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THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FOWELL**
(sitting alone)

BETWEEN:

Mr Stephen Bwona **Claimant**

AND

Breakthrough Deaf-Hearing Integration
(Operating As Deafplus) **Respondent**

ON: **20 February 2017**

APPEARANCES:

For the Claimant: **In person**

For the Respondent: **Mr C Milson, Counsel**

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Respondent is in breach of the Working Time Regulations 1998 in respect of two days' pay and the Claimant is awarded £288.46 in compensation.

2. The Claimant's other claims under the Working Time Regulations 1998 and/or unlawful deduction from wages are dismissed.

3. The Respondent is ordered to pay to the Claimant a further £288.46 in costs.

REASONS

1. The Claimant brings three claims:

    a. Breach of the Working Time Regulations 1998 (alternatively for unauthorised deduction from wages) in respect of annual leave;

    b. Unlawful deduction from wages in relation to additional hours worked in January and February 2016; and

    c. Unlawful deduction from wages in relation to overtime worked during a weekend on 20 and 21 February 2016.

2. The Claimant worked as Head of Finance and Company Secretary for the Respondent, a charitable organisation assisting the deaf and hearing-impaired. He worked for them from 7 July 2015 to 10 June 2016, less than two years, and so has no claim for unfair dismissal. His employment ended in him being escorted off the premises by the Chief Executive, Mr Gary Williams, about halfway through his notice period. The Claimant feels that he worked very hard for the Respondent and that his contribution was not properly appreciated, particularly given the manner of his departure, and these claims for underpayments reflect his continuing sense of grievance.

3. In addition to hearing evidence Mr Bwona and Mr Williams I was provided with documentary evidence in the form of a bundle of about 500 pages, much of which dealt with wider aspects of the case and how busy the Claimant had been throughout his period of employment.

4. Having heard that evidence I make the following findings of fact. At the time of the Claimant's recruitment the position had been vacant for about four months and so there was a substantial backlog of work. The previous incumbent had told Mr Williams that a full time role was not required and it could be done by a three day per week Head of Finance, providing they had suitable administrative support. The job was advertised on that basis with the intention that the incumbent would be supported by a Financial Assistant.

5. Mr Williams agreed with the Claimant that he start on a full time basis because of the backlog, and because of the impending merger with another organisation which was due to take place in September or October 2015. Following that merger one employee would transfer to the Respondent who could work for one day a week as a Financial Assistant and another would work for three days each week in HR which would provide some assistance as well. From then on it was intended that he would revert back to 21 hours per week role. The merger was delayed until January 2016. During that month Mr Williams discussed with the Claimant reducing to part-time hours from mid-January and he

worked on that basis from that point onwards.

6. On the weekend of 20 and 21 February he worked on both days in order to produce a budget for the 2016/2017 financial year. Part of the Claimant's role was to prepare the payroll. He would send the relevant figures to Mr Williams for authorisation each month. At no time did he raise or claim the overtime payment for the weekend of 20 and 21 February or claim that he had been underpaid in January and February 2016 as a result of the reversion to part-time hours.

7. Mr Williams noticed in the April figures for payroll, provided to him by the Claimant, that the Claimant's own hours had increased again to 37. He questioned this in writing and the Claimant resubmitted the figures, reducing them to 21. Mr Williams was concerned about the discrepancy and responded by email to say that if he had worked more hours it was up to him to reflect his hours fairly.

8. Concerns were raised about the Claimant's performance in late 2015 and it was felt that he was not managing his time effectively and prioritising tasks. It is not necessary to go into those matters any further; the upshot is that he was given three months' written notice on 11 March 2016 to expire on 10 June 2016. He was told that he was expected to carry on working during his notice period during which the Respondent was openly recruiting for his successor. Tensions arose during this period with result that on 25 April 2016 the Chair of Trustees informed the Claimant in writing that the operational elements of his role would cease with immediate effect and he was then escorted off the premises. That letter also informed him that he would be paid as normal until his termination date of 10 June 2016 and that he would need to cooperate with an effective handover.

9. The following day he was emailed at home by Mr Williams requesting for various sign-in information, and he was told to ensure that any outstanding leave was taken between then and 10 June. The Claimant responded by saying that he could not arrange any holidays as he had been dismissed, demanding his holiday pay in full for the period from July 2015 to 10 June 2016 minus the four days which he said he had taken by that stage. The request from the company was repeated and each side maintained their stance from then on.

10. On 9 May Mr Williams emailed to say that Mr Bwona had used 10 days leave out of 20 days accrued up to 10 June. The 10 day figure was calculated on the basis of the four days taken by the Claimant which is not disputed and an additional six days which he had booked during the period from 28 April to 6 May 2016. (This was to attend his daughter's wedding in Italy.) The 20 day figure in Mr Williams' email was on the basis of his whole holiday entitlement from the date of joining to dismissal regardless of when the holiday year fell. Having realised his mistake he wrote a follow up email to say that his calculation was wrong

and that annual leave could not be carried over without his authorisation and that no authorisation had been given.

11. That was not quite correct however. The Claimant had discussed the six days holiday for his daughter's wedding with Mr Williams before the end of the holiday year and Mr Williams agreed in evidence today that he probably agreed at the time that this could be carried over.

12. In any event he insisted that the Claimant was expected to take any holiday owning during his notice period and he was not paid any further holiday pay on termination.

13. The Claimant could have accessed his payslips on line at any stage but was unaware of this, assuming that his access had been blocked. As a result he was not aware that the holiday pay had not been paid until August when he raised it with Mr Williams. The Tribunal claim form was submitted on 13 September but there was no ACAS certificate number and so it was rejected. He obtained his ACAS certificate number on 3 October and the claim was then re-submitted. It has been accepted at a previous hearing that the claims were presented in time.

14. My conclusions in light of these facts are as follows. The claims for the weekend working and for the claimed underpayment of wages are both out of time. They are required to be brought within three months of the underpayment in question. An unusual feature of this case is that it was down to the Claimant to specify which payments he was entitled to and he failed to do so at the appropriate time. He subsequently said that he was too busy to look into this but that does avoid the fact that he could have claimed them at the time had he genuinely believed he was entitled to these payments. I am not satisfied that he would in any event have been entitled to them in a senior role such as his occasional additional hours of work are expected particularly in preparing budgets towards the end of the financial year. If there had been a claim for excessive hours worked, the Respondent's policy is to provide the time off in lieu, so for that combination of reasons those claims are dismissed.

15. Turning to the main holiday pay claim, the period of holiday taken in connection with his daughter's wedding does not affect the calculations since that holiday was carried over and taken. The period from the beginning of the financial year on 1 April to 10 June of approximately two and one-third month.

16. A full time person is entitled to 25 days per year plus bank holidays, a total of 33 days. So, on the basis of working three days a week, the pro-rata amount is 19.8, which has to be rounded up to 20 days per year. Two and a one third months' entitlement, at 20 days per year, amounts to four days, including Bank holidays.

17. Bank holidays fell on 2 and 30 May leaving only two days remaining. I

accept the Respondent's evidence that no further request to carry over holidays from the previous year was made or would have been agreed. It is only therefore this two days which remains in issue.

18. The Respondent does not have any clause in its contract of employment requiring staff to take leave in their notice period, and the staff handbook does not refer at any stage to garden leave. The only mention in the handbook is on page three where it states, in connection with resignation or termination, that on leaving Deafplus an employee will be entitled to outstanding holiday entitlement "or by agreement" to be paid for any such entitlement. Mr Williams took the view that that meant that specific agreement was required for an employee to be paid annual leave on termination. I do not agree. That merely reflects the normal position of an employee working their notice, where an employer may pay outstanding holiday on termination (as is permitted under the Working Time Regulations) or may chose to take holiday in this period with the employer's agreement.

19. It is well established that employers are entitled to fix the times or dates on which employee can take holidays. It is commonly done such as in connection with Christmas shutdowns and the like. What is required however is a clear provision in the contract of employment that employees may be required to take their annual leave during the notice period. The Working Time Regulations do deal with this specifically. By Regulation 15(2) a workers employer may require the worker:

    (a) to take leave to which the worker is entitled under Regulation 13 or Regulation 13A or

    (b) not to take such leave on particular days by giving notice to the worker in accordance with paragraph three.

20. Paragraph 15(3) provides that a notice under paragraph 15(2) "shall specify the days on which leave is or, as the case may be, is not to be taken, and where the leave on a particular day is to be in respect of only part of the day, its duration".

21. In the present case it is clear that no such qualifying notice was given in the sense that specified dates were provided on which Mr Bwona should be on leave. This provision may give way to alternative agreement between the parties, but as already noted, there was no such clear provision in this case.

22. On that technical construction of the Working Time Regulations therefore I find that Mr Bwona remained entitled to be paid his two days' annual holiday on termination. He had a daily rate of pay as £144.23 and so those two days amounted in total to £288.46.

23. Having succeeded to some extent in relation to his claim he may also recover from the Respondent some of his Tribunal fees, which fall under

the heading of costs which the Tribunal has power to award. I have given consideration to the award of costs and in particular to the Tribunal fees paid by Mr Bwona which totalled £390. This is a claim in which only a small proportion of the total amount originally sought has been recovered. On the other hand the Claimant has succeeded on his main claim which was for holiday pay for the holiday year in question albeit that the true amount was very much lower than he may have anticipated. I also bear in mind that the Respondent could have avoided any liability had it simply given a notice of the correct dates. Having regard to the amount recovered it would in my view be disproportionate for the costs to exceed the compensation, and so I limit the amount of costs also to £288.46.

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Employment Judge Fowell
Date: 26 February 2017