



EMPLOYMENT TRIBUNALS

Claimant: Mr R Radcliffe

Respondents: (1) YOLO London Limited
(2) The Commissary Kitchen Limited

FINAL MERITS HEARING

Heard at: London Central (remotely, by video hearing) **On:** 07 January 2021

Before: Employment Judge Smailes (sitting alone)

Appearances

For the claimant: In person

For the respondents: Mr N Lowry, director of both respondent businesses

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was an employee of the second respondent at all material times.
2. The second respondent made an unauthorised deduction from wages by failing to pay the claimant the wages due from 23 March 2020 to 15 May 2020 and is ordered to pay the claimant the sum of £4,585.11, being the total gross sum unlawfully deducted.
3. The claim against the first respondent is dismissed.

REASONS

Conduct of the hearing

1. The hearing was conducted as a remote hearing to which the parties consented. The form of remote hearing was a video conference hearing. A face to face hearing was not held because of the Covid pandemic and because it is in the interests of justice and in accordance with the overriding objective to minimise expenditure on time and costs.

Introduction

2. The claimant was employed by the respondents or one of them as a head chef from 9 December 2019 to either 23 March 2020 or 15 May 2020. By a claim form dated 2 June 2020 he brought a claim for unlawful deductions from wages against the first respondent for the period 1 April to 15 May. On 11 July 2020, he filed the same claim against the second respondent.
3. The claimant claims that he is owed arrears of pay from 01 April 2020 to 15 May 2020. He was not paid during this period.
4. The respondents contest the claim. On behalf of both respondents, Mr Lowry says they are neutral as to which of them is found to be the employer as he is the director and owner of both companies and therefore considers them to be one company.
5. The claimant represented himself and gave sworn evidence. The respondents were represented by Mr Lowry, director and owner of both companies, who gave sworn evidence. I also considered the documents provided in emails from the claimant on 20 October 2020 and the respondents on 24 September 2020. The claimant sent another email on 04 Jan 2021. This contained the earlier documents and an updated summary. Mr Lowry had not seen the updated summary before the hearing so I allowed him some time to read it before taking any evidence. There was no agreed bundle.
6. I had the ET1 and ET3 in relation to the claim against the first respondent only. The parties confirmed that the only difference in the ET1 and ET3 in relation to the second respondent was the name of the respondent. I decided it was not necessary to adjourn to obtain these documents.

Issues for the Tribunal to decide

7. The nature of the complaints being pursued were clarified at a case management hearing in October 2020. That hearing was intended to be a full merits hearing in the claimant's claim against the first respondent. However, since the claimant had applied to consolidate the claim against the first respondent with the claim against the second respondent, the judge converted the hearing to a case management hearing. The two claims were consolidated.
8. At the case management hearing the parties agreed the issues to be determined by the Tribunal and confirmed to me that these remained the issues:

Identity of employer

- a. Was the claimant's employer at relevant times the first respondent or the second respondent?

Termination of employment

- b. When did the claimant's employment terminate?

Unauthorised deductions

- c. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by not paying his wages for the period 1 April 2020 to 15 May 2020 and if so how much was deducted? For the reasons set out in this Judgment, I find that the period in issue is 23 March 2020 to 15 May 2020.

Findings of fact

9. The relevant facts are as follows.

Identity of employer

10. The claimant had a written contract of employment as Head Chef of the second respondent with effect from 09 December 2019. It was signed by the claimant and Mr Lowry for the second respondent on 20 December 2019.
11. As to whether there was a change of employer after that, Mr Lowry gave evidence that he was aware that there was a cut-off date for applications for assistance under the furlough scheme. He attempted to consolidate the second respondent business and other businesses owned by him under the control of the first respondent in order to access the Coronavirus Job Retention Scheme (the furlough scheme) to keep his employees in employment during the first Covid 19 lockdown. The application to register for the furlough scheme failed and despite further attempts he was unable to access the furlough scheme.
12. There is no documentary evidence of consolidation. Mr Lowry says that as the owner of both respondent companies he considers them to be one company. The status of the companies is that Mr Lowry has made an application to Companies House to strike off both companies. The applications are active but suspended as the Registrar has received objections, including an objection from the claimant.
13. The claimant gave evidence that his contract was in the name of the second respondent. He was unaware that there had been any change of employer. He made a claim against both respondents to protect his position as there were different employer names on his payslips.
14. I have considered the documents provided by the parties. The employer is named as 'YOLO LTD(HWH)' on the claimant's revised March 2020 payslip, a payslip issued in May 2020. There is a schedule of transactions showing the payments to the claimant in March 2020 and May 2020 coming from a

business account in the name of 'PALL MALL WINE LTD'. The claimant's P45 states the name of the employer as YOLO Ltd.

15. The first reference by the claimant to being made aware of a change of employer is in an email dated 05 May 2020 from him to a member of staff in the accounts department following a telephone conversation with another member of staff. The claimant's email says:

P indicated that the furlough application has been rejected because the company name had been changed!!... Could you please let me know as soon as possible with regards to the outcome of the recent re-application and the name of the company that is applying. In essence, I would like to know who I work for!

16. The reply dated 08 May 2020 includes a message relayed from P:

Here is where we are at with the furloughing situation:

The owner (Nathan) and his book keeper made an application on 20 April for the whole company staff to be furloughed first under Yolo limited as this is the company that was paying you (and all staff) at the time of the pandemic.

The limited company was formed early February 2020. Unfortunately the furlough application was declined due to the newly formed limited company not being active with HMRC at the time of furlough, (which was 28 Feb) as the book keeper didnt register it before 28 feb. So he is making a new application for the entire staff including you, under our former limited trading name, in the hope that this will work and plead our case. This affects *all staff and we won't know for a few more days. But right now it's 50 50* with our pleading of the case.

The furlough money you received at the end of March was from Nathan's (the owner) personal account, because he, as we all thought, the furlough funds would come through. Currently our book keeper's focus right now is to try to get us all furloughed. He has been trying to reach HMRC everyday to get this resolved. To clarify, we have not received any funds on your behalf at all, or anyone's in fact.

17. I find that the revised payslip and the P45 are not evidence of a change of employer because:

- a. Mr Lowry owned a number of businesses and this documentation was issued for administrative convenience rather than being intended to have legal effect. This is illustrated by the fact that no one contends that the claimant was ever employed by 'Pall Mall Wine';
- b. Mr Lowry and staff writing on his behalf updated employees by 'WhatsApp' messages and emails. There is no reference to a change of employer in the updating 'WhatsApp' messages to all employees in the 'WhatsApp' group dated 27 March 2020 and 3 April 2020 or in an email to the claimant on 25 March 2020. Mr Lowry signs off his message with 'MHG' and emails come from an '@mayfairhg.com' email address. MHG is the Mayfair Hospitality Group and is the name used by Mr Lowry and staff acting on his behalf when communicating with employees of all the businesses under Mr Lowry's control. As with 'Pall Mall Wine Ltd', no one contends that the claimant was ever employed by the 'Mayfair Hospitality Group';
- c. The email dated 08 May 2020 says that the funds to pay the claimant in March were from Mr Lowry's own funds and not from YOLO.

18. The email dated 08 May 2020 also says that a new application to access the furlough scheme would be made using the 'former limited trading name'. This is further indication that Mr Lowry was considering various options for organising the businesses he owned in his attempts to access the furlough scheme rather than having transferred the claimant and other staff employed by the second respondent to employment by the first respondent.
19. The notice given to the claimant on 15 May 2020 refers to 'the Company' throughout but does not identify which company. In the claimant's written contract "the Company" is the second respondent. The notice is signed by the HR consultant who signs off messages with the sign off that is used as the general one for all the businesses under Mr Lowry's control 'HR Consultant, Yolo London Ltd | Pall Mall Wine Ltd, Mayfair Hospitality Group'.
20. I find that the written contract is clear and unequivocal evidence that truly reflects the intentions of the claimant and the second respondent at the beginning of the claimant's employment and so I find that the claimant was employed by the second respondent as a head chef from 09 December 2019.
21. The claimant's evidence at the hearing is consistent with the documents provided. There has been no challenge to the evidence of the 'WhatsApp' messages and emails. I find that the respondents did not notify the claimant of an intention to change his status to transfer his employment to the first respondent or of an actual change. I find that the claimant was unaware of any such intention and cannot have agreed to such a change.
22. I find that the claimant remained an employee of the second respondent at all times.

Termination of employment

23. The claimant's contract included a term that he was entitled to 1 week's written notice of the termination of his contract during the first 2 years of employment (clause 3.2) and that the employer had discretion to pay salary in lieu of notice (clause 3.3). Under section 86 of the Employment Rights Act 1996 the claimant is entitled to not less than one week's notice.
24. On 22 March 2020, the Haymarket Wine House, the claimant's place of work, had to close to the public in line with government guidance. On that day Mr Lowry informed the claimant that he was aiming to access the furlough scheme and would provide updates. Mr Lowry confirmed at the hearing that he did not give the claimant notice on 22 March 2020 and I find that he was not given notice on 22 March 2020. I note here that the claimant was paid £2055.56 net on 27 March 2020 and received one further payment in May 2020. I deal with these payments later.
25. In the weeks between 22 March 2020 and 15 May 2020 the claimant received email updates indicating that the respondents were pursuing a furlough application for him and other employees. The claimant did not apply for any welfare benefits as he understood he was not allowed to do this if he

was furloughed. He understood that although there was going to be a delay in receiving payments, the furlough scheme would cover his wages. He said it made no sense to him that the respondents would be asking for furlough payments for him during April and May 2020 if his employment had been terminated on 22 March 2020.

26. It proved difficult and ultimately impossible to register the respondent companies with HMRC for the purposes of the furlough scheme. Without the necessary registration code they could not access the scheme. In May 2020 Mr Lowry decided that there were no other options and he had to accept he was unable to access the furlough scheme. He had tried everything, he had no money left and had no other option than to close the businesses.
27. The claimant was informed in a telephone call on 11 May 2020 from Mr Lowry and another member of staff that the business would be closing and that he would receive details in writing.
28. On 15 May 2020 the HR consultant sent an email to the claimant giving notice with immediate effect. The notice said that the last day of employment was 22 March 2020 and he would be paid 1 week's pay in lieu of notice and any accrued holiday pay from the beginning of March 2020. The claimant received a P45 with 23 March 2020 as the termination date.
29. I find that although the business was not operating due to the lockdown restrictions, the claimant's employment contract was not terminated until notice was given on 15 May 2020 and the contract was terminated that day. The Claimant was summarily dismissed without notice. He received a further payment of £379.77 on 18 May 2020 and an amended payslip for March 2020 that gave this breakdown of his pay: March basic $£2,583.33 \times 20/31 = £1666.66$ plus 2 days holiday $£238.46 = 1,905.12$, one week's notice and holidays pay £764.27. National Insurance Contributions of £234.05 were deducted, resulting in a net pay figure of £2,435.34, which is the sum of the amounts he was paid on 27 March 2020 and on 18 May 2020.

Unauthorised deductions

30. The claimant remained in employment until 15 May 2020.
31. In his claim form the claimant claimed for 6 week's pay from 01 April 2020 to 15 May 2020, based on his understanding that the two payments he had received in March and May 2020 covered his wages to the end of March 2020. However, his amended payslip states that he was paid wages up to and including 22 March 2020 and in addition he was paid 1 weeks' notice and 1 day accrued holiday pay. The wages were calculated to 20 March 2020 plus 2 days holiday as 20 March 2020 was the last day that the claimant attended his workplace.
32. I find that the claimant was paid to 22 March 2020 and was not paid for the period 23 March until 15 May 2020.

33. I find that the claimant was paid 1 week's pay in lieu of notice and 1 day accrued holiday pay. This payment is not payment of wages from 23 March 2020.

34. The second respondent informed all employees by 'WhatsApp' message on 27 March 2020 that it would pay 80% of wages. There is no written agreement to this variation to the claimant's contract. I find that the claimant had not agreed to a variation in his contract to accept a reduction in wages.

The law

35. Section 13(1) of the Employment Rights Act 1996 (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 unauthorised deduction from wages pursuant to Section 23 ERA.

36. Section 86(1)(a) ERA provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice if his period of continuous employment is less than two years.

Conclusions

Identity of employer

37. The claimant continued to be employed by the second respondent at all material times. He was not employed by the first respondent.

Termination of employment

38. The claimant was not given notice on 22 March 2020. The second respondent continued to attempt to register for the Coronavirus Job Retention Scheme. This action is inconsistent with having terminated the employment on 22 March 2020. The claimant's employment continued until it was terminated without notice on 15 May 2020.

39. The claim was presented in time, being presented within the time limit beginning with the effective date of termination, which was 15 May 2020.

Unauthorised deductions

40. I conclude that the claimant was entitled to be paid his wages until 15 May 2020 and that the first respondent made an unauthorised deduction from wages by not paying him wages from 23 March 2020 to 15 May 2020. The payment made in lieu of notice and accrued holiday is not a payment of

wages for 23-31 March 2020. However, as the claimant received pay in lieu of notice, no further amount is due in respect of notice.

41. The claimant and the first respondent did not agree a change to the terms of the contract relating to pay. I calculate the following mounts on a gross basis, but the first respondent is to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.
42. The claimant's gross weekly pay was £596.00. The amount due is 7 weeks and 5 days x £596.00 = £4,585.11.
43. The second respondent has indicated that it has no funds to pay any award. The claimant should note that it may be possible to claim payment from the National Insurance Fund.

Julia Smailes

Employment Judge Smailes

25 February 2021

Sent to the parties on:

1 March 2021

For the Tribunal: