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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112807/2021 V

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Held via Cloud Video Platform (CVP) on 9 February 2022

Employment Judge J McCluskey

Mr J Forrester

**Claimant
In Person**

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Ovec Systems Ltd

**Respondent
Represented by
Mr A Logan
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Tribunal is that:

- (i) The complaint of breach of contract is not well-founded and does not succeed.
- (ii) The complaint of unauthorised deduction from wages is not well-founded and does not succeed.
- 30 (iii) The claim for payment of accrued but untaken holiday entitlement is not well-founded and does not succeed.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal on 29 November 2021. He asserted that he was entitled to payment of four days' notice pay,
5 that there had been an unlawful deduction of wages in respect of lie time repayment and that he was entitled to payment in respect of one day of accrued but untaken annual leave.
2. I heard evidence from the claimant and from Mr Logan for the respondent. The respondent indicated at the outset of the hearing that they intended to
10 call David Keating as a witness. On conclusion of the claimant's evidence the respondent said that they no longer intended to call Mr Keating to give evidence.
3. The respondent produced a bundle of documents (page 1-25) which was referred to by both parties during the hearing. The claimant also produced a
15 screenshot of a WhatsApp exchange between himself and Phil Tobin, a former employee of the respondent, dated 25 October 2021. This was also referred to by the parties during the hearing.

Issues

4. Is the claimant entitled to any payments from the respondent for the following:
20 (i) notice pay
(ii) wages for lie time
(iii) holiday pay
5. If so, what sums are due to the claimant.

Findings in fact

- 25 6. The Tribunal made the following findings in fact which are relevant to the matters to be decided:

7. The claimant was employed as an engineer. He commenced employment with the respondent on 7 January 2019. He worked 40 hours per week. On 30 September 2021 the claimant submitted his resignation in writing to the respondent. He gave four weeks' notice of termination of employment. The parties agreed that the claimant's last day of employment would be Friday 29 October 2021.
8. The claimant's offer of employment from the respondent is dated 5 December 2018 (page 16 of the bundle). No subsequent contract of employment was issued to the claimant. The offer of employment is the claimant's contract of employment with the respondent. The offer of employment states that "salaries are paid by bank transfer monthly by the 30th of the month, your first payment shall be deducted by two weeks lie time". The offer of employment sets out an entitlement to 31 days holiday per year and that the holiday year runs from 1 January each year.
9. During the claimant's employment he was usually paid his salary on the 25th of each month.
10. When an employee was leaving employment payment would usually, but not always, be made to that employee at the end of the month, rather than on or around 25th of the month. In the case of departing employee Mr Tobin, he was paid on 25th of his final month of employment with the respondent, rather than at the end of the month. This was because Anne Campbell, the director of the respondent who was in charge of payroll, was not at work during the last few days of Mr Tobin's employment and required to process the final payroll early for Mr Tobin.
11. On 24 September 2021 the claimant messaged Alistair Logan, a director of the respondent and said "When do we get paid. I thought it would be yesterday with it being the holiday weekend". Mr Logan replied "Anne is going in tomorrow to do the wages. Remember it's the end of the month" (page 2 of the bundle).

12. The claimant worked on 25 October 2021. On that date he sent a WhatsApp message to Ms Campbell. The claimant asked if he was to be paid his wages for October 2021 that day. He said "Today is payday, I have bills coming out." Ms Campbell replied at 5.53pm and told the claimant his wages would be paid on Friday 29 October 2021 in time for the end of the month. The claimant replied at 8.16pm stating that he wanted his wages to be paid that night. Ms Campbell did not respond as it was outside office working hours. (page 6 of the bundle)
13. The claimant messaged Mr Logan on 25 October 2021 at 8.20pm. He said "I've tried to contact Anne. I want my wages in tonight for what I'm due for the month....Spoke to Phike. He left 30 July was paid 25 July then paid lie time holidays etc at a later date. If they aren't in tonight I will be in tomorrow for my belongings and let a lawyer deal with this." (page 7 of the bundle) (message 1).
14. Mr Logan replied at 8.47pm saying "If this is how you want to end things then so be it. I am not involved in payroll so I don't know why you are bothering me with this again. Please see a screenshot of your job offer which clearly states your wages will be in your bank account by the 30th of the month. Your things (including the tools in the service vehicle) will be ready for you to collect at the front door of the building from 10am tomorrow. Please do not try to enter the building" (page 7 of the bundle).
15. The claimant replied at 8.52pm "As you are terminating my notice early I expect full payment by 30th September. I will be speaking with my lawyer" (page 9 of the bundle). Shortly thereafter the message was corrected by the claimant to say "30th October".
16. Mr Logan replied at 9.01pm "Office hours closed 4 hours ago therefore payment won't be made tonight. At no point did I terminate your notice early. You said you will be in for your belongings tomorrow. I am simply letting you know that your things will be ready from 10am and you are not to come into the building" (page 10 of the bundle).

17. The claimant replied at 9.02pm “By not letting me into the building you are terminating my notice period. I stated I wanted it sorted or I would collect my belongings. I haven’t actually collected. Therefore by you denying me access to come to work you are terminating my notice” (page 10 of the bundle).
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18. On Tuesday 26 October 2021 the claimant had been due to go to a job in Carlisle with the respondent. On the morning of 26 October 2021 the claimant went to the respondent’s premises. He intended to collect his tools from the service vehicle and sort out payment of his wages. He did not intend to go to Carlisle or carry out duties for the respondent. The claimant met Campbell Logan, the founder of the respondent at the premises. The claimant shouted and swore at Campbell Logan about payment of his October wages. The claimant collected his tools and left the respondent’s premises. This incident lasted around two minutes. The claimant did not return to the respondent’s premises at any time thereafter.
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19. The claimant was paid his wages up to and including 25 October 2021 on 27 October 2021. The claimant was also paid for the two weeks’ of lie time as set out in his offer of employment. The lie time was paid to the claimant at his starting hourly rate of pay. This was the same sum as had been withheld from his first salary payment. His holiday pay was calculated based on a leaving date of 25 October 2021 and was paid to the claimant.
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Relevant law

20. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract of employment (if more).
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21. Section 13 of the Employment Rights Act 1996 (‘ERA’) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the worker’s contract advised in writing, or by the worker’s prior written consent.
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22. Under Section 13(3) of the ERA there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
- 5 23. Under Section 27(1) of the ERA “wages” means any sums payable to the worker in connection with their employment.
24. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker’s employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken. A worker is entitled to leave paid at the rate of a week’s pay calculated under the ERA.
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Submissions

25. Each party made brief closing submissions.
- 15 26. The claimant submitted that as he was usually paid his wages on 25th of each month he was entitled to be paid wages for his final month of salary on 25 October 2021. He acknowledged that his offer of employment stated that his wages are paid by the 30th of each month. He submitted that this wording in his offer of employment no longer applied as custom and practice meant that he had a contractual entitlement to payment of wages on the 25th of each month. He submitted that he had not resigned from employment with immediate effect on 25 October 2021 but that his employment had been terminated early by the respondent on 25 October 2021, in breach of contract. He submitted that he was entitled to payment of his leave time wages at his current rate of pay and not his starting rate of pay. He submitted that if his employment had not been terminated early by the respondent he would have accrued a further day of annual leave for which payment was due.
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27. The respondent submitted that claimant’s contractual entitlement was to receive wages by the 30th of each month. They acknowledged that the claimant had been paid wages on or around 25th of each month during his
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employment but submitted that did not change the contractual commitment to payment by the 30th of each month. They submitted that departing employees were usually paid on the last working day of the month. They submitted that the claimant had resigned from employment with immediate effect on 25
5 October 2021 and that no further wages were due after that date. They submitted that the claimant's lie time had been deducted at the starting rate of pay. Lie time had been repaid to the claimant at his starting rate of pay and there was no entitlement to repayment at the higher rate. They submitted that as employment had ended on 25 October 2021 there was no payment due
10 for any accrued but untaken holiday entitlement after that date.

Discussion and decision

28. The circumstances of this case arise from a dispute between the parties about when the claimant would receive his final payment of wages for October 2021 and whether the claimant resigned or was dismissed during his notice period.
- 15 29. Dealing first with whether the claimant resigned or was dismissed during his notice period, the respondent's position is that the claimant resigned from his employment with immediate effect on 25 October 2021. The claimant's position is that his employment was terminated with immediate effect on 25 October 2021. I prefer the evidence of the respondent for the following
20 reasons.
30. Mr Logan in evidence described the message which he received from the claimant on the evening of 25 October 2021 (message 1) as an "ultimatum". His wages were to be paid that night or he would go to the respondent's premises the following day to collect his belongings and let a lawyer deal with
25 matters. Mr Logan said in evidence that, on replying to say that his wages would be paid by the 30th and making arrangements for the claimant to collect his belongings, he understood that the claimant was resigning with immediate effect. I am satisfied that it was reasonable for Mr Logan to reach this conclusion given the ultimatum nature of the message, the reference to the
30 previous message from Ms Campbell where the claimant had already been told he would not be paid on 25 October 2021, the reference to the claimant

collecting his tools in the morning and the reference to there being no further communication from the claimant himself who would pass matters to a lawyer to deal.

5 31. In subsequent messages during the evening of 25 October 2021, the claimant sought to rely on Mr Logan's message about the claimant collecting his belongings, as indicating that there was a dismissal by Mr Logan and that the claimant had not resigned. I do not agree that making arrangements for the claimant to collect his belongings is a dismissal by the respondent. I am satisfied that Mr Logan's reference to the claimant collecting his belongings was because the claimant himself, in a previous message, had said he would come into the respondent's premises the following day to collect his belongings.

15 32. The claimant also sought to rely on Mr Logan's message about not entering the premises, as indicating that there was a dismissal by Mr Logan and that the claimant had not resigned. I do not agree with that argument. Mr Logan in evidence stated that he was concerned that the claimant would be angry the following day, a situation which was borne out as the claimant shouted and swore at Campbell Logan whilst collecting his belongings. I am satisfied that asking the claimant not to enter the premises when collecting his belongings, in the context of the messages Mr Logan had already received, did not amount to a dismissal by Mr Logan.

25 33. In reaching my decision that there was a resignation with immediate effect by the claimant on 25 October 2021 I have considered all of the surrounding circumstances. I am satisfied that a reasonable employer would have understood the claimant's words to be a resignation. In considering all the circumstances I have looked at events both preceding and subsequent to the exchange of messages on 25 October 2021. The claimant had enquired of Mr Logan the month before as to the date when wages were paid and had been told they were payable by the end of the month. On 25 October 2021 Mr Logan sent the claimant a screenshot of his contract of employment which stated that salaries were paid by 30th of the month. The claimant had been told by Ms Campbell, prior to his ultimatum message to Mr Logan (message 1), that

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his salary would be paid on 29 October 2021, prior to the month end, and I heard no evidence to the effect that this would not happen. The claimant subsequently attended the workplace on 26 October 2021. He was angry and shouted and swore at Campbell Logan. The claimant stated in evidence that he did not intend to go to Carlisle, which was the job he was due to work on with the respondent from 26 to 28 October 2021, or to do any work for the respondent. He intended only to collect his tools and sort out payment of his wages. This was consistent with his WhatsApp message from the previous evening. I was satisfied that the respondent was entitled to treat the claimant as having resigned with effect from 25 October 2021. The claimant's conduct the following day supported a resignation in that he collected his belongings, demanded immediate payment of his wages and left around two minutes later.

34. I have also had regard to the case law in connection with resignations in the heat of the moment. This was not a position adopted by the claimant as he maintained that there had been no resignation by him. I have, however, considered whether the case law on retracting a resignation may nevertheless be relevant to the claimant's case.

35. The general rule is that unambiguous words of resignation may be taken at their face value without any need for analysis of the surrounding circumstances to determine what the employee intended **Sothorn v Franks Charlesly and Co 1981 IRLR 278, CA. Sovereign House Security Services Ltd v Savage 1989 IRLR 115, CA** and **Kwik-Fit (GB) Ltd v Lineham 1992 ICR 183 EAT** are authorities for the proposition that where special circumstances arise, such as a heat of the moment resignation, apparently unambiguous words can be considered in the light of the surrounding circumstances. I have considered whether any such special circumstances arise in this case. Having done so I have reached the conclusion that this was not a heat of the moment resignation and therefore no special circumstances arise. The claimant had been told by Mr Logan on 24 September 2021 that wages were payable by 30th of each month. The claimant had spoken to Ms Campbell, the director in charge of payroll, about wages on 25 October and at 5.53pm Ms Campbell had made it clear

that the claimant's wages would be paid on 29 October 2021 and not on 25 October 2021. The claimant did not resign until his communications with Mr Logan later that evening. The claimant had ample notice of the date by which wages would be paid to him. I am satisfied that is not a resignation to which the special circumstances exception applies. In the event that I am wrong on that I am satisfied that the claimant's angry conduct the following day and his evidence that he only intended to collect his tools is consistent with the claimant having no wish or intention to retract what he had said. In the circumstances the respondent was entitled to continue to treat the claimant as having resigned.

36. I have also considered whether the claimant was entitled to resign, and treat himself as having been dismissed by the respondent, when he was told that he would be paid his October 2021 wages on the 29th of the month and not the 25th of the month. I accept that the claimant was usually paid his wages on the 25th of each month rather than by 30th as set out in his offer of employment. The claimant maintained that as he was usually paid on 25th of each month this was a custom and practice which overrode what was set out in writing in his offer of employment. I do not agree with that argument. The written offer of employment sets out an express contractual term that salaries were paid monthly by the 30th of each month. The claimant was well aware of that term which had been brought to his attention only the month before when he had made an enquiry about the payment date of his wages. The contractual term is clear. Further, although the practice of the respondent was to pay salaries on or around the 25th of each month that was not the usual case for employees who were leaving the respondent's business. A contract of employment is a legally binding agreement. Once it is made, both parties are bound by its terms and neither can vary the terms without the agreement of the other. I do have some sympathy for the claimant who had set up payments for bills to come out of his bank account before the end of each month and was concerned about having money to pay these. However, that is a matter for the claimant in the arrangement of his finances. His written offer of employment referred to salaries being paid by 30th of each month. That was the date by which his salary was due. I am

satisfied that there was no variation of the terms of the claimant's offer of employment, with the agreement of both parties, such that his final salary for October 2021 was due on 25th of that month.

5 37. Having found that there was no contractual entitlement to payment of wages on 25 October 2021 and that respondent was entitled to treat the claimant as having resigned with effect from that date, the breach of contract claim does not succeed.

10 38. The claimant submitted that his claim for one day of accrued but untaken holiday entitlement was dependent on his employment having ended on 29 October 2021. As I have found that his employment ended on 25 October 2021 his claim for accrued but untaken holiday entitlement does not succeed.

15 39. The parties accepted that a lie time payment had been made to the claimant on termination of his employment. The lie time payment was the same sum as had been withheld from the claimant's first salary payment, as set out in his offer of employment, based on his starting hourly rate of pay. The claimant said that the lie time payment should have been paid to him at his leaving hourly rate of pay which was higher. He sought payment of the difference of £82.09 net.

20 40. The claimant's offer of employment stated this his "first payment shall be deducted by two weeks' lie time". I am satisfied that the payment due to the claimant on termination of his employment was the same sum as had been deducted from his first wages payment. There was nothing in the offer of employment which stated that repayment of the lie time would be at a higher rate. The claim of unlawful deduction of wages in the sum of £82.09 net, for
25 the balance between his starting and finishing hourly rate of pay, does not succeed.

30 Employment Judge: Jacqueline McCluskey
Date of Judgment: 03 March 2022
Entered in register: 04 March 2022
and copied to parties

I confirm that this is my judgment in the case of Mr J Forrester v Ovec Systems Ltd and that I have signed the judgment by electronic signature.

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