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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Gomez**

Respondent: **Higgins Entertainment Ltd**

Heard at: **East London Hearing Centre** **On: 3 July 2017**

Before: **Employment Judge Goodrich (sitting alone)**

Representation

Claimant: Mr S Kane (Pupil Barrister)

Respondent: Mr B Lasi (Manager accounts and finance for Respondent)

JUDGMENT & ORDER
OF
THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal that:-

1. The Claimant's unlawful deduction from wages claim fails and is dismissed.

2. The Respondent's application for a preparation time order is refused.

WRITTEN REASONS (Oral reasons having been given to the parties at the hearing on 3 July 2017)

The claim, background and the issues

1. The background to this claim is as follows.

2. The Claimant issued proceedings against the Respondent on 20 April 2017. Before this he had undergone ACAS conciliation as prospective claimants are now required to do.

3. The Claimant has brought a claim for arrears of pay. He gave his dates of employment with the Respondent as being 15 November 2016 – 20 December 2016.

4. In box 8.2 of his claim form giving the details of his claim he stated:

> *"After receiving the payment for the last week of work, I discover that there is a week that I have not been paid, I start in January to raise in person and several times by phone and email, I have wasted the time these almost 3 months. They do not have any attitude to pay me what corresponds, I have even been given phone numbers where no one answers, I have proof of all of this."*

5. In box 9 the claimants are asked what compensation is being sought and what do they want if the claim is successful. No details were given by the Claimant in box 9, so it was unclear exactly what he was claiming and for what period of time worked.

6. The Respondent entered a response denying the Claimant's claims. In their details of response they stated that a breakdown of the clock-ins and timesheets show that all the hours worked by the Claimant had been paid.

7. The case was set down for a two hour hearing before me and both parties asked to bring sets of documents they wanted to produce to support their cases.

8. At the outset of the hearing I sought clarify with the parties exactly what the dispute involved. I asked both parties to read each other's sets of documents (documents having not been exchanged between them) and clarify exactly what was in dispute between them.

9. After I had done so Mr Kane, representing the Claimant, notified me that the Claimant is claiming for three days of work, namely on 15, 16 and 17 November 2016. He informed me that the Claimant is claiming a total of 19 hours work at £7.50 per hour amounting to £142.50 gross.

10. The issue for me was therefore whether the Claimant was entitled to these sums or not.

The relevant law

11. This is a dispute that is more a question of disputes of fact than involving any great issue of law. On one side the Claimant says that he worked on the three days in question, on the other side the employer said that he did not.

12. The question of whether the Claimant was owed the money or not is therefore a matter of contract, namely what the parties had agreed. A contract can be verbal or in writing or both; and in order to be valid one of the necessary essentials is that there needs to be sufficient certainty of the terms.

The evidence

13. The Claimant gave evidence himself. In addition he produced two (unsigned) witness statements from witnesses that did not attend this Tribunal hearing. One was

from a Mr George Hasa, who worked formerly at the Respondent. The other was from an individual called Moe Beyyumi.

14. On behalf of the Respondent I heard evidence from Ms Christina Sorrentino, general manager for the bar where the Claimant worked; and Mr Behzad Lasi, who was responsible for the accounting and finance function for the Respondent.

Findings of fact

15. I find that, having read the witness statement and listened to their evidence, all the witnesses were giving genuine evidence and none was attempting deliberately to be untruthful.

16. Some matters are not in dispute.

17. The Respondent runs a late night bar in Shoreditch.

18. The general manager for that bar is Ms Christina Sorrentino. The assistant manager at the relevant times was Ms Julia Stoyanova.

19. On 14 November 2016 Ms Stoyanova and the Claimant had an exchange of text messages.

20. Amongst the text messages were the following:

20.1. The Claimant notified Ms Stoyanova that he was working on Friday and Saturday but would otherwise be available.

20.2. In response, Ms Stoyanova sent a text message *"Ok, do you want to come tomorrow for trial shift"* to which the Claimant replied *"Of course"*.

20.3. Ms Stoyanova told the Claimant to come to the Shoreditch High Street bar at 8pm the following evening.

21. There is no dispute, therefore, that the Claimant attended the bar the following evening.

22. In dispute is whether Ms Stoyanova was at work that evening, as the Claimant says; or that she was not at work that evening but that Ms Sorrentino was and that it was she who interviewed the Claimant that evening.

23. Also in dispute is whether the Claimant worked a trial shift that evening from 8pm – 2am, as he says; or that Ms Sorrentino had an interview with him that might have lasted about half an hour as a result of which he was hired to commence shifts the following week, as Ms Sorrentino says.

24. Also in dispute is whether the Claimant worked shifts the following two days, namely Wednesday 16 and Thursday 17 November.

25. This has not been a particularly easy dispute to answer. The Claimant's English is not particularly good, although no interpreter was requested. With patience, I believe

that the Claimant did understand the questions well enough when repeated as necessary a few times and also having the benefit of his representative being able to ask him the questions. Additionally, it did not appear to me that with about £140 at stake that it would have been proportionate at this late stage to adjourn the hearing and to have required an interpreter to attend.

26. I have considered factors both for and against each side's accounts of events including the following:

26.1. I am mindful that, regrettably, not all employers pay their employees the full wages that are due to them. I read an article today in the IDS brief, a journal on employment law, highlighting this issue.

26.2. Nonetheless the fact that some employers are unscrupulous does not mean that this particular employer is unscrupulous. There is no particular reason to believe that this employer is dishonest or unscrupulous.

26.3. The Claimant's evidence appeared confused. As set out above it was not made clear in his ET1 claim form to the Employment Tribunal exactly what he was claiming and only today was I able to clarify this.

26.4. The Claimant's evidence today was that Julia Stoyanova was at work on 15 November and asked him to carry out work the next two days' shifts. This evidence is contradicted by the handwritten rota of the timesheets provided to me. This shows that Ms Stoyanova was working on Monday 14 November. This is consistent with her and the Claimant having exchanged text messages that day. The records show that she was not working on 15, 16 or 17, then returned to work on 18 November.

26.5. Ms Sorrentino's evidence that one of them covered the shifts so that she would have been at work if Ms Stoyanova was not on shift was therefore plausible. She also said that she remembered having interviewed the Claimant that day.

26.6. The Claimant's witness statements were not borne out by the evidence of the shifts. In particular Mr George Hasa, according to the records of the shifts was not working on the Tuesday or Wednesday but was working on Thursday 17.

26.7. Unless the timesheets were being deliberately falsified, which appears unlikely particularly for the sums of money at stake and with all the other shifts being recorded, this seems more likely as evidence of what took place.

27. On the balance of probabilities, therefore, I find that although Ms Stoyanova referred to the Claimant working a trial shift that what in fact happened when Ms Sorrentino was present the following day was that she gave the Claimant an interview and engaged him to work the following week. This is consistent with Julia Stoyanova's follow-up texts on 20 November 2016 when she sent a text message attaching the rota for the following week. This is more consistent with the following week being the first week of the Claimant's paid work. In my experience, someone attending for an

interview would generally not be paid. Someone who works a shift should be paid, although in the hospitality industry often people do an unpaid trial shift for the employer to decide whether to take the individual on as an employee. On the balance of probabilities, however, as stated I find that what took place was an interview rather than a trial shift.

28. Although, therefore, I have sympathy with the Claimant for working in an industry that does ask individuals to work unpaid trial shifts before being taken on for employment, I find the Respondent's version of events to be slightly the more probable.

29. After I had given judgment, Mr Lasi made an application for a preparation time order for five hours' preparation time on the case. He stated that the Respondent had made a settlement offer of £150 which was slightly higher than the sum claimed by the Claimant today and the Claimant had rejected it, asking for £172.50. This, he submitted, was unreasonable conduct and had the Claimant accepted the offer the hearing today would have been unnecessary.

30. In response Mr Kane submitted that the Claimant's conduct was not unreasonable. He (the representative) discussed the offer on Friday (the Friday before the case was heard today on Monday) and the Claimant was confused about the terms of the offer. It was not unreasonable conduct for him to wish to present his claim for the Tribunal's judgment.

31. The relevant law is set out in the Tribunals Rules of Procedure and case law giving guidance. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides that a tribunal may make a costs order or preparation time order and shall consider whether to do so when it considers that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted. There is, therefore, a two stage process in considering applications for costs or preparation time orders. The first stage is whether the unreasonable etc threshold has been reached. The second stage is whether to exercise the discretion to made a costs order.

32. There are other provisions as to costs or preparation time orders which are not relevant here.

33. In the case of *Kopel v Safeway Stores (2003) IRLR 753 EAT* guidance was given that the refusal of an offer of settlement is a factor which an Employment Tribunal can take into account in deciding whether to make a costs order, although a Tribunal does not have a system in the county court for money claims in the High Court or County Court referred to as "*Calderbank offers".*

34. Rule 84 provides that, in deciding whether to make a costs, preparation time or wasted costs order, the Tribunal may have regard to the paying party's ability to pay.

35. In this case I consider that there was unreasonable behaviour on the Claimant's part in not accepting the Respondent's offer which would have met the sum he was claiming. Although I accept that the Claimant does not speak English as his first language, he has been in touch with ACAS, who could have explained what the Respondent was offering if he was uncertain about it.

36. Whether to make a preparation time order involves, however, a two-stage process. The first stage is consideration of whether there has been unreasonable conduct. The second is whether to exercise my discretion to make an order for costs.

37. In this case I have decided not to exercise my discretion in favour of costs. The Claimant is working in a low wage industry, earning somewhere around the national minimum wage. The amount of sum claimed would be disproportionate to the time, effort and trouble of seeking to enforce a preparation time order. More importantly I consider that it is best to have closure on this litigation and for all the parties to move on. The application is refused.

Employment Judge Goodrich

3rd August 2017