



EMPLOYMENT TRIBUNALS

Claimant: Mr Steven Dalton

Respondent: City Circle UK Limited

Heard at: Bury St Edmunds (by CVP)
On: 17 February 2022

Before: Employment Judge Hutchings (sitting alone)

Representation

Claimant: in person

Respondent: Ms Amy Richards (solicitor)

JUDGMENT

1. The claim for breach of contract for non-payment of notice pay is not well founded. The respondent has paid the claimant's notice pay in full.
2. The claim for breach of contract for non-payment of holiday pay is not well founded. The respondent has paid the claimant's holiday pay in full.
3. The claim for breach of contract is not upheld. The respondent did not breach the claimant's contract of employment.

REASONS

Introduction

1. The claimant, Mr Steven Dalton, was employed by the respondent, City Circle UK Ltd, as a coach driver from 24 February 2020 until 30 November 2020. The claimant gave one month's written notice to terminate his employment on notice on 30 October 2020.
2. The claimant claims that the respondent owes him notice pay and holiday pay, and that it breached his contract of employment by refusing to put him on furlough and by making an unreasonable change to his terms of employment.
3. The respondent is a coach company based in London and Edinburgh. It contests the claim on the basis it paid the claimant notice pay and holiday

pay in full on 10 December 2020 and that it did not breach the claimant's contract of employment. The respondent asserts that the Tribunal does not have the jurisdiction to decide if the respondent should have been placed on furlough.

4. I set out the issues for the Tribunal to decide.

Issues for the Tribunal to decide

Notice pay

5. First, the Tribunal will address the issue raised by the claimant as to whether he retracted his notice.
6. Then the Tribunal must determine:
 - a. What are the terms of the contract?
 - b. How much notice was the claimant entitled to receive?
 - c. What notice did she receive?
 - d. Was the notice paid in full?
 - e. If not, how much notice pay is outstanding?
 - f. Should any outstanding pay be paid net or gross?

Holiday pay

7. The Tribunal must determine:
 - a. What is the leave year?
 - b. What is the claimant's holiday entitlement?
 - c. What holiday pay has the claimant taken / accrued?
 - d. Is accrued holiday paid on termination?
 - e. What holiday pay has been paid to the claimant?
 - f. What, if any, holiday pay is owed to the claimant and how is it calculated?
 - g. Should any outstanding pay be paid gross or net?

Breach of contract: furlough

8. Does the Tribunal have jurisdiction to determine the complaint that the respondent did not put the claimant on furlough?

Breach of contract: unreasonable change to terms of contract

9. The Tribunal must determine whether the respondent changed the terms of the claimant's contract. If so, was any change unreasonable?

Procedure, documents and evidence

10. I considered documents from a 162-page agreed bundle which the parties introduced in evidence. The claimant gave sworn evidence to the Tribunal in his witness statement. The respondent was represented by Ms S Roberts, who called sworn evidence from Ms Tara Jablonski, the respondent's Human Resources manager. Mr Dalton and Ms Roberts made oral submissions to the Tribunal.

Findings of fact

11. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers in square brackets are to the agreed Bundle of Documents.
12. The claimant, Steven Dalton, was employed by the respondent, City Circle Coaches Limited, as a coach driver from 24 February 2020. The claimant had a written contract of employment with the respondent which he signed on 24 February 2020. [23-27] Mr Dalton's place of work was the respondent's London branch, 4 Millington Road, Hyde Park Hayes, Hayes, Middlesex, UB3 4AZ. [23] In his oral evidence Mr Dalton confirmed to the Tribunal that he knew the job was based in London when he accepted it and he had moved to London to take up the role.
13. The key terms of the contract relevant to this claim are:
 - a. 264 guaranteed days annually, 9 hours a day at an hourly rate of £11.50. The guaranteed dates depend on the time of year as follows:
 - i. March to October: 23 guaranteed days per month; and
 - ii. November to February: 20 guaranteed days per month.
 - b. Leave year: 1 April to 31 March the following year.
 - c. 28 days paid holiday each leave year, no right to carry unused holiday to the following leave year.
 - d. Any accrued holiday is paid on termination of the contract.
 - e. Notice period of one month.
14. As a result of the Covid-19 pandemic and government legislation the respondent's business was not able to operate in the usual way from March 2020. At this time the claimant returned to live Bradford with family as he felt uncomfortable in London, which he described as the '*epicentre*' of the pandemic. The respondent decided to place some employees on the government's furlough scheme. At that time, it concluded that Mr Dalton was not eligible for furlough.
15. On 25 March 2020 Ms Jablonski explained to Mr Dalton that he was not eligible to furlough as to qualify an employee had to be on the payroll system before 28 February 2020. While Mr Dalton started on 24 February he did not appear on the system until 10 March, the date of his first salary payment. Ms Jablonski told the Tribunal that '*to ensure that employees who were not eligible for furlough were not left without pay*' the respondent offered them a 50% contract: 50% work for 50% time. Mr Dalton was offered this option. As he was living in Bradford and did not feel comfortable returning to London Mr Dalton decided not to accept the offer and instead agreed to unpaid leave. [68] The furlough explanation and 50% offer was repeated by Ms Jablonski on 30 March. [69]
16. Mr Dalton challenged the respondent's conclusion about furlough, telling Ms Jablonski on 6 April that HMRC had told him he was eligible for furlough. In evidence Mr Dalton told the Tribunal that he was told by HMRC he was entitled; he did not state when he was told this or provide details of this

conversation or the basis on which HMRC told him he was entitled to furlough pay from the respondent.

17. On 15 April the government updated furlough eligibility criteria. On 17 April 2020 Ms Jablonski informed Mr Dalton that, following *'the latest government announcement about the changes in eligibility'* he was now eligible for furlough. [73] This was confirmed in writing: the letter states during furlough employees *'must remain available for work during this time, so we can bring you back in immediately the situation changes.'* [74]
18. On 26 July the respondent updated employees about the impact of the Covid-19 pandemic on its business. The claimant did not attend the meeting but received a recording the following day and email update on 30 July 2020. [84]
19. On 11 September 2020 the respondent held a further update meeting by zoom, following an initial decision by the government to end furlough on 31 October 2021. [87] This was followed by a letter of 14 September to all employees warning them of possible redundancy. [89]
20. To avoid redundancy on 6 October 2020 the respondent held a zoom consultation with employees setting out the following options, which it was offering to all employees: [145-148]
 - a. Service break agreement
 - b. Sabbatical
 - c. Part time contract
 - d. 50% agreement
21. Also, in October 2020 Mr Dalton queried his holiday entitlement; he received an explanation on 7 October that 5 days holiday was deducted in both August and September [100], which he accepts. [101]
22. On 26 October 2020 Mr Neil Pegg, the respondent's managing director, wrote to Mr Dalton to confirm the redundancy avoidance options and to invite Mr Dalton to a meeting the following day. At this meeting Mr Pegg explained the company's situation, the options and confirms that the option of 50% work for 50% pay was available to Mr Dalton. Mr Dalton comments he did not think this was available to him and that he can't remember it. Mr Pegg shows Mr Dalton the details of this option on the PowerPoint presentation used at the zoom meeting. [148] The 50% offer was clearly explained to all employees at that meeting. Initially Mr Dalton seemed to have misunderstood the 50% offer, thinking that he could be on standby at home in Bradford. [132] However the notes of the meeting with Mr Pegg record Mr Pegg explaining that the 50% arrangement involved working at the company's London premises, Mr Dalton's place of work, not being on standby at home.
23. The offer is 50% guaranteed work and pay over the next 6 months to avoid redundancy. [124-130] The details of the 50% offer are confirmed to Mr Dalton in writing on 28 October. [128] On 30 October Mr Dalton rejects this offer saying it was unreasonable for him to be asked to clean coaches at the depot in London when he had moved from London to Bradford. He gives 30 days' notice *'starting on 1 November.'* [132, 133] The following day Mr Dalton emailed Ms Jablonski again to withdraw his resignation; he asked to

be placed on furlough instead. He gives the reason for this change as the government's furlough announcement. [133]

24. On 11 November 2020 the respondent confirms in writing its acceptance of Mr Dalton's notice; this email provides an explains the respondent has decided not to agree to the retraction as Mr Dalton's relocation to Bradford (which was his choice) means he cannot satisfy the furlough conditions to be available for work at his place of employment in London. The letter notes the last day of the claimant's employment as 30 November 2020. [134]
25. On 10 December 2020 Mr Dalton received his final pay of £1138.50 (20 days salary) plus £103.50 (9 days holiday, identified on the payslip as '9 units'). [151]

Conclusions – notice pay

26. In witness evidence Mr Dalton explains that after giving one month's written notice on 30 October 2020 [132] he retracted his notice the following day [133]. Once an employee has given notice to the employer, notice cannot be withdrawn by the employee without the express agreement of the employer. The reason for this is that notice terminates an employment contract. If the employer does not agree to accept that notice is retracted, the contract remains terminated. There is a limited exception to this rule: if the employee gives notice 'in the heat of the moment'.
27. Mr Dalton did not present any evidence to the Tribunal that notice on 30 October 2020 was given in the heat of the moment. He emailed the respondent stating he was giving notice '*having taken legal advice*'. The following day he retracted his notice following the government's decision to extend furlough, stating the retraction was made '*in line with the prime minister's guidelines*'. Mr Dalton confirmed this as the reason for his retraction in his witness evidence.
28. Therefore, there is no issue before the Tribunal as to the validity of notice, which is given on 30 October 2020; termination of employment was effective 30 November 2020, satisfying the contractual requirement of one month's notice. [132]
29. His employment contract guarantees Mr Dalton 20 working days in November. He was paid his notice pay in full in his final salary payment on 10 December 2020. His December payslip shows Mr Dalton's basic pay (which is his notice pay) and 9 days of outstanding holiday pay. [151]. The notice pay amounts to 11 days of salary because of the respondent contractual right to deduct any outstanding holiday from salary paid in the notice period. Therefore the 20 days' pay for November 2020 comprised 11 days salary and 9 days holiday (the section titled holiday pay sets out how the 9 days accrued holiday is calculated) as follows:
- a. '*Basic*': £1138.50, being 11 days at a daily rate of, £103.50 calculated as 9 hours each day, at an hourly rate of £11.50.
 - b. '*Holiday*': £931.50 referred to as '*9 units*' which are the claimants 9 days of outstanding holiday at the daily rate of £103.50.

30. This breakdown was explained to the claimant in a letter from Ms Jablonski dated 7 October 2020, [100] which Mr Dalton accepts. [101]
31. I find that Mr Dalton has been paid his notice pay in full, amounting to 11 days' pay after deduction of 9 days accrued holiday.

Conclusions – holiday pay

32. The respondent's leave year commences on 1 April to 31 March the following year. The claimant is entitled to 28 days of paid holiday in each leave year. On termination of employment the claimant is entitled to payment for untaken holiday. [25]
33. The contract of employment does not allow the claimant to carry over any accrued holiday from the previous holiday year. Mr Dalton is entitled for payment for any unused holiday for the period 1 April 2020 to 30 November 2020. The claimant's pro rata holiday entitlement for this period is: 8 months holiday out of a 12 month leave year; $8/12 \times 28$ days; the respondent calculated this as 19 days.
34. At the request of the respondent, Mr Dalton took 5 days in August 2020 and 5 days holiday in September 2020. In evidence Mr Dalton says that he did not give consent. However, on 7 October 2020 the claimant queried this deduction with Ms Jablonski [99], who responds immediately with a written explanation [100] which he accepted. [101] Therefore, the Tribunal finds that there is no issue with the deduction of holiday in August and September 2020 and this was validly paid at that time, as evidenced in the payslips. [155, 154]
35. The calculation of holiday in August and September is based on 23 contractually guaranteed days in these months, 9 hours a day, at an hourly rate of £11.50 resulting in a daily rate of £103.50. During August and September Mr Dalton was on furlough, so he was paid 80% of his hourly rate (£82.80) for working days. Any holiday in this period must be paid at 100%. Therefore for 5 days paid holiday in August and September respectively a 'top up' payment of £20.70 (the remaining 20% of £103.50) was paid.
36. Full payment is evidenced in the claimant's August and September payslips. [155, 154] For each month payment breaks down as follows:
- a. 23 guaranteed days multiplied by £82.80 (the 80% daily furlough rate paid as salary) = £1,904.40 (this figure includes 5 holiday days paid at 80%).
 - b. 20% top up of the 5 days holiday pay: $5 \times £20.70 = £103.50$
37. I find that the claimant was paid his 5 days holiday pay in full (at 100% of his daily rate) in August and September.
38. The claimant had 19 days holiday in his final leave year. He was paid 5 days in August and 5 days in September. Therefore, he had 9 days holiday remaining; the 9 days were paid by the respondent in Mr Dalton's final salary payment on 10 December 2020. This deduction of holiday in the notice period is valid because the contract provides that the respondent may require, at its sole discretion, any employees to take any outstanding

accrued holiday entitlement during the notice period [25, 41]. In oral submission Ms Roberts referred me to the Working Time Regulations 1998. Regulation 15(5) allows any rules in 15(1) to (4) be amended by agreement. The contract amends Regulation 15(1), that a worker may take leave to which he is entitled under Regulation 13(1) on such days as he may elect. Ms Roberts referred the Tribunal to the case of: *Industrial & Commercial Maintenance Ltd v Briffa EAT/0215/08 & EAT/0216/08*. This confirmed that a contractual term requiring a worker to take holiday in a notice period is valid. Therefore, the contractual term allowing the respondent to deduct holiday pay during Mr Dalton's notice period is legally valid meaning the respondent was entitled to pay Mr Dalton 9 days as holiday out of the 20 guaranteed days work in November 2020; the remaining 11 days were correctly paid as salary and explained in the conclusions about the notice pay claim.

39. Accrued holiday pay on termination must be paid at 100% of the daily wage. The holiday terms were set out in the respondent's holiday policy, which was incorporated into the contract of employment, signed by Mr Dalton on 25 February 2020. [42] The contract provides that a day of accrued holiday will be calculated as 1/260th of basic salary.
40. Mr Dalton was paid his outstanding holiday pay of 9 days in full on termination. This is evidenced by his payslip for 10 December 2020. [151] The breakdown of Mr Dalton's holiday is:
- a. 20 days pro-rata days for the period 1 April to 30 November 2020
 - b. 5 days holiday taken at respondent's request (out of 23 days guaranteed work) in August
 - c. 5 days holiday taken at respondent's request (out of 23 days guaranteed work) in September
 - d. Remaining 9 holiday days paid in the claimant's notice period as allowed by the contract, calculated as daily rate of £103.50 x 9 days = £931.50. [151]
41. I find that the respondent has paid Mr Dalton's holiday pay for the period 1 April 2020 to 30 November 2020 in full. No outstanding holiday pay is due to Mr Dalton.

Breach of contract: furlough

42. Mr Dalton claims that the respondent refused to place him on furlough and this amounts to a breach of contract. The consideration for the Tribunal is: does the Tribunal have jurisdiction to determine the complaint that the respondent did not put the claimant on furlough? I find that it does not.
43. There is no express reference to rights of furlough in Mr Dalton's employment contract. The law does not imply a provision. Furlough was an entitlement set out in legislation introduced by the government during the Covid-19 pandemic. The rules were set by government; they are not implied into a contract of employment between an employer and employee. It is a matter for the employer if they claim furlough payments for an employee, applying furlough criteria in place at the time an application by an employer is made. Therefore, it is the opinion of the Tribunal that any issues Mr Dalton

raises in respect of furlough cannot amount to a breach of contract. There is no claim in the Tribunal's jurisdiction on the issue of furlough.

44. The Tribunal notes that the respondent did explain to Mr Dalton its decision not to place him on furlough in March 2020. On 25 March 2020 Ms Jablonski emailed Mr Dalton explaining that he was not eligible to furlough as to qualify an employee had to be on the payroll system before 28 February 202 and while Mr Dalton started on 24 February he did not appear on the system until 10 March. Although Mr Dalton challenged the respondent's conclusion about furlough, telling Ms Jablonski on 6 April that HMRC had told him he was eligible for furlough, he has not evidenced the advice HMRC gave him.
45. Therefore the Tribunal finds there is no claim in respect of the respondent's decision not to place Mr Dalton on furlough in March 2020.

Breach of contract: unreasonable change to terms of contract

46. Did the respondent amend the terms of the claimant's contract? If so, were any changes unreasonable?
47. Mr Dalton's contract of employment reserves the right of the respondent to make reasonable changes to the terms and conditions of employment. [26] In the context on the Covid-19 pandemic the respondent made an offer to Mr Dalton of 50% pay for 50% work on the basis that furlough arrangements required employees to be available for work when work was available. This offer was reasonable in the circumstances. It was for paid work at the respondent's London depot.
48. Mr Daltons' contract was not amended. It was made clear at the zoom meeting in October 2020 to Mr Dalton and all the respondent's employees that the options aimed at avoiding redundancy and were a choice for employees to consider individually. The 50% offer was rejected by Mr Dalton. Mr Dalton accepts that his place of employment, as set out in his contract, was the London depot. In March 2020 Mr Dalton had moved from London to Bradford. This was his choice. It was understandable at the time as Mr Dalton was renting in London and needed to reduce costs as his income had reduced due to him accepting the offer of unpaid leave in March 2020. This was the reason he rejected the offer.
49. In evidence Mr Dalton accused the respondent of 'breaking the law' by requiring him to travel through different Covid tiers (from Bradford where he lived to his place of work in London) contrary to the government's Covid rules at that time. This is not an accurate explanation of the situation. Mr Dalton's place of work was London. He decided to move to Bradford. The letter dated 31 March 2020 notifying Mr Dalton that the respondent had placed him on furlough is clear: it states '*you will remain employed during the furlough period and your usual terms will apply.....you must remain available for work during this time, so that we can bring you back immediately if the situation changes*'. [74] When the respondent made the 50% offer it was not requiring Mr Dalton to travel through tiers. They were offering him work at his place of employment in line with the rules on furlough, which had been made clear to him in Ms Jablonski's letter explaining furlough. [75]

50. The 50% offer was reasonable at that time. Work was available, albeit at 50% given the circumstances of the Covid-19 pandemic. The work offered was at Mr Dalton's place of work. The proposed contractual change did not change his place of work nor was it contrary to the Covid legislation at that time. By accepting furlough payments Mr Dalton had accepted that he '*must remain available for work during this time*'. Available for work meant available to work at the London depot. By choosing to move to Bradford, he had put himself in a position where he could not commute to his contractual place of employment. This is the reason Mr Dalton did not accept the offer. No change to his contractual terms was imposed on Mr Dalton; indeed, no change to the contract took place, therefore there is no breach. The offer did not change the contract; it was a reasonable offer to avoid redundancy at a difficult time. It was Mr Dalton's decision to resign.
51. Therefore, I find that there is no breach of Mr Dalton's contract of employment.

Employment Judge **Hutchings**

24 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 March 2022

FOR EMPLOYMENT TRIBUNALS