



EMPLOYMENT TRIBUNALS

Claimant: Mr Yoosefinejad

Respondent: East Space Limited

Heard at London Central (by CVP)

On: 12 January 2024

Before Employment Judge Shukla (sitting alone)

Representation

Claimant Mr Shah

Respondent In person (Mr Edwards)

JUDGMENT

1. The claimant's claims for notice pay and holiday pay are not well-founded. The claims for unauthorised deduction from wages, holiday pay and breach of contract are accordingly dismissed.

WRITTEN REASONS FOR JUDGMENT

2. I gave judgment and oral reasons at the hearing. As requested by the claimant at the hearing, I set out written reasons below. Page references below are to the 60-page hearing bundle.

Findings of fact

3. The claimant's contract of employment is at page 44 onwards. The employment began on 1 April 2023. The contract described the claimant's duties as "Operations Director or such other role as we [the employer] consider appropriate" (clause 2). The respondent said the claimant's job title was "General Manager". The respondent is in the entertainment industry, including arranging events, for example at nightclubs.
4. The contract contains the following provisions:
 - a. The claimant must diligently devote the whole of his time, attention and abilities to the business of the employer (clause 2.1).
 - b. The normal working hours are 10am to 6pm Monday to Friday. The claimant may be required to work additional hours, additional days or different days,

without additional remuneration: clause 5. TOIL (Time Off In Lieu) applies on an ad hoc basis, and must be approved in advance by the line manager: clause 5.3-5.4.

- c. "Your probationary period is three months from commencement of employment. Your probationary period may be extended at our discretion. We will confirm in writing when you have satisfactorily completed your probationary period." Clause 6.1
 - d. The claimant is entitled to 28 days paid holiday, not including bank holidays: clause 9.2.
 - e. "Subject to any other term of this agreement, your employment shall continue until terminated by either party giving the other not less than . . . [8 weeks' notice by the employer for up to 5 years' service]." Clause 20.
 - f. The respondent may terminate employment at any time with immediate effect by paying a sum in lieu of notice: clause 22.1.
 - g. The respondent may also terminate employment with immediate effect without notice and with no liability to make any further payment (other than in respect of amounts accrued due at the date of termination or required to be paid by law) if the claimant is guilty of any gross misconduct, gross negligent or serious breach of the contract of employment: clause 22.2, 22.2.1.
5. On 14 June 2023, Mr Edwards received verbal complaints from other employees, which are also recorded in two emails, about the claimant's conduct. The emails said as follows:
- a. The claimant is not working the hours a GM [general manager] is required to work.
 - b. Lack of support on shifts and physical presence at the venue.
 - c. Poor understanding of venue operations and priorities.
 - d. Lack of initiative/ proactivity.
 - e. Delegating tasks yet unable/ unwilling to help or take on tasks of his own;
 - f. Lack of understanding and assistance with finance and reporting.
 - g. Poor handling of security issues leading to animosity among the security team and venue staff.
 - h. There is little or no effort from the claimant in coming to events even semiregularly. Most of the staff barely know him. Security have even commented that they don't feel comfortable liaising with him about events because he's never there. He just has not been the extra pair of hands that we hoped a new GM would be.
 - i. A lot of the staff feel it is unfair someone holding a managerial role while not pulling their weight when everyone works so hard.
6. Mr Edwards dismissed the claimant on that day, and paid him for another 12 days, ie to the end of June 2023, which was also the end of the claimant's probationary period. Mr Edwards said he had thought that the claimant was entitled to the statutory period of notice, that is a week's notice period (ie 5 days), but decided to pay him for 12 days.
7. There is a conflict of evidence about the reasons given at the time for the claimant's dismissal. The claimant said in his witness statement:

[Mr Edwards said] "I'm going to have to let you go. You know the financial position of the organisation. Plus, I think you've lost the team."

11- He then explained that one of the staff had tried but couldn't get hold of me one day last week and that another was annoyed that I'd asked them to open the building for deliveries from time to time.

12- I thought that these felt like minor grievances, and certainly not grounds for dismissal, but didn't feel like there was much point in arguing.

13- Then he said something along the lines of that he liked me, was happy with my work, and that if we were in a better financial position he would be willing to give it another go.

14- I believe that my salary was roughly the difference between losing money and making a slight profit. The accounts I saw during my time working for Pickle Factory were all based on projections and formulas.

15- I asked him where that left me in terms of pay, and he said he'd pay me till the end of the month (about 2 and a half weeks pay). He said this was more than twice as much as he was obliged to give me as I was in my probation period.

8. Mr Edwards said at the hearing that the main reasons for dismissing the claimant were that he was not doing his job, and had "lost the team". Mr Edwards said costs were not part of the reason for dismissing the claimant.
9. I accept Mr Edwards' evidence that his principal reasons for dismissing the claimant were that, based on the concerns raised by his colleagues set out above, the claimant was not doing his job, and did not have the confidence and respect of his team.

Conclusions on claim for notice pay

10. The claimant submitted that under his contract, he was entitled to 8 weeks' notice pay, as there was no separate notice period in the contract for probationers. The respondent said that, in retrospect, he would have dismissed the claimant for gross misconduct.
11. I find, on the balance of probabilities, that the claimant committed a fundamental (or serious) breach of his contract of employment, which entitled the respondent to terminate his contract with immediate effect. I accept the respondent's evidence that the claimant had lost (or perhaps never gained) the confidence and respect of his team, and was not performing his job to the standard expected. In the context of a probationary period, I find it was crucial to the contract of employment that the claimant demonstrate a basic ability to carry out the role. I accept the claimant was in serious breach of the standards expected of him, in light of the emailed feedback from his colleagues.

12. I find also that the respondent accepted this breach, in dismissing the claimant. The claimant argued that, by giving notice pay to the end of June (and the end of the claimant's probationary period), the respondent elected to affirm the contract of employment. I reject this argument, as it is plain from the facts that the respondent did not intend to continue with the claimant's contract of employment. The claimant did not work for the respondent after 14 June 2023. An analogy may be made with the reasoning in *Quilter v Falconer* [2020] EWHC 3294, para 121 (what matters is whether repudiatory breach has been unambiguously accepted; employee not necessarily taken to have affirmed the contract by giving short period of notice). There is no ambiguity in this case.
13. The claim for notice pay is accordingly dismissed.

Conclusions on claim for accrued holiday pay

14. The claimant presented a claim for accrued holiday pay. In his ET1, the claimant said he had accrued 7 days' leave during his employment, but only taken 5 days' leave, and therefore was owed 2 days' holiday pay. At the hearing, the claimant accepted he had in fact accrued 6 days' leave, and said his claim was therefore for 1 day's pay. The respondent's case was that the claimant had taken 6 days' leave.
15. This issue boiled down to whether the claimant took leave on Friday 26 May 2023. The claimant said he had not, and the respondent said he had, because the claimant had been present at a festival on that day (not in his work capacity). Mr Edwards and Mr Napier gave evidence that the claimant had been at the festival on that day (and not at work), and they had both seen him there. The claimant denied this. The claimant submitted it was the respondent's duty to keep and produce written records of leave taken. Mr Edwards replied that it does not have records of leave that employees take without asking. I accept the respondent's evidence that the claimant was at the festival and not at work on 26 May 2023.
16. The claim for accrued holiday pay is accordingly dismissed.

Employment Judge Shukla
15/01/2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15/01/2024

FOR THE TRIBUNALS