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EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr G Giannini

AND

RVB Cuisine LMT

Heard at: London Central

On: 28 April 2017

Before: Employment Judge Burns (Sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mr B Hendley, Consultant

JUDGMENT

- 1 The Claim is amended to permit a holiday pay claim.
- 2 The claim for deductions from pay is dismissed.
- 3 The claim for pay in lieu of holidays not taken is upheld in the sum of £800.
- 4 Under Section 38 of the Employment Act 2002 the Respondent is ordered to pay the Claimant two weeks' pay in the sum of £876 for failing to provide the Claimant with a statement of terms and conditions.
- 5 The claim for notice pay is dismissed.
- 6 The Respondent must pay the Claimant the originating fee of £160 which he paid to the Tribunal to bring his claim
- 7 The total amount payable by the Respondent to the Claimant is £1836

REASONS

Identifying the issues/amendment of the claim

1. The Claimant in his ET1 had indicated that he was not claiming unfair dismissal. (He had no right to claim unfair dismissal because he did not have two years' service).

2. However he indicated on the ET1 that he was claiming “notice pay and other payments”. He had not ticked the claim for holiday pay. He did mention in the text of his claim form that he had not been given a contract.

3. He sent an email to the Tribunal on 15 April 2017 in response to a request from a Judge setting out his claim in more detail and I went through this document with him at some length in his evidence in chief.

4. It transpired that the claims he wished to make were as follows. (i) that there had been a deduction from his pay in December 2016 somewhere in the vicinity of £600 or £700. (ii) That he had not been paid for two days work that he did in January 2017 shortly before he was dismissed. (iii) He also claimed notice pay. He alleged that it had been promised to him orally by Mr Kurian and Ms Bhatia that he would have four weeks’ notice. (iv) Holiday pay. In that regard, it was pointed out to me correctly by Mr Hendley that the claim for holiday pay was not made in the ET1. Although the Claimant had referred to claiming other payments, he had not ticked the box which said that he was claiming holiday pay.

5. I have decided to allow Mr Giannini to add his claim for holiday pay for a number of reasons. Firstly, it is not in dispute that he was due and has not been paid holiday pay so it is very unjust that he should not be allowed to have his holiday pay. Secondly, he is not familiar with the Employment Tribunal processes or entitlements under employment law and I do not think that there is any prejudice to the Respondent of a forensic nature. I think applying the principals in the case of Selkent Bus Company it is fair and reasonable to allow him to amend his claim to add a claim for holiday pay.

6. I pointed out at the beginning of the hearing that if I upheld any of his claims, then I would have to consider a claim under Section 38 of the Employment Act 2002 which requires the Employment Tribunal to award compensation if it finds that the employee was not provided with a a statement of terms of employment.

Witnesses and documents

7. I heard evidence from Mr Giannini and then from Rashima Bhatia who appears to be the owner or senior director of the business and then I heard evidence from Mr K Kurian, who is the restaurant manager.

8. Mr Kurian and Mr Giannini had not produced witness statements although Ms Bhartia had. The documents were in a Respondent’s bundle on two treasury tags.

9. I found out late in the hearing that part of this bundle had not been properly provided to the Claimant and I gave him my bundles so that he could look at the missing pages.

10. There was also a record of meeting with Giovanni Giannini dated 12 January 2017 and I was handed a bunch of payslips relating to “trunk payments” and a “right to information” form signed by the Claimant.

11. The Claimant was told in a letter from the Tribunal dated 2 March 2017 (which listed this hearing today) that he should bring all relevant documents to the Tribunal hearing itself. He has not brought his bank statements to prove what payments he did and did not receive. He says he gave his bank statements to the office for remission of Tribunal fees. That however is completely useless as evidence for purposes of the Tribunal hearing.

12. As he has the onus of proof I am unwilling to conclude that he did not receive payments where the Respondent has told me that he did, and produced a relevant payslip.

13. The Claimant started work for the Respondent on 12 September 2016. I accept there must have been some sort of oral agreement between him and Ms Bhatia and Mr Kurian but I do not accept that he was promised £28,000 a year.

14. I do accept that the oral agreement initially was £23,000 salary per year. After a while there was another discussion about his pay and it was increased to £24,000 a year which was £2,000 gross per month.

15. I have been shown payslips in the bundle (which the Claimant says he never got but which I am willing to accept are genuine) showing that he was getting £2,000 gross per month from October 2016.

16. I find that he was properly paid for all the months up to December 2016. Insofar as December is concerned, the employer made a deduction of approximately £325 from the December payment on the grounds that the Claimant had been on an unauthorised absence.

17. The Claimant wanted to go to Italy in late December 2016. I am not entirely satisfied about what his exact reasons were but in any event he wanted to go to Italy after Christmas for the New Year. He discussed this idea with Mr Kurian and I find that Mr Kurian said words to the effect that he could provided he filled out a request form.

18. I do not find that Mr Giannini gave the request form to Mr Kurian before going on leave because I have seen an email on 31 December saying: "Dear Giovanni, Can you kindly fill out the attached absence form as I don't have your holiday form at my end? Kind Regards Kenny".

19. That email would not have been sent by Kenny if the Claimant had indeed given Kenny a holiday absent form, so I find that although Kenny said it would be ok if the Claimant was absent this was conditional upon the leave of absence form being filled out and it was not filled out and therefore Mr Giannini was not authorised to go to Italy and be absent from the restaurant over the New Year.

20. He was unauthorised and therefore the Respondent was fully entitled not to pay him for those days when he was absent, so I dismiss the claim for deductions from his December pay.

21. The next claim is for being paid for two days in January 2017 before he was dismissed. I find that he was paid for the days he worked. He only worked for two days on 7th and 8th and was called in on 12th for about an hour or an hour and a half and dismissed but he was paid for all three of those days. I accept the payslip for January which shows a payment of the net sum of £181.82.

22. The next claim is for notice pay. Although I do accept that at the beginning of the relationship there was an oral discussion about Mr Giannini coming to work at the restaurant, I do not accept the Claimant's evidence that they promised him four weeks' notice pay. Mr Giannini's manner of giving me this evidence was not very convincing and he seemed to be thinking it up as he went along. I think it is very unlikely that Ms Bhatia and Mr Kurian would agree to give him a four week notice period from the beginning when he was on probation, this simply does not make any sense.

23. The Respondent says he was entitled to two weeks' notice pay under a written contract which they say they gave him. I do not accept that the Respondents gave the Claimant a written employment contract or any written terms of employment.

24. The Respondent had produced in the bundle a draft contract which the Claimant had not signed but which the Respondent said it had given the Claimant. Ms Bhatia was muddled about the dates that she said she had given this contract to the Claimant initially saying it was given in September and then changing this to 20 November when I pointed out some other document in the file.

25. Furthermore, one of the few things the Claimant he did state clearly in the ET1 was that he had not been given a contract but in the ET3 the Respondent did not rebut that.

26. The suggestion that he was given a contract has only come in Ms Bhatia's witness statement, it is not mentioned in the ET3. The onus of proof is on the employer to prove that they have provided written terms of the employment contract to the employee.

27. I heard from Mr Kurian that he had been present when Ms Bhatia gave the contract to the Claimant and that he then chased Mr Giannini to return it signed. However there is no documentary evidence of him chasing Mr Giannini for this. In contrast as we have seen when Mr Giannini did not produce a written absence form, Mr Kenny chased them very promptly. If the Respondent had given Mr Giannini a written contract to sign and he had not signed it or returned it as they now suggest, Mr Kurian would have emailed Mr Giannini chasing him to return the contract, but he did not do so. I do not believe the Respondent about this, I find that they did not give a written contract to Mr Giannini.

28. That being the case the Claimant is not entitled to two weeks' notice pay under the draft contract which was never agreed.

29. Mr Gianninis entitlement to notice would have been be one weeks under the Employment Rights Act. The next question is whether he is entitled to claim that notice pay or not.

30. He was dismissed on 12 January for two reasons. Firstly for allegedly harassing female employees. I am not willing to accept that as a proven reason for dismissing Mr Giannini. I have seen one alleged complaint from a female member of staff from early December 2016. I was told by Ms Bhatia that although she was out of the country, she was told by Mr Kurian that this complaint had been made. If so, and if it is a summary dismissal matter allowing the employer to simply dismiss the employee on the strength of this letter, why did she not dismiss him then through Mr Kurian? Mr Giannini carried on working until 8 January 2017. Why did she allow that situation to continue if he had committed gross misconduct meriting summary dismissal which she knew about by 14 December? It does not make sense. I do not accept the allegations against Mr Giannini of sexual harassment

31. However, as already mentioned I have accepted the evidence that not only was the Claimant on an unauthorised absence over New Year, but he stayed away on an unauthorised absence basis until 7 January. I find that that was gross misconduct by him. For that reason I find that the Respondent was entitled to summarily dismiss the Claimant without any notice pay. Had he been entitled to notice pay, it would have been one week. In the event he is not going to get any notice pay because he was absent without leave and did not fill in his absence form.

32. I am however, awarding £800 holiday pay. It is not in dispute that the Claimant was entitled under the Working Time Regulations to nine days' holidays, he did not have any paid holiday, he should have been paid money in lieu of holidays when he was dismissed and he was not and I am told by the Respondent that the value of that it £800. Mr Giannini has not put forward any other figure for me to consider so I award £800 for holiday pay.

33. I am now obliged to consider awarding some two weeks' or four weeks' pay for the failure of the Respondent to give him a contract.

34. I see that they did actually provide him with various other documents, namely company documentation, job description, staff Handbook, personal hygiene specification, food handlers agreement, Working Time Regulations, waiver, extension of probation period etc. They made some effort to give them some documentation but they did not give them the crucial bit which was the statement of terms and conditions giving basic information about matters such as the amount of his pay and the amount of his holiday, the length of his notice period etc.

35. Had the Respondent given a contract to the Claimant, and insisted he hand back a copy duly signed by him, it would have avoided, to avoid exactly this type of discussion and argument that we have had this morning, arguing about what the terms were.

36. I think the proper amount to award is two weeks' net pay which comes to £876.

37. In summary, I am upholding the claim to the extent of £800 holiday pay and £876 compensation for not being given a written contract.

38. In addition, although I do not mention this at the hearing, I have decided that the Respondent must pay the Claimant the originating fee of £160 which he paid to the Tribunal in relation to bringing his claim.

39. The total is £1,836 payable in 14 days.

Employment Judge Burns
19 May 2017