



EMPLOYMENT TRIBUNALS

Claimant: Mr C Marshall

Respondent: Brighton Kitchen Management Ltd

HELD AT: London South ET by Cloud
Video Platform and telephone

ON: 14 February 2022

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person

Respondent: Mr P Bartley, director

JUDGMENT

By consent, the respondent agrees to pay to the claimant the sums of £49.50 in expenses incurred during his employment and £69.02 in deductions from wages.

The claimant has accrued 7 days annual leave during his employment which was untaken at the termination of his employment. He is entitled to payment in lieu of that annual leave in the sum of £753.83, subject to deductions for income tax and National Insurance contributions.

REASONS

1. The claimant brings claims for unpaid wages and expenses (section 13 Employment Rights Act 1996) and unpaid annual leave which was outstanding on the termination of his employment, as per Regulation 14(1) and (2) of the Working Time Regulations 1998.
2. The respondent has agreed to pay the claimant his outstanding wages and expenses, which were £69.02 and £49.50 respectively. This is awarded to the claimant by consent and without determination by the Tribunal.

3. The Tribunal was greatly assisted by the parties having supplied a number of documents, including payslips, bank statements, payment receipts, emails and WhatsApp messages which record the events of the period in question.
4. The parties also greatly assisted the Tribunal by confirming that the facts are agreed and so it was not necessary to take any evidence under oath. What was required of the Tribunal was a decision as to whether the claimant's holiday entitlement was still owing to him, or whether a payment made by the respondent for two weeks' wages when no work was made available to the claimant could be used to offset the respondent's obligations to pay the claimant for his holiday.
5. The facts relevant to the issue for the Tribunal to decide, as agreed by the parties, are as follows.
6. The claimant worked for the respondent as a head chef in a pub, the Bath Arms. The respondent company supplies catering staff to pubs in the area in which the claimant was employed. The day to day operations were overseen by the area manager, Nick, and Mr Bartley is the respondent's director.
7. The claimant began work on 31 August 2020 and on 18 October 2020, on the instructions of Mr Bartley, was told by Nick that his services were no longer required in the Bath Arms. Mr Bartley understood that Nick had given the claimant warnings about his performance, but the claimant did not accept that this was the case. However, it is clear from the claimant's WhatsApp messages, particularly that of 1 November 2020 where he admitted that "*things didn't work out for me*" in the pub, that the claimant was aware that the respondent had issues with his ability to carry out his duties in the Bath Arms.
8. On or around 18 October 2020, the claimant was offered an alternative job by the respondent in another establishment, on a much lower wage and part-time. The parties agreed that the claimant never responded to either Nick or Mr Bartley about this job offer. Both parties agreed that because of the Coronavirus restrictions in place at the time and the news of an imminent further lockdown in England, there was great uncertainty surrounding what work might be available in the respondent's business. As a result, the parties agreed that the claimant was told by the respondent that he would be "*kept on the books*" until further information became known. It is Mr Bartley's view that he did this as a conscientious employer and I accept that this was the case and that Mr Bartley did not simply wish to terminate the claimant's employment while the general situation in the country at that time was so uncertain.
9. Furthermore, both parties accepted that as the respondent had several chefs in kitchens in the area, other work may have become available to the claimant in the future. The claimant, in a WhatsApp message to Mr Bartley on 1 November 2020 said "*if you need my services again give me a shout*" to which Mr Bartley replied "*no worries, yeah*".
10. I have taken judicial notice of the following facts to do with the Coronavirus restrictions in place at the time, as the parties referred me to some of them and they are relevant to the facts of this case. On 22 September 2020, there was a

10pm curfew for hospitality venues put in place, including public houses. On 30 September 2020, there was a government warning of further restrictions to come in the near future. On 14 October 2020, there was the announcement of a new three-tier system of Covid restrictions announced by the government and on 31 October, the second national lockdown was announced, to come into effect on 5 November 2020. All of these announcements, I note, had a marked effect on the hospitality industry of which the parties were a part.

11. I note that in the period from 18 October 2020 to 31 October 2020, the claimant was still employed by the respondent. The respondent had imposed a unilateral change to the claimant's terms and conditions, in that he had asked him to move from the Bath Arms where he had earned £28,000 per annum full time, to working part-time for an hourly rate equivalent to the minimum wage. The parties agree that the claimant had not accepted that change to his terms and conditions and that the claimant was not dismissed by the respondent in October 2020.
12. The "furlough" scheme did not become operational until the national lockdown at the start of November 2020. Therefore the claimant was not on furlough between 19 October 2020 and the start of the furlough scheme in November 2020. The claimant was paid two weeks' wages in full for the second half of October 2020.
13. The claimant was then put on the Coronavirus "furlough" scheme by the respondent and was paid furlough pay until 29 November 2020. On 2 December 2020, the government announced that the national lockdown had ended. As of early December 2020, the respondent was able to open for business. The claimant was not paid any more payments for the period after 29 November 2020 and was not called by the respondent to return to work thereafter either.
14. There were some issues with the payments made by the respondent, including that payments for the first two weeks in November were missed. These were paid at the end of December 2020. The respondent accepts that the first of these payments was too small and accepts that the claimant is owed the balance, which is £69.02, which Mr Bartley has agreed he will pay.
15. The claimant agrees that (other than this £69.02 which was unpaid at the date of this hearing) he was paid correctly and in full for the wages and furlough payments he was owed as at 29 November 2020.
16. However, the claimant says (and the respondent accepts) that he has never taken any annual leave during his employment. The claimant worked 5 days per week and earned £28000 per annum. As with all workers, he is entitled to a minimum annual leave allowance of 28 days including bank and public holidays. He was employed from 31 August 2020 until 29 November 2020, and during that time accrued annual leave of 7 days. This is payable at his daily rate of pay, which I agree with the claimant is £107.69 gross per day. This makes an entitlement of £753.83.
17. The respondent's case is that the two weeks' wages of £839.26 were paid to him when he was not provided with any work to do and that this sum should be used to offset what annual leave payment he is owed. As the two weeks' wages is more

than his holiday entitlement, the claimant is owed no further wages payments for his annual leave.

18. Finally, in the claimant's ET1 claim form he submits that he is entitled to recover interest on the sums owed to him by the respondent. However, interest is not recoverable on this basis in the Employment Tribunal.

The Law

19. Annual leave that is accrued but untaken at the termination of employment must be paid in lieu by the employer at the time of termination as per Regulation 14 Working Time Regulations 1998.
20. A term of an employee's contract cannot be varied unilaterally by an employer. Unless the claimant agrees with the change, or acquiesces so that he is deemed to have accepted it by performing his role in accordance with the new terms and conditions, the contract remains unchanged, until the employee agrees to change or the employer ends the contract and offers the employee a new contract on the new terms and conditions. Until this happens, an employee is entitled to the benefit of any payments (including of wages) that may be due under the old terms and conditions.

Application of the law to the facts

21. The parties understood that the claimant had been dismissed at the end of the lockdown period in November 2020, because he was not contacted by the respondent to return to work once the hospitality industry was able to open up again. His last furlough payment was for week ending 29 November 2020, and I agree with the parties that, on the balance of probabilities, his employment ended on this date.
22. Because the claimant was not dismissed until then, wages were still payable to him in the period following his removal from the Bath Arms and before the furlough scheme started. He is therefore entitled to the two weeks' wages for the period 19 October 2020 onwards. This is a contractual entitlement, because he did not accept the offer of new terms and conditions and a lower salary and the respondent did not terminate his employment at that point.
23. As well as the contractual right to pay, the claimant has a separate entitlement to annual leave under the Working Time Regulations 1998, of 28 days per year. The respondent had the right to require the claimant to take annual leave during the furlough period, or in the two weeks after his removal from the Bath Arms, at which point his weekly wages would have been classed as holiday pay for the 7 day period of his holiday entitlement and no further payments would have been owing to him at the termination of his employment.
24. However, the respondent did not appear to turn its mind to the issue of annual leave and the claimant did not ask to take it before his dismissal. It remains outstanding on the termination of his employment and must therefore be paid to him and cannot be offset by any other payments made by the respondent.

25. The respondent therefore is to pay the sum of 7 days leave which is £753.83 gross, which is to be subject to income tax and National Insurance contributions.

Employment Judge Barker

Date _____ 14 February 2022 _____

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