



EMPLOYMENT TRIBUNALS
(England and Wales)
London Central Region

Claimant: Ms T J Kormornick
Respondent: Magnit Global WFQ Ltd

Heard by CVP on 4/7/2023
Before: Employment Judge J S Burns

Representation

Claimant: in person
Respondent: Mr J Holyhead (General Counsel)

JUDGMENT

The claim is struck out.

REASONS

1. The judgment followed a Public Preliminary Hearing to consider jurisdictional matters, described in the notice as “whether the claim was presented in time”.
2. I heard evidence on oath from the Claimant and then from Mr Holyhead and was referred to documents which the Claimant emailed to me during the hearing.
3. The name of the Claimant’s employer is now Magnit Global WFQ Ltd so the name of the Respondent has been amended accordingly.
4. Prior to 20/10/2022 the Respondent was called ZeroChaos (Europe) Ltd.

Findings of fact

5. The Claimant started work on 2/2/2018 as an agency worker in part of a hair and make-up team providing services under a zero-hours contract to Bloomberg.
6. The Claimant uses Bloomberg time-sheets to claim from the Respondent payment for her hours of work and the Respondent then invoices Bloomberg for the same.
7. This arrangement and the Claimant’s assignment from the Respondent to Bloomberg continues.

8. The Claimant entered into this arrangement 2018 under a contract dated 1/2/2018 with the Respondent which describes the Claimant as a “casual worker” and not an employee¹ and which provides in clause 10 as follows:

10.1 Your holiday entitlement will depend on the number of hours that you actually work and be pro-rated on the basis of a full-time entitlement of 28 days' holiday during each full holiday year (including the usual eight public holidays in England and Wales). The Company's holiday year runs between 1 January and 31 December.

10.2 You will be informed of the amount of holiday you have accrued on a bi-weekly basis at the same time as receiving your payslip for that period. In order to take your holiday entitlement you must seek approval from the Client in advance and record each period of holiday taken on your timesheet. You are not permitted to take holiday in advance of it being accrued.

10.3 At the end of each assignment the Company will pay you in lieu of any accrued but untaken holiday for the holiday year in which the assignment ends.

9. On 2/2/2018 the Claimant was issued with a document the first page of which reads: “**WORKFORCE LOGIC..INTELLIGENCE AT WORK... WELCOME TO YOUR ASSIGNMENT AT BLOOMBERG!**”

10. The attached guide explained that how time-sheets should be submitted through an on-line portal. On page three of the document the following appears;

“Workforce Logiq Web is your tool to report time and expenses. You can find the login page at: <https://eu.workforcelogiq.com/>. Log in to the system with the credentials that has been sent to you via email during the onboarding process. If you are unable to login you can always reset your password on the main page by entering your email and click reset.

HOLIDAY - You need to report vacation by entering time using the Holiday pay code on your timesheet. The rate will be the same as normal rate. Your holiday entitlement is provided in your contract. Please also log bank holidays by using the public holiday pay code on your timesheet. The rate will be the same as your normal rate.”

11. The Claimant sent me an example of the Bloomberg time sheet (file name 1.png) entitled Hourly Timesheet Entry for Makeup artist (707352 A8). The time sheet time-sheet has a section on it for claiming holiday hours taken. The Claimant says she has used another kind of time sheet. I do not need to resolve the point of exactly which type of time sheet she has used.

12. She also sent me example of a page on the portal called “Dossier” on which there is a record of holiday accrual. Mr Holyhead’s evidence was that this page on the portal has always recorded holiday accrued by agency workers such as the Claimant, and this was done at least

¹ It is unnecessary for me to decide whether or not she is an employee

as regularly as the time-sheets were submitted. The page was accessible to the Claimant if she logged in and knew where to find it.

13. In 2020 the Respondent using the name ZeroChaos issued a very similar "*Welcome to your assignment at Bloomberg!*" document to the Claimant and others. The first page explains again that it is necessary to log in to the portal (then called the "ZeroChaos Web"). The second page includes the following: "*HOLIDAY You need to report vacation by entering time using the Holiday pay code on your timesheet. The rate will be the same as normal rate. Your holiday entitlement is provided in your contract.*"
14. The Respondent did not send the Claimant and her colleagues in the hair and makeup team separate messages about the holidays they were accruing and no mention of this was made of holidays or accrued holiday entitlement in the annual December emails from the Respondent's payroll department in 2018 to 2021.
15. The Claimant and some of her colleagues did not arrange to take paid holidays and did not claim any holiday-pay from the Respondent from 2018 until the end of 2022. The Claimant explained that she didn't realise that she was entitled to paid holidays and didn't realise that she had accrued an entitlement to paid holidays because she did not look on the requisite dossier page on the portal, and her ignorance about this was not remedied because, contrary to clause 10.2 of the contract, she was not "*informed of the amount of holiday you have accrued on a bi-weekly basis at the same time as receiving your payslip for that period*".
16. In 2022 the Respondent decided to allow workers who had not claimed holiday pay in 2021 to claim and be paid for up to 40 hours of accrued but previously not claimed/paid holidays in 2021, and also allowed workers who had not claimed holiday pay in 2022 to carry this forward into 2023.
17. Bloomberg, the Respondent's client. has refused to bear the costs of most of this concession by the Respondent, on the grounds that the workers concerned had had an opportunity to take and claim holidays at the proper time, but failed to do so. Hence the Respondent has had to bear most of the costs of this.
18. On 3/12/22 a Respondent payroll manager sent an email to the Claimant and her colleagues which contained the following : "*Holiday Accrual – just a reminder that you can carry over up to 40 hours holidays into the next calendar year. To find your holiday balance in the timesheet tool, click on the down arrow beside your name, then click on My Profile. Scroll down and you will be able to see the balance. ..Please make sure to check with your manager before*

scheduling any time off. If you take holidays, please make sure to the Vacation Time (Billable) pay code on the timesheet.”

19. This alerted the Claimant and some of her colleagues to the fact that they had been missing out on getting their paid holidays and the result has been that the instant claim has been brought by the Claimant, somewhat as a test case. There are apparently about 6 or so others in the Claimant's team who are in a similar situation.

20. On 24/3/23 the Respondent sent the Claimant and her team an email which included *“Just some reminders about holiday accruals and submitting timesheets with holiday hours. Please periodically check your holiday accrual balance. To find your balance, click on the down arrow beside your name and select ‘My Profile’ . The balance will be in the personal information tab.”* The email contained a screenshot of the webpage to illustrate the explanation. This email was sent in response to the complaints of the Claimant and a few others that they had not previously known how to access the information about their holiday accruals.

21. The claim is for pay in lieu of holidays for the years 2018 to 2021. The Claimant's particulars of claim includes the following *“I am filing a claim for unpaid holiday from years 2018-2021 which totals to the amount of £7738.60 plus interest at the statutory (sic) rate, or such other rate the tribunal thinks is appropriate. This figure has been reached by taking my net pay from each year and dividing it by 12.07% as advised by the government's holiday calculator. My rate of pay per hour varies from £30 per hour to £34.25 and I usually work in 8 hour shifts.”*

22. The Claimant confirmed in her evidence that her claim is a claim for unauthorised deduction from earnings.

23. The holiday pay which the Claimant is claiming is for 2018, 2019, 2020 and part of 2021 (the part whereby her accrued 2021 holiday entitlement exceeds the 40 hours she has been paid out for).

Discussion and conclusion

24. This is a claim under section 23 Employment Rights Act 1996 which allows a complaint to be brought to the Employment Tribunal in respect of an unauthorised deduction of wages, subject to the requirement that the claim must be presented within three months of the date of the payment of wages from which the deduction was made, or (if it was not reasonably practicable to claim within that period), within such further time as the tribunal considers reasonable.

25. However (whether or not it was not reasonably practicable to claim within the three-month period of any deduction) under section 23(4A) an ET may not consider so much of the complaint as relates to a deduction where the payment of wages from which the deduction was made was before the period of two years ending with the presentation of the complaint.
26. Her ET claim was presented on 27/4/2023. Hence the claim for any holiday pay before 28/4/2021 is barred as an unauthorised deduction claim. The Claimant has been paid in lieu for 40 hours untaken holidays for 2021. It is possible that the Claimant accrued more than 40 hours holiday-entitlement from 28/4/2021 to 31/12/2021 but if so the element of her claim not barred by section 23(4A) is likely to be small.
27. There is however a more fundamental problem. The Respondent has not made a deduction from the wages of the Claimant because she was not entitled to be paid for holidays she has not taken in 2021. If she had taken holidays and complied with the instruction (which she received from the outset of her employment) to claim her holidays in her time-sheets, then she would have been entitled to be paid for those holidays and no doubt would have been. As however she did not, she was not due any such payments.
28. If the Claimant had taken and claimed holidays which she was entitled to at the time, and then had not been paid for them, she would then have had a good claim for a deduction from wages, but this has not happened.
29. Hence there has not been any deduction and she cannot make a claim for unauthorised deductions. No time point arises because this is not a case of the deduction being out of time under section 23(2) Employment Rights Act 1996; - rather there has been no deduction in the first place.
30. An authorised deduction claim must be brought in respect of “wages” which is defined in section 27 ERA 1996 to include “*holiday pay...payable under a contract or otherwise*”.
31. Under the Claimant’s contract she was only entitled to a payment in lieu of holidays not taken under clause 10.3 which limits such payments as follows: “*At the end of each assignment the Company will pay you in lieu of any accrued but untaken holiday for the holiday year in which the assignment ends*”

32. The Claimant's assignment to Bloomberg did not end in 2021 and it has still not ended. Hence, she has no claim under her contract for payment in lieu of untaken holidays in 2021 in any event.
33. The Claimant says that she did not take the holidays and claim payment for them in 2021 because the Respondent breached its obligation in clause 10.2 of her contract (*"You will be informed of the amount of holiday you have accrued on a bi-weekly basis at the same time as receiving your payslip for that period"*).
34. However, even if this was so, that would be a claim not for a deduction of wages for holidays taken, but rather for damages for breach of contract, which type of claim the Claimant cannot bring at all in the Tribunal if she is a worker, and which she could bring if she is an employee only after her employment has ended, (by virtue of the paragraph 3(c) of the ET's Extension of Jurisdiction (England and Wales) Order 1994). As the Claimant's contract with the Respondent continues, she cannot bring such a claim in the Tribunal, even if she is an employee.
35. If her ET claim is to be regarded as having been brought under the Working Time Regulations 1998 then the "use it or lose it" principle applies, (subject to a coronavirus exception in regulation 13(10) which is of no application in the instant case).
36. Under the WTRs there is also the roll-forward principle discussed in paragraph 102 of Smith v Pimlico Plumbers Ltd 2022 EWCA Civ 70 : *"Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave."* I refer to this as the "S and P principle"
37. The Claimant submitted that the Respondent cannot discharge the "S and P principle employer burden" because the Respondent breached its obligation in clause 10.2 of her contract (*"You will be informed of the amount of holiday you have accrued on a bi-weekly basis at the same time as receiving your payslip for that period"*).

38. The Respondent says that the S and P principle does not apply, because the Respondent did not prevent the Claimant from taking paid holidays - and she was informed from the beginning that she could do so, and how to claim payment on her time sheets; and furthermore that the Claimant was provided with access to the information about the accrual of her holiday entitlement - by regular updates of this information on the web-based dossier.
39. I doubt that the Claimant would succeed in a "S and P principle" argument on the facts of this case, but I do not need to decide this, because it is irrelevant to this claim for the reason that the Claimant's contract/employment with the Respondent has not been terminated.
40. Under the WTRs no leave entitlement (and this includes any entitlement to pay in lieu of untaken holidays which may be rolled forward under the S and P principle) can be replaced by a payment in lieu unless the employment is terminated, (see Regulation 13(9)(b) and 13A(6)(a)), and the Claimant's contract/employment with the Respondent continues. Hence, she would have no entitlement to the payment in lieu in any event under the WTRs.
41. The claim is outside the jurisdiction of the Tribunal.

J S Burns Employment Judge
London Central
5/7/2023
For Secretary of the Tribunals
Date sent to the parties 05/07/2023
