



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Astuti

**Respondent:** Mr Yaser Iqbal t/a Smokin' Rooster

**Heard at:** Southampton                      **On:** 12 January 2017

**Before:** Employment Judge Bridges

**Representation:**

**Claimant:** Mr G Cook (Solicitor)

**Respondent:** Mr Yaser Iqbal

**JUDGMENT** having been sent to the parties on 26 January 2017 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant made the following complaints:
  - 1.1 unlawful deduction of wages,
  - 1.2 accrued holiday pay, and
  - 1.3 breach of contract for notice monies.
2. In addition the claimant alleged that the respondent had failed to provide her with a written statement of employment particulars under section 1 of the Employment Rights Act 1996 (ERA).
3. The respondent denied he was the correct employer and contended that the claimant was employed by Smokin Rooster No2 Ltd ("Rooster 2") based in Bournemouth. The respondent also denied substantive liability and alleged that the claimant was a volunteer and, therefore, not an employee or worker and was not entitled to any payments.

### Respondent's strike out application

4. At the outset of the hearing the respondent applied to strike out the claimant's complaints. The respondent's application for a strike out was initially made in the respondent's email of 10 September 2016 and this was followed up with various further emails repeating the application.
5. Essentially the application is on two grounds. First, the claimant's non-compliance with the Tribunal's standard directions Order of 2 August 2016 which required the claimant to send to the respondent and the Tribunal her written statement of the remedy she was seeking by 30 August 2016. Second, the manner in which the claimant's solicitors had conducted the case and, in particular, not responding to the respondent's phone calls in August 2016 and ignoring communications from the respondent.
6. I read the parties written submissions in relation to this application and heard further oral submissions from both parties.
7. Mr Cook, the claimant's solicitor, agreed that he was responsible for missing the deadline of 30 August 2016. His explanation for this was that he went on holiday for two weeks in mid-August 2016 but had had to come home early because his wife was taken seriously ill. Mr Cook himself became sick with flu on 22 August 2016 and did not return to work until 7 September 2016.
8. On 12 September 2016 the claimant's solicitors sent by post to the respondent the claimant's witness statement dealing with remedy and emailed this to the Tribunal on 13 September 2016.
9. The respondent, however, did not receive the claimant's witness statement on remedy until towards the end of September 2016.
10. Mr Cook apologised and fully accepted that he should have made contingency plans in relation to ensuring compliance with the Tribunal's Order.
11. There is a high hurdle to overcome in relation to striking out a case.
12. In relation to the failure to comply with the Order, which I found was a failure by Mr Cook, I considered the prejudice to the respondent and whether a fair hearing was still possible. The initial hearing was due to take place on 14 October 2016 but was adjourned to 12 January 2017 because the respondent went to the wrong hearing centre in Bristol rather than to where the case was listed in Southampton. In these circumstances there was no prejudice to the respondent in having received the claimant's remedy statement towards the end of September 2016. I also found that the breach of the Order by Mr Cook was not a contumelious default but was because of his failure to make adequate arrangements whilst he was off sick.
13. Turning to the allegation of unreasonable conduct against the claimant's solicitors. Even if the claimant's solicitor's firm did not return the respondent's calls and correspondence whilst Mr Cook was on holiday, I decided that this conduct would be insufficient in itself to amount to unreasonable conduct. I found that it was not a deliberate or persistent disregard of required procedural steps. Further, even if it had amounted to such unreasonable conduct, I still have a discretion whether, or not, to strike out. I did not

exercise my discretion to strike out because a fair trial was still possible in this case.

Who was the correct employer?

14. This issue as to the correct employer was first raised by the respondent in his email of 10 January 2017 approximately two days before the final hearing.
15. The question to be determined was who did the claimant enter into a contract with when she was offered and accepted the job.
16. There was a dispute on the documentary evidence in relation to this and other issues. In particular there was a dispute whether the texts and emails relied on by the claimant were genuine. Mr Yaser Iqbal's evidence was that the claimant falsified these documents and they were not genuine documents. In the claimant's evidence she denied this and relied on Mr Yaser Iqbal's name being on top of both emails of 17 March 2016 in connection with the job and arranging for an interview (C1, 3 – 4). Further, that the name "Yas" appeared on top of the text messages of 27 and 28 April 2016 (C1, 7). No name appeared on the top of the other text messages between the parties. The claimant's explanation for this was that when she printed them off from her phone the top part of the message was not printed.
17. I preferred the claimant's evidence on whether the emails and texts were genuine. I found Mr Yaser Iqbal's evidence not credible at best and untruthful at worst.
18. On or about 24 March 2016 the claimant had a job interview with Mr Yaser Iqbal. Mr Yaser Iqbal offered the claimant a job as a kitchen porter and general help on the basis that she successfully completed one day's probation which the claimant agreed to. The claimant successfully completed the one day's probation. The parties agreed that the claimant's wages would be £5.30 per hour and she would work six hour shifts over five or six days a week. Prior to the claimant commencing employment she texted Mr Yaser Iqbal saying that she needed at least 24 hours work a week otherwise she would not be able to pay her rent.
19. The claimant commenced work on or about 29 March 2016 at Rooster 2's premises at 221 Old Christchurch Road, Bournemouth which is a family run restaurant/takeaway business.
20. The claimant was a young Italian woman who came to the UK to study for a degree in Forensic Science.
21. The claimant was not provided with any written statement of terms and conditions of employment or any letter confirming the claimant's terms of employment. Further she was not provided with any payslips throughout her employment.
22. The evidence in relation to the circumstances of how the claimant's employment was terminated was also relevant.

23. On 28 May 2016 the claimant texted Mr Yaser Iqbal saying she had a fever and could not come into work that day. Mr Yaser Iqbal replied by saying that notification by text was not accepted and asked the claimant to call him at 4.00pm. The claimant tried to call Mr Yaser Iqbal at 15:30 but then fell asleep. Mr Yaser Iqbal replied telling the claimant that she was “off the Rota” until further notice (C1 page 8). The claimant texted the respondent on 1 June 2016 (C1 page 9) asking for her timesheet. Mr Yaser Iqbal replied on the same date stating “I don’t want you coming to the shop again. Best of luck.”
24. It was, therefore, Mr Yaser Iqbal who terminated the claimant’s employment on 1 June 2016.
25. In the claimant’s ET1 she named the respondent as “Yaser Iqbal trading as Smokin’ Rooster.”
26. Mr Yaser Iqbal completed the response saying that “Smokin’ Rooster” was the respondent and he was the contact. However, at no point in the response did he allege that the claimant was employed by a company whether that was Smokin’ Rooster Ltd (“Rooster 1”) or Rooster 2.
27. Mr Yaser Iqbal was a fifty percent shareholder of Rooster 2 and his brother Mr Nasar Iqbal held the other fifty percent. Rooster 2 traded from 221 Old Christchurch Road, Bournemouth. Mr Yaser Iqbal was not a director of Rooster 2.
28. Mr Yaser Iqbal owned and was a director of Rooster 1 which traded from 7 Grand Parade, High Street, Poole, Dorset.
29. At no point during the claimant’s employment, or prior to it, did either Mr Yaser Iqbal or Mr Nasar Iqbal tell the claimant that she would be employed by either of the above companies.
30. In these circumstances the claimant’s contract was with Mr Yaser Iqbal personally who was the employer and correctly named as the respondent in these proceedings.

The claimant’s employment status

31. The respondent submitted that the claimant was a volunteer and in his evidence he stated that no payments had been made to her throughout her employment because of this.
32. Mr Cook submitted that the claimant was an employee within the meaning of section 230(1) ERA.
33. The claimant answered an advert in the shop window stating “Staff Required Part Time/ Flexible Hours / Shifts Available” (C1, 1 and 2). There was no reference to volunteers. I have already found that there was an oral contract between the claimant and Mr Yaser Iqbal for the claimant’s services made on or about 24 March 2016 under which there were mutual obligations for the claimant to work and for the respondent to pay the claimant for that work. The respondent did pay the claimant for many of the hours she worked during the

period between March 2016 and May 2016 as shown by the timesheets (C1, 5-6).

34. Further, I found that the claimant was required to provide personal service. This is evidenced by the text messages between the claimant and Mr Yaser Iqbal (C1, 7-8 and 14-18) which showed that the claimant was personally required to attend at 221 Old Christchurch Road to perform her duties. In particular Mr Yaser Iqbal's text messages to the claimant leading up to her being taken off the rota, and then dismissed, showed that the claimant was required to personally carry out her duties. Further, other texts showed that the claimant was required to attend personally at certain times to open or close the shop.
35. Turning to the issue of control the claimant was placed on a weekly rota in the same way as the other staff. The claimant was required to attend work at a set time as set out on the rota to carry out her duties as directed by the respondent. The text messages showed that the claimant could not decide on which days she worked, or did not work, but that she was required to work on specific days at specific times. She was not free to leave when she wanted.
36. When working it was normally Mr Yaser Iqbal who told the claimant what work she was required to do and how it was to be done. The claimant was also given her own login details for the till (C2, page 1).
37. In conclusion the respondent exercised control over when, and how, the claimant carried out her work. The claimant was an employee within the meaning of Section 230(1) ERA.

#### The substantive complaints

38. In the wages complaint Mr Yaser Iqbal denied that the claimant had been provided with any payments during her employment and stated that the claimant was working on a purely voluntary basis. He alleged that the two timesheets relied on by the claimant (C1, 5-6) were fraudulent because they had been fabricated by her.
39. I rejected Mr Yaser Iqbal's evidence in relation to this issue and I found that his evidence was untruthful.
40. In the claimant's first witness statement (C1) she set out in detail the hours she had worked and the actual payments made to her which were paid in cash. A significant part of the claimant's evidence was corroborated by the two timesheets (C1, 5 - 6). The respondent did not challenge the claimant in cross examination in relation to her evidence on the detail of the payments made (other than to allege the claimant had received no payments) and the sums owed for work she had done.
41. I accepted the claimant's evidence on the sums owed to her. In summary the claimant was unpaid for 47 hours in March 2016 and unpaid for 148 hours in May 2016. This totalled 195 hours at the hourly rate of £5.30 pence per hour which equalled £1,033.50.

42. I awarded the claimant £1,033.50 in relation to unpaid wages.
43. Turning to the holiday pay claim. The claimant was never paid holiday pay during her employment of approximately nine weeks. Further, she did not take any annual leave. I accepted her evidence and calculation of  $9 / 52 \times 5.6 \times £185.50$  a week which equalled £179.79.
44. I awarded the claimant £179.79 for accrued unpaid holiday pay.
45. In relation to the breach of contract complaint for notice pay the claimant was dismissed summarily by Mr Yaser Iqbal in his text of 1 June 2016 when he informed her that he did not want her coming to the shop again.
46. As the claimant had worked for more than one month she was entitled to one week's statutory notice.
47. I award the claimant one week's net pay in the sum of £185.50.
48. The claimant also made an application for a Section 38 award because of the respondent's failure to comply with its legal obligations under Section 1 ERA and provide the claimant with a written statement of her terms and conditions of employment. This breach was still outstanding at the date of issue of the proceedings.
49. No attempt was made by the respondent to document the oral agreement between the parties by way of a formal contract, written statement of terms and conditions or even in a letter setting out the main terms, including the name of the employer.
50. I awarded the claimant four weeks pay at £185.50 a week which equalled £742.

#### Fees and expenses

51. The claimant succeeded in her claims and was entitled to an award in relation to the Employment Tribunal fees paid by her. I, therefore, awarded the claimant £160 in relation to the issue fee and £230 in relation to the hearing fee making a total of £390.
52. The claimant made an application that the respondent pay the claimant's wasted expenses as a result of the respondent's application on the 14 October 2016 to postpone the hearing on that date. The respondent had attended at the wrong hearing centre in Bristol on the 14 October 2016 when the Notice of Hearing clearly stated that the hearing was at Southampton Employment Tribunal.
53. I ordered the respondent to pay the claimant her expenses for her flight from Glasgow, where she was at university, to Southampton for the hearing at Southampton Employment Tribunal on 14 October 2016 in the sum of £134.95. Further, that the respondent pay the claimant's other expenses for attending the hearing on 14 October 2016 for a hotel of £64.00, taxi fare of £17.00 and bus fare of £2.00. The total of the claimant's expenses to be paid by the respondent is £217.95.

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Employment Judge Bridges

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Date 14 February 2017

REASONS SENT TO THE PARTIES ON

16 February 2017

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FOR THE TRIBUNAL OFFICE