



# EMPLOYMENT TRIBUNALS

## Claimant

Mr H Karbasi

## Respondent

Yasmin Management Limited

AND

## HEARD AT:

London Central

ON: 18 January 2019

## BEFORE:

Employment Judge Hemmings

## Representation

### For Claimant:

In person

### For Respondent:

Not present

## JUDGMENT

The Judgment of the Employment Tribunal is that:

- (1) The claim in negligence is dismissed having been withdrawn by the Claimant
- (2) The Respondent unfairly dismissed the Claimant and is ordered to pay compensation in the sum of £14,000
- (3) The Respondent owes the Claimant outstanding holiday pay and is ordered to pay to the Claimant the sum of £900
- (2) The Respondent failed to provide a Written Statement of Employment Particulars to the Claimant and is ordered to pay the Claimant the sum of £2,032
- (4) The Respondent is in breach of contract by having failed to give the Claimant his lawful notice entitlement or a compensatory payment in lieu and the Respondent is ordered to pay damages to the Claimant in the sum of £1,250

## RESERVED REASONS

1. By a Claim Form presented to the Employment Tribunal on 8 August 2018 the Claimant Hussein Karbasi complains of unfair dismissal, unpaid holiday pay, breach of contract (the non-payment of notice pay), and the loss of his laptop, arising out of a short period of employment during 2018 as Assistant Manager at the Respondent's YAS Restaurant.
2. The Respondent entered into a Corporate Voluntary Arrangement (CVA), approved by its creditors on 1 March 2018, prior to the Claimant commencing employment.
3. No Response (Defence) has been entered by or on behalf the Respondent nor has there been any communication whatsoever with the Employment Tribunal by any officer or representative of the Respondent or of the CVA Insolvency Practitioners.

4. The Notice of Claim dated 24 September 2018 sent to the Respondent was properly addressed but remains unanswered.
5. A precautionary duplicate Notice of Claim dated 4 December 2018 sent by the Tribunal to the Insolvency Practitioners was properly addressed but again remains unanswered.
6. No Default Judgment has been issued under Rule 21(2) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”).
7. The objective of the Employment Tribunal, expressed in general terms, is to conduct fair proceedings resulting in just outcomes. Accordingly, dealing with cases in the absence of either party is problematical. Nevertheless, in a case where a Respondent is aware of the proceedings and ignores them there is little alternative but to proceed with the Hearing in their absence, requiring the Claimant nevertheless to prove the merits of his claims and the remedies he seeks.
8. I have considered adjourning the proceedings to provide the Respondent with a final, apparently undeserved, opportunity to engage with these proceedings but any prognosis for such engagement is pessimistic, and a postponement both unfair to the Claimant in the context of his responsible conduct of these proceedings and a probable waste of scarce judicial resources. Accordingly, this Final Hearing proceeded in the absence of the Respondent.
9. The Tribunal had before it a Claim Form and a set of documents assembled by the Claimant, marked C1. The Claimant testified to the grounds of claim set out in the Claim Form and to the documents in C1.

#### THE ISSUES

10. The Claimant acknowledges that his claim in respect of his laptop, valued at £500, which he loaned free of charge to the Respondent and which was stolen by a former colleague who was owed wages by the Respondent, is a claim under the law of negligence, the Claimant asserting that the Respondent had failed to discharge its duty of care to him to protect his property against the foreseeable risk of such theft. Claims in the Tort of Negligence are outside the jurisdiction of the Employment Tribunal but within the civil jurisdiction of the County Court under its small claims procedure. Accordingly, the Claimant withdrew that claim with the intention of pursuing it in the County Court. That claim is dismissed by the Tribunal upon such withdrawal, the Tribunal recording that the withdrawal was for the express purpose of instituting civil proceedings and recovering compensation. Otherwise the issues in this case are as follows.
11. The first issue for the Tribunal to determine within these proceedings is whether or not the Claimant was unfairly dismissed, automatically in law because the cause alleged by the Claimant for his dismissal was that he made section 43A Employment Rights Act 1996 public interest (whistleblowing) protected disclosures (section 103A Employment Rights Act 1996).
12. Two further issues are whether the Respondent owes the Claimant holiday pay in respect of outstanding holiday entitlement at the date of termination of employment and a payment in lieu of two weeks’ notice.
13. The final issue is whether or not the Respondent issued the Claimant with a statutory Statement of Employment Particulars.

THE FACTS

14. In the absence of any contrary evidence, and in the context of the Tribunal testing the Claimant's evidence, and requiring him to satisfy the Tribunal of its integrity. The Tribunal reached the following findings of fact, having been satisfied as to the truth and reliability of the account given by the Claimant to the Tribunal.
15. The Claimant worked as the Respondent's Assistant Manager at the Respondent's licensed restaurant, YAS, in Kensington for just over two months between 13 May 2018 and 20 July 2018.
16. At the recruitment stage the Claimant and the Respondent reached agreement on the Claimant's role, his rate of pay (£2,500 per calendar month gross and in the region of £2,000 net.), working hours and an agreement on two weeks' notice to terminate being required on either side.
17. It soon transpired that the experience of working for the Respondent, the restaurant being managed by the owner's son, was appalling.
18. The Claimant establish that suppliers were misled into providing food and alcohol when the Respondent had no intention of paying the suppliers and that staff were cheated of their wages.
19. The Claimant worked 12 hour shifts from 10 am until 10 pm, seven days a week throughout his short period of employment.
20. The restaurant would stay open until about 4 am each day. Average daily takings were between £1,000 and £3,000 with the owner's son taking into his personal possession each morning all the previous day's takings, removing the till roll record of transactions and destroying it, and zeroing the register.
21. Junior employees were invariably vulnerable migrant workers. None were issued with employment contracts, wages were delayed or withheld altogether, employees were overworked, often in tears and invariably anxious, and when they approached the owner's son regarding such shortcomings they were subjected to verbal abuse.
22. When the Claimant gained a full picture of what was happening in the restaurant he chose the option of staying and attempting to change the culture and improve the circumstances of his colleagues and suppliers.
23. His efforts proved futile. He repeatedly requested that the terms and conditions of employment for everyone should be put in writing and issued to each member of staff, in particular requesting a statutory Statement of Written Particulars for himself whilst expressing reservations to the owner's son about the rough handling of staff and suppliers by the Respondent.
24. It was evident to the Claimant that any criticism by him to the owner's son about the treatment of staff and suppliers was unwelcome and ultimately concluded that it would not improve the way in which the Respondent was running, and would continue to run, the business.
25. On 20 July 2018, the Claimant's final day at work, there was a food and drink supply crisis with unpaid creditor-suppliers refusing to provide any further supplies.

26. The owners son instructed the Claimant to find a new supplier, instructed him to promise that the new supplier's invoices would be paid, the owner's son telling the Claimant that, as in the past, the new supplier would be led on by false promises that the invoices would be paid, repeating the cycle of deception and fraud.
27. The Claimant protested that obtaining supplies with no intention of paying them would be a fraud by the Respondent, that the treatment of other suppliers had been fraudulent, and that the Claimant would not act in that way because he was not dishonest. The Claimant told the owner's son that it was no way to treat suppliers and "*I'm a principled person - I won't defraud anyone*". The owners son's reply was "*you're fired, then*".
28. The owner's son paid the Claimant his outstanding wages but refused to pay any holiday entitlement and notice pay.
29. The Claimant was out of work for a month before getting a three-month temporary job at £2,000 per month gross and approximately £1,500 per net per month.
30. The Claimant has been unemployed since the expiry of that temporary job at the end of November but is retraining and expects to be in full-time employment, with earnings comparable to those when he was with the Respondent, by the end of March 2019.
31. SUBMISSIONS

The Claimant did not wish to make any closing submission, preferring to rely on his Claim Form, his testimony, and the documents at C1.

32. THE LAW

The Employment Tribunal's function is to procure and conduct fair hearings resulting in just outcomes. It does so by applying the relevant principles of employment law to its findings of fact in respect of workplace related claims within its jurisdiction. In doing so the Tribunal seeks to fulfil the Overriding Objective set out in Rule 2.

The applicable principles of law, concisely identified as required by Rule 62(5) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, are as follows, acknowledging that it is the statutory text which must be applied in reaching a judgment whilst having regard to the clarification and guidance on that text available to the Tribunal through the reported Decisions of the Higher Courts.

The law applied in the Employment Tribunal is to be found in the Common Law in relation to contract disputes but otherwise primarily in Acts of Parliament and Regulations made under the authority of Parliament, and found within authoritative Appeal Court Decisions explaining the operation and effect of those Parliamentary sources of law and reported in various hard-copy and on-line libraries of Law Reports and, finally, found within the body of recorded case-law constituting the Common Law of the land.

Automatic Unfair Dismissal

Under s.103A of the Employment Rights Act 1996 it is provided that an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Breach Of Contract

The starting point for the Tribunal is to identify the intention of the parties to the contract and to require the parties to honour the enforceable obligations they intended to create in the event of a dispute which comes before a Court of Law.

The burden of proof in a contract claim is on the Claimant i.e to succeed the Claimant must establish the merits of their claim and meet the standard of proof. That standard in a contract claim is to establish the facts underpinning the merits of the claim on the balance of probabilities.

#### Holiday Pay

The Working Time Regulations 1998 provide that, in the absence of a contractual entitlement to a higher amount, an employee is entitled to 28 days paid annual leave accruing pro-rata on a monthly basis.

#### Failure to Provide Written Statement of Employment Particulars

When a Claimant makes certain claims to an Employment Tribunal, i.e those claims listed in Schedule 5 to the Employment Act 2002 and the Tribunal is satisfied that the Respondent has failed to comply with its obligation under Part 1 of the Employment Rights Act 1996 to provide a Statement of Employment Particulars to the employee within two months of commencement of employment the Tribunal must award two weeks' pay, capped at the statutory rate for a week's pay, or may pay four weeks' pay if it is just and equitable to do so.

### 33. CONCLUSIONS

- (1) Upon the Tribunal's findings of fact, the Tribunal is satisfied that the Respondent dismissed the Claimant because of the protected disclosures he made, repeatedly, to the Respondent about unlawful treatment of its staff, in particular failing to issue Statement of Written Particulars of Employment (unlawful under, Part 1 of the Employment Rights Act 1996) and withholding wages (unlawful under Part 11 of the Employment Rights Act 1996 and also a breach of contract), the criminal offence of fraud committed against suppliers who had delivered supplies when the Respondent had no intention of paying for them, and the intended criminal offence against a future prospective supplier the owner's son had instructed the Claimant to engage and defraud (offences under the Fraud Act 2006).
- (2) There is a clear public interest in such unlawful and illegal behaviour being disclosed.
- (3) It is automatically unfair in law for an employer to dismiss an employee if the reason, or if there is more than one reason, the principal reason for the dismissal was that the employee made a protected disclosure.
- (4) The Tribunal is satisfied that the Respondent dismissed the Claimant for a combination of reasons which included his past protestations about the unlawful treatment of staff and the dishonest treatment of suppliers, his protestation on 20 July 2018 about the intention to retain a new supplier and defraud them, and because he refused the instruction to participate in the proposed fraud.
- (5) The Respondent's dismissal of the Claimant was an unfair dismissal in law.
- (6) The Respondent received no payment in lieu of outstanding holiday entitlement, nor received a payment in lieu of two weeks' notice, there being no lawful justification for withholding that payment.
- (7) The Claimant is entitled to outstanding holiday pay and damages for breach of contract in respect of his notice entitlement.
- (8) The Respondent failed to issue the Claimant with a statutory Statement of Employment Particulars.

34. REMEDY

Unfair Dismissal

The Claimant seeks loss of past and future earnings only.

The Claimant's loss of past earnings for the six-month period 20 July 2018 to the date of this hearing, 18 January 2019, is £15,000 (six months x £2,500 per month). The Claimant mitigated his loss with the three-month contract at £2,000 a month by a sum therefore of £6,000.

The actual past loss of earnings is £9,000.

The Claimant projects two further months of loss of earnings whilst completing his training. The Tribunal is satisfied that the training is a legitimate initiative by the Claimant to mitigate his loss and restore his earnings to his pre-dismissal level thereby guillotining any liability of the Respondent to compensate him beyond the completion of that training. Two months future loss of earnings at £2,500 is £5,000.

The total past and future loss of earnings is £14,000, the amount of compensation the Tribunal orders the Respondent to pay to the Claimant.

Holiday Pay

The amount of holiday entitlement accrued by the Claimant during his employment with the Respondent was six days at a daily rate of £150.

The Tribunal orders the Respondent to pay to the Claimant £900 in respect of outstanding holiday pay.

Breach of Contract

The Claimant was entitled under his contract to two weeks' notice of termination.

Two weeks salary is £1,250 and the Tribunal orders the Respondent to pay the Claimant damages in the sum of £1,250 for breach of contract.

Statement of Employment Particulars

Where an employer breaches its obligation to provide an Written Statement of Employment Particulars, as the Respondent did, the Tribunal has a discretion to award either two weeks' pay (capped at £508 per week) or four weeks' capped pay. The Tribunal exercises its discretion to award the higher sum, £2,032, because of the abject failure to issue a Statement to the Claimant in spite of requests and reminders of the Respondent's legal obligation within an institutionalised culture of abject failure to issue any member of staff with the required statutory document.

The Respondent is ordered to pay to the Claimant the sum of £2,032.

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**Employment Judge Hemmings**

Date 20 February 2019

JUDGMENT AND REASONS SENT TO THE  
PARTIES ON

22 February 2019

FOR THE TRIBUNAL OFFICE