EMPLOYMENT TRIBUNALS

Claimant: Mr J O Rourke

Respondent: Ms K Foley Gardner and Mr P Gardner, a partnership

HELD AT: **Leeds By CVP** **ON:** **10 August 2023**

BEFORE: **Employment Judge JM Wade**

REPRESENTATION:
Claimant: In person
Respondent: In person

PUBLIC PRELIMINARY HEARING

JUDGMENT

1 The claimant's unfair dismissal complaint is dismissed for the reasons below.
2 The claimant's unlawful deductions from wages complaint succeeds and the respondent shall pay to the claimant the gross sum of £538.
3 The claimant's claim of unlawful deductions and/or breach of contract in relation to tips is dismissed.

REASONS

Introduction

1. The respondent partnership traded in 2022 as a sports bar. The claimant was its assistant manager. The claimant had presented a complaint of unfair dismissal and unlawful deductions from wages concerning notice pay after the parties parted company in October 2022. The respondent disputed the claims. An Employment Judge directed this preliminary hearing because there was a time limit issue. Dismissal was said to be 23 October 2022, ACAS conciliation was commenced on 3 February and the claim was presented on 17 March 2023. With

the parties' consent, the respondent employer was correctly identified as they appear above, and having determined the preliminary issue, again with the parties' consent, I also determined the deductions from wages complaint.

Evidence

2. Both parties had presented documentation to the Tribunal including a final payslip and communications before and after the claimant's resignation. I also heard oral evidence from Ms Foley Gardner on behalf of the respondent partnership and from the claimant. I did not have a copy of the claimant's contract but there was no dispute about relevant terms.

Findings

3. The claimant worked for the respondents'bar from 17 September 2016, latterly as an assistant manager. The employment was subject to a written contract of employment which did not contain a garden leave clause, but did contain a provision about not working for a similar business after the employment ended.

4. After a period in which the claimant was unhappy at work period during the summer of 2022, with one resignation made and then withdrawn, and then a dispute over taking holiday, the claimant tendered six weeks' notice on 17 September 2022. The notice was to terminate his contract on 29 October 2022, the claimant saying that would be his last shift.
5. The claimant had expected to work that notice, but the respondents preferred to pay him for his notice period with no requirement to work - they placed him on garden leave, saying in an email: "*We feel it is in everyone's best interests for you to leave with immediate effect, in essence placing you on garden leave until 29 October. All money due, covering your notice period, will be paid as normal on a weekly basis into your account, a P45 will then be issued at the end of October. You will then be free to engage in new employment. ...Lastly I would just like to draw your attention to the clause in your contract restricting where you are able to work to not impact on the business.*"
6. The claimant was paid a weekly salary of £538 gross, a week in hand – in effect pay for the period up to 23 October would be paid on or around 4 November. Tips were typically taken in cash. There was no provision in the contract about tips. The custom and practice was that tips would be placed in a secure place each night, counted up at the end of the calendar year and used to fund a staff holiday. In March 2022 the claimant and around 13 staff had been taken to Lanzarote, booked on the basis of tips in 2021, to which the respondents made further contributions to cover the cost of the holiday. That had occurred in previous years also, albeit in the first year of his employment the claimant may also have received a cash bonus to reflect tips.
7. In early October Ms Foley Gardner met with the claimant and provided him with a written warning on 4 October, which sought to set out the terms of his garden leave, namely that the claimant was not required to complete any work, attend work, **or communicate with colleagues**. The respondents believed the claimant had been seeding discontent amongst staff by being with them during his garden leave.

8. I pause there to note that the claimant had not agreed a garden leave clause in his contract of employment, and to seek to impose terms mid way through his notice did not amount to his agreement to those terms.
9. After his contract of employment had ended on 29 October, he was notified in a payslip on 4 November that, "contract terminated due to conditions of garden leave broken". The claimant was not paid his final week's notice of the six week period. The respondent paid salaries, "a week in hand"; payment on 4 November was in respect of the week ending 21 October.
10. There was no communication to the claimant before 29 October that the respondent had, prematurely, for reasons of his conduct, wished to terminate that contract. That wish was not communicated to the claimant because the respondents did not want to sour a wedding over the relevant weekend affecting the claimant and colleagues.

The Law

11. Establishing the effective date of the termination of a contract of employment is a question of fact, but informed by principles of contract law. I find the claimant's contract provided for notice in writing as that is what he did. Generally parties can also terminate contracts by unequivocal conduct – telling someone they are fired – for example. If a party wishes to terminate for repudiatory breach by the other party, they must say so, and not affirm the contract. Either way, the contract terminates on the date that communication of the termination takes place (unless there is termination by frustration or operation of law – both rare events).
12. The right not to suffer unlawful deductions from wages is set out in Part II of the Employment Rights Act 1996 – Protection of Wages. Deductions shall only be made if authorised by the employee's contract or a statutory provision (such as tax), or if the employee has previously signified his agreement in writing.

Conclusions

13. Applying the law to the facts above, the claimant's contract of employment ended on 29 October by virtue of the notice he gave. His claim that dismissal occurred on 23 October, by virtue of the sending of the payslip and its communication on 4 November is misconceived. A contract of employment cannot be retrospectively terminated. His case was never that his resignation was a constructive dismissal. The unfair dismissal complaint is therefore dismissed. There was no dismissal. If he wishes to pursue a constructive unfair dismissal claim, it was reasonably practicable for that to have been presented in time because the claimant knew of his own resignation. The claimant identified the difficulty in his dismissal case when he said, "the reason I could not present the claim in time was because I did not know about dismissal until 4 November".
14. As for the unlawful deductions from wages complaint, this succeeds. The deduction of the last week's notice pay during which the claimant was not required to work was an unlawful deduction of exactly the kind prohibited by the Act.
15. As to the assertion of the right to a share of tips as either a breach of contract claim or an unlawful deduction from wages complaint, this fails. The custom and practice term of the contract between the parties was the collection of tips to pay for a joint staff holiday; there is no necessity to imply into such a term that staff leaving will be paid their share at the date of leaving. Further, for the claimed to succeed the sum claimed must be calculable, and the claimant was unable to identify more than a belief in the total sum accumulated by the time of his departure.

Employment Judge JM Wade
10 AUGUST 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 August 2023

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FOR THE TRIBUNAL OFFICE

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