EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Barton**
Respondent:	**The Night Jar Doncaster Ltd**
Heard at:	**Sheffield** **On: 2 February 2018**
Before:	**Employment Judge Little**

Representation

Claimant:	In person accompanied by Mr J Blower (PSU)
Respondent:	Mr C Simms, accountant

RESERVED JUDGMENT

My Judgment is that:-

1. The claimant did not suffer an unauthorised deduction from wages.
2. The complaint of wrongful dismissal succeeds.
3. The damages to which the claimant is entitled for wrongful dismissal are to be regarded as met and extinguished by the overpayment of £128.27 which I find was made by the respondent to the claimant.

REASONS

1. In a Judgment sent to the parties on 7 December 2017 I found that the respondent (rather than the then second respondent Mr L McGuire) had at all material times been the claimant's employer.
2. Having resolved that preliminary point this hearing has been to determine the merits of Mr Barton's complaints which are in respect of alleged unauthorised deduction from wages and wrongful dismissal. I should add that although in a document prepared for this hearing the claimant referred to his holiday pay entitlement, there is no such complaint before the Tribunal.
3. **The relevant issues**

These are as set out in the case management order which I made on 5 December 2017 and which was sent to the parties on 7 December 2017.

4. **The material before me**

The claimant had prepared a document which was headed "Dean Barton Wage Claim".

The respondent had prepared their own schedule estimating what they thought the claimant was entitled to. The respondent had also prepared for the purposes of this hearing what was described as a cleaning log and there were various documents which referred to the club's opening hours. There was also a screenshot of text exchanges.

The respondent had also brought to the hearing a bank statement. Although an attempt has been made to obliterate it, the account name shown for that bank statement does not appear to be that of the respondent company.

During the course of his evidence the claimant produced further documents. These included an appendix to what might have been an application for a liquor licence, a couple of flyers and a photograph of an 'X' report from a till. The claimant also referred to some of the documents which had been before me at the last hearing mainly screenshots of exchanges between probably Mr MaGuire and the respondent.

5. **The evidence**

The claimant gave evidence and the respondent's evidence was given by Mr S Audsley, director and Mr C Simms, a chartered accountant. On the reverse side of the respondent's schedule under the heading "Notes" was in effect a brief witness statement.

6. **Overview**

The essential issues I need to determine can be summarised as:

What period did the claimant work; during that period how many hours did he work; what was his contractual entitlement to pay and what was he actually paid?

In the vast majority of cases where such issues arise, the answers will be very straightforward. There will be a written contract of employment, there will be payslips, there will be PAYE records, there may be timesheets. Unfortunately, in this case there are no such documents.

It is common ground that there was no written contract of employment. It is also common that the claimant was paid in cash and that pay slips were not issued. The respondent and it's accountant appreciate that there should have been pay slips and PAYE records. Their explanation for their total absence in this case is rooted in their continuing denial that they were the claimant's employer. At the last hearing the respondent contended that the actual employer was a Mr Lee McGuire who at that stage was a second respondent to the claim. In his evidence to me at the last hearing, Mr McGuire said that he had kept certain records and those had been on a memory stick but that device had been lost.

In the absence of documentation which would readily resolve the matters in dispute the parties have been driven to clutch at such as straws as compiling, after the event, a cleaning log in an attempt to show the hours

which the club opened (the respondent's document) and inviting me to look at flyers for reggae nights and karaoke contests (the claimant's documents) whereby the claimant attempts to challenge the hours the respondent says the club was open.

7. **The alleged illegality issue**

This is a new issue and so not referred to in the list mentioned above. It arises in circumstances where the respondent contends that the claimant is giving evidence before me at this hearing which conflicts with the evidence he gave at the last hearing and which suggests that the claimant was not informing the Department of Work and Pensions of the hours he was working.

8. **My conclusions**

8.1. <u>What was the duration of the claimant's employment with the respondent?</u>

In his claim form Mr Barton states that the employment began on 25 February 2017 and that, as of the date he presented his claim (9 August 2017), his employment was continuing. In his "wage claim" document the claimant states the relevant start date as 1 March 2017 and the last working day is given as 2 July 2017.

The respondents have referred me to a screenshot of a text exchange which I assume was between Mr Audsley and Mr McGuire. If so it is Mr Audsley who enquires on 4 March 2017 "who was that guy working last night", to which Mr McGuire replies that it was the claimant.

Accordingly the parties are not very far apart on the start date and bearing in mind that the text exchange does not confirm categorically that the claimant had started on 3 March, I am prepared to accept the claimant's evidence that it was 1 March 2017. As to the end date, naturally in this case there is no such documentation as a letter of dismissal or P45. In his claim form the claimant states that "after 3 months" he did not receive any further shifts. That would result in a de facto end date of something like 1 June 2017 and yet the claimant now contends that he worked the whole of June.

As recorded in the reasons given for my earlier Judgment, one of the documents before me on the last occasion was the 'manager's messengers' document which includes the exchange on 29 May 2017 between a Mr Goodwin, the designated premises supervisor for The Night Jar who states in a message dated 29 May 2017 and referring to the claimant:

"Don't sack him then. Just don't give him hours. I don't want him or Liam working there ever again".

In these circumstances I am satisfied that the period of employment was the three months which the claimant had originally contended for and not the four months which he now contends for.

8.2. What hours did the claimant work during those three months?

In his wage claim document, Mr Barton now contends that he worked 43 hours per week on average, save for the first week when it was 32. As the claimant apparently kept no record of his own I do not know how he arrives at this average. Whilst the respondent has none of the usual documentation to support it's case, it contends that The Night Jar was only open for a maximum of 28 hours per week and so it would be impossible for the claimant to work for 43. In an attempt to counter this, the claimant says that he undertook a certain amount of cleaning work whilst the club was closed to the public. It is also in this context that the claimant produces the licensing appendix where he seeks to show that the club was in fact open for business on nights when the respondents documents show that it would have been closed. However Mr Audsley says that the licensing appendix (obviously part of a larger document which I have not seen) only indicates the hours which the club *could* open, rather than the hours it actually did open. The respondent also points out that what the claimant is now saying about the hours he worked differs from what he said at the first hearing.

My note of the claimant's evidence at that hearing in this regard is:

"I thought I was doing 16 hours or more. Sometimes I did more than 16 hours". The claimant explained that the relevance of 16 hours was that if he worked more than 16 hours per week he would need to inform the Job Centre from whom he was receiving Employment Support Allowance. The claimant gave evidence on the last occasion and also at this hearing that he believed that he could not declare any hours in excess of 16 to the appropriate authorities because he had no written contract.

There is obviously a significant difference between approximately 16 hours per week and the average of 43 which the claimant is now seeking.

On the imperfect evidence which is before me I consider that it is doubtful that the claimant could have worked as many as 43 hours per week, even if the club's opening hours were somewhat more ad hoc than the respondent suggests. Further I note from the handwritten table which the claimant provided at the last hearing, that of the three random weeks shown there, the hours worked are given as 15, 17 and 15. How reliable even those figures are is questionable as at the first hearing the claimant was not able to explain how, many months later and without any records to rely upon, he was able to produce what appeared to be a precise record of hours worked.

On the issue of alleged illegality and drawing a veil over whether or not either party was properly accounting for any tax or national insurance – matters which have not been discussed before me – I take the view that the claimant's alleged failure to notify the DWP of any hours worked in excess of 16 per week does not represent the illegal performance of the contract of employment. In contrast with such obligations as tax and national insurance, there was no obligation cast on the respondent. It was the claimant's sole responsibility to declare

at the Job Centre that he had not worked more than 16 hours per week.

My primary finding is that, in line with the claimant's original evidence, he was not on average working above 16 hours per week. However if he was, and in that case not declaring it to the DWP, I conclude that it would be inequitable to allow the claimant to benefit from what may have been some type of benefit fraud. I should add that I am not of course any finding that the claimant had behaved in that way.

8.3. What was the claimant's contractual entitlement to pay?

It is common ground that the claimant was entitled to receive no more than the national minimum wage rates for the hours he worked. It is also a matter of record that the hourly rate for the national minimum wage in March 2017 was £7.20 but on 1 April 2017 it increased to £7.50. It follows that the claimant's gross weekly wage during March should have been £115.20 and then for April through to the end of May it would have been £120 per week. Accordingly for the 14 weeks of the employment the total gross payment which the claimant should have received was £1,660.80.

8.4. What was the claimant actually paid?

The claimant's wage claim document refers to payments at the rate of either £32 per week or £35 per week, with one payment in April 2017 of £120. Mr Barton has given no clear explanation as to how at this remove he can recollect these figures and in particular the unusually high payment he received for one week in April, or why from the end of April onwards the weekly payments increased to £35. The claimant was apparently keeping no record of the monies he received in cash. I asked the claimant why he continued to work without complaint for a pittance. Mr Barton said that he enjoyed the work.

The respondent's theory as to what the claimant might have received is based upon the rather odd arrangement whereby the respondent made available to Mr McGuire 25% of the weeks takings and from those funds Mr McGuire would pay the staff. At the last hearing Mr McGuire told me that this was the arrangement. He took no money for himself and would divide the 25% equally between the staff who had worked that week – it seems whatever hours they had worked. That of course begs various questions, such as what were the 25% payments to Mr McGuire over the relevant three month period and how many staff worked for each week of that period? On the former point, the respondent has produced a bank statement from HSBC which, as I have noted appears to be bank account in a name different to that of the respondent. The statement covers the period 21 April 2017 to 8 May 2017. Within that two week period two payments to Mr McGuire on 24 April are shown – totalling £272.50 and there are two payments on 2 May 2017 totalling £365.50. I have been given no explanation as to why there are two payments on the same day per week.

In the respondent's schedule there is a column which purports to show the 25% figure paid to Mr McGuire for the 11 week period covered by

that schedule. Two of those amounts tally with the bank statements I have just referred to and suggest that the respondent is treating the total of the two sums paid to Mr McGuire on each of the dates as being the 25% figure. However I have no documentary evidence by way of bank statements to confirm that the other nine 25% payments referred to in the schedule are correct. The respondent has then assumed that there were two staff working in each of those weeks with the result that the payment which Mr McGuire made to the claimant was half of the 25% payment each week. On that basis, for the 11 week period which the respondent considers relevant, the respondent contends that a total payment of £1789.07 would have been paid to the claimant.

I should add that I do not accept that the 11 week period is correct. Whilst the claimant accepts that he did some DJ work at the club prior to starting to do paid bar work I have found that the DJ'ing work would have been in February 2017 and that the bar work commenced on or about 1 March 2017. With the result that the claimant worked 14 weeks.

Whilst again the evidential position is hardly ideal, on the balance of probabilities I accept the respondent's theory. There is some corroboration from what Mr McGuire said at the last hearing and there is some documentary evidence (a rare commodity in this case) by way of the bank statements. Further I consider that it is most implausible that the claimant would have worked for a three month period for the extremely low weekly payments he contends for.

Although I have found that the claimant worked for a 14 week period, the respondent has only provided information about the 25% payments and the share of that payment for an 11 week period and in those circumstances it is only the amount shown in the respondent's schedule (£1789.07) for which credit can be given.

8.5. Was there an unauthorised deduction from wages?

Based upon the 16 hour week which I have limited the claimant to and for a 14 week period at the appropriate national minimum wage rates the claimant should have received a total payment for the employment of £1660.80. I have found that in fact he received more than that, namely £1789.07. It follows that there was an overpayment to the claimant of £128.27. However the respondent has not made a counter claim within these proceedings and there is the question of notice to consider, as to which see below.

8.6. Was the claimant dismissed by the respondent?

On the basis of the text exchange to which I have referred, it is clear that the respondent intended to expressly dismiss the claimant – "sacked Dean yet?". Whilst this was commuted to "don't sack him then. Just don't give him hours" that has the same effect. Accordingly I find that the claimant was dismissed with effect from 29 May 2017.

8.7. Was that dismissal wrongful?

Everything else being equal, the claimant was entitled to the statutory minimum notice if his employment was terminated. By virtue of the

Employment Rights Act 1996 section 86, where a person has been employed for one month or more but less than two years they are entitled to one week's notice. The only exception would be if the employer was permitted to dismiss without notice because the employee had committed gross misconduct. The respondent is not arguing that that is the case here. In those circumstances I conclude that the claimant's dismissal being without notice or a payment in lieu was wrongful.

8.8. What damages should be awarded to the claimant for wrongful dismissal?

The answer to that in principle is that it should be one week's net pay. I take the view that it is appropriate to work out the average weekly pay on the basis of the share of the 25% payment which I have found the claimant received during the 11 week period referenced by the respondent. That would give a gross weekly average of £162.64. As the payment should be net I take the view that the overpayment of £128.27 to which I have referred should now be applied as credit and in fact to extinguish any damages which would otherwise have been awarded to the claimant.

Employment Judge Little

Date: 15 February 2018