a witness statement but they had not been required to.
13. I noted that the respondent’s ET3 had stated its correct name as “White Goose Bistro Ltd”. I checked Companies House and found the company record.

Issues

14. The issues in an Employment Tribunal hearing are questions that the Tribunal must answer. In this case the issues were:
 1. ***Holiday Pay (Working Time Regulations 1998)***
 - 1.1 *What was the claimant’s leave year?*
 - 1.2 *How much of the leave year had passed when the claimant’s employment ended?*
 - 1.3 *How much leave had accrued for the year by that date?*
 - 1.4 *How much paid leave had the claimant taken in the year?*
 - 1.5 *Were any days carried over from previous holiday years?*

1.6 *How many days remain unpaid?*

1.7 *What is the relevant daily rate of pay?*

2. Unauthorised deductions

2.1 *Were the wages paid to the claimant for September 2023 less than the wages they should have been paid?*

2.2 *Was any deduction required or authorised by statute?*

2.3 *Was any deduction required or authorised by a written term of the contract?*

2.4 *Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?*

2.5 *Did the claimant agree in writing to the deduction before it was made?*

2.6 *How much is the claimant owed?*

3. Breach of Contract

3.1 *Did this claim arise or was it outstanding when the claimant's employment ended?*

3.2 *Did the respondent do the following:*

3.2.1 *Fail to pay the claimant the correct amount of notice pay for his Garden Leave period?*

3.3 *Was that a breach of contract?*

3.4 *How much should the claimant be awarded as damages?*

15. I joined the video hearing shortly before 10:00am. The hearing was scheduled to start at 10:00am. I opened the hearing at the designated start time but only the claimant was in attendance. I explained to the claimant that I needed to check if there was a problem that had prevented the respondent from joining the hearing and asked him to switch off his camera and microphone while the Tribunal Clerk made enquiries of the respondent.

16. At 10:08am, the Tribunal Clerk reported that they had spoken to the respondent's office and had been told that there was no one available to take the call. They left a message and sent an email to the respondent. The Tribunal has no record of receiving any calls or correspondence from the respondent until its email of 8 April requesting written reasons.

17. I found that it was in the interests of the overriding objective of the Tribunal (Rule 2 of the Employment Tribunals Rules of Procedure 2013) to continue in the

respondent's absence. It clearly was aware of the date and time of the final hearing as the details were on the original Notice of Hearing and the respondent's email of 12 March that attached its documents referenced the hearing date in the subject line. It was not proportionate to delay further or relist the hearing. It did not delay or save cost to wait or adjourn.

18. At the start of the hearing, I amended the name of the respondent to "White Goose Bistro Limited" with the agreement of the claimant.
19. The claimant gave evidence on affirmation. I asked him questions about his dates of employment, rates of pay, holiday entitlement and the other aspects of his claim. I put to him the allegations that the respondent had made in its ET3.
20. I then took time to make my decision before announcing my Judgement in the hearing.

Findings

21. I made findings of fact based on the evidence I heard and read. I made findings on the balance of probabilities: which account was more likely to be true. I considered the respondent's documents but could not give them as much weight as I gave the claimant's evidence as the respondent had not provided a witness to be cross-examined on the documents.
22. I found the claimant's evidence to be credible. His evidence was internally consistent and consistent with the documents that were produced by both sides. I made the following findings:
 - 22.1 The claimant began his employment on 20 June 2023. He agreed the date provided by the respondent.
 - 22.2 The claimant was initially paid at the rate of £11.00 per hour. The parties agreed this.
 - 22.3 The claimant was employed on a zero-hours contract with a probationary period of three months. The contract was terminable on notice of two weeks.
 - 22.4 Following a discussion between the parties, the claimant was given a pay increase to £13.00 per hour as co-manger of the respondent's café effective from 1 September 2023.
 - 22.5 I find that there were no conditions precedent on the pay increase that the claimant's performance had to be exceptional or that there would be no further breaches of the respondent's policies. I make that finding because:
 - 22.5.1 I found the claimant's evidence to be credible in rebutting the respondent's assertions;
 - 22.5.2 I found it unlikely that the respondent would have made the offer conditional on the terms alleged;

- 22.5.3 I found it highly unlikely that a respondent that had policies for everything did not put such a fundamental term in writing to the claimant at the time; and
- 22.5.4 I find it even more surprising that the respondent made no reference to the fact that the claimant would not be paid at £13.00 per hour in the dismissal letter.
- 22.5.5 I therefore find that the claimant was paid at £13.00 per hour from September 2023 to his dismissal.
- 22.6 I find that the claimant was given notice of dismissal by email on 29 September 2023 that referenced a two-week notice period. I find the effective date of termination, therefore, to be 12 October 2023.
- 22.7 I find that none of the allegations made by the respondent about the claimant's conduct and breach of its policies as contained in the document attached to its ET3 met the standard of proof required to be credible. I make that finding because:
- 22.7.1 The respondent did not produce a witness or witness statement as to the facts alleged;
- 22.7.2 I found the claimant's rebuttal of the allegations to be credible and they were internally consistent and consistent with the documents; and
- 22.7.3 The dismissal email and letter made no reference to the alleged acts but instead stated that the decision to dismiss was made after "...considering various factors, including your alignment with the role's requirements and your overall performance against the objectives set at the outset of your employment."
- 22.8 I find that the claimant's calculations of his hours were accurate. I made that finding because:
- 22.8.1 The respondent produced no records of the claimant's hours worked;
- 22.8.2 The respondent did not produce the calculations of its accountant;
- 22.8.3 The claimant's evidence was credible and was corroborated by his documents that showed his hours worked.
- 22.9 I therefore find that the claimant was underpaid for his notice pay, holiday pay and wages for September 2023 because his wage should have been calculated at £13.00 per hour and his average weekly hours were 31.1875 per week, taking a 12 week average, as follows:
- 22.9.1 The claimant was underpaid holiday pay by £229.80;

- 22.9.2 The claimant was underpaid wages for September 2023 by £209.50;
- 22.9.3 The claimant was underpaid for his notice period by £263.95, which;
- 22.9.4 makes a total underpayment of **£703.25**.

Employment Judge Shore

Signed 13 May 2024