



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT (sitting alone)
BETWEEN:

Mr N McAlister
Claimant

AND

HRM Pubs Ltd
Respondent

ON: 24 January 2017

Appearances:

For the Claimant: Mr I McAlister, claimant's father

For the Respondent: Mr M Cole, counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The respondent shall pay to claimant net holiday pay in the sum of **£530.38**.
2. The respondent shall pay the claimant costs in the sum of **£390** in respect of his tribunal fees.
3. The claimant's application for a Preparation Time Order is refused.

REASONS

1. This decision was given orally on 24 January 2017.
2. By a claim form presented on 20 October 2016 the claimant Mr Nicholas McAlister claims holiday pay and unlawful deductions from wages.
3. The claimant worked for the respondent as a trainee chef. In the ET1 he gave his period of employment as from 15 February 2016 to 4 August 2016. His start date is disputed by the respondent as they say he commenced employment on 1 May 2016. The claimant changed his case at this hearing to say that the employment terminated on 10 August 2016.
4. The respondent's position was that the termination date was 4 August 2016.

The issues

5. Is the claimant entitled to 14 days' holiday pay for 30 hours unpaid?
6. Is the claimant entitled to wages for the period from 4 to 10 August 2016?
7. Was he an employee or worker in the period from 15 February 2016 to 1 May 2016?

Witnesses and documents

8. The tribunal heard from the claimant. For the respondent the tribunal was given witness statements from Mr David Hinchley and Mr Simon Hinchley-Robson. They did not attend to give evidence and their evidence was therefore untested.
9. There was a small bundle of documents of 47 pages.

Findings of fact

10. The claimant worked for the respondent as a trainee chef from 14 February 2016 to 3 August 2016. According to the ET3, the respondent employs about 8 people. The respondent disputes the period of employment and says that it was from 1 May 2016 to 4 August 2016.
11. The parties agreed that a week's pay for the purposes of section 221 Employment Rights Act 1996 was £208.68 per week gross and £201.74 net.
12. The claimant's case is that during his employment all bank holidays were worked and no holiday was taken or paid.
13. In their written witness statements the respondent said that from 15 February 2016 to 1 May 2016 the claimant was self-employed. Mr David Hinchley's evidence was that on 1 May 2016 the claimant was taken on as an employee because he did not wish to be self-employed any more. He wanted to be "paid through the books".
14. The respondent accepts that for the period 1 May to 4 August 2016 the claimant was entitled to his holiday pay and puts this at 5 days (witness statement Mr Simon Hinchley-Robson paragraph 5) although counsel accepted that this was not entirely correct. With the assistance of the parties and using the formula in Regulation 14 of the Working Time Regulations we reached an agreed gross sum of £307.36. We later recalculated this to a net figure.
15. The claimant gave evidence. He has worked in the pub and kitchen trade since 2010 when he was 17. The only time he has been paid in cash was the period from 14 February 2016 to 1 May 2016. The claimant said he

- started work for the respondent on Sunday 14 February 2016 and I find that this was his start date.
16. His evidence was that he was told by the respondent that they would pay him in cash “for a little bit and then they would put him on the books”. The claimant’s evidence was that he didn’t really ask about it, he needed a job, they were offering him a job, he went for it and “beggars can’t be choosers”.
 17. There was no live evidence from the respondent and therefore on a balance of probabilities I find that the claimant did not ask to be self-employed and he accepted the situation as put to him by the respondent. My finding is that this was their choice and not the claimant’s choice.
 18. The claimant’s evidence was that he did not ask for time off. He could ask to swap on the rota and that the respondent would organise the swap. He did not do this himself. It was put to the claimant in cross-examination that he could have rung up and said he was not coming in and the respondent would have said “fine”. The claimant’s reply was “I doubt it”.
 19. In the absence of any live evidence from the respondent and on the claimant’s evidence I find that he was not free to decline the work once he had been put on the rota and that there was mutuality of obligation sufficient to found worker status.
 20. I find that in the period from 14 February 2016 when the claimant started with the respondent and 30 April 2016, being the day before he was acknowledged as an employee, he was at the very least a worker and entitled to holiday pay.
 21. I have considered whether the claimant is entitled to be paid his wages for the period from 4 to 10 August 2016.
 22. The claimant changed his position on the day of the hearing. His claim form gave his finish date as 4 August 2016. At this hearing he said it was the 10th August because his first pay from his new employer was on 19 August 2016 which led him to believe he started with them on 12 August 2016.
 23. I was taken to the respondent’s August rota which did not show the claimant’s name, unlike the May, June and July rotas.
 24. The reason for the change of position was given as the discovery of the first pay date from the new employer. However, the claim form was lodged on 20 October 2016, two months after the claimant says he was first paid by his new employer. I find on a balance of probabilities that the claimant knew or ought reasonably to have known by the date of the presentation of his claim, the date he was first paid by the new employer and therefore his finish date with the respondent was as he originally stated, the 4th August 2016. The respondent agreed that date. I find therefore that the claimant’s finish date was 4 August and he is not entitled to be paid until 10 August.

The law

25. Under Regulation 13A of the Working Time Regulations 1998 a worker is entitled to an aggregate entitlement of 28 days' holiday pay in the leave year. Under Regulation 13(9) a worker is entitled to be paid in lieu of any untaken leave, on termination. The right to payment derives from Regulation 16. The formula for calculating holiday pay is set out in Regulation 14.

26. In terms of remedy, Regulation 30 provides:

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

27. Regulation 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.

Conclusions

28. It was agreed at the outset of the hearing that claimant was entitled to holiday pay in the gross sum of £307.36 for the period from 1 May to 4 August 2016. Following submissions Mr Cole for the respondent drew my attention to Regulation 30(3) and (4) of the Working Time Regulations (set out above) and I accepted that the award should be net as compensation. With the agreement of both parties and following my findings on liability, the net figure for the period from 14 February 2016 to 4 August 2016 was agreed as £530.38.

29. The claim for unlawful deductions from wages from 4-10 August 2016 fails.

30. I award £390 in respect of the claimant's tribunal fees. This is an award of costs under Rule 74(1) of the Employment Tribunal Rules of Procedure 2013.

31. The claimant made an application for a Preparation Time Order for 5 hours at £36 per hour, in the total sum of £180. The claimant submitted that the

respondent had promised documents which were not forthcoming, there was no contract of employment and no P45. They then had to go to Early Conciliation it was difficult to get the respondent to respond to their requests. The claimant considered it unreasonable and disruptive.

32. The respondent submitted that this did not meet the test in Rule 76. It is unfortunately common in civil litigation. Even if it were true, which was not conceded as counsel did not have instructions on the point, the respondent's actions did not have the additional element that would justify an award of costs.
33. I accepted the respondent's submission. Although the claimant had described difficulties in the litigation with obtaining information and documents, this was unfortunately not out of the ordinary and I found that the test for an award of costs, in this case a Preparation Time Order (PTO), was not met and I did not exercise discretion to award a PTO.

**Employment Judge Elliott
Date: 24 January 2017**