EMPLOYMENT TRIBUNALS

Claimant: Mr J Ives

Respondent: Toast by Alison and Mark Limited

Heard by Cloud Video Platform **On:** 1 March 2021

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr M Hargreaves, Owner

JUDGMENT

1. The claimant's claim for unlawful deductions succeeds in part.
2. The respondent shall pay to the claimant the sum of £230.00.

REASONS

Introduction

1. This claim was listed for a 2-hour hearing. The parties were ordered to provide each other with documents and to provide witness statements for anyone intending to give evidence. Despite a clear letter from the Tribunal that the hearing was to be by CVP, the claimant attended the Magistrates Court in Lincoln, believing, he said, that the hearing would take place there. He dialed in to the CVP hearing and was content to participate by telephone. Mr Hargreaves attended via the CVP platform.

2. I heard evidence from the claimant and Mr Hargreaves. I had access to Facebook and shared details of that with the participants. I also had the ET1 and ET3.

3. At the end of the hearing, I reserved my decision which I set out below.

4. The parties agreed that the correct name of the respondent is "Toast by Alison and Mark Limited" (company number – 12623177).

Issues

5. The claimant claims unpaid wages and the issues are therefore as follows:

6. If the claim is put as one of unlawful deductions:

    a. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

7. If the claim is put as a breach of contract:

    a. Did this claim arise or was it outstanding when the claimant's employment ended?

    b. Did the respondent do the following:

        i. Fail to pay the claimant for work carried out on 1, 2, 3, 4, 5 and 6 July 2020?

    c. Was that a breach of contract?

    d. How much should the claimant be awarded as damages?

Law

8. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

    'An employer shall not make a deduction from wages of a worker employed by him.'

9. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

10. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    a. a contract of employment (defined as a 'contract of service or apprenticeship'), or

b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

11. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'

12. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

13. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

14. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

15. In relation to breach of contract the principles are not complex. There is a need to determine what the claimant's contractual entitlement was and then to decide whether the respondent breached that contract.

Findings of fact

16. I make the following findings of fact.

17. The respondent is a café. Its sole owner and Director is Mr M Hargeaves.

18. The claimant is a chef. He was in fact working in a supermarket when he was approached by Mr Hargreaves to work at his new venture 'Toast', a café in Cleethorpes. The claimant accepted the offer.

19. The offer was to work for 55 hours each week spread across Tuesday, Wednesday, Thursday, Friday, Saturday and Sunday. Monday was a day off. It was agreed that the claimant would be paid £10.00 per hour. There were no written terms, the offer and acceptance were verbal.

20. During 2020 the country went into what was termed 'lockdown' and amongst other things restaurants were forced to close. However, it was announced during June 2020 that from Saturday 4th July, pubs, restaurants and hairdressers would be able to re-open, providing they adhere to COVID Secure guidelines.

21. In preparation for this the claimant, who had been given a key to the respondent's premises, helped to prepare for the opening of the respondent on 4 July.

22. Following a dispute at work, the details of which do not need to concern us, the claimant ceased working for the respondent on 6 July 2020.

Discussion and conclusion

23. Given that the evidence in this case is entirely oral I have had to consider the credibility of the witnesses.

24. The claimant's evidence changed during the course of the hearing. He initially said that he agreed to work for 55 hours a week at £10.00 per hour. He said that he worked from 1 to 6 July and that during that period he worked some 76 hours for which he received no payment. He said expressly that the respondent was "open for business" from 1 July, and that he worked between 23 and 30 June 2020 to help to get the kitchen "up to standard". He says he did that for free.

25. In his claim form, which he said in oral evidence was correct, the claimant says he worked as follows:

    a. 1 July, 7.00 am to 4.00 pm - 9 hours;

    b. 2 July, 7.00 am to 10.00 pm - 15 hours;

    c. 3 July, 7.00 am to 12.00 midnight - 17 hours;

    d. 4 July, 7.00 am to 1.00 am (with a 1-hour break) - 17 hours;

    e. 5 July, 7.00 am to 12 midnight (with a 1-hour break) - 16 hours; and

    f. 6 July, 2 hours.

26. The claimant said that he worked after hours making fresh bread and other products for the next day.

27. When questioned the claimant's evidence changed. First, he insisted that the official opening of the restaurant was 1 July not 4 July. When it was pointed out that the country was still in lockdown on l July the claimant said that he was making bread and other fresh produce to be frozen, although later in his evidence he again stated that the "business was open" from 1 July.

28. Second, the claimant said that the respondent's opening hours were 8.00 am to 4.00 pm. This is not correct; the opening hours were initially 8.00 am to 10.00 pm Thursday to Sunday and 8.00 am to 6.00 pm Monday to Wednesday. If the claimant had worked in a business that was open from 1 July, he would have worked 5 full days and known the opening hours.

29. Third, when asked about the agreed 55 hours and the actual hours he claimed to have worked (76) the claimant said it was in fact agreed as 55 hours "on average" and as such he sought to justify asking for more than 55 hours for the week in question.

30. The evidence of Mr Hargreaves was brief. He agreed that the offer to the claimant was for 55 hours work per week. He agreed the hourly rate was £10.00. He also agreed that the claimant did some work in the week before the opening on 4 July, but he says he paid the claimant cash for that. He agreed that he had not paid the clamant for working on 4, 5 and 6 July 2020.

31. Given the claimant's change in evidence and in particular his insistence that the respondent was open on 1 July 2020 when that could quite clearly not have been the case, and given Mr Hargreaves' candor in respect of the non-payment for 4 – 6 July, where there is a conflict in the evidence, I prefer the evidence of Mr Hargreaves.

32. Given the above, I find that the claimant was offered employment as a chef with the respondent with effect from 4 July 2020. I accept that he helped to set up the kitchen in the 3 days before the respondent was open for business, between 1 and 3 July 2020, but that he did not have any contractual or other entitlement to be paid for that, although I accept Mr Hargreaves' evidence that in fact the claimant was paid in cash for doing that.

33. That leaves payment for 4, 5 and 6 July 2020 which the respondent concedes it owes the claimant. In that period, I find as the respondent says, that the claimant worked 10.00 am to 12 midnight on 4 July, 8.00 am to 3.00 pm on 5 July and for 2 hours on 6 July. That is a total of 23 hours which, at £10.00 per hour is £230.00 for which I have given judgment above.

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Employment Judge Brewer

Date: 1 March 2021

JUDGMENT SENT TO THE PARTIES ON

2 March 2021

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