



EMPLOYMENT TRIBUNALS

Claimant

Mr. B. Khatri

v

Respondent

Mustang Valley Limited

Heard at: **Birmingham**

On: **11 October 2023 & 6 March 2024**

Before: Employment Judge Wedderspoon

Representation:

Claimant: Nirajan KC (lay representative)

Respondents: Mr. S. Rajbhandari, Director

Interpreters : Ms. S. Guring

Mrs. N. Makan

JUDGMENT

1. The claim for unlawful deductions is well founded and the claimant is awarded £6,500 gross.
2. The claim for holiday pay is well founded and the claimant is awarded £650.81
3. The claim for notice pay is well founded and the claimant is awarded £500.
4. The claim for failure to provide written terms and conditions is well founded and the claimant is awarded £1,000.
5. The Tribunal makes a declaration that the respondent failed to provide to the claimant with itemised pay statements.
6. The total judgment is £8,650.81 which is payable forthwith.

WRITTEN REASONS

1. The Tribunal gave an oral judgment on the day. The respondent requested written reasons for the Judgment. These are the written reasons.
2. By claim form dated 27 April 2023 the claimant pursues complaints of holiday pay, arrears of pay, notice pay, failure to provide terms and conditions and pay slips. ACAS conciliation was entered on 15 of February 2023 and the claimant obtained his certificate on 28 of March 2023.
3. This matter came before the Tribunal as a fast track listing. The claim was previously listed for a one day hearing on 11 October 2023. Due to lack of time, in the main caused by the parties emotional outbursts and shouting across one another, so it was impossible to conduct the case in the limited time, the hearing had to be adjourned and could not be re- listed by reason of the unavailability of an interpreter until 6 March 2024. Immediately prior to the

listed resumed hearing representations were made that an interpreter was no longer required. In the circumstances, the hearing proceeded with the parties' agreement, in the absence of an interpreter.

4. The Tribunal was provided with two bundles of documentation; one from the claimant and another from the respondent. The Tribunal was greatly assisted by the interpreters in this case Ms. Guring and Mrs. Makan and the Tribunal expresses its thanks to them. The Tribunal heard evidence from the claimant, from the respondent's director Mr. Rajbhandari, two employees Ms Rai and Pramila Bala.
5. In its pleaded ET3 drafted on the instructions of the respondent and by a solicitor, the respondent conceded that the claimant was an employee of the respondent. However, in the respondent's witness statement the respondent sought to retract that concession. This issue had not been raised at the Preliminary Hearing two months before the final hearing and the case had been prepared on the basis that the status of the claimant's employment was not in issue. As unsatisfactory as this may be in the context of some of the language used in the documentation, the Tribunal deemed it was far too late for the respondent to seek to retract from this concession and the claimant would be unduly prejudiced.

Credibility

6. The Tribunal found that the parties tried their best to recall events sometime ago. In considering the evidence the Tribunal applied the standard of proof of the balance of probabilities, namely what was more likely than not. The Tribunal found the evidence of the respondent's director at times inconsistent and unreliable. The respondent's witness, Mr Balla another chef at the business suggested he was intimidated by the claimant's actions on 29 January 2023 but it would appear that they were together the next day working well. The Tribunal found this evidence unsatisfactory. In the circumstances where there has been a dispute of evidence the Tribunal preferred the evidence of the claimant.
7. In respect of the directors' evidence, in message exchanges with the claimant he indicated he agreed to sell his shares to the claimant (see page 253) but in oral evidence he disputed that he had reached an agreement with the claimant to sell his shares. At the Tribunal hearing the director stated that he had not used the claimant's credit or debit card to buy items for the business but that was inconsistent with page 242 of the bundle which indicated he requested the claimant's details of his credit card to purchase a cooker for the business. The Tribunal concluded the respondent's director's evidence was unsatisfactory.

Status of the claimant

8. As set out above, contrary to the pleaded case, the respondent sought to suggest that the Tribunal should find that the claimant was a director of this business. The claimant was not registered at Companies House as a director of the business. This matter came at a late stage in the case. The pleaded case of the respondent set out in its ET3 prepared by solicitors on the instructions of the respondent, is that the claimant was an employee of the respondent company. In the circumstances the Tribunal declined to go behind that full and open admission in the pleaded case.

Findings

9. There is no dispute the claimant was employed by the respondent from the 14 of October 2022 until termination on 9 February 2023 as a head chef. The

respondent conceded the claimants employment status in the ET3 to the claim prepared by its legal advisor. He was a shareholder as well as an employee of the company.

10. The agreement between and signed by the parties dated 22 of July 2022, states that the claimant would be paid a salary £26,000 per annum. The respondent's director was to be paid £24,000. Once the business became profitable it was agreed that the parties would receive a 10% salary increment which would be eventually capped at a salary of £28,000 for the claimant and £26,000 for the respondent's director.
11. The Tribunal therefore found at the commencement of the employment, on the balance of probabilities the claimant's salary was agreed to be £26,000 per annum.

Arrears of Pay

12. The claimant commenced work from 14 October 2022. The respondent's evidence that the claimant commenced work on 17 October was rejected. The parties were launching a new business and initially it did not have sufficient funds in the bank to pay the claimant £26,000 or the respondent £24,000 per annum. For the claimant this would equate to a sum of £2,166 per month; approximately £500 per week. The parties agreed for the November date only they would only take a payment of £500 for the month. This is supported by a text message sent by the claimant stating "*I temporarily agreed to take £500 per month*" and the e-mail from the respondent to its own accountant at page 56 dated 1st December 2022 requesting that £500 should be paid for the month of November.
13. On the balance of probabilities, the Tribunal does not find that this was a continuing arrangement but a temporary arrangement for the particular month of November 2022. In the circumstances the Tribunal does not accept that the claimant conceded that £500 would be a continuing salary. In late February 2023 the claimant determined to terminate his position in the business by emailing the respondent's director giving notice of his intention to do so. The claimant stated that the sum owed to him was £16.66 but he would let go of this. The Tribunal finds that this was a deal and but did not evidence a continuing agreement to be paid merely the sum of £500.
14. In the circumstances the claimant has been underpaid save for the month of November (when he accepted the sum of £500 only on a temporary basis) and there was an unlawful deduction from wages. The claimant is awarded £6,500 gross.

Holiday pay claim

15. The respondent concedes in its ET3 that the claimant was owed some days of holiday. The respondent's case in its ET3 is that the claimant's entitlement for holiday was 8.6 days holiday entitlement calculated on the basis of £500 per month that is £115.38 per week; in the circumstances if the claimant used 2 days of holiday the respondent's case is that he is only owed £198.45. The claimant's evidence is that he took off only Christmas and Boxing Day. The respondent is unable to confirm this.
16. On the balance of probabilities, the Tribunal preferred the claimant's evidence who was clear that he took two days off work only. Pursuant to the Working Time Regulations 1998 a worker is entitled to 28 days. The Tribunal accepts the claimant's calculation of 9.15 days owed. The Tribunal does not accept that this should be calculated at a rate of £500 per month; that was a temporary arrangement.

17. The claimant alleges that the respondent actually owes him £650.81. For the period of time, he was entitled to 9.15 days of holiday at a daily rate of £71.12. The Tribunal awarded the claimant the sum of £650.81. Further he contends that he was not provided with itemised pay slips and the Tribunal makes this declaration (see below).

Breach of contract claim

18. On 29 January 2023, in the kitchen of the Mustang Valley the claimant was boiling noodles and adding salt to the water. The claimant's case is that the respondent's director unexpectedly shouted and made a violent move towards him stating "*you are adding too much salt*". The claimant insisted he had added the correct amount of salt and stated that the respondent's director should stop bullying him by picking on small things.

19. On 9 of February 2023, the respondent summarily dismissed the claimant (see page 191). The respondent stated he set out the events of 29 January 2023 in a text to the claimant, but the claimant had no response. The respondent said he kept chasing the claimant as to whether he was going to attend work and waiting for an explanation. On the basis that the claimant showed no intention to return to work and having shown no remorse for his actions for alleged physical violence within the work environment he decided to dismiss him for gross misconduct.

20. The Tribunal was shown the incident on cctv and it appeared that the respondent's director major criticism was the addition of salt to boiling noodles the claimant was preparing. The respondent relies upon its assertion that the claimant had committed something dangerous namely tried to put/spray boiling water in the face of the respondent's director. The Tribunal rejected this suggestion. The Tribunal having viewed the cctv determined that the claimant's version was correct; he suggested to the director, he taste the noodles the claimant was preparing. The claimant stated this and raised the spoon towards the director to taste the food. In the circumstances he did not do anything dangerous or anything that could be reasonably considered to be a repudiatory breach of contract. The respondent was not entitled to immediately dismiss the claimant for this. There was no act of gross misconduct to justify the claimant being summarily dismissed.

21. Facing instant and termination of his employment, the claimant informed the respondent he did not wish to be part of the business and requested the business to close and wanted a request his shares. He contends the director stole £2000 from the bank account on the 2 of February; made an excuse not to come to work that evening and just dissolved the business on 8 February.

22. The claimant was not being paid in accordance with the agreement at this time and was reluctant to attend work. The Tribunal finds that the claimant was not guilty of gross misconduct and the respondent was not entitled to dismiss him summarily without providing one weeks' notice in accordance with the statutory provisions under section 86 of the Employment Rights Act 1996. The Tribunal awards the claimant one weeks' notice which equates to £500.

Written terms and conditions

23. There was a dispute of fact as to whether the claimant provided the document on 9 of November 2022 for the respondent. The claimant's case is that the document at page 43 was produced by the respondent. The respondent's case is that it was provided by the claimant having adopted it from a previous contract of another employer.

24. The Tribunal considers the accompanying agenda and finds it was the respondent who wanted to discuss the main terms and conditions set out in the document. The document itself was not signed but provides some details of what is to be expected within a terms and conditions document; but it was provided late. The Tribunal concludes there was a failure to provide full terms and conditions, but an attempt to provide some terms and makes an award of two weeks pay equitable; namely £1,000.

Wage slips

25. The Tribunal finds that the wage slips in the bundle do not comply with Section 8 of the Employment Rights Act 1996 as itemised pay statements because they do not contain the gross amount of wages or salary or fixed deductions and net wages. Further they do not set out cash payments made to the claimant. The Tribunal declares that the claimant did not receive itemised pay statements.

Employment Judge Wedderspoon

3 July 2024

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.