



EMPLOYMENT TRIBUNALS

Claimant: Mr A Mancini

Respondents: 1. Mr Adam Smith
2. Ms Sandra Owens
3. Mr David Ashfords

Heard at: Exeter **On: 15 and 16 October 2017**

Before: **Employment Judge Fowell**

Representation
Claimant: Unrepresented
Respondent: Ms R Oakes, lay representative

JUDGMENT

The Claimant's complaints against the first respondent are dismissed.

The Claimant's complaints against the second and third respondents of unfair dismissal, breach of contract, unlawful deduction from wages and upheld and he is awarded compensation of £6,094.06.

The complaint of breach of the National Minimum Wage Regulations 2015 is dismissed.

REASONS

1. By a claim form dated 14 December 2016 Mr Mancini brings the following claims:
 - a. Unfair dismissal contrary to section 104 of the Employment Rights Act 1996 – what is normally referred to as an automatically unfair dismissal - on the basis that the reason (or principal reason) for his dismissal was asserting a statutory right to a statement of terms and conditions of employment, contrary to section 1, and/or an itemised pay statement contrary to section 8 of the 1996 Act;

- b. Unlawful deduction from his wages in the month of his dismissal between 1 and 10 August 2016, including the accumulated tips he says he was supposed to receive at the end of his employment;
 - c. Breach of contract, in respect of his week's notice pay and holiday pay, which were never received;
 - d. Failure to make the required payments under the National Minimum Wage Regulations 2015.
2. These claims arise from Mr Mancini's employment at a restaurant on the Isles of Scilly in the summer of 2016. The business in question went by two names: during the day it was the Tolman Café, and in the evening it was the Bay View restaurant.
 3. One of the main issues to be decided is who exactly was Mr Mancini's employer; whether it was Mr David Ashfords and Ms Sandra Owens, who owned the premises and used to run it as a business or, as they claim, Mr Adam Smith who took it over in 2008 when they retired. Mr Mancini says that Mr Smith was only ever the General Manager acting on their behalf.
 4. None of the respondents responded to the claim in time. An order under Rule 21 of the Employment Tribunal Rules of Procedure was made preventing any of them from taking any further part in the proceedings without the leave of the Employment Judge, and shortly afterwards a response was received on behalf of Ms Owens and Mr Ashfords, which was accepted. For convenience I shall therefore refer to them throughout as the respondents and to Mr Smith by name. No response has been received at any stage from Mr Smith and he did not attend the hearing.
 5. The hearing was listed for two days and the evidence and submissions were completed in the course of 15 October 2017. Documents were submitted from both sides, but I had a lever arch file about 600 pages from the respondents which encompassed everything. This contained coloured dividers – red, orange, yellow, green and blue, with the pages identified by initial letter and number, so that for example the pages in the yellow section begin with a Y. I also heard evidence from the claimant and each of the respondents. Having done so, I make the following findings of fact.

Findings of fact

6. Mr Mancini responded to a job advert on Gumtree which had been posted by Mr Smith. It advertised the post of KP (presumably Kitchen Person) and General Worker for a busy café on the Isles of Scilly, six days per week, with split shifts. It added that accommodation and meals would be provided and that the role was from April to October, "maybe into November".
7. Mr Mancini applied and submitted his CV and references. He had a telephone interview with Mr Smith and was offered the job. Since this involved relocating from Kent, he clarified by phone beforehand the accommodation arrangements, which involved living with the respondents at their home near the restaurant. Given the importance of this issue on a personal basis I am satisfied that Mr Mancini also discussed this with the respondents before he arrived on 31 March. He has also confirmed with Mr Smith that the £1400 per month would be paid net, after deductions of tax

and national insurance. This was the payment he then received in cash for the months of April and May 2016.

8. The job advert was unclear about any rent being due for accommodation. The implication was that it would be free, but after about a month, Mr Smith told Mr Mancini that he should be paying rent. The discussions or expectations were not clear, but the respondents assured Mr Mancini that they did not expect him to pay them any rent, and matters continued on that basis.
9. There were several other employees at the restaurant. The total number varied between five and ten. Mr Smith was also a chef and took an active role in the running of the restaurant during the day and into the evening. The respondents had no day to day involvement.
10. Attached to the restaurant was an animal park, which was a venture introduced by Mr Smith. It included a variety of animals such as monkeys as a tourist attraction. Another change introduced by Mr Smith, this time during the summer of 2016, was to rebrand the restaurant, so that although it remained the Tolman Café during the daytime, when they served lunches, in the evening it marketed itself as the Bay View Restaurant. He redecorated and there was some new branding, including menus. He also introduced separate credit card machines for the daytime and evening businesses. Otherwise, it was the same operation which had historically been carried on from those premises, serving lunchtime and evening meals.
11. Mr Mancini was popular. Both respondents spoke highly of him and on their own account treated him as a son. He also worked long hours. Estimates varied but he did not disagree too strongly with Mr Ashford's description that his day rarely began before 10 and he would work in the cafe over lunch. There would then be a gap between about 2 pm and 5 pm, when he returned for the evening business. This took him until 10 or 10.30 pm. This indicates a typical pattern of about 3 1/2 hours in the morning and about 5 1/2 hours in the evening - a nine hour day. Over six days this would be 54 hours. The business was open seven days a week and although he was meant to work for six days a week, he was often called in on the seventh day to help. On Mr Ashford's account he had "the odd day off". Mr Mancini did not suggest that the total exceeded the 60 hours set out in his claim form and I accept this as the most likely figure in practice.
12. From the beginning of June Mr Mancini took over as Front of House Manager. That resulted in a pay increase to £1600 per month. This was paid in cash that month.
13. A further bone of contention was the distribution of tips. At page Y39 is a till receipt from the restaurant business recording that by 7 August 2016 the restaurant's taking included £436 in tips. Mr Mancini explained, and I accept, this was only the tips in the evening restaurant, paid by credit card. Cash tips were accumulated in a glass jar and when reasonably full he would transfer this to a red tin under the desk to be accounted for by Mr Smith but Mr Mancini also recorded the amount transferred in an A4 diary: e cash tips amounted to £2506.33 by 7 August, a total of £2,942.33 including the credit card tips.

14. Mr Mancini was told by Mr Smith that the total amount would be divided up among the staff at the end of the season. Many of the staff left at some point for one reason or another and it is not clear whether they received their allocation of tips. Mr Mancini did not receive any either when he left. There is no record of any credit card tips paid in the cafe during the daytime, and I accept Mr Ashfords' evidence from his time in the business that the great majority of such tips were in the evening as it was a snack menu at lunch, but allowing for some increase I find that the total amount reached £3000 by this date.
15. Turning to Mr Smith's role, he took over management of the business when the respondents' retired. He drew up a single paragraph agreement, presented as a sublease, which is at page G7. According to this he would pay them £600 a month in rent. The precise terms stated simply:

"Tolman café will be leased to you Adam Smith from 10.10.2008 at the cost of £600 per month, all utility bills and rates must be paid for and are not inclusive of rent , a 6 months notice will be required if lease is to be [cancelled – the last word is unclear]"
16. The respondents lease of the premises from the Duchy of Cornwall continued however and they did not obtain any written consent to this arrangement.
17. To outward appearances the business carried on as before. Whether at Mr Smith's suggestion or simply as a result of inactivity on their part, the respondent's continued to have some liabilities however. The business had a public liability insurance certificate which was renewed every year in their names. Every year an accountant, Ms Keeley, would present them with accounts for the business for them to sign off. In practice they took little notice of these and signed as requested. Although there is a statement in the response drafted by Ms Keeley to the effect that she took her instructions from Mr Smith *and* Ms Owens, in practice the instructions came from Mr Smith. Ms Owens has been in very poor health for the last few years with regular hospital admissions and no longer had any real interest in the business.
18. There were occasional discussions between them and Mr Smith at their house and elsewhere, including occasionally over the monthly payments which he was due to make to them, but in general they left him with a free hand over the business. That included recruiting and dismissing staff, and paying their wages, which were all paid in cash. Conveniently for Mr Smith, they remained the account holders for all the suppliers to the business so, for example, the food and drink delivered to the restaurant and café were provided through accounts in their name.
19. At the end of the 2016 season Mr Smith also left the business. An article from the local newspaper at page Y85 records that there was a problem over planning permission for the animal enclosures and it was shut down. He then made arrangements to transport the animals to another venue on the mainland and the respondents were held liable for the costs of air transport. It was not clear whether they had to pay this, but another invoice, for over £3,000, did have to be paid by them for drinks supplied to the

restaurant. Had they not done so there would have been no further supplies on the ferry and the business would have been in difficulties.

20. In early August there was a discussion between Mr Mancini and Mr Smith over his pay. By 2 August he had still not received his wages for July and was given £600 to tide him over. Then on 7 August 2016 he was given a further £718.68 in cash and received two payslips for June and July (at Y28 and Y29) which were confusing. One was in the name of "Sandra Owens T/A Tolman Café" and the other in the name of "Bay View Restaurant". This was the first indication that these businesses were treated separately for payroll purposes.
21. He was unhappy about these arrangements. They did not match the previous arrangement of £1600 net and this was recorded as the first taxable pay for the year to date. He told Mr Smith that he was going to write to HMRC to ask for their records of his employment and indeed did so that day (Y32) advising them that he suspected tax evasion and giving an account of the conversation in which he said that he was asserting his statutory right to a written statement of terms of employment.
22. Relations became rather cool from this conversation onwards. Mr Mancini went into work on the next two days and continued to act professionally but late on 10 August 2016 he found a short letter of dismissal pushed under his door (Y34). It gave him one week's notice on grounds of redundancy and was signed by Mr Smith as General Manager. Ms Owens had also attached her signature.
23. Mr Mancini was on good personal terms with the respondents and given the late hour he did not challenge them directly about this but he raised it with them the next day. Their view, as was their normal approach, was that this was out of their hands. Such matters were simply up to Mr Smith. Indeed, they told Mr Mancini that he was welcome to stay at the house even if he was not working at the restaurant anymore.
24. When Mr Mancini obtained his records from HMRC they showed, consistent with the information provided, that he had two employers: the respondents on the one hand and Mr Smith on the other (Y57). In each case their records incorrectly showed that the employment began on 1 June 2016.
25. Mr Mancini did not complete his one week's notice. He moved out on 12 August 2016 and obtained a receipt from the respondents to the effect that he had no rent or other monies outstanding. I am satisfied that Mr Mancini drafted this receipt for Ms Owens to sign and, once again, she signed it without reading, but no rent or other monies have been claimed.
26. The same applies to the reference he drafted. Mr Mancini disputed that he prepared this document, but I prefer Ms Owen's account. The terms are glowing, and it focuses rather more on his personality than his work record, which is unusual in a reference. He has also taken care to include mention of "our company" in the top line, in support of his claim. In the same way he wrote them a very affectionate farewell card, taking care to include reference to "your company" which he highlighted during this hearing. In these respects I did not find Mr Mancini's account credible. However, Ms Owens did not wish to disagree with the contents of the reference.

27. Since Mr Smith left the island, the respondents have now leased the business on a more formal basis to a new manager, who continues to run it on their behalf.
28. Finally, Mr Mancini obtained alternative employment on 26 October, but had he not done so his employment with the respondents would have expired in all probability by 31 October.

Conclusions

29. Contracts of employment are formed in the same way as any other contract. The first point is to identify who the parties are. Here, the contract was formed between Mr Smith and Mr Mancini following the advert on Gumtree. That did not clarify all of the details but these were ironed out between them over the phone before he arrived, sufficient at least for him to understand the nature of his role, the hours and pay. The question is, was Mr Smith contracting on his own behalf, or was he doing so on behalf of the respondents. In the employment setting it is very common for those recruiting staff to be acting on behalf of a company, a partnership or, in this case, the joint owners of a business. I conclude that they both were and remain the joint owners, not least because that is how they have described themselves. At no time have they parted company with the business. Instead they leased the premises to Mr Smith, or at least that is how it is described. In practice it is simply an agreement that he pay them £600 per month on six months' notice. They now have a new manager but they retain ultimate control. The fact that Mr Smith was on a very loose rein, and they left all the decision-making to him, does not avoid the conclusion that they still held the reins, as shown for example by the fact they were left with liability for orders for the restaurant.
30. Although it is more normal for a general manager to be employed in the business of this sort, essentially the arrangement here was that he was self-employed. His rewards depended on the success of the business but that does not change the position. I also have in mind that Mr Mancini was living in respondents' house, which is also an indication of their ultimate control. I note too that Mr Smith was careful to obtain their signature on the annual accounts and even on the dismissal letter. Accordingly, I conclude that in reality the employers here were the respondents rather than Mr Smith and it follows that dispute ignoring these proceedings, on the evidence presented he was not the employer and has no liability.
31. A further alternative put forward is that Mr Smith was managing the restaurant business in the evening and the respondents were still responsible for the cafe operating during the day. I can find no legal basis with this distinction. As already noted, the difference in practice was simply one of rebranding. Different card machines were introduced but this may simply have been an accounting exercise, to track which part of the business was the more profitable. I have not been shown any separate accounts for the two businesses. Although HMRC records indicate this dual responsibility, that simply reflects the information which they were given, either by Mr Smith or the accountant. It was clearly incorrect over the start date, and, I conclude, over the identity of the employer too. It would not only be artificial to describe this as two separate employments but it

would be contrary to the terms set out in the original job advert and the agreement for a fixed monthly sum for 60 hours per week working split shifts. Had they been advertised as two separate jobs, a different conclusion might apply, but some such clear distinction would need to be established, and this news of the HMRC records came as a surprise to Mr Mancini.

32. I was also referred to an email from Mr Smith, the only record of any involvement he had in these proceedings, in response to ACAS advising them that he had no intention of making an offer of settlement. In this email he describes himself as essentially the employer – Mr Smith T/A Tolmans cafe and T/a Bay View Restaurant.
33. This email is part of a series of communications aimed at reaching settlement and is therefore covered by the doctrine of “without prejudice” which should not therefore be referred to at these hearings and is not admissible in evidence. Even if it were, it is a statement made long after the event and does not accord with any of the earlier circumstances described above. His motives in presenting himself belatedly as the employer are unclear, but they do not change my assessment.
34. I am satisfied in any event that Mr Mancini understood and believed throughout that the employers were the respondents and Mr Smith was acting on their behalf.
35. The next question is whether the reason or principal reason for the dismissal was asserting a statutory right. In Mr Smith’s absence there was little dispute over this issue and I am satisfied that Mr Mancini was frustrated with the failure to produce pay statements which matched the sums he received and the date he started working. There was little focus by comparison on the request for a statement of terms and conditions and my conclusion is that it was discussion these pay statements which was the principal reason for the dismissal. The claim of unfair dismissal is therefore upheld, and since the only issue of substance raised at the hearing was the identity of the employer, subject to what follows the claimant is entitled to succeed in recovering his other losses due as well.

Compensation

36. At the time of his dismissal, Mr Mancini’s contract provided for £1600 per month net, plus a pro-rata share of the tips received by the staff over the course of the summer period.
37. I will first assess any breach of the National Minimum Wage (NMW). This involves taking the tips into consideration. Without analysing them in excessive detail at this stage, the total of £3000 would have to have been shared among all of the staff. I do not accept Mr Mancini’s claim to be entitled to all of the tips until 18 June (made on the basis that all the staff working to that date had left). There is no basis in law or principle to claim their share. This total would have to be shared with between 5 and 10 people, and adopting an average figure of 7.5, his total would reduce to £400.
38. This is a sum before deduction of tax or national insurance, and would have been accrued over a period of over 4 months, so the net monthly addition,

would be approximately £60, given that tax and national insurance would be deducted at the marginal rates of 25% and 12% respectively. If Mr Mancini's earnings were being averaged therefore the total would be about £16060 per month.

39. The NMW has to be assessed as if earned at the date of the hearing, and is presently £7.50 per hour. At 60 hours per week, this would be £450 per week. From this has to be deducted the accommodation offset allowed by the regulations which is currently £44.80 per week leaving a total of £400.20 per week. This corresponds to £20,810.4 per year or £1734.20 per month before tax and national insurance. After deduction of tax and national insurance in the relevant tax year, the net amount would have been £1,443.00 per month, less than actually paid, so there was no breach of the National Minimum Wage.
40. Returning to a calculation of the other losses, the first item is the unpaid wages up to the date of notice. The net monthly figure was £1,600, a daily rate based on 365 days per year of £52.60, so the total for these 10 days is **£526.00**.
41. The next item is the breach of contract for the failure to pay notice pay for the one week from 10 to 17 August. At the same daily rate this is £368.20. To this would be out of the net value of his entitlement to £400 in tips (at 63%) i.e. £252.00. The total losses for breach of contract therefore amount to **£620.20**.
42. There is also the failure to pay his accrued but untaken holiday at the date of dismissal, which may be claimed either as a breach of contract or unlawful deduction from his wages. The statutory entitlement to annual holiday is a total of 5.6 weeks, which, on the basis of six days work per week amounts to 33.6 days pay per year. Mr Mancini worked for just over a third of the year – four months and 17 days. Rounded up to the nearest half day, as required by the Working Time Regulations, this comes to 13 days. As already calculated, the relevant net daily rate is 52.60, amounting to a total of **£693.80**
43. Compensation for unfair dismissal similarly extends at £1600 per month net from 18 August 2016 to 24 October 2016, a period of two months and 6 days, amounting to **£3,515.60**
44. Given the shortness of the summer season there is no basis to make any discount to this sums for the possibility that Mr Mancini's employment would have terminated for other reasons and on all accounts he was an excellent employee.
45. There is also the failure to provide a written contract of employment, and in view of the success of the other claims, the Tribunal has power to award, at its discretion, between two and four weeks' pay. In the present case, given the lack of any direct part played by the respondents in this failure, I award two weeks' pay in the further sum of **£738.46**.
46. These totals may therefore be summarised as follows:

a. Unpaid wages	£526.00
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b. Notice pay	£620.20
c. Holiday pay	£693.80
d. Unfair dismissal	£3,515.60
e. Lack of a contract of employment	<u>£738.46</u>
f. Total	£6,094.06

47. Finally, there is power to increase this awarded by up to 25% for failure to comply with the ACAS code of practice in respect of any dismissal. No procedure of any sort was followed on this occasion, which would ordinarily result in an uplift of 25%. Mr Mancini has claimed 10% in his schedule of loss, but in the unusual circumstances of this case, in which the respondents are essentially liable for the actions of Mr Smith, and given their support of Mr Mancini and unwillingness to accept any rent, I make no uplift.

48. The total sum payable therefore in compensation is £6,094.06.

Employment Judge Fowell

Date 17 October 2017