



EMPLOYMENT TRIBUNALS

Claimant: Mrs Romona Romila

Respondent: F&P (Didcot) Limited

Heard at: Bury St Edmunds (by CVP)
On: 18 February 2022

Before: Employment Judge Hutchings (sitting alone)

Representation

Claimant: in person

Respondent: did not attend

JUDGMENT

1. The respondent was in breach of contract by failing to pay the claimant full notice. The respondent is ordered to pay to the claimant damages in the sum of £57.70 in respect of outstanding notice pay.
2. The respondent was in breach of contract by failing to pay the claimant her accrued holiday pay. The respondent is ordered to pay to the claimant damages in the sum of £807.66 in respect of outstanding holiday pay.

REASONS

Introduction

1. Oral Judgment is given at the hearing. As the respondent was not represented at the hearing, the reasons for decision are set out in this Judgment.
2. The claimant, Romona Romila, was employed by the respondent, F&P (Didcot) Limited, as a front of house team member at the Mulberry Pub from 27 May 2019 until 30 September 2020. The claimant's employment was terminated by one week's written notice on 23 September 2020.
3. The claimant claims that the respondent breached her contract of employment by failing to pay her contractual notice pay in full and holiday pay at all.

4. The respondent is a restaurant business. It contests the claim on the basis it paid the respondent furlough pay to 30 September 2020 and is now in financial difficulty.

Preliminary matters

5. At the beginning of the hearing, before I heard any evidence, I addressed two preliminary matters:
 - a. That the Tribunal had been informed by PBC Business Recovery and Insolvency in an email dated 1 February 2022 that the respondent company was being placed into a Creditors Voluntary Liquidation ('CVL') within the meaning of the Insolvency Act 1986 ('IA'); and
 - b. In an email to the Tribunal dated 17 February 2022 PBC Business Recovery and Insolvency informed the Tribunal that, given the late stages of the CVL and the current financial status of the respondent, no-one would be available to attend the hearing on behalf of the respondent.
6. As to the first point, the Tribunal noted that, as the respondent 'was being placed' in a CVA, and the Tribunal had not been informed of the effective start date of the CVA there was no reason under the IA, or any other legislation, that the hearing could not proceed. The Tribunal noted that a CVA does not in any way inhibit the Tribunal from dealing with the merits of the claim. This was explained to the claimant at the hearing.
7. The Tribunal noted that, if the claimant succeeds the position will vary as to whether the claimant had notice of the meeting of creditors where the CVA was approved. It is binding on all creditors who had notice of the meeting, whether they attended, or voted.
8. To this point the claimant confirmed that she did not have notice of the CVA; she informed the Tribunal that she had received an email from Victoria Slater of the respondent stating from 1 October 2020 F&P (Didcot) Limited would be ceasing to trade. She referred the Tribunal to the email at page 9 (document 3) of the Bundle. The Tribunal considered the document, noted that it made no reference to a CVA, and concluded the hearing could proceed in the normal way.
9. As to the second point, given PBC Business Recovery and Insolvency on behalf of the respondent had confirmed prior to the hearing that no-one would be representing the respondent at the hearing, the Tribunal concluded that it was fair and just to avoid further delay and the hearing could proceed in the absence of the respondent. This was explained to the claimant.
10. Having agreed with the claimant the basis of claim as:
 - a. Breach of contract for non-payment of notice pay; and
 - b. Breach of contract for non-payment of accrued holiday pay;

I set out the issues for the Tribunal to decide.

Issues for the Tribunal to decide – notice pay

11. 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?

Issues for the Tribunal to decide – holiday pay

12. 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?

Procedure, documents and evidence

13. I considered evidence from the claim form and response form and a 23-page bundle submitted to the Tribunal by the claimant. The claimant gave sworn evidence to the Tribunal in her witness statement. The evidence of the respondent was set out in the response form. The respondent did not submit further evidence to the Tribunal.
14. The claimant informed the Tribunal that she did not have a copy of the response form. The hearing was adjourned, and a copy of the response form was emailed by the Tribunal to the claimant. The hearing was reconvened, and the claimant confirmed that she had read the response form.
15. I reminded the claimant of the rule requiring her to copy any communications and documentation sent to the Tribunal to the respondent. The claimant informed the Tribunal that she had not sent the witness statement and bundle of documents to the respondent. The hearing was adjourned, and the claimant emailed the bundle and her witness statement to the respondent. When the hearing was reconvened, the Tribunal confirmed that, as the respondent had notified the Tribunal that it would not be attending the Tribunal in any event, the hearing could proceed.
16. The claimant made oral submissions to the Tribunal.
17. Evidence was considered by the Tribunal on liability and remedy.

Findings of fact

18. 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.

19. The claimant, Romona Romila, was employed by the respondent, F&P (Didcot) Limited, as a front of house team member for the respondent's pub, The Mulberry, from 27 May 2019. The claimant had a written contract of employment with the respondent [1-7]. She was employed part time working 6 hours a day at an annual salary of £15,000 gross. While the contract does not refer to a part time position, in evidence the claimant confirmed in that she worked 6 hours a day, 5 days a week and the salary of £15,000 per annum reflected this. The claimant was entitled to 28 days paid holiday. The contract provides that: *'any amendment or modification of this Agreement or additional obligation assumed by either party in connection with this Agreement will only be binding if evidenced in writing signed by each party or an authorised representative of each party'*.
20. On 21 March 2020 the claimant's manager informed her that, due to the government's decision on 20 March 2020 to shut down the hospitality industry due to the Covid-19 pandemic, the respondent's restaurant would close. The claimant was placed on furlough. On 2 April 2020 the claimant received and signed a furlough agreement [8] which implemented the government's Coronavirus Job Retention Scheme. The agreement does not vary the entitlement to notice pay or accrued holiday pay as set out in the claimant's contract of employment. The agreement is in writing but is not signed by the respondent.
21. On 23 September 2020 the respondent emailed the claimant to inform her that the company would cease trading [9] and that she would be paid a final furlough payment on 30 September 2020.
22. On 30 September 2020 the claimant received her final salary payment from the respondent. This sum is a furlough payment, including one week's notice pay at 80%.
23. In an email dated 1 October 2020 to Victoria Slater of the respondent, the claimant raised queries about her notice pay and payment for outstanding holiday [10]. The respondent did not reply to this enquiry. In October and November 2020 [11-13], the claimant made further enquiries by email about her alleged outstanding holiday pay and notice pay. On 13 November 2020 Victoria Slater replied, informing the claimant that the company was in administration process [14] and that *'sadly has no funds only debts with no ability to pay them'*. In response, by email, on 16 November 2020 the claimant asked for contact details for the administrator to enable her to determine the position in relation to the alleged unpaid notice monies and holiday pay [15].
24. The respondent's leave year is 1 April to 31 March the following year [3]. On 30 October 2020 the manager of The Mulberry confirmed that the claimant had 5 days holiday untaken from the leave year April 2019 to March 2020.
25. There was no further correspondence from the respondent.

Conclusions – notice pay

26. The contract requires both parties to give a minimum notice period of 1 week. The contract states that: *'the Employer may not make any changes to remuneration or any other term or condition of this Agreement between the time termination notice is given through to the end of the notice period.'*
27. The claimant received 1 weeks' notice by email on 23 September 2020, terminating employment on 30 September 2020.
28. The notice was paid at 80% of the claimant's gross wage. The claimant is entitled to a week's paid notice (at 100% of pay) under the terms of her employment contract, unless there is an applicable reduction required by the terms of the contract [2]. For this to apply, there would need to be a written variation to the terms of the contract, signed by both parties. The furlough agreement dated 2 April 2020 is a written variation. However, it is not signed by the respondent. Further, there is no reference in this agreement to notice pay; only to furlough pay of 80%. The obligation is on the employer to pay the remaining 20% as the employment contract provides for notice pay in full and the agreement relating to furlough does not vary this. Therefore, 20% of one week's notice pay is outstanding and due to the claimant.
29. The contract of employment refers to a *'gross hourly rate of £15,000 (fifteen thousands pounds) per year'* [2]. The claimant's annual salary is £15,000 gross. This equates to a weekly rate of £288.46 gross: a daily rate of £57.69 gross.
30. On 30 September 2020 the claimant was paid £230.76 gross in respect of her notice pay, being 80%. The amount of outstanding notice pay is £57.70 gross (£288.46 - £230.76), being the outstanding 20%.

Conclusions – holiday pay

31. 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, excluding public holidays. On termination of employment the claimant is entitled to payment for untaken holiday [3 and 6].
32. The contract of employment does not allow the claimant to carry over any accrued holiday from the previous holiday year. There is no express right to carry over holiday from the previous year. The Working Time Regulations 1998 ('WTR') only entitle a worker to be paid in lieu of holiday accrued but untaken in the final leave year. Therefore, the period of employment for which the claimant can claim any accrued, unpaid leave is 1 April 2020 to 30 September 2020. The claimant cannot claim the 5 days unused holiday for the period 1 April 2019 to 31 March 2020.
33. The claimant is entitled for payment for any unused holiday for the period 1 April 2020 to 30 September 2020. The claimant's pro rata holiday entitlement for this period is: 6 months holiday out of a 12 month leave year; $6/12 \times 28$ days; 14 days.

34. The claimant did not take any holiday in the period 1 April 2020 to 30 September 2020. Therefore, the claimant accrued 14 days holiday to be paid by the respondent on termination of the contract.
35. Under the terms of the contract of employment accrued holiday pay on termination by either party must be paid at 100% of the daily wage. This provision is not amended by the furlough agreement.
36. The claimant was not paid any outstanding holiday pay on termination. The claimant is entitled to 14 days holiday pay at a daily rate of £57.69. The claimant is entitled to £807.66 gross.

Consequential loss and other damages

37. The respondent has breached the contract of employment in respect of notice pay and accrued holiday pay. The purpose of contractual damages is to put the claimant in the position they would have been in had the contract not been breached. The awards for outstanding notice and holiday pay address the direct breaches of the contract. The claimant has also claimed for consequential loss. There is no entitlement to consequential loss in respect of the breaches by the claimant. I explain this below.
38. The breach of contract relates to payment of notice and holiday pay. These have been fully compensated. There is no consequential loss flowing from these breaches. The breach does not relate to the termination of the contract; therefore, the claims for damages relating to closure of the pub on short notice, being financial claims for deferral of the loan and the claim for injury to health are not consequential and no award for damages can be made.

Employment Judge Hutchings

Employment Judge **Hutchings**

18 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
10/3/2022.

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FOR EMPLOYMENT TRIBUNALS