



EMPLOYMENT TRIBUNALS

Claimant: Ms B Olownia

Respondent: Training in Electrical Limited

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 9th November 2021

Before: Employment Judge Ayre, sitting alone

Representatives:

Claimant: In person

Respondent: Ms N Domansky, company director

JUDGMENT

1. The claim for holiday pay succeeds. The respondent is ordered to pay to the claimant the sum of £900 by way of holiday pay.
2. The claim for unlawful deduction from wages / breach of contract in respect of the bonus payment fails and is dismissed.

REASONS

Background

1. On 3 June 2021, following a period of Early Conciliation from 27 April 2021 to 4 May 2021 the claimant brought a claim for holiday pay and unpaid bonus.

2. The case was listed for a final hearing on 24 September 2021. The final hearing could not proceed on 24 September as neither party had complied with the case management orders and the case was not ready for hearing. The hearing on 24 September was therefore converted to a preliminary hearing at which the issues in the case were identified and further case management orders were issued to get the case ready for hearing.

The Proceedings

3. In advance of the final hearing today the claimant sent to the Tribunal and to the respondent a witness statement and a bundle comprising three documents: a P45, a contract of employment and a payslip. The respondent sent in a 39-page bundle of documents which included a witness statement for Ms Nina Domansky and a statement for Mr Alan Pearce, the respondent's former accountant.
4. The claimant had not received a copy of the respondent's bundle as it had, in error, been sent to her old work email address, which the claimant no longer has access to. At the start of the hearing today the bundle was sent to the claimant and I adjourned the hearing to give her time to read it.
5. The claimant's witness statement included a claim for 5 months' loss of earnings, covering the period from 1 April 2021 to 1 September 2021, and totaling £16,250. This figure had not been mentioned previously, even at the preliminary hearing on 24 September 2021. The claimant told me that it had not been included previously because she had not had access to her contract of employment until recently. When she saw the contract of employment, she realised that it was a permanent contract and therefore wished to claim for loss of earnings. She said that she had not been able to work for 5 months after leaving the respondent's employment.
6. Ms Domansky submitted, on behalf of the respondent, that the claimant had been able to work since leaving the respondent's employment. The claimant had, she submitted, asked for and been given her P45 from the respondent on 31 March.
7. The claim for 5 months' pay is a new one and has been treated as an application to amend the claim. Having given the parties the opportunity to make representations in relation to this new claim, I have decided to refuse the application to amend. In reaching my decision I have considered the factors in Selkent factors. The reasons for my refusing the application to amend are as follows:-
 - a. The amendment that the claimant is seeking to make is an entirely new claim. It is not just a relabeling of an existing claim;
 - b. The application is made at a late stage in the proceedings, after the original date for the final hearing;

- c. The application is significantly out of time; having been made more than seven months after the claimant's employment with the respondent ended, and more than five months after the claimant presented her claim. In her claim form the claimant alleges that her employment terminated on 19 March 2021, and her P45 states that the date of termination of her employment is 31 March 2021;
 - d. It is not clear that a claim for 'loss of earnings' is one that the Tribunal has jurisdiction to consider. There is no claim for unfair dismissal and the claimant, in any event, had less than two years' service. It is not obvious that the claim can be pursued as one of breach of contract
 - e. The respondent would be prejudiced were the application to amend the claim to be granted at such a late stage, as it is not prepared to deal with that claim.
8. I heard evidence from the claimant and, on behalf of the respondent, from Ms Nina Domansky, company director. I read the statement of Mr Alan Pearce, but have placed little weight on it as Mr Pearce was not present at the hearing to give evidence and be cross-examined.

The Issues

9. The issues that fell to be determined were identified at the Preliminary Hearing on 24 September 2021, in summary, as follows: -

Holiday pay

- a. Is the claimant entitled to be paid an additional £1,277 in respect of holiday pay, either under her contract of employment or under the Working Time Regulations 1998?
- b. The claimant alleged at time of the Preliminary Hearing that she was entitled to 28 days' accrued but untaken holiday pay on the termination of her employment, at the rate of £150 gross per day (calculated using an annual salary of £39,000), giving a total of £4,200 gross holiday pay.
- c. The claimant admitted that she was paid holiday pay of £2,923 gross on the termination of her employment, and claimed to be entitled to the difference between £4,200 and £2,923, namely £1,277 gross.

Bonus payment

- d. Did the respondent agree to pay the claimant a bonus payment of £1,000?

- e. If so, did the respondent make an unlawful deduction from the claimant's wages and/or breach the claimant's contract of employment by failing to pay the bonus to her?

10. In her witness statement the claimant claimed £2,177 for holiday pay. She told me that the reason she was now claiming a higher amount of holiday was because she had gained access to documents relating to her employment, and believed she was entitled to 34 days holiday a year rather than 28. She was therefore claiming an additional 6 days holiday to cover bank holidays, at the rate of £150 a day, totaling £900.
11. Ms Domansky accepted, on behalf of the respondent, that the claimant was entitled to an annual holiday entitlement of 34 days, including bank holidays, and that the correct daily rate for holiday pay is £150 gross. She argued however that the claimant had already been paid for 8 bank holidays. She admitted that the claimant was entitled to an additional 6 days' holiday pay at £150 a day.

Findings of Fact

12. The respondent is a small business which provides training services. The claimant was employed by the respondent, initially as Personal Assistant to the owner, Robert Hurley on a salary of £31,200 and subsequently as Finance Manager / bookkeeper on a salary of £39,000.
13. The claimant's employment began on 3 December 2019 and ended on 31 March 2021. At some point during 2020 she was placed on furlough in accordance with the Coronavirus Job Retention Scheme. There was no evidence before me of the dates upon which the claimant was on furlough.
14. The claimant was entitled under her contract of employment to 34 days' holiday each year, made up of 8 bank holidays and 26 additional days. The respondent's holiday year runs from 1 April to the 31 March. During the 2019 to 2020 holiday year the claimant did not take any of her 26 days of holiday. She was however paid for 8 bank holidays as they fell during the year.
15. The claimant suggested in her evidence that she worked every day of the week and every bank holiday, including Christmas Day and Boxing Day. When I asked her what work she had carried out on Christmas Day, Boxing Day and other bank holidays she replied that she was working part-time 'checking accounts'. I found this difficult to believe, no explanation was given as to why she needed to check accounts on Christmas Day and Boxing Day, and the claimant was on furlough for some of her employment. The claimant did not carry out any work from February 2021 onwards.
16. On 16th April 2021 the claimant spoke to the respondent's accountant and asked for her P45 and P60 to be issued. She told him that she needed these documents because she had found new employment. The respondent sent the claimant a P45 with a termination date of 31 March. The respondent did not object or suggest that her employment

terminated on a different date. I find that the claimant's employment terminated by mutual consent on 31 March 2021.

17. On 7th April 2021 the claimant was paid the sum of £4,701.80 which included 20 days' holiday pay for holidays which were not taken during the financial year 2020/2021.
18. The claimant alleges that, during a staff meeting on 17 December 2019, Robert Hurley, the owner of the respondent, said that as the company had done really well despite Covid, all tutors would be paid a bonus of £200 and that the claimant, and two other employees, Lucy and Mrinal, would be paid a bonus of £1,000 by the end of March 2021.
19. Ms Domansky gave evidence that she had been through the company's accounts and bank statements meticulously and spoken to the company's accountant. Having done this she could find no evidence of bonuses being paid to any staff or tutors.
20. She also contacted the other employees and tutors who were present at the staff meeting. None of the tutors could recall being promised bonuses. Lucy and Mrinal did not reply to the emails that Ms Domansky sent them. Ms Domansky asked the company accountant to check if bonuses had been paid, and he told her that there was not.
21. The respondent does not have any record of a bonus payment having been promised to the claimant. No other member of staff has received a bonus and the respondent does not have any record of paying bonuses. The respondent has not paid any bonuses to staff over the course of the last 12 years. The claimant accepted in evidence that she had not been paid a bonus the previous year.
22. There was a conflict of evidence between the claimant and Ms Domansky. On balance I preferred the evidence of Ms Domansky, who appeared to be a credible witness. She accepted willingly that the claimant was entitled to be paid an additional £900 holiday pay and her evidence was consistent with the documents before me. In contrast the claimant's evidence was at times not credible, for example her suggestion that she worked every bank holiday.

The Law

Unlawful deductions from wages

23. Section 13 of the Employment Rights Act 1996 ("**the ERA**") prevents an employer from making deductions from a worker's wages unless the deduction is:
 - a. required or authorised by law or by a provision in the worker's contract; or
 - b. The worker has agreed to the deduction in writing in advance of it being made.

24. Section 13(3) provides that a 'deduction' occurs 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 wages properly payable by him to the worker on that occasion.*"

Contract claims

25. The Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives Employment Tribunals the power to consider claims for breach of contract up to a value of £25,000. To succeed in a claim for breach of contract an employee must show, on the balance of probabilities, that her employer has breached an express or implied term of her contract of employment.

Holiday pay

26. Claims for holiday pay can be brought as complaints of unlawful deduction from wages, as complaints of breach of contract or under the Working Time Regulations 1998 ("**the WTR**").

27. The WTR give workers the right to 28 days holiday a year, including bank holidays. To succeed in a claim for holiday pay in excess of 28 days a year a claimant must establish that she has a contractual right to more than 28 days holiday a year, and that her employer has breached the terms of her contract.

Burden of proof

28. The burden of proof in relation to all of the above claims lies with the claimant. It is for her to show, on the balance of probabilities, that the respondent has either made an unlawful deduction from her wages, or has breached either the terms of her contract of employment or the WTR.

Conclusions

Holiday pay

29. The claimant was entitled, under her contract of employment, to 34 days' holiday a year including 8 bank holidays. The claimant was paid for 8 bank holidays during the 2020 – 2021 holiday year. She was paid for a further 20 days' holiday for that holiday year in April 2021.

30. Having been paid for 28 out of 34 days, the claimant is entitled to an additional 6 days' holiday pay at the rate of £150, a total of £900.

31. The respondent has made an unlawful deduction from the claimant's wages and breached the claimant's contract of employment by failing to pay the claimant an additional 6 days' holiday pay on the termination of her employment. The respondent is therefore ordered to pay the claimant the sum of £900 holiday pay.

Bonus claim

32. The claimant has not discharged the burden of proving, on the balance of probabilities, that she was entitled to be paid a bonus of £1,000. On balance I prefer the respondent's evidence on this issue. Ms Domansky was a credible witness who had done an investigation into the question of whether a bonus had been promised and found no evidence that one had been. There was no record of the respondent ever paying bonuses in the last twelve years and the claimant accepted that she had not been paid a bonus previously. There was no documentary evidence to support the claim for bonus.
33. The claimant has therefore not established that the respondent has made an unlawful deduction from her wages or breached her contract of employment by not paying her a bonus. The claim for bonus therefore fails and is dismissed.

Employment Judge Ayre

6 December 2021
