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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100194/2023

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Held on 19 April 2023 by Cloud Based Video Platform

Employment Judge S Neilson

Mr K Carlin

**Claimant
In person**

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Clyde Contracts & Supplies Limited

**Respondent
Represented by
Mr Wilkinson**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that:-

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- (a) the claimant's complaint under Section 23 of the Employment Rights Act 1996 is well-founded and orders the respondent to pay to the claimant the sum of £526.75 less any appropriate tax and national insurance;
- (b) the claimant's complaint under Regulation 14 and 30 of the Working Time Regulations 1998 is well founded and the respondent shall pay to the claimant the sum of £421.40 as accrued holiday pay less any appropriate tax and National Insurance.

REASONS

1. The claimant appeared in person and represented himself. The respondent was represented by Mr Wilkinson, the Managing Director and owner of the respondent.
- 5 2. The claimant was claiming in respect of unpaid wages for the weeks of 12 to 18 November 2022 and 19 to 25 November 2022 and for 2 weeks accrued but unpaid holiday over the Christmas period. These claims were respectively a claim for unlawful deductions under Section 13 and 23 of the Employment Rights Act 1996 (“ERA”) and a claim for accrued but unpaid holiday pay under
10 Regulation 14 and 30 of the Working Time Regulations 1998 (“WTR”).
3. The claimant and the respondent had both lodged a number of documents to which they referred during the course of the hearing. The claimant gave evidence and Mr Wilkinson and Mr Tolland (the Operations Manager for the respondent) also gave evidence.

15 Findings in Fact

4. The respondent is engaged in the business of carrying out property maintenance and housing repairs throughout Glasgow. They employ approximately 30 people.
5. The claimant commenced employment with the respondent on 30 September
20 2021.
6. The claimant was employed as a roofer.
7. The claimant did not receive any written terms and conditions of employment.
8. The holiday year for the claimant ran from 30 September (the anniversary of his commencement of employment) through to 29 September.
- 25 9. The claimant was entitled to 28 days paid holiday per year inclusive of any public holidays.

10. The claimant did not take any holidays in the period from 30 September 2022 through to the termination of his employment on 25 November 2022.
11. The claimant worked 40 hours a week.
12. The claimant was paid weekly by a transfer of his wages directly into his bank account.
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13. The claimant was paid at the end of a week for work carried out that week.
14. The claimant was entitled to a gross weekly wage of £526.75. His net weekly wage was £415.84.
15. The claimant was absent from work for an operation to his shoulder from 29 September 2022. The claimant returned to work on 8 November 2022.
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16. The claimant notified the respondent on 15 November 2022 that he wished to take annual leave in the period from 13 December 2022 to 23 December 2022.
17. On 17 November 2022 Mr Wilkinson met with the claimant in a company van at the site where the claimant was working. They discussed the holiday request and Mr Wilkinson turned down the request. The claimant indicated that he was not inclined to cancel the holiday.
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18. The respondent gave written notice to the claimant on 18th November 2022 to terminate his employment. The written notice stated:- "Your employment with Clyde Contracts & Supplies Ltd will be terminated on Friday 25 November 2022 at 3.30 p.m.. Please accept this as your seven day notice period. We thank you for all your efforts during your time of employment and wish you all the best for the future." The written notice was signed by Kenneth Wilkinson, Director, Clyde Contracts & Supplies Limited.
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19. The written notice was hand delivered to the claimant by Mr Tolland, the Operations Manager for the respondent on Friday 18 November 2022.
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20. The claimant attended at work up to and including 18 November 2022.

21. On Sunday 20 November 2022 at 18.31 the claimant received a text message on his mobile phone from Mr Tolland. It stated "Hi Kev, Kenny has asked me to text you to say there is nothing for you this week and not to come into work. Thanks Gary."

5 22. Mr Tolland had been instructed by Mr Wilkinson to send the text to the claimant.

23. The claimant did not attend at work following receipt of the text.

24. The claimant's employment terminated on 25 November 2022.

10 25. The claimant was not paid by the respondent in respect of the week from 19 November to 25 November 2022. The last payment of a weekly wage was received by the claimant on 17 November 2022.

26. The claimant was not paid for any accrued holiday pay on the termination of his employment.

Submissions

15 27. The claimant seeks his wages for the two weeks prior to the termination of his employment on 25 November. The claimant believed that he was paid one week in arrears such that the pay he received on 17 November 2022 related to pay up to 11 November – with the result that he was still to be paid for the weeks 12 to 18 November and 19 to 25 November. In respect of
20 holidays the claimant considered that he was entitled to 30 days holiday in the 2022 calendar year (28 plus two additional days for the Queens jubilee and funeral). He had taken 20 and was entitled to 10 days holiday outstanding.

25 28. The respondent stated that pay was not paid one week in arrears – the pay the claimant received on 17 November 2022 related to the actual week 12 to 18 November 2022. The respondent accepted it had not paid the claimant for the week of 19 to 25 November as its position was that the claimant was effectively terminated on 18 November 2022 as he had shown too much bad feeling towards the respondent to allow the respondent to continue working

after that date. With regard to holidays the respondent does not operate on a calendar year basis. The holiday year runs from the anniversary of the commencement date for each employee. In the claimant's case that was 30 September 2021. The respondent conceded that there might be some small amount of accrued holidays due for the period to 18 November 2022 – although they considered the claimant had taken a half day holiday for a physio appointment in November and they counted 18 November as a holiday.

The Law

29. Section 23(1)(a) of the ERA provides a "worker" with the right to make a complaint to an Employment Tribunal that an employer "has made a deduction from his wages in contravention of section 13". Section 13 ERA provides a worker with a right not to suffer unauthorised deductions. Specifically, Section 13(3) states "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the workers' wages on that occasion."
30. Section 24(1)(a) ERA provides "Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer.. (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13.."
31. Under the WTR an employee is entitled to paid on termination of employment in respect of accrued holiday pay – Regulations 14 and 30.

Discussion & Decision

32. In relation to the claim for unlawful deductions the claimant seeks two weeks' pay. However, the evidence from both Mr Tolland and Mr Wilkinson, which the Tribunal accepts, is that the claimant was not paid one week in arrears,

wages were paid at the end of the week for that week worked. Accordingly, the last pay the claimant received on 17 November 2022 was pay for the week 12 to 18 November 2022. There is no unlawful deduction in respect of that week's pay.

5 33. The position regarding the pay for the week 19 to 25 November 2022 turns on when the employment terminated and the reason why the claimant did not attend at work that week. If the employment terminated on 18 November 2022 through some material fault on the part of the claimant or the claimant refused to attend work or otherwise made himself unavailable for work in that week
10 there would be no obligation upon the respondent to pay the claimant's wages for that week.

34. There was clearly a disagreement between the claimant and the respondent about the claimant's desire to take holidays in the period prior to Christmas. This did not suit the respondent and they turned down the request. The
15 claimant indicated that he was not inclined to cancel the holiday. The respondent then issued the notice of termination of employment on 18 November 2022. That notice is very clear that the employment will terminate on 25 November 2022. The Tribunal does not accept Mr Wilkinson's position that the employment terminated on 18 November 2022. Whilst the Tribunal
20 accepts that there may have been some bad feeling between the parties (to use Mr Wilkinson's phrase) as regards the holiday it is very clear that after the discussion in the van on 17 November Mr Wilkinson elected to give one week's notice to terminate. The claimant was entitled to one week's notice and the respondent clearly gave one week's notice.

25 35. The reason the claimant did not attend at work in the last week was because he was told by text on Sunday 20 November 2022 expressly not to come into work. In these circumstances the Tribunal is satisfied that the claimant is entitled to his wages for that week. The failure to pay those wages is an unlawful deduction from pay and the Tribunal accordingly declares that there
30 has been an unlawful deduction of one week's gross pay of £526.75 and orders the respondent to pay that to the claimant.

36. In relation to the issue of holidays the Tribunal accepts the evidence of Mr Wilkinson and Mr Tolland that the holiday year for the claimant runs from the anniversary of the commencement date. That is consistent with Regulation 13(3)(b)(ii) of the WTR. Whilst there had been discussion around the impact of the two additional days holiday for the Queens jubilee and the funeral that discussion was irrelevant to the question of holiday entitlement for the holiday year commencing 30 September 2022. The claimants holiday calculations were also irrelevant given that he was basing his calculations on a calendar year. The claimant was accordingly entitled to 28 days holiday in the year from 30 September 2022 to 29 September 2023. The claimant's employment terminated on 25 November 2022. The Tribunal was not satisfied that the claimant had taken any holiday in the period from 30 September 2022 to 25 November 2022. The respondent pointed to a physio appointment for two hours in November 2022 and claimed that 18 November 2022 was a "holiday". However the evidence shows the claimant attended at work on 18 November 2022 and that the physio appointment was not treated as a holiday at the time (based on the respondents own time records). Accordingly, the Tribunal was satisfied that the claimant was entitled to a pro-rata holiday entitlement for the period from 30 September 2022 to 25 November 2022. That amounted to 4 days or 4/5 of a weeks pay. Accrued holiday entitlement is accordingly £421.40 less tax and NI.

37. Finally, the Tribunal notes that there was some evidence led at the Tribunal about an invoice submitted by the respondent to the claimant for repayment of sick pay the claimant received whilst off on sick leave for his shoulder operation. This was not an issue that was relevant to these proceedings.

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Employment Judge: S Neilson
Date of Judgment: 23 April 2023
Entered in register: 24 April 2023
and copied to parties

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