



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr G Lawson

v

OfficeServe Limited

Heard at: London Central

On: 16 October 2020

Before: Employment Judge Joffe (sitting alone, via Cloud Video Platform)

Representation

For the Claimant: In person

For the Respondent: Ms K Zakrzewska, litigation consultant

JUDGMENT

1. The claimant's unfair dismissal complaint is dismissed on withdrawal by the claimant.
2. The respondent failed to pay the claimant for accrued but untaken annual leave under regulation 14 of the Working Time Regulations 1998 and under the terms of his contract of employment in the sum of £1238.80 net and must pay that sum to the claimant.
3. The respondent was in breach of contract in not giving the claimant's four weeks' notice of termination of his contract of employment and must pay the claimant damages of £1100.61 net.

4. The respondent's defence had no reasonable prospects of success and the respondent must pay to the claimant £1200 for preparation time.

REASONS

Claims and issues

1. By a claim form dated 12 June 2020, the claimant brought claims for unfair dismissal, unlawful deductions from wages and breach of contract.
2. The claimant did not have two years continuous employment with the respondent and withdrew his unfair dismissal claim.
3. The issues I had to decide therefore were as follows:

Unlawful deductions from wages

- (1) Did the respondent make unauthorised deductions from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 in the following respect:

Not paying for holiday accrued but untaken at the time of the claimant's dismissal?

Breach of contract

- (2) Did the respondent breach the claimant's contract of employment:
 - a) By not giving the claimant the notice required by his contract of employment?
 - b) By not paying the claimant for accrued but untaken holiday in accordance with his contract of employment?

Findings of fact

4. I heard evidence from the claimant on his own behalf and, for the respondent, from Ms Amie Harbron, Head of HR. I was provided with an agreed bundle of some 91 pages.
5. At the outset of the hearing, Ms Zakrzewska conceded that:
 - a) The claimant's contract of employment entitled him to 33 days of annual leave per year;
 - b) The respondent was not entitled to in effect backdate the four weeks' notice the claimant was entitled to under his contract of employment to commence on the date when he had himself given a longer period of notice;

- c) If the claimant was sick during a day of booked annual leave, that day should be treated as a sick day rather than annual leave.
6. The only substantive issue remaining was whether the claimant was entitled to be employed and/or paid for the longer period of notice he provided.
 7. The respondent employed the claimant from 28 May 2019 as a full stack developer.
 8. His contract of employment provided in respect of annual leave:

‘Holiday entitlement accrues at this rate of one-twelfth of annual entitlement for each calendar month worked in the year, rounded down to the nearest half day. You are entitled to paid annual holiday of 25 working days in each full calendar year worked, taken at times to be agreed in advance by the Company.

You are also entitled to take the usual public holidays in addition each year.

...

On termination of your employment an adjustment will normally be made to your final salary payment to reflect any accrued holiday entitlement not taken or any holiday taken in excess of your entitlement.’
 9. There was also provision for up to five days of untaken annual leave to be carried over to the following leave year if pre-authorized by a director.
 10. So far as notice is concerned, the contract provided that the claimant was entitled to four weeks’ notice once he had completed his three month probationary period.
 11. The claimant resigned on 11 March 2020, giving extended notice until 29 May 2020. He wanted to give the respondent the opportunity to plan for his departure.
 12. The respondent accepted the claimant’s resignation in a letter from Ms Harbron of 11 March 2020. She said: ‘I understand that your last working day will be 29th May 2020.’
 13. The claimant had carried over three days of annual leave from 2019 and he used these in January 2020. He booked a further day’s leave on 13 March 2020 but fell ill with flu on that day. He was off sick the following week but intended to attend work on 23 March 2020.
 14. The respondent’s business was affected by the pandemic and the lockdown. A video conference was arranged involving the claimant, Ms Harbron and a number of managers. The claimant was told that, because of the effect of the pandemic on the business, the respondent could not honour his extended notice period but he would receive his contractual notice period of four weeks.
 15. The claimant was told he would not have to work his notice.

16. Ms Harbron wrote to the Claimant on 24th March 2020 confirming that the Claimant's last working day was to be 8th April 2020:

'Further to our discussion on Monday 23rd March 2020 with Lewis Lovejoy, Matt Lewis, Christoph Haschka and yourself, we discussed the unprecedented impact the coronavirus outbreak has had for our businesses across the Group. We have seen instantaneous decrease in sales of all business across Jeanie Marshal Foods, Chiltern Foods and OfficeServe.

With that in mind, it was decided that you will fulfil your contractual notice period of four weeks meaning your last working day will be Wednesday 8th April 2020.'

17. There was further correspondence between the parties in which the claimant asserted a right to be paid for the notice period he had originally given and the respondent maintained its position that the claimant's employment would terminate on 8 April 2020.

Law

Unlawful deductions from wages

18. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.
19. On a complaint of unauthorised deductions from wages, a tribunal 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: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

Holiday pay

20. Under regulation 13 of the WTR 1998, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.
21. Under regulation 14, where a worker's employment is terminated during the course of his leave year and 'the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer

shall make him a payment in lieu...’ calculated in accordance with the formula set out in regulation 14(3).

22. By regulation 16, a worker is entitled to be paid for any period of annual leave he or she is entitled to at the rate of a week’s pay in respect of each week’s leave.

Breach of contract: notice

23. An employee has a right to receive the amount of notice provided for in his or her contract of employment. The fact that an employee has previously given longer notice does not abrogate the employer’s right to give notice in accordance with the contract.
24. Where an employer gives less notice than is provided for in the employee’s contract, the measure of damages is the earnings the employee would have received in the remainder of the notice period.

Submissions

25. The claimant made brief submissions. The respondent relied on Ms Harbron’s statement.

Conclusions

Holiday pay

26. The respondent conceded that the claimant’s contract provided for 33 days of holiday and that he was entitled to be paid for the holiday accrued by the time of dismissal with no deductions, since the three days of holiday he had taken had been carried over with permission from the previous year and on a further single day the claimant had been sick and was entitled to sick leave.
27. The entire amount of accrued holiday pay is due as damages for breach of contract. In the alternative, a proportion equivalent to the amount of the claimant’s statutory entitlement (28 days) which had accrued is due as being an unlawful deduction from wages.
28. The only remaining question was what proportion of the leave year should be applied to the holiday entitlement. That question turned on the question of when the claimant’s employment could lawfully have been terminated.

Breach of contract: notice

29. The respondent was in breach of the claimant's contract of employment in giving the claimant notice on 24 March 2020 to expire on 8 April 2020. The claimant is entitled to be paid for the balance of his notice period, one week and four days.
30. The parties agreed that the claimant's net daily rate was £122.29 so that the total owed for breach of contract in giving short notice was £1100.61.
31. The claimant had accrued holiday pay for 112/356 or 30.6% of the leave year, a total of 10.13 days. Applying the claimant's net daily rate, the total owed is £1238.80.

Preparation time order

32. Under rule 76 of the Employment Tribunals Rules of Procedure 2013, a costs or preparation time order may be made where 'a claim or response had no reasonable prospect of success'. Under rule 79, the number of hours allowed for under a preparation time order is to be decided on the basis of , information provided by the receiving party and 'the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required'. The current hourly rate is £40 per hour.
33. The claimant said that he had spent about 100 hours preparing the case. Much of this time was spent researching other employment tribunal decisions on the government website to try to find cases like his own. He did not have a lawyer to guide him.
34. The respondent resisted the order, saying that 100 hours was an unreasonable amount of time to spend on a small claim, it had been reasonable to defend the claims, and the claimant had produced his witness statement very late.
35. I concluded that a preparation time order was appropriate. The respondent's position up to the day of hearing was that the claimant was entitled to only 25 days of holiday per year. This was wrong on any view; it was less than the claimant's statutory entitlement and the claimant's contract was clear that his annual leave entitlement was in fact 33 days. Similarly, it seemed to me simply unarguable for the respondent to assert, as it did until the concession made at the hearing, that it was entitled to backdate its own giving of notice to the date when the claimant had given longer notice. Those defences had no reasonable prospects of success.
36. I understood why the claimant spent so long researching issues about notice, but it did not seem to me that 100 hours was a reasonable and proportionate amount of time to have spent preparing a claim of this size. My best estimate

of the amount of time a layperson could reasonably have spent preparing this claim, including researching the law and preparing documents and a witness statement was 30 hours. I accordingly made a preparation time order for 30 hours at £40 per hour, a total of £1200.

Employment Judge JOFFE

Date : 27th Oct 2020

JUDGMENT SENT TO THE PARTIES ON
27/10/2020

FOR THE TRIBUNAL OFFICE

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