



EMPLOYMENT TRIBUNALS

Claimants: Mr G Imperato
Mr S Yilmaz

Respondent: Poppy 2017 Limited

HELD AT: Manchester

ON: 17 September 2019

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimants: Mr P Murphy, friend

Respondent: Mr Daniel Bacci, shareholder and director, and Ms J Pike,
HR consultant

JUDGMENT

The judgment of the Tribunal is that:

1. Mr Imperato was unfairly dismissed.
2. Mr Imperato was entitled to be paid a statutory redundancy payment by the respondent.
3. The respondent was in breach of contract by dismissing Mr Imperato without notice.
4. The respondent made an unlawful deduction from wages by not paying Mr Imperato in lieu of 1.9 weeks' accrued but untaken holiday.
5. Mr Yilmaz's complaint of unfair dismissal is not well founded.

6. Mr Yilmaz was not entitled to be paid a statutory redundancy payment by the respondent.
7. The respondent did not dismiss Mr Yilmaz so was not in breach of contract in relation to dismissal without notice.
8. The respondent made an unlawful deduction from wages by not paying Mr Yilmaz for his full wages in the period 12 November to 9 December 2018.
9. The respondent made an unlawful deduction from wages by not paying Mr Yilmaz in lieu of 1.08 weeks' accrued but untaken holiday on termination of employment.
10. The respondent failed to provide a written statement of employment particulars to the claimant so an award of 2 or 4 weeks' pay will be considered at the remedy hearing.
11. There will be a remedy hearing on 12 November 2019 at the Manchester employment tribunal, beginning at 10 a.m. with a time estimate of one day, unless the parties notify the tribunal before that date that they have agreed remedy.

REASONS

Claims and issues

1. The claimants claimed unfair dismissal; that they were entitled to a redundancy payment; breach of contract in respect of failure to give notice of termination of employment; and unlawful deduction from wages in respect of a failure to pay them in lieu of accrued but untaken holiday at date of termination. They also asserted that they had never been given a written statement of employment particulars. Mr Yilmaz made an application to amend his claim to include a complaint of unlawful deduction from wages in respect of wages due up to the date of termination. The respondent did not object to this amendment and leave was given to amend the claim to include this complaint. Mr Imperato did not apply to amend his claim to include a complaint of unlawful deduction from wages in respect of unpaid wages up to the date of termination of employment.

2. The issues were discussed and agreed to be as follows:

Unfair dismissal

2.1. Was the claimant actually dismissed and, if so, when?

2.2. If the claimant resigned, rather than being dismissed, was the claimant constructively dismissed?

- 2.3. Was the respondent in fundamental breach of contract?
- 2.4. Did the claimant resign in response to that breach?
- 2.5. If the claimant was actually or constructively dismissed, has the respondent shown a potentially fair reason for the dismissal? (Redundancy or some other substantial reason?)
- 2.6. Did the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances?
- 2.7. If the dismissal was unfair, what are the chances the claimant would have been fairly dismissed had a fair procedure been followed?

Redundancy

- 2.8. Was the claimant actually or constructively dismissed?
- 2.9. If the claimant was dismissed, was this because of redundancy? (There is a presumption that dismissal was because of redundancy - section 163 (2).)
- 2.10. If the claimant was dismissed because of redundancy, did the claimant lose the right to a redundancy payment because he refused a job offer or resigned during a trial period when the job offered was suitable employment in relation to the employee and refusal of the offer or resignation during the trial period was unreasonable (section 141 (2)-(4) Employment Rights Act 1996).

Breach of contract (notice)

- 2.11. Was the claimant actually or constructively dismissed?
- 2.12. What notice was the claimant entitled to?

Holiday pay

- 2.13. To be considered under the Working Time Regulations or as a breach of the contract of employment.
- 2.14. Did the claimant have holiday which was accrued but untaken at the date of termination for which he was not paid in lieu?
- 2.15. If this is a contract claim, did the contract give a right to payment in lieu of accrued but untaken holiday?
- 2.16. If this is a Working Time Regulations claim, was there a relevant agreement as to the holiday year? If not, the relevant holiday year begins on the anniversary of the start of employment.

Unlawful deduction from wages (Mr Yilmaz only)

2.17. Was Mr Yilmaz paid all the wages to which he was entitled up to the date of termination of employment?

Failure to provide a written statement of employment particulars

2.18. If another claim succeeds:

2.18.1. Did the respondent fail to provide the claimant with a written statement of employment particulars or fail to provide particulars of change?

2.18.2. If so, the tribunal must award 2 or 4 weeks' pay.

Representation

3. The claimants were represented by a friend, Mr Murphy, who informed me that he had not been a representative before. The respondents also did not have legal representation, although Ms Pike is an HR consultant who gives advice to the respondent and its associated companies. I allowed both Ms Pike and Mr Daniel Bacci to ask questions and put arguments on behalf of the respondent.

Summary of the case

4. The claimants were the manager and deputy manager of a restaurant, Zio, operated by the respondent company, owned by Daniel and Dominic Bacci, who I refer to collectively as "the Bacci brothers". The restaurant closed suddenly, with the purported forfeiture of the lease by the landlord. There was a dispute as to when and how the claimants' employment came to an end. The Bacci family owns two other companies which operate two other restaurants. There was a dispute as to whether employment was offered to the claimants at the other restaurants. The claims of unfair dismissal (actual or constructive), entitlement to a redundancy payment, breach of contract (failure to give notice of termination of employment), and failure to pay holiday pay arise out of these circumstances. In addition, as noted above, Mr Yilmaz claimed unlawful deduction from wages in respect of failure to pay all wages due up to the termination of employment.

Evidence

5. I heard evidence from the two claimants and from Mr Daniel Bacci for the respondent. Mr Daniel Bacci and his brother, Mr Dominic Bacci, are the owners of the respondent company. They had prepared a joint witness statement, but agreed that Mr Daniel Bacci could give evidence on all relevant matters so we did not hear oral evidence from Mr Dominic Bacci. Further references in these reasons to Mr Bacci are to Mr Daniel Bacci unless otherwise stated.

6. I also read witness statements from Mr Denis Warner, operations manager of the Capannina restaurant, and Mr Phil Ogden, manager of the Dolce Vita restaurant, who did not attend to give evidence. Mr Murphy, on behalf of the claimants, agreed

that I could read the statements and give them such weight as I considered appropriate.

7. There was an agreed bundle of documents. It appeared at the hearing that the claimants had misunderstood the case management orders made at a previous hearing which had been adjourned. Further documents were inserted in the bundle at the hearing, at their request, and with the agreement of the respondent.

8. I checked with Mr Yilmaz at the start of the hearing whether he required an interpreter because, although he had not requested an interpreter, he had written that Turkish was his first language and he wanted Mr Murphy to speak on his behalf. Mr Yilmaz informed me that he did not need an interpreter and he gave oral evidence in English without any apparent difficulty in understanding the questions.

Facts

9. The claimants both worked in the Zio restaurant in Barrowford. Mr Yilmaz was the restaurant manager and Mr Imperato the assistant manager at relevant times. At the time the Zio restaurant ceased to operate, both claimants were employed by the respondent company. Their employment had transferred to that company by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 when the respondent bought the business from the administrators of the previous business owner, Kator Limited. Kator Limited went into administration on 5 October 2018.

10. The claimants had been unaware of the transfer of the business and change of their employer at the time the change took place. The respondent had not provided the claimants with an updated statement of employment particulars (if they had ever had a statement of employment particulars, which is a matter of dispute). The respondent and its predecessor in business had not notified the claimants of the transfer of the business.

11. The claimants had each been employed for a number of years in businesses owned by members of the Bacci family. It is common ground that Mr Imperato's continuous employment began on 1 June 2010. Although the respondent had initially disputed the start date of Mr Yilmaz's continuous employment, at the hearing, it was agreed that this was 1 October 2009.

12. Mr Bacci told me that Kator Limited had been owned by his mother.

13. There are two other restaurants owned by companies of which I was told the Bacci brothers are the shareholders: the Dolce Vita, which is the trading name of Michael 1987 Ltd, and the Capannina restaurant, which is the trading name of Henry 1948 Limited.

14. On 17 November 2018, Mr Yilmaz arrived at the Zio restaurant to find the premises locked and a notice on the door that the premises had been seized on the authority of the landlord and the lease forfeited. The respondent disputes the right of the landlord to have forfeited the lease and I have been told that there are ongoing legal proceedings between the respondent and the landlord in relation to this.

Whether or not the landlord was entitled to seize the premises, the result was that the respondent has not been able to carry on the Zio restaurant business at those premises since the purported forfeiture of the lease.

15. Mr Yilmaz, on finding the premises locked and the forfeiture notice, tried to call Mr Bacci, but spoke to Mr Warner. Mr Yilmaz told other employees, including Mr Imperato, what had happened.

16. Initially, the Bacci brother were hopeful that the restaurant would re-open on Monday 19 November and this was the message given to staff through Mr Yilmaz.

17. Mr Imperato discovered by searching for Kator Limited online that it had gone into administration on 5 October 2018. This was the first he or other employees knew about this. Mr Imperato rang the administrators and they told him that, from 5 October 2018, the staff had been transferred to a new company, the respondent company. This was the first that Mr Imperato and other staff knew about their employer having changed.

18. On Monday 19 November 2018, the message passed to Mr Imperato from the Bacci brothers via Mr Yilmaz was that things were taking time and things would be better on 20 November.

19. I deal with messages sent by Mr Imperato on 20 November in the section below which relates to Mr Imperato.

20. I accept the evidence of Mr Bacci that two of the chefs went to work at La Capannina. Mr Warner, Operations Manager based at La Capannina Restaurant in Bury, picked up one of the chefs, who had no transport, and took him into work over a period of some months, although the journey took him out of his way. Mr Yilmaz did some work at the Dolce Vita, which I deal with below. Mr Imperato did not do any work for any of the associated companies' restaurants after the closure of Zio. There is a dispute as to why this was, which I deal with in the section which relates to Mr Imperato.

21. It is common ground that the Bacci brothers were hopeful, and remained hopeful at all relevant times, of reopening Zio in the near future. They were coming into the restaurant's busiest trading period, Christmas, and had a large number of bookings in the diary for December. They accepted that, because of the lease situation, they would be unable to continue trading in the short term but they were still hoping to resolve the situation with the lease and resume trading. I find that the arrangements made for staff to work elsewhere were intended as temporary measures, until Zio could reopen. I accept the evidence of Mr Bacci that they did not want to lose staff; they had a good team at Zio and knew how difficult it is to find and retain good staff.

22. I now set out facts that relate to each individual claimant.

Mr Imperato

23. In the afternoon of 20 November 2018, Mr Imperato sent a What's App message to Mr Bacci as follows:

“I am sorry to disturb you, I am sure you and your family having a tuff time. As you know we all worried about Zio, cos we care about....I have been loyalty to you for the last 8 years, would be nice if you can tell me if there are any updates.”

24. The two ticks by the message suggest that it was read. However, Mr Bacci did not reply. Having not received any reply, Mr Imperato forwarded the message to Mr Dominic Bacci in the evening of the same day, with the additional message:

“Hi Dominic, I have send this message to Daniel without any reply...Please can you let me know something...I always been there when you needed. Thank you.”

25. Mr Imperato received no reply to this message, although the two ticks by the message suggest that it was read.

26. Mr Imperato received no reply to his messages from either Mr Bacci. It is agreed that neither of the Bacci brothers contacted Mr Imperato directly about the situation or about any alternative work. Mr Bacci informed me that they relied on Mr Yilmaz to pass on information. There is a factual dispute as to what the Bacci brothers asked Mr Yilmaz to say to Mr Imperato.

27. Mr Bacci gave evidence that Mr Imperato was offered work, via Mr Yilmaz, at their other restaurants. Mr Imperato and Mr Yilmaz deny this. I prefer the evidence of Mr Imperato and Mr Yilmaz. Mr Imperato had shown himself willing, in the past, to go temporarily to another restaurant. An exchange of What's App messages from October 2018 included in the bundle provides evidence that Mr Imperato had gone to work at another of the Bacci family restaurants on request when they were short handed. This restaurant was further away from Mr Imperato's home than Zio's.

28. I accept Mr Imperato's evidence that he was not asked by the Bacci brothers, directly or indirectly, to work elsewhere after the closure of Zio's and that he would have been willing to do so if he had been asked, as evidenced by his past willingness to do so. Mr Yilmaz mentioned to him that Mr Yilmaz could work for another restaurant for a short period until Zio's reopened. Mr Imperato asked about himself and Mr Yilmaz told him they did not need anyone else. If he had been offered work, I find it more likely than not that he would have taken it. In any event, since the Bacci brothers were still hopeful of reopening Zio's, any offer would have been of a temporary nature, if made, rather than an offer of alternative permanent work for another associated company in a different location.

29. Mr Imperato started doing some work part-time for a friend in the first week in December since he was not being paid by the respondent and had not been offered any alternative work by the respondent. He asked a friend to help him by giving him some work. He took the work while he waited to find out if and when he could return to work at Zio's. Shortly after that, he received his P45 at which time he understood that his employment with the respondent had ended. He did not find and start a permanent job until February.

30. Mr Imperato says that the first time he knew his employment was not continuing was when he got his P45 with no explanation. His P45 was issued in the name of Kator Limited on 6 December 2018, although that company was in administration at that time and the claimant's employment had transferred to the respondent. The P45 gave a leaving date of 23 November 2018.

31. Mr Bacci heard from one of the chefs who had gone to work at one of the other restaurants that Mr Imperato had found alternative employment with his uncle in Colne and was working there. This prompted the respondent to send the P45. Neither Mr Bacci contacted Mr Imperato directly to ask whether the information they had been given was correct or to offer Mr Imperato temporary work at one of the respondent's associate companies until the situation at Zio's was resolved.

32. Payslips from Kator Limited for Mr Imperato are included in the bundle, with the last processing date being 18 November 2018. The payslips all give pay for 30 hours a week at £8 per hour (£240 gross per week).

Mr Yilmaz

33. It was common ground, following oral evidence, that Mr Yilmaz had been paid for the week ending Sunday 11 November and not for any work at Zio's after that date. Mr Yilmaz collected the payment for the week ending Sunday 11 November from the safe when given access to the premises on 30 November 2018.

34. About a week after the restaurant closure, Mr Bacci contacted Mr Yilmaz, asking him to go to work at one of the other restaurants in the group as a temporary measure. I accept Mr Yilmaz's evidence that he was asked by Mr Bacci to work there until Zio's reopened.

35. Mr Bacci, in giving evidence, said he had no idea how to answer, when asked whether Mr Yilmaz was transferred to work for another company or was still employed by the respondent when working at Dolce Vita. He then said that Mr Yilmaz was transferred for a period of time until they sorted the problems out. He agreed that this was short term until Zio was up and running. Then said he did not know if it was temporary or permanent.

36. I find that Mr Yilmaz's employment was not transferred to Michael 1987 Limited, the company operating the Dolce Vita, although payslips which the respondent has produced (which Mr Yilmaz disputes receiving) and Mr Yilmaz's P45 were issued in this name. HMRC records for Mr Yilmaz give income in the year ended 5 April 2019 from the employer he joined after his employment with the respondent and from Kator Limited, with an end date to his employment there of 21 October 2018. There is no record of payment from the respondent company or from Michael 1987 Limited.

37. I find that Mr Yilmaz was seconded on a temporary basis to work at Dolce Vita. The Bacci brothers remained hopeful, until and beyond the time that Mr Yilmaz left the respondent's employment, that Zio's would reopen and it was their intention that Mr Yilmaz would return as restaurant manager when it did reopen. I find that Michael 1987 Limited paid Mr Yilmaz as agent for Michael 1987 Limited for the period of time he worked there.

38. There is a dispute about the hours Mr Yilmaz worked at Dolce Vita and whether Mr Yilmaz was given payslips. It is common ground that Mr Yilmaz was paid in cash, as he had been when working at Zio's, although the payslips indicate, in error, that payment was made by cheque. Mr Yilmaz said he only worked there 5 nights. The evidence produced by the respondent is inconsistent as to how long they say Mr Yilmaz worked at Dolce Vita. Mr Ogden's witness statement states that Mr Yilmaz started working there the week after the closure and worked for two weeks before leaving for what he said was more suitable alternative employment nearer home. The payslips suggest he worked there three weeks. Mr Yilmaz's What's App messages, which I refer to below, refer to 3 days but this was prior to 28 November 2019. I find it more likely than not that Mr Yilmaz continued doing some work for Dolce Vita after the What's App message.

39. The respondent included in the bundle of documents payslips for Mr Yilmaz from Michael 1987 Limited dated 2, 9 and 16 December 2018, each being for 30 hours each week, with gross weekly pay of £247.50 (£8.25 per hour). Mr Yilmaz said he did not recall receiving these payslips and then that he did not receive these and they did not represent accurately pay he had received. He said he was paid £50 per day when working at Dolce Vita. He had been paid £270 per week when working at Zio.

40. Included in the bundle was an incomplete, so undated, What's App message (which, from the messages which followed, was prior to 28 November 2018). The incomplete message seems to be asking a question about "Vita", which I understand to be the restaurant "Dolce Vita", the trading name of Michael 1987 Ltd. The series of messages was between Mr Daniel Bacci and Mr Yilmaz. In answer to the question about "Dolce Vita", Mr Yilmaz replied:

"Yea it was good there, okay when can i get paid also i got wages left in save in zio i need to take at aswell pls"

41. Mr Bacci replied that he would arrange payment on Wednesday and asked how many days Mr Yilmaz had worked that week. He wrote that they were still locked out of Zio but hoped to get in that week and he would let Mr Yilmaz know when.

42. Mr Yilmaz replied:

"I worked 3 days that week plus if i take the one in save i am okay thank you."

43. I take the references to "save" to be references to the safe at Zio's premises.

44. On 28 November 2018, Mr Yilmaz messaged Mr Bacci to ask what was happening. The reply in the bundle appears to be incomplete but the bit which is included states that they are still locked out.

45. Around 30 November 2018, Mr Yilmaz was informed by a member of his family who had been passing Zio's, that things were being removed from the restaurant. I accept Mr Bacci's evidence that they were removing whatever they could for safekeeping until the situation about the lease could be resolved. Mr Yilmaz was

able to retrieve his money from the safe and his personal possessions under the supervision of the Bacci brothers and Mr Warner.

46. Mr Yilmaz formed the view that, as the business was closed, he needed to find alternative employment as he had a family to keep and bills to pay. He did so and, as evidenced by HMRC records, he started new employment on 10 December 2018. Work at Dolce Vita involved a longer journey for Mr Yilmaz than to Zio's. I accept the evidence of Mr Bacci that he was told by Phil Ogden, manager of Dolce Vita, that Mr Yilmaz had informed him that he had found a job near his home so was not working for them any more. I find that Mr Bacci was told this because this is what Mr Yilmaz had informed Mr Ogden. Mr Ogden's witness statement supports this, stating that Mr Yilmaz said he had decided to leave the business, explaining that he had found suitable alternative employment nearer to home.

47. A P45 for Mr Yilmaz was issued by Michael 1987 Limited on 17 May 2019, giving a leaving date of 16 December 2018. Total pay to date in the tax year 2018/2019 was given as £9225.06, which is obviously more than Mr Yilmaz was paid in the period he was seconded to Dolce Vita.

48. The evidence as to how long Mr Yilmaz worked at Dolce Vita is unclear. However, doing the best I can on the unsatisfactory and inconsistent evidence, I find, on a balance of probabilities that Mr Yilmaz worked for two weeks at a rate of £250 gross per week. It appears likely to me that Mr Yilmaz worked more than the 5 days he recalls, since he had already worked 3 days some time prior to 28 November and continued until some time after he saw things being removed from the premises on 30 November, which prompted him to look for other work. It seems unlikely to me that he would have stopped doing work which was available until he had at least an offer of alternative work. Mr Ogden's witness statement said he worked for two weeks. I prefer Mr Ogden's evidence to that of the disputed payslips which suggested Mr Yilmaz had worked for three weeks.

Written statements of employment particulars

49. The respondent asserted that the claimants had been given written statements of employment particulars by Kator Limited. They produced a pro forma of a statement of employment particulars for Kator Limited but were not able to produce any copies of statements containing the particular details for either claimant. Mr Bacci said that all the paperwork for Kator Limited was with the administrators and they had not been able to get hold of copies of this. The claimants denied that they had ever been given copies of the statements. The respondent did not present any evidence about how and when statements of employment particulars were given to the claimants.

50. It was common ground that no employment particulars or notice of change of particulars were given to the claimant after the TUPE transfer of the business from Kator Limited to the respondent.

51. I find, on a balance of probabilities, that the claimants were not given written statements of employment particulars by Kator Limited, the predecessor in business. Mr Bacci's oral evidence that he had seen copies of contracts with the claimants' names on is not sufficient to persuade me that statements of employment particulars

were issued to the claimants. It is agreed that the respondent did not issue any full statement of employment particulars or statement of change of particulars, following the transfer of the business to the respondent although, in accordance with section 4(3) Employment Rights Act 1996 a written statement containing particulars of change, which would include the identity of the employer, must be given at the earliest opportunity and no later than one month after the change in question.

Facts relating to holiday pay

52. It was common ground that holidays had been calculated by the respondent's predecessors in business on the basis of the calendar year as the leave year. I heard no evidence that terms relating to holiday, including whether any payment would be made in lieu of accrued but untaken holiday, on termination were agreed orally and I have found, on a balance of probabilities that no written statements of employment particulars were issued to the claimants.

53. In the period from 1 January 2018, Mr Imperato said he took 10 days' paid holiday, 5 in May and 5 in July.

54. In the period from 1 January 2018, Mr Yilmaz said he took 5 days holiday in around June/July.

55. Mr Bacci could not give any precise information about holidays which had been taken by the claimants but said that staff in the restaurant business would not be able to take holiday at the busiest Christmas period so he suggested it was unlikely that the claimants would not have taken more of their holiday allowance by November.

56. I accept the evidence of the claimants as to the holidays they had taken, in the absence of any records produced by the respondent.

Submissions

57. Both parties made oral submissions.

58. Ms Pike, on behalf of the respondent, submitted that the respondent did not bring the claimants' employment to an end; they had offered both claimants employment. There was no breach of contract by the respondent. The claimants had jumped the gun, and chose to leave, starting new jobs. The respondent acknowledged that they owed both claimants some money and were willing to pay. The respondent disputed the amount of holiday the claimants said had not been taken.

59. Mr Murphy, on behalf of the claimants, submitted that Mr Imperator got no response to his enquiries, other than his P45. Mr Yilmaz helped out at the Dolce Vita in the expectation that Zio's would be up and running again. He was not transferred to employment at the Dolce Vita.

The Law

Unfair dismissal

60. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Dismissal may be actual i.e. the employer, by its words or actions, brings the contract to an end, or constructive, which is provided for by section 95(1)(c). Section 95(1)(c) provides that an employee is to be regarded as dismissed if “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

61. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not affirmed the contract by their conduct.

62. Section 98(1) ERA provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Redundancy is one of these potentially fair reasons for dismissal.

63. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer’s undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

Entitlement to a statutory redundancy payment

64. The relevant parts of section 139(1) Employment Rights Act 1996 state:

“For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a).....

(b) the fact that the requirements of that business –

for employees to carry out work of a particular kind, or

for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.”

65. Section 139 (2) ERA provides:

“For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either or the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).”

66. Section 163(2) ERA provides that, for the purposes of a reference as to the right of an employee to a redundancy payment, “...an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.”

Breach of contract (notice)

67. An employee who is dismissed (actually or constructively), other than where the employee has committed a fundamental breach of contract, is entitled at common law to reasonable notice. The notice period must be no less than statutory minimum notice of termination, which is one week for each completed year of service up to a maximum of 12 weeks: section 86 ERA. A contract of employment may provide for a longer period of notice.

Holiday pay

68. A contract of employment may contain express provisions relating to holiday entitlement, including any entitlement to pay in lieu of accrued but untaken holiday on termination of employment. There is no implied right, as a matter of contract, to pay in lieu of accrued but untaken holiday.

69. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. A relevant agreement is a workforce agreement which applies to the worker, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer.

70. A failure to pay in lieu of accrued but untaken holiday on termination will be an unlawful deduction from wages.

Unlawful deduction from wages

71. Section 13(1) ERA provides that 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. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 ERA.

Written statement of employment particulars

72. If a claimant succeeds in one of the complaints listed in Schedule 5 Employment Act 2002 and the tribunal determines that the respondent was in breach of its obligation to provide a written statement of employment particulars or particulars of change, the tribunal must, subject to exceptional circumstances, award the minimum of 2 weeks' pay and may, if it considers it just and equitable in all the circumstances, award 4 weeks' pay for the breach: section 38 Employment Act 2002. Jurisdictions in Schedule 5 Employment Act 2002 include unfair dismissal and unlawful deduction from wages.

ConclusionsMr Imperato*Unfair dismissal*

73. The Bacci brothers did not communicate directly with Mr Imperato about his employment following the closure of Zio's on 17 November 2018. They relied on Mr Yilmaz to communicate with Mr Imperato. I have found that they did not offer Mr Imperato any alternative work with the associated companies via Mr Yilmaz. The information on 17 November was that Zio's was expected to re-open on 19 November. On 19 November, the news was that things were taking time and would be better on 20 November. Mr Imperato's attempts to get information from the Bacci brothers on 20 November did not receive any replies. Mr Yilmaz told Mr Imperato that Mr Yilmaz was going to work at another of the family's restaurants but told Mr Imperato that there was no work for him. Mr Imperato was left in limbo, not receiving any pay and not being given any offer of alternative work but still being left with the expectation that Zio's would reopen at some point. In these circumstances, Mr Imperato took temporary work with a friend. There is no evidence to suggest that, by doing so, he precluded the possibility of returning to his job at Zio's when it re-opened. The respondent has asserted that Mr Imperato resigned. I conclude that Mr Imperato did not resign by his actions in taking alternative, temporary, work.

74. Although there were never any words of dismissal said or written to Mr Imperato, I conclude that, by sending him a P45 giving a termination date of 23 November 2019, the respondent terminated his contract of employment with effect from the date he received that P45. The P45 was issued on 6 December 2018. I conclude that Mr Imperato's employment ended, by reason of dismissal, when he received that P45 in the normal course of post, which I take to be on 8 December 2018. The effective date of termination is 8 December 2018.

75. The respondent's case was put on the basis that Mr Imperato resigned and that he was not dismissed. They did not, in the alternative, argue that dismissal was for the potentially fair reason of redundancy. What prompted them to send Mr Imperato his P45 and, as I have concluded, terminate his employment, was their understanding that he was working elsewhere, rather than a lack of available work, although the circumstances were such that there could have been a dismissal for the potentially fair reason of redundancy, because of the closure of Mr Imperato's place

of work. I conclude that the dismissal was unfair because the respondent has not shown a potentially fair reason for dismissal.

76. The respondent has not asserted that it was entitled to dismiss Mr Imperato for misconduct. However, for completeness, I note that there is no evidence of any contractual provision precluding him from taking alternative temporary work when work was not being provided by the respondent and I conclude that there was no such implied term. I conclude Mr Imperato was not in breach of contract by taking alternative work.

77. In the alternative, if I had found that the respondent had shown that dismissal was for the potentially fair reason of redundancy, I would have concluded that the respondent did not act reasonably in all the circumstances in dismissing Mr Imperato. Mr Imperato was dismissed without any procedure at all being followed. Whether it was by mistake, at a time when the Bacci brothers were understandably preoccupied with the lease situation, or intentionally, Mr Imperato was not offered any alternative work at the associated companies' restaurants when, on the evidence of Mr Bacci, this would have been available. For this alternative reason, I would have found the dismissal unfair.

78. Remedy for unfair dismissal will be determined at the remedy hearing. Remedy for financial loss will be considered from the effective date of termination i.e. 8 December 2018. Mr Imperato was not paid for some time prior to that date by the respondent but he has not brought a complaint of unlawful deduction from wages.

79. Since I have concluded, as set out below, that Mr Imperato is entitled to be paid a statutory redundancy payment, the basic award will be reduced by the amount of that redundancy payment: section 122(4) ERA.

Entitlement to a statutory redundancy payment

80. I have concluded that Mr Imperato was dismissed for the reasons given above. There is a statutory presumption that dismissal is by reason of redundancy. I conclude that the respondent has not displaced this presumption since it argued that Mr Imperato resigned, rather than being dismissed. I conclude, therefore, that Mr Imperato is entitled to a statutory redundancy payment calculated in accordance with the statutory formula.

Breach of contract (notice)

81. I have concluded that Mr Imperato was dismissed for the reasons given above. He was not given any notice. He was entitled to 8 weeks' notice of termination, based on his dates of service from 1 June 2010 to 8 December 2018. At the remedy hearing, damages for this notice period will be assessed. However, compensation may not be awarded twice for the same loss i.e. in the unfair dismissal compensatory award as well as damages for breach of contract.

Holiday pay

82. Since I have found that Mr Imperato was not issued with a written contract of employment and I have had no evidence as to contractual terms about payment in lieu of accrued but untaken holiday being orally agreed, I conclude that a complaint of breach of contract in relation to holiday pay is not well founded.

83. However, Mr Imperato was entitled to be paid for accrued but untaken holiday entitlement in accordance with the provisions of the Working Time Regulations 1998. Since there is no relevant agreement in writing as to the leave year, the leave year for these purposes starts on the anniversary of Mr Imperato's start of employment i.e. 1 June. He is entitled to be paid in lieu of any accrued but untaken entitlement in the final leave year, up to the effective date of termination, calculated on a pro rata basis. His entitlement for the period 1 June to 8 December 2018 (27 weeks) was $27/52 \times 5.6$ weeks = 2.9 weeks. I have accepted Mr Imperato's evidence that he took 5 days holiday in July 2018 (and earlier holiday in May, which is irrelevant for this calculation). He, therefore, had an accrued but untaken entitlement to holiday of 1.9 weeks and was entitled to be paid in lieu of this holiday. If the parties cannot agree on the calculation, this will be done at the remedy hearing.

Written statement of employment particulars

84. Since Mr Imperato has succeeded in other claims and I have found that he was not provided with a written statement of employment particulars, I must award two or four weeks' pay as additional compensation in accordance with section 38 Employment Act 2002, no exceptional circumstances having been put forward as to why such an award should not be made. I will hear the parties' arguments as to what this should be at the remedy hearing, if remedy is not agreed prior to that hearing.

Mr Yilmaz*Unfair dismissal*

85. Mr Yilmaz was offered, and took, alternative temporary work with the respondent's associated company's restaurant, Dolce Vita, about a week after the closure of Zio's. The respondent did not, by any words or conduct, terminate his employment. The respondent seconded him, on a temporary basis, to that restaurant. Mr Yilmaz was prompted to look for other work, nearer home, after he concluded, having seen items being removed from Zio's on 30 November 2018, that it was not going to reopen. I found that he told Phil Ogden, manager of Dolce Vita, that he had found a job near his home so was not working for them any more. I conclude that, by saying this to Mr Ogden, Mr Yilmaz resigned. If Mr Ogden was not employed by the respondent, he was acting as agent for the respondent and could be expected to pass on this information to the respondent.

86. I conclude that Mr Yilmaz was not actually dismissed, but resigned. He resigned, not because of any breach of contract by the respondent, although the respondent had been in breach of contract by not paying wages, prior to Mr Yilmaz being seconded to Dolce Vita, but because he concluded that Zio's was not going to reopen and he found work closer to home than Dolce Vita. I conclude that Mr Yilmaz

was not constructively dismissed since he did not resign in response to any breach of contract on the part of the respondent.

87. Since I have concluded Mr Yilmaz was not actually or constructively dismissed, I conclude that the complaint of unfair dismissal is not well founded.

Entitlement to a statutory redundancy payment

88. Since I have concluded, for the reasons given above, that Mr Yilmaz was not actually or constructively dismissed, he is not entitled to a statutory redundancy payment.

Breach of contract

89. I have concluded, for the reasons given above, that Mr Yilmaz was not actually or constructively dismissed. The breach of contract complaint is, therefore, not well founded.

Unlawful deduction from wages

90. There was a period prior to Mr Yilmaz being seconded to Dolce Vita for which he was not paid. It was common ground that he was not paid for the period after 11 November 2018, until he started working at Dolce Vita. Although the evidence has not been clear as to exactly when Mr Yilmaz resigned, this must have been before 10 December 2018, when he started his new job, rather than 16 December 2018, the date given on his P45. I conclude that the effective date of termination was 9 December 2018, the day before Mr Yilmaz started his new job.

91. Mr Yilmaz was paid a fixed amount per week when working for the respondent. He was entitled to be paid for periods when he was available for work, even though the respondent was not providing work. At the remedy hearing, the shortfall of wages will be calculated on the basis that Mr Yilmaz was paid for two weeks' work at Dolce Vita at the rate of £250 per week but was otherwise unpaid in the period 12 November to 9 December 2018. I would hope that the parties could agree on the calculation.

Holiday pay

92. Since I have found that Mr Yilmaz was not issued with a written contract of employment and I have had no evidence as to contractual terms about payment in lieu of accrued but untaken holiday being orally agreed, I conclude that a complaint of breach of contract in relation to holiday pay is not well founded.

93. However, Mr Yilmaz was entitled to be paid for accrued but untaken holiday entitlement in accordance with the provisions of the Working Time Regulations 1998. Since there is no relevant agreement in writing as to the leave year, the leave year for these purposes starts on the anniversary of Mr Yilmaz's start of employment i.e. 1 October. He is entitled to be paid in lieu of any accrued but untaken entitlement in the final leave year, up to the effective date of termination, calculated on a pro rata basis. His entitlement for the period 1 October to 9 December 2018 (10 weeks) was

10/52 x 5.6 weeks = 1.08 weeks. I have accepted Mr Yilmaz's evidence that he had not taken any holiday in this period (and earlier holiday in June/July, which is irrelevant for this calculation). He, therefore, had an accrued but untaken entitlement to holiday of 1.08 weeks and was entitled to be paid in lieu of this holiday. If the parties cannot agree on the calculation, this will be done at the remedy hearing.

Written statement of employment particulars

94. Since Mr Yilmaz has succeeded in his complaint of unlawful deduction from wages and I have found that he was not provided with a written statement of employment particulars, I must award two or four weeks' pay as additional compensation in accordance with section 38 Employment Act 2002, no exceptional circumstances having been put forward as to why such an award should not be made. I will hear the parties' arguments as to what this should be at the remedy hearing, if remedy is not agreed prior to that hearing.

Employment Judge Slater

Date: 15 October 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

16 October 2019

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