EMPLOYMENT TRIBUNALS

Claimant: Mr W Rutter

Respondent: HH Hospitality Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 3 April 2024 and in chambers on 10 April 2024

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr Flowers, respondent's employee

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claim for breach of contract relating to holiday pay is dismissed.

The claimant's claim under s23 Employment Rights Act 1996 (ERA) is well founded. The respondent is ordered to pay to the claimant the amount of the deduction in contravention of s13 ERA being the amount deducted from the claimant's pay for taking nominal breaks from 10 Aug 2021 to 14 Nov 2023. The parties should agree the appropriate figure and apply to the Tribunal for a remedy hearing if they are unable to do so.

REASONS

1. After a period of early conciliation from 7 Jul 2023 to 18 Aug 2023, the claimant brought a claim for 'holiday pay' and unlawful deduction from wages on 14 Nov 2023. The claimant began employment as a night porter/manager with the respondent in its hotel on 10 Aug 2021 and remained in employment at the date of the hearing.

2. We identified that the claim for holiday pay was brought on the basis of the claimant's written contract, not under the Working Time Regulations 1998 (WTR). The claimant did

not object to this. The claimant wrote in his claim 'I was finally given a contract from 10/08/21 stating I had 28 days holiday including 8 days bank holidays. Since then I have had repeatedly had problems with my employers who were working out my holiday as a zero hour contract and not giving me my full entitlement of 28 days holiday each year.'

3. The claimant said that he should have been allowed to take and be paid for 28 times 10 hour shifts holiday each holiday year, and that he should be paid for the 10 hour shifts which he had not been able to take as holiday. He also said that he should have been given an additional day's holiday for the King's coronation national holiday and claimed 10 hours pay for that day.

4. The claim for deduction from wages related to deductions made by the respondent from wages in respect of a nominal break to be taken by the claimant each shift. The respondent did not deny making such deductions. The original claim was only for deductions from October 23. In the hearing, the claimant made an application to amend to claim such deductions from the start of his employment. This application to amend the claim was allowed for reasons given orally.

5. We asked the claimant whether he wished to amend his claim to cover sums he said were due to him after the date he presented his claim until the date of the hearing. The claimant decided against this.

6. The claimant presented a written witness statement and was cross examined. For the respondent, Mr Hirst presented a written witness statement and was cross examined. Mr Hirst was a director of the respondent and general manager of Hawkstone Hall and Gardens where the claimant worked. We were referred to a bundle of documents. Neither party referred us to any legal authorities.

7. The hearing was listed for two hours.

8. After the claimant amended his claim, the respondent complained that it should be given the opportunity to call as a witness the manager who interviewed the claimant to give evidence about what was said in his interview. However, we took the view that the respondent knew the claimant would rely on what was said to him in his interview because he set it out in his claim form, and so had had ample opportunity to call evidence on this. In any event, as below, our decision does not depend on what was said in the interview.

What happened

9. The claimant applied for a job with the respondent which was advertised as part time hours 20 per week with a night shift schedule.

10. The claimant's unchallenged evidence was that, in his interview, he was told his hours would be 10pm to 8am for 4 nights and then it would be 4 days off. He was told that he would be paid in full for the full 10 hour shift as some nights he would be unable to take a break.

11. The claimant was not given a contract of employment before starting his employment and had to chase for it. On 29 Sep 2021, he was given one and he signed and returned it on the same day. At no time afterwards, did the respondent take any steps to change this contract.

12. The contract had the following information relevant to the claim:

    12.1. Key point 5: Basic salary £12 per hour

12.2. Key point 6: Contractual hours: 40 hours per week (subject to clause 4)

12.3. Key point 7: Holiday entitlement: 28 days (subject to clause 6)

12.4. Clause 4: Your contractual hours shown at 6 above. The Company reserves the right to vary your hours according to the requirements of the business, market conditions and as economic circumstances dictate.

12.5. Clause 6: The holiday year runs from 1 Jan to 31 Dec each year. You will receive the statutory minimum holiday entitlement for each complete year which must be taken in the holiday year. Your current entitlement is shown at 7 above which includes public/bank holidays.

12.6. The contract stated that the full terms of the contract could be found in the Employee Handbook. We were not shown this document. We were informed by the respondent that there were no terms in it about holiday pay. Neither party sought to rely on it.

13. The contract had no terms relating to breaks and whether or not any break would be paid and did not specify that a deduction from wages would be made for breaks. The claimant was not subsequently informed that a deduction would be made for breaks, until he saw that this was what was happening on the respondent's wages system, as below.

14. In fact, the claimant always worked 10pm to 8am for four nights and then had four nights off before working four nights again. His average hours were therefore 35 hours a week, as agreed by the claimant and Mr Hirst in the hearing. The claimant would clock in a little before his start time and usually clocked out a little after his official end time. He said it was generally known that no further pay would be paid unless the employee had worked more than half an hour longer than the usual shift length. Occasionally, the claimant did work beyond this 10.5 hour period and he would then receive a payment for the additional time. There was no facility for clocking off for a break and then clocking back in. The claimant would take a break if time allowed. The claimant was paid £15 per hour.

15. The claimant only became aware that the respondent was making deductions from his pay for a break in October 2023 when he was able for the first time to access a wages system and he saw that 30 minutes was being deducted from his wages each day for break times. On wage slips showing holiday payments, a payment for the equivalent of 30 minutes was deducted from each payment.

16. The respondent said that these deductions had always happened and it was only from October 2023 that it was visible on its system. (The question of why the claimant did not notice this from pay slips was not raised with the claimant.) It appeared that the respondent was deducting a nominal break period from the total period the claimant was clocked in for, and so this may have resulted in no apparent deduction on many occasions.

17. The claimant understood from his contract that he was entitled to 28 times 10 hour day paid holiday per year. He evidently became aware early in his employment that the respondent's understanding did not match his own because, as per his witness statement, on numerous occasions in 2022, he contacted the wages department and asked for his holiday entitlement. He was repeatedly told that he was on a zero hours contract and he had to accrue holidays before he could take them. He asserted that he had a 'full contract' and was entitled to 28 days paid holiday every year. The respondent was calculating the claimant's holiday entitlement on a pro rata basis, as if the claimant had a zero hours

contract, and not allowing him to take holiday until he had accrued it. The claimant was not satisfied and finally contacted ACAS for early conciliation on 7 Jul 2023.

18. The claimant did not take the full 28 days holiday he asserted he should have had. He took the amount which the respondent told him he was entitled to. The respondent conceded in the hearing that it would be unfair to penalise the claimant if he only took the holiday which the wages department told him he could take as holiday.

19. Therefore, in 2021, the claimant took 2 days holiday which was in December 2021. In 2022, he took 17 days holiday and in 2023, he took 14 days holiday until the presentation of his claim. By 'days', both parties understood the claimant was taking 10 hours for each day of holiday. The respondent's HR software for a reason which was not explained, other than there was some averaging going on, sometimes counted a day's holiday as being a different number of hours than 10, but, on average, it worked out as 10 hours per day.

20. The respondent's defence to the holiday pay claim was that the claimant was employed on an hourly basis with the salary paid dependent on the number of hours worked. The claimant was accidentally given the wrong contract of employment which was for salaried employees. The respondent relied on the contract of employment which it said should have been given to the claimant to evidence the fact that, as per that contract, holiday entitlement would depend on the hours worked, with a 28 day holiday entitlement reduced pro rata depending on the number of hours worked. The respondent argued that it was the contract which should have been given to the claimant, but was not given to him, which should be used to calculate his holiday entitlement. The respondent argued that the claimant must have known that the terms in his written contract were wrong because the number of hours to be worked was wrong. It said that the reference in clause 4 to the respondent's right to vary hours was designed to cover occasional changes to hours, not permanent ones.

21. The respondent's defence to the deduction from wages claim was that such deductions had always been made.

22. The respondent did not argue that there had been an implied variation to the contract through the claimant undertaking his role.

23. The claimant remained in his employment with the respondent

Relevant law

24. Under Rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee's employment.

25. Under Rule 7 of the same order, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented (a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim.

26. Under s13(1) ERA, an employer shall not make a deduction from wages of a worker employed by him unless—

(a)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
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

27. The Working Time Regulations 1998 set out the regime for entitlement to statutory holiday pay.

Conclusions

28. We find that the claimant was employed under the contract which he was given by the respondent and which he signed. The respondent was in control over what contract it gave the claimant and had every opportunity to give him the contract it wanted to cover the relationship, not only at the start of the employment, but also when the claimant started challenging his holiday entitlement. Any reasonable and organised employer would, at that point, have looked into the matter, seen that the claimant had been given the wrong contract, and taken steps to rectify the error. We consider that the contract which the claimant was given was not so incompatible with the reality of his employment terms that new different contractual terms should be sought to explain the relationship. The contract allowed for a variation in the number of hours which the claimant worked and we do not accept that this was only on a temporary basis or, even if that were true, that an error in the number of hours would have vitiated the contract.

29. The claimant's claims must therefore be judged with reference to the contract which he signed. We note that both the written contract and the reality of the situation was that the claimant was not working on a zero hours basis.

Holiday pay claim

30. The claimant's claim for holiday pay was apparently brought as a breach of contract claim not under the WTR. It was not his case that he had not been paid for days of employment. Therefore, the holiday pay claim was not an unlawful deduction from wages claim.

31. The Tribunal does not have jurisdiction to decide on the claimant's breach of contact claim because he is still an employee of the respondent. Breach of contract claims can only be heard by the employment tribunal if the employment has ended. We therefore dismiss the breach of contract claim. However, if the claimant wishes to apply to amend his claim to add a claim for holiday pay under the WTR, he should apply for a reconsideration of this decision within 14 days of the date this decision is sent to the parties as per Rule 71 of the Employment Tribunal Rules of Procedure.

32. We recognise that this is not helpful to the parties who have an ongoing employment relationship and wanted guidance on what position to take on the holiday pay issue. We make the following non binding, preliminary comments which have no relevance to our dismissal of the holiday pay claim.

Non binding comments on contractual holiday entitlement

32.1. If the claimant's interpretation of his contract were correct, it would mean he had pro rata much more holiday than his colleagues. Although this does not necessarily rule out the claimant's interpretation, it does suggest that the contract must be carefully considered to determine what it means.

32.2. We consider it important to take into account the wording of clause 6 which says that the claimant was entitled to the statutory minimum holiday entitlement. The

holiday entitlement given at key point 7 says the entitlement is subject to clause 6. We pointed this issue out to the parties. The claimant said he had never read the contract as limiting his holiday entitlement to the statutory minimum, while the respondent considered that this is what the contract did. According to the express terms of the contract, we consider that the claimant's holiday entitlement should be interpreted as being limited to the statutory minimum holiday entitlement.

Non binding comments on entitlement under WTR

32.3. The WTR have their own rules for calculating holiday entitlement and pay. We are not in a position to take a view as to whether the claimant was receiving the correct holiday entitlement and pay under WTR.

32.4. According to Reg 16(1) & (2) WTR, the claimant is entitled to a week's pay in respect of each week of leave, as calculated under s221 to 224 ERA.

32.5. The claimant had normal hours of work, being 4 times 10 hour shifts followed by 4 days off. (The fact that he was occasionally paid for overtime does not change this as per 234(1) ERA.) The claimant was a shift worker under s222(1) ERA because his normal working hours were worked on days of the week which varied from week to week. Under s222(2) ERA, the amount of a calendar week's pay is calculated based on an average of the pay in the preceding period. Under Reg 16(3) WTR, the averaging period is 52 weeks or, if at the point where the claimant had less than 52 weeks employment, the period of his employment. In fact, as the claimant worked a regular shift pattern, this is going to work out in the region of £525 per calendar week (35 hours x £15).This will determine a calendar week's pay if the claimant took a calendar week's holiday.

32.6. After the first year of employment, workers do not need to accrue holiday prior to taking it.

Non binding comments in relation to other aspects of the contract claim

33. Having dismissed the breach of contract claim, we do not need to comment further on it. However, we make the following observations:

33.1. The claimant's claim for pay for the King's Coronation was misconceived. If this was a contractual claim, the Tribunal does not have jurisdiction to decide it. In any event, the contract the claimant relied on expressly stated that the 28 days holiday entitlement included public holidays. If it was a claim under the WTR, there is no entitlement under the WTR to have an extra day of public holiday when it is declared ad hoc by the Government.

33.2. We also note that, to bring a breach of contract claim, the claimant must have financial loss to claim. The claimant had no financial loss to claim because he was paid for each day of his employment, even if he worked days when he thought he should be having holiday.

Unlawful deduction from wages

34. We find that the respondent made an unlawful deduction from the claimant's wages in respect of deductions made for breaks. There was no term of the claimant's written contract allowing the respondent to make such deductions. The claimant at no time gave agreement in writing for the deductions. This is enough to conclude that the deductions for

breaks were unlawful. The fact that the claimant was told in his initial interview that he would be paid for breaks is consistent with this.

35. The claimant was entitled to a minimum of £150 for each 10 hour shift. To the extent that he did not receive this, there was a deduction from his wages.

36. We did not have the information to calculate how much had been deducted from the claimant's wages over the period from 10 Aug 2021 to 14 Nov 2023. We leave it to the parties to calculate the sum and trust that the respondent will then promptly make the appropriate payment to the claimant. If the parties require the Tribunal to calculate the sum due or make an order for payment of it, they must apply to the Tribunal for a further hearing and provide the Tribunal in advance with a new bundle containing all relevant information to calculate the underpayments, and a schedule agreed as far as possible of underpayments, indicating where there are disagreements.

10 April 2024

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Employment Judge Kelly