



EMPLOYMENT TRIBUNALS

Claimant: Mr Junhai Feng
Respondent: New Zonyi Ltd t/a Kirin Restaurant

Heard at: London Central
Before: Employment Judge Elliott
On: 26 August 2020

Appearances

For the claimant: In person
For the respondent: Mr Feng Gao, Office Manager
Interpreter in the Mandarin language: Ms Y Xiao

JUDGMENT

The judgment of the tribunal is that the respondent shall pay to the claimant the sum of £706.06 for unlawful deductions from wages and £82.10 for holiday pay making a total gross sum of **£788.16**.

REASONS

1. This decision was given orally on 26 August 2020 and the claimant requested written reasons.
2. By a claim form presented on 11 February 2020 the claimant Mr Junhai Feng claims holiday pay and unlawful deductions from wages. The claimant worked at the respondent's restaurant from 7 to 18 October 2019.
3. The respondent was very keen to seek to settle this matter with the claimant and I offered them the opportunity to discuss matters during a break but the claimant was adamant that he did not wish to discuss the matter with the respondent and he wished the tribunal to make a decision.

The issues

4. A preliminary hearing by telephone took place before me on 2 July 2020. The issues that the tribunal would have to decide at the hearing were identified as follows:

Unlawful deductions from wages

5. The claimant says he is due to be paid the National Minimum wage of £8.21 per hour for 108 hours between 7 and 18 October 2019, as to 62 hours in the first week and 46 hours in the second week. Has the claimant been paid for these hours? Is he entitled to be paid for these hours?
6. The respondent's case is that the claimant broke a boiler at work and they seek the cost of this in the sum of £984. They filled in an Employer's Counterclaim in the ET3 but this had not been processed and served.
7. I explained to the respondent that an Employer's Counterclaim can only be brought if the conditions in Article 4 of the Employment Tribunals (Extension of Jurisdiction) Order 1994 are fulfilled as the tribunal only has limited jurisdiction to hear an Employer's Counterclaim. It must be in respect of a claim that the employee has brought in this tribunal "*by virtue of this Order*" (Article 4(d)).
8. I took the view that the claimant had not brought a breach of contract claim opening himself up to a counterclaim and therefore there was no valid counterclaim in these proceedings. My reasons for this were explained both at the preliminary hearing and in the Case Management Order.
9. I explained to the respondent that this did not prevent them from pursuing that claim for example in the small claims track in the County Court.

Holiday pay

10. Is the claimant entitled to accrued holiday pay for the period from 7 to 18 October 2019? He claims 1 day's holiday pay in the sum of £82.10.

Witnesses and documents

11. I had statements from the claimant and from Mr Liang Wang a Director of the respondent and heard evidence from them.
12. I was sent only one document, which was from the respondent. It was an invoice for the boiler repair in the sum of £984 and dated 19 October 2019.
13. During his closing speech, the claimant said that there was CCTV footage at the restaurant which the tribunal could obtain which would show what time he left work on 18 October 2019. I explained to the claimant that it was the parties' job to present the evidence to the tribunal and not the role of the tribunal to collect the evidence. I was aware that the claimant had received help with the claim for example in drafting his witness statement and he had received a Case Management Order which set out what he needed to do in order to present

evidence. I considered it disproportionate to adjourn the hearing in order for this CCTV to be obtained

Findings of fact

14. The claimant worked for the respondent from 30 September 2019 to 18 October 2019. These dates are not in dispute although the exact days of work were not clearly set out by either party. He was only paid £450 in total. The dispute is for the period from 7 October 2019 to 18 October 2019. The rate of pay claimed is £8.21 per hour which was the National Minimum Wage at the relevant time in October 2019.
15. The respondent trades as Kirin Japanese Restaurant. It is a relatively new business. The claimant was initially employed as an assistant chef. The respondent's evidence was that he was not good at his job and they had to change his role to that of kitchen assistant which they did from 14 October 2019. He was within his probationary period when they terminated his employment. I make no finding as to the quality of the claimant's work.
16. I asked the claimant exactly which days he worked between 7 to 18 October. He said he worked 10.5 days in the period. From 7 to 17 October he worked full days but finished at 4:30pm on 18 October 2019. The respondent said that he finished closer to 1:30pm.
17. I asked who engaged or hired him? He said it was the Head Chef, Mr Li who had interviewed him. There was no offer letter or contract of employment. I asked what was agreed about the days he would work and the pay he would get? He said the agreement was for full days during weekdays with a start time of 10:30am to 10:30pm with two hours as a break. On weekends it was 4:30 pm to 10:30pm with no break. There was an agreed weekly rate of £450. The claim is for the national minimum wage of £8.21 per hour.
18. It was put to the claimant that he was told that his break could be from 2:30pm to 6pm. The claimant disagreed. The difficulty for both parties was that the employment details had not been recorded in writing, so there was no documentary evidence to support either side's position.
19. The claimant agreed that he was given £450 in cash by Mr Li but he could not remember exactly when. He said it was the only payment he received. I find on the balance of probabilities that it was for his first week of employment starting on Monday, 30 September 2019. This is because he makes no claim in respect of that week.
20. No pay slip was given to the claimant. The respondent said that they did not have an address for the claimant. It is for the respondent to take this information when they employ someone, so that they have this means of communication available to them. In any event, I find that the pay slip could have been handed to the claimant when they paid him in cash. The claimant had no way of knowing what statutory deductions had been made from this pay in terms of tax or national insurance or anything else.

21. The claimant admitted (his statement paragraph 4) that on 18 October 2019 he lit a cigarette while he was in the toilet on the ground floor. This triggered the fire alarm. The claimant was told by the Head Chef that the triggering of the fire alarm caused the boiler to break down and they held the claimant responsible for this. I make no finding as to the cause of the breakdown of the boiler. The invoice says no more than "*boiler repair fee and parts*". This resulted in the termination of employment.
22. The claimant's evidence was that he worked for 62 hours in the week of 7 October employment and 46 hours the following week. He set out the details in his witness statement. The respondent said that he worked 49 hours the week of 7 October and 34 hours in the following week. There was no contract of employment or any documentary evidence before the tribunal to show his expected or agreed hours of work.
23. The claimant said in his witness statement paragraph 5 that he agreed that the company could deduct money from his wages to hire an engineer to fix the boiler. This was not an agreement recorded in writing. That agreement does not meet the requirements of section of the 13 Employment Rights Act 1996 in respect of lawful deductions from wages. I cannot and do not offset anything in respect of the boiler in relation to the unpaid wages.
24. The claimant did not take any annual leave during his brief period of employment. The respondent did not dispute this.
25. The respondent's witness Mr Wang is a Director of the company. He told the tribunal that he does not work in the kitchen so he did not have first-hand knowledge of the working practices with the claimant. This was a matter for their Head Chef Mr Li who was not called to give evidence. Mr Wang had to make a telephone call to Mr Li at the start of the hearing to find out about the payment of £450 in cash. It was not a matter about which he had any first-hand knowledge.
26. I make the following findings of fact on a balance of probabilities bearing in mind that I had first-hand evidence of fact from the claimant and that the respondent did not have a witness with first-hand knowledge of the working practices. This has led me to prefer the evidence of the claimant in relation to the hours that he worked.
27. I find that the claimant worked 10 hours per weekday and that he worked 4 weekdays in each week. I find that he also worked less hours at weekends. The 10 hours per weekday is based on a start time of 10:30 with a finish time of 10:30pm and two hours for his break. I understand that the respondent will not agree with this finding but the difficulty for them is that they have chosen not to record in writing their arrangements with this employee and they can produce no employment records or time records of any sort.
28. The claimant's oral evidence to the tribunal was that he worked six days per week. I find on balance of probabilities that this was 4 weekdays and the 2 days of the weekend.
29. I find that the claimant is entitled to be paid for 10 hours a day at £8.21 per hour for 4 weekdays in the week commencing Monday 30 September and from

4:30pm to 10:30pm on Saturday 5 and Sunday 6 October 2019. The claimant's evidence was that he did not receive any break at the weekend so I find that he is entitled to be paid six hours for the weekends. I accepted this evidence in the absence of any first hand evidence to the contrary and in the absence of any documentation.

30. This is a total of 52 hours at £8:21 for the week commencing Monday 30 September 2019.
31. The claimant's final week of employment began on Monday, 14 October 2019. His last day of employment was Friday, 18 October 2019 and he accepts that he did not work for a full day. I award him three days at 10 hours at £8.21 and for Friday, 18 October 2019 I find that he finished work at 3:30pm. This is based on his evidence that paragraph 4 of his witness statement. I had no evidence from the Head Chef to contradict this. The claimant is entitled to be paid from 10:30am to 2:30pm when he started his break. I find that at 3:30pm he would have been on his unpaid break and this is why he was taking time to have a cigarette. I therefore find that he is entitled to be paid for four hours on Friday, 18 October 2019.
32. I find that the claimant worked for 34 hours in the week commencing Monday, 14 October 2019 at £8.21 per hour.
33. I also award the claimant the one day holiday pay claimed as it is not in dispute that he took no leave during the period of his employment.

The relevant law

34. Section 13(1) of the ERA provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.
35. Regulations 13, 13A and 14 of the Working Time Regulations 1998 set out the entitlement to annual leave and pay for annual leave and the way in which it is to be calculated.

Conclusion

36. Following the calculations in Regulation 14 WTR the claimant is entitled to one day's holiday pay. This is awarded as claimed in the sum of £82.10.
37. Based on the above I find that the respondent has failed to pay the claimant for a total of 86 hours and that this is an unlawful deduction from wages. 86 hours at £8.21 = £706.06.
38. The combined total of the award to the claimant is therefore **£788.16**.

39. The tribunal and the parties were grateful to Ms Xiao for her hard work in interpreting during the hearing.

Employment Judge Elliott

26 August 2020

Sent to the parties on:

27/08/2020...

For the Tribunal: