



EMPLOYMENT TRIBUNALS

Claimant: Ms I Wu
Respondent: Holofy Limited

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (by video)
On: 23 July 2021
Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: Mr C-p Choi (Representative)
For the respondent: Did not appear and was not represented

JUDGMENT

The respondent has made unauthorised deductions from the claimant's wages of £3,384.61 and has failed to comply with its contractual and statutory obligation to pay the claimant money in lieu of untaken holiday entitlement, totalling £1,366.04.

The Respondent is ordered to pay the claimant forthwith the sum of £4,750.65

REASONS

Conduct of this preliminary hearing

- (1) This has been a remote hearing. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.
- (2) In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net No members of the public attended.
- (3) The respondent had not filed a response to the claim, and did not attend the hearing.

- (4) The claimant and her representative were able to contribute to the discussion and to hear all comments made.
- (5) No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.
- (6) The claimant produced a statement, in the form of a Summary and a small bundle of documents, and gave evidence on oath.
- (7) The participants were told that it is an offence to record the proceedings.
- (8) The claimant gave evidence from the same room as her representative. I was satisfied that she was not being coached or assisted by her representative or any unseen third party while giving her evidence.

The claim and issues

- (9) The Claimant was employed by the respondent, from 6 January 2020 until her employment was terminated with effect from 21 October 2020. By a claim form presented on 15 January 2021 the claimant brought complaints of breach of contract (unpaid notice pay) unpaid holiday pay and unlawful deductions from wages. The respondent has not filed a response to the action.
- (10) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
 - (11) *Unpaid annual leave – Working Time Regulations/Breach of contract*
 - (i) When the claimant's employment came to an end, was she paid all of the compensation she was entitled to under her contract and/or under regulation 14 of the Working Time Regulations 1998?
 - (12) *Unauthorised deductions*
 - (i) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by not paying her £4,410.11, being the amount due to her for the period 1 September 2020 to 21 October 2020 and if so how much was deducted?

Facts

The tribunal determined that the material facts are as follows:

- (13) The claimant began work for the respondent on 6 January 2020, her salary being £2,000 per month. Her contract, dated 13 January 2020, included the following clauses:

“14 - Termination clause: “Either you or Holofy can terminate your employment by giving 30 days notice in writing...”

6 - Holidays: “On the termination of your employment you will be paid in lieu of holiday not taken but accrued in the holiday year. The amount of the payment in lieu will be 1/260th of your full time equivalent salary for each accrued holiday day.”

- (14) On 23 July 2020 Ms Carmen Telehoi (Chief Experience Officer of the respondent and the claimant's line manager) verbally informed the claimant that she was on furlough leave. The claimant was paid her normal wage until 31 August 2020. 04 Sep 2020, following a text enquiry from the claimant as to why her August pay was the full salary amount and not the appropriate furlough amount, Mr Eduard Cristea, the respondent's chief executive, replied "You haven't been on furlough. It was sort of the month notice. I thought Carmen did let you know." However, the claimant had never been given formal notice. Mr Cristea continued to maintain that the claimant's contract had been terminated until the claimant wrote to him on 20 September 2020 observing that her contract entitled her to 30 days' written notice and accrued holiday pay.
- (15) On 21 Sep 2020 the respondent appears to have accepted the validity of the claimant's points. Mr Cristea emailed the claimant stating "Please take this email as a written notice of ending your employment with Holofy. We will take in consideration all legal benefits you are entitled to and will resolve them at the end of your employment. Your last day of working at Holofy will officially be 21 of October 2020." The effect of this was that the claimant was given the 30 days' notice due to her that her employment would end on 21 October 2020.
- (16) By this stage, the claimant had worked for 79% of one year based on the appropriate proportion of one year for the period 6 January – 21 October 2020 and had therefore accrued 15.8 days basic holiday entitlement, from which she had taken one day. She had taken all "bank" holidays to which she was entitled. She therefore had 14.8 days untaken holiday leave due to her.
- (17) On 30 Oct 2020 the respondent set the claimant a payslip detailing the full amounts due to her at the termination date of 21 Oct 2020, as follows:
- | | | |
|-------|--|------------------|
| (i) | Pay from 1 September to 21 October 2020 | £2,384.61 |
| (ii) | Money in lieu of untaken holiday entitlement | <u>£1,025.50</u> |
| (iii) | gross amount | £4,410.11 |
| (iv) | Total deductions (tax, NI, student loan) | £1,134.06 |
| (v) | Net amount due | £3,276.05 |
- (18) The claimant has never received any payment in relation to the amount due to her. There is no evidence before the tribunal that the respondent has accounted to the appropriate authorities for the tax and other deductions due. The tribunal inferred, given that the net amount had never been paid to the claimant, that this had not happened.

Law

Unlawful deductions from wages

- (19) S13 of the Employment Rights Act 1996 (ERA) gives workers the right not to have unlawful deductions made from their wages. "Wages" is defined to include

commission payments. "Deduction" is defined to include no payment being made at all.

Breach of Contract

- (20) Reg 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (1994 Order) allows employees to bring a claim for damages for breach of a contract of employment, which arises or is outstanding at the termination of the employment, in the employment tribunal.

Untaken holiday entitlement

- (21) Reg 13 of the Working Time Regulations 1998 (WTR) entitles workers to four weeks' ordinary annual leave in each leave year. A leave year begins either on the date set out in the worker's contract or some other relevant agreement or, if there is none set out, the date the worker joined the employer, and each subsequent anniversary of that date. Where there is a set holiday year, the leave to which a worker is entitled is equal to the proportion of that leave year remaining on the date on which his employment begins. Generally, this holiday cannot be carried forward from one year to the next. Regulation 13A entitles workers to an additional 1.6 weeks' holiday per year, which leave may be carried forward if a relevant agreement provides. The maximum number of days holiday per year that can be taken under these two provisions is 28
- (22) Reg 14 (WTR) entitles workers to a payment in lieu of any untaken holiday on the termination of their employment either calculated in accordance with a relevant agreement or, if there is no such contractual provision, a sum equal to the amount that would be due as determined according to the formula $(A \times B) - C$ where—A is the period of leave to which the worker is entitled under regulation 13 and 13A, B is the proportion of the worker's leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date.

Conclusion

- (23) The claimant was employed by the respondent from 6 January 2020 until 21 October 2020.
- (24) The claimant never received the salary due to her for the period 1 September 2020 to 21 October 2020.
- (25) The claimant never received any payment in lieu of untaken holiday entitlement.
- (26) In relation to untaken holiday entitlement, the Working Time Regulations provide a formula for calculating the amount due, but only if there is no relevant agreement which deals with the matter. In this case, there was a relevant agreement. Clause 6 of the claimant's employment contract provided

that on termination of her employment the claimant would be paid in lieu of untaken holiday calculated at 1/260th of her total full time salary per day, ie £92.30 per day. The claimant had 14.8 days' untaken holiday entitlement at the termination of her employment. The amount due to her was therefore £1,366.04, and not the £1,025.50, set out in the payslip sent to the claimant.

- (27) The claimant was not paid for the period 1 September to 21 October 2020, being £2,000 due for September 2020, and the appropriate proportion of her salary due for October 2020, calculated by the respondent to be £1,384.61.
- (28) The respondent has made unauthorised deductions from the claimant's wages in the gross sum of £3,384.61.
- (29) The respondent has breached its obligations pursuant to the Working Time Regulations 1998 and contract to pay the claimant any sum due to her in relation to untaken holiday entitlement. The appropriate gross sum was £1,366.04.
- (30) The respondent is therefore ordered to pay the claimant the sum of £4,750.65 forthwith. In due course, the parties will need to account to HMRC for the appropriate tax and other deductions.

Employment Judge Palca

23RD July 2021

Sent to the parties on:

23/07/2021

For the Tribunal:

APPENDIX 1

Judicial Mediation: What is it? How it can help you as an employer or employee?

How does mediation work

Mediation is a way of resolving disputes between employers and employees without the uncertainty, stress, costs, time of going to a tribunal. The advantages for both parties are:

- The mediator, who is an Employment Judge, helps the parties try to find a solution to their dispute in a constructive, positive way – unlike the adversarial nature of litigation.
- Although the mediator helps the parties find a solution, the mediation day is for the parties. The mediator does not tell the parties what to do or what they should settle for.
- The mediator will talk to each party in turn to discuss what they want, trying to bridge the gap between them. It is not essential for the parties to meet, but usually helps.
- The parties can agree terms which cannot be ordered by a tribunal, such as a reference.
- Judicial Mediation (JM) can be arranged quickly and easily unlike tribunal hearings.
- Trying to settle matters with mediation is not a sign of weakness, as some believe.

What you need to know about judicial mediation with a judge as mediator

- Judicial mediation (JM) is offered for claims likely to take at least 3 days in the Tribunal.
- It can take place at any time after the employer's response (ET3) has been filed with the tribunal – up until the tribunal decision.
- The fact that the ACAS conciliation failed does not mean it is not worth having a JM. It is a very different process, involving detailed discussions about settlement options.
- JM is voluntary. Both parties must agree to mediate. A party can withdraw at any time.
- The discussion is confidential; what is said at the mediation cannot be repeated either in the tribunal or to anyone not in the mediation.
- What a party says to the mediator is confidential – to enable a free and frank discussion.
- A party can have their adviser or a friend with them at the mediation.
- The mediation usually happens remotely, which can be via a platform such as Zoom or Teams or even by phone.
- If the mediation is unsuccessful, the judge conducting it will never be the judge for the final hearing.

How can judicial mediation (JM) help you?

- JM is focussed on finding a solution to the dispute rather than fighting it out with no certainty about the result.
- It can save a lot of time and stress for both parties by avoiding a tribunal hearing.
- If a case settles, there will be no adverse findings of fact that might affect either party or their witnesses.
- It removes the blame, aggression and anxiety often involved with going to a tribunal.
- The parties can move on with their lives without the uncertainty of litigation.
- There is now a backlog of cases in the tribunal which means you may have to wait quite a while to get a Hearing.
- A judgment dismissing a claim after mediation does not go on the public register.
- Most mediations lead to an agreement acceptable to both parties.

Can you get representation?

Yess Law helps and advises some unrepresented claimants at mediations, often at no cost . To see if they can help you, contact yesslaw.org.uk/mediation/draw

APPENDIX 2

SOURCES OF LEGAL ADVICE AND ASSISTANCE

Although employment tribunals are used to dealing with parties who are unrepresented, many cases are more complex than they may seem. Advice and guidance from an experienced outsider before the case is heard can be just as valuable as representation at the hearing itself.

Below is a list of organisations where you may get free legal advice and/or representation at the tribunal hearing. For more information see the websites.

We cannot guarantee that these organisations can help you. We are not responsible for the content or quality of any advice or help. We do not delay cases to allow any extra time for you to get assistance.

There is a good, reliable guide to the law and procedure, from Citizens Advice www.citizensadvice.org.uk.

You can represent yourself. The tribunal staff and Judges will do everything they can to ensure your case is given a fair hearing. You can sit in on other hearings before yours begins so that you understand the process; this can be very helpful. We cannot give you legal advice or advice on how to conduct your case. The Employment Tribunal website has useful information see www.gov.uk/employment-tribunals

ET Litigant in Person Support (ELIPS) One-off free advice from employment lawyers run by the Employment Lawyers Association - see <https://www.elaweb.org.uk/content/employment-tribunal-litigant-person-support-scheme>

Advice agencies Law Centres: www.lawcentres.org.uk

The address of a law centre nearest to you is available on their website.

Citizens Advice: www.citizensadvice.org.uk

The website has the address of your local Citizens Advice. It also explains work-related issues and practical advice, such as writing a Schedule of Loss. The Whitechapel Advice clinic at Tower Hamlets Citizens Advice offers specialist employment advice to those in Tower Hamlets: Call 020 7247 1050.

Discrimination cases only: You can try - Equality Advisory and Support Service: www.equalityadvisoryservice.com helpline is on 0808 800 0082 (free phone) - MIND the mental health charity provides a free "Infoline" on 0300 123 3393 - The Disability Law Service provides information and support for disabled people, their families and carers <https://dls.org.uk/our-services/employment/>. Helpline – call 020 7791 9800 (option 7).

Mary Ward Legal Centre: <https://www.marywardlegal.org.uk/legal-advice/employment-advice/>
They offer employment advice by phone 10-1pm, 2-4.30pm (0207 831 7079) or you can complete an enquiry sheet and email it to them: employmentappointments@marywardlegal.org.uk.

BPP Employment Law Telephone Advice Line: Call 0207 633 4534 and leave a message. A student will try to contact you for details and refer you to a volunteer lawyer.

Law Works: www.lawworks.org.uk

The LawWorks Clinics Network is a nationwide network of free legal advice sessions supported by LawWorks. For a listing, see the website.

Free Representation Unit: www.thefru.org.uk

FRU may offer free representation at the tribunal hearing. If your case is two days or less, you can approach FRU direct. Otherwise you need a referral from an advice agency such as a Citizens Advice Bureau.

Advocate: www.WeAreAdvocate.org.uk

Advocate may be able to offer free representation by a barrister at the tribunal hearing. You cannot approach them direct. You need a referral from an advice agency, solicitor or your MP.

Support through Court: www.supportthroughcourt.org

StC (T: 020 7947 7701) provides not legal advice, but support and practical assistance, helping with paperwork such as witness statements. Volunteers can often attend at short notice, including mediations.

Working Families: www.workingfamilies.org.uk and Maternity Action
www.maternityaction.org.uk

Both have helplines for maternity/ paternity issues at work and family rights.

Kalayaan: info@kalayaan.org.uk

Advice for domestic workers, anti-trafficking. Helpline: 0207 243 2942

Protect A whistleblowing charity aims to protect society by encouraging workplace whistleblowing. Focus is more on advice before blowing the whistle than in relation to running a tribunal case. For confidential advice call 020 3117 2520 (* option 1) or for more information look at the website <https://protect-advice.org.uk/>. The advice line is open Mon, Tue, Thurs: 9:30am – 1pm, 2pm – 5:30pm; Wed, Fri: 9:30am – 1pm.

Other possibilities

YESS: www.yesslaw.org.uk is a charity which may, if available, provide free support at mediations. You should give 2 weeks' notice. It also gives legal advice about resolving disputes, fees are means-tested (T:020 3701 7530).

Want to try to resolve the claim? If you want to settle the claim to avoid going to the tribunal there is a no-fee online mediation service (DRAW) for low paid London workers. For information see www.drawmediation.org.uk T: 0203 701 7535.

If you are a member of a trade union, the union may be able to help you.

If you have household, car or other insurance cover, it may include legal expenses insurance, which can cover an employment tribunal case. Some solicitors, barristers or other representatives offer a 'no win, no fee' service.