Case No: 1300258/2021
Hearing Code: V

EMPLOYMENT TRIBUNALS

Claimant: Mr M King

Respondent: Swissport GB Limited

Heard at: The Midlands West Employment Tribunal (remotely, by CVP)

On: 2 June 2021

Before: Employment Judge Wilkinson

Representation
Claimant: in person
Respondent: Mr Lee Rogers (solicitor)

JUDGMENT

1. The claimant is not entitled to unpaid holiday pay and received all payments owed to him.

2. The respondent did not make any unauthorised deductions from the claimant's wages.

3. The claim shall be dismissed.

REASONS

1. This is Mr Moses's claim for unpaid holiday pay and an unauthorised deductions from his wages stemming from his contract of employment with the respondent. It was issued on 21 January 2021 and comes before me for final hearing.

2. The claimant is a litigant in person.

3. The respondent has been represented by Mr Rogers.

4. I have read the court bundle running to 72 pages, a witness statement from Michael Antropik (Head of Employee Relations for Western Europe) on behalf of the respondent and I have heard evidence from the claimant and from Mr Antropik as well as submissions where required.

5. The hearing took place, due to the Covid-19 pandemic ("the pandemic") by video. However due to technological issues with his video whereby he could not hear or be

heard the claimant had to participate by telephone. I am satisfied that the hearing was nevertheless fair in accordance with Article 6, ECHR 1950. I ensured that all participants had sufficient breaks. The hearing in any event only lasted for around 90 minutes.

6. The claimant was employed by the respondent which is in the aviation industry. The respondent has been badly affected by the pandemic and the restrictions imposed by Parliament and the government. As a result it sought to make employees redundant. In order to stave off this, I am told by the respondent and I accept, that it entered into negotiations with two trade unions – Unite and GMB – and implemented collective agreements relating to pay under which it (the respondent) was to allocate untaken but accrued holiday pay to employees subject to the government's furlough scheme limited pursuant to those agreement. This is relevant to my decision.

7. The month in dispute is October 2020. The claimant worked between 1-18 October 2020 inclusive and was then placed on furlough for the remainder of that month. He was made redundant on 31 October 2020.

8. I now turn to the respective heads of claim and my findings of fact.

Holiday pay

9. The agreements with the trade unions provided that holiday could be allocated to those employees on furlough in the months of August, September and October 2020. The agreement was for the respondent to 'top up' the furlough pay for the allocated hours to 100%.

10. The claimant agrees that the collective agreements were entered into. He does not assert that they were unfair. For the avoidance of doubt nor does the tribunal.

11. The claimant says that he was not fully aware of the terms of the collective agreements. Mr Antropik gave evidence, which I accept, that the respondent did its best to ensure that employees were made aware by, for example, posting the agreements (which formed part of the bundle by way of employee updates) on the walls at business premises. Whilst it is unfortunate that the claimant was not aware of them I am satisfied and find that the respondent used its best endeavours to ensure that the employees were aware.

12. In any event it is an undisputed fact and I note the terms of the claimant's contract that collective agreements would be incorporated into contracts of employments and therefore I find as a fact that this collective agreement became a part of the contract of employment.

13. That therefore was the contractual provision.

14. I considered the claimant's pay slip for October 2020 which was within the bundle. That shows:

    a. Covid-19 furlough pay at £751.01

    b. Holiday pay at £34.39

15. In his evidence the claimant told me that he did not fully understand the wage slips. He asserted that the 'holiday pay' ought to have explicitly set out his holiday entitlement. It is fully understandable that the claimant was confused by his pay slips. The tribunal struggled to follow them fully even when explained in evidence.

16. Mr Antropik's evidence was that the furlough pay was calculated by reference to each

employee's previous year of pay for the same reference period – here October 2019. This was accepted by the claimant as how furlough pay was calculated and I find this as a fact.

17. Mr Antropik told me that the 'furlough' figure of £751.01 included within it the 40 hours' of allocated holiday pay which the respondent had allocated to the claimant whilst on furlough in October 2020 pursuant to the collective agreement. Each hour of pay was, within the government guidelines, 80% of the previous years' earnings.

18. Mr Antropik further told me that the holiday pay of £34.39 was the remaining 20% of the 40 hours' of allocated holiday pay over and above the 80% incorporated into the 'furlough figure'.

19. When I asked the claimant what figure he says ought to have been under 'holiday pay' on that basis he was unable to give me a figure.

20. Overall I find that the claimant was unable to properly establish on the balance of probabilities, that he was entitled to a greater amount. I accept the evidence of Mr Antropik on the figures and find as a fact that the full 40 hours of allocated holiday pay, at 100% (in accordance with the terms of the contract as incorporating the collective agreement) were in fact paid to the claimant.

21. This head of claim therefore must fail.

Unauthorised deductions from wages – overtime

22. In respect of the second limb of the claimant's claim he told me that he had worked 36 hours' of overtime in October 2020 between 1 and 18 October 2020 over and above his contracted weekly hours (37 ½ hours per week). He asserted that this ought to have been paid to him as follows:

    a. 31 hours at 1.25 x pay; and

    b. Five hours at 2 x pay.

23. The claimant was unable, when I asked him, to set out when these additional hours were undertaken. His explanation was that they were logged on a system to which he lost access following his redundancy.

24. Mr Antropik acknowledged that the claimant's original contract, entered into with 'Midland Airport Services Ltd (Trading as Aviance)' in 2007 set out the following, at clause two:

    "Overtime is voluntary and overtime rates will not accrue until 40 hours per week have been worked."

25. Mr Antropik's evidence was that subsequent to this contract a number of factual changes had occurred:

    a. The claimant's employment was now with Swissport UK Ltd due to a number of transfers over the intervening years – this was accepted as fact and I find this as fact.

    b. The claimant's working hours week had reduced from 40 hours to 37 ½ hours per week. Given the claimant was disadvantaged by this, the respondent company had agreed to pay a monthly 'top up' allowance – entered into the wage slips as 'MBA payment'. This was not disputed by the claimant albeit he informed me, and I accept, that he had not been

formally aware of this change until some time after the event. In any event I find as fact that the claimant's contracted hours had been amended to 37 ½ hours.

c. In respect of overtime the contract had again changed over time and in particular following the onset of the pandemic such that it was paid only when an employee had exceeded their total hours for any so-called reference period (here four to five weeks). In the claimant's case, using the four-week period this would mean that overtime would only become payable once the claimant had worked 4 x 37 ½ hours in any four-week period (i.e. on any hours over 150 hours in that period).

26. In respect of (c), the claimant's case was that he accepted that for the month of October he had not worked for over 150 hours. I therefore find this as fact given that it was agreed between the parties. The claimant was clear that this was through no fault of his own as he had been put on furlough. I can sympathise with the claimant on this point: the fact that he was to be placed on furlough mid-way through the month and subsequently made redundant was not something that he could reasonably have foreseen. The claimant however averred that he had worked over the contracted weekly number of hours for the period between 1 and 18 October 2020 when he was in work. He relied on the provisions within his original contract.

27. I find as fact that the claimant's overtime payments were as set out by Mr Antropik. In support of this I accept that many years have passed since the claimant initially entered into a contract of employment and that since that time the basis of his employment and how overtime is calculated will have changed. I also accept Mr Antropik's evidence that the more recent 'Swissport contract' (contained in the bundle at pages 31-43) is an accurate reflection of the changed terms. I am supported in this by reference to the claimant's September 2020 wage slip in which he was paid overtime based on that calculation. I therefore find that the basis for calculating overtime had changed and that the claimant had affirmed this change.

28. In those circumstances, given that (a) overtime only became payable once the claimant had worked over 150 hours in the four-week period; and (b) he did not in fact (regardless of this being outside of his control) work over 150 hours; I find as fact that overtime did not become payable and as such there were no unauthorised deductions made by the respondent.

My decision

29. In those circumstances and given my findings above I remind myself of the legal provisions.

30. A claim for holiday pay must be based on a contractual provision or based upon an unauthorised deduction from wages. This is not a claim in which the Working Time Regulations 1998 were relied upon by the claimant. Indeed I note from the claimant's November 2020 wage slip that he was in fact paid the balance of his outstanding leave in his final wage slip.

31. An unauthorised deductions from wages are prohibited (unless they fall within the excluded provisions) by virtue of section 13(1) of the Employment Rights Act 1996. A key component of this is that the employer must have made a deduction.

32. Based upon my findings I find that there were no deductions made by the respondent either in respect of holiday pay or overtime. The claimant received all payments owed to him in respect of both heads of his claim.

33. For those reasons, in my judgment, this claim must be dismissed.

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Employment Judge Wilkinson
2 June 2021