EMPLOYMENT TRIBUNALS

Claimant: Mrs S Pagan

Respondent: Thicket Priory Limited

Heard at: Leeds (CVP) **On: 31 August 2021**

Before: Employment Judge A.M.S. Green

Representation
Claimant: : Mr J Guildford – the claimant's father
Respondent: Miss K Nowell - Counsel

RESERVED JUDGMENT

1. The claimant's claim for ordinary unfair dismissal is dismissed upon withdrawal.

2. As at the date of termination of employment, the claimant was contractually entitled to 4 weeks' notice of termination of employment.

3. The effective date of termination of the claimant's employment was 30 March 2021.

4. On 20 April 2020, the respondent gave the claimant sufficient notice requiring her to take holiday whilst she was on furlough.

REASONS

1. The claimant has ticked the following boxes in her ET 1 claim form:

    a. Ordinary unfair dismissal;

    b. Automatic unfair dismissal;

    c. A statutory redundancy payment;

    d. Notice pay;

e. Holiday pay;

f. Arrears of pay; and

g. "Other payments".

2. The claimant provided particulars of claim which run to many pages. In summary she claims:

   a. She was ostensibly dismissed by the respondent on 26 March 2021 by way of redundancy. She was employed as the Operations Manager of a wedding venue operated by the respondent. She says that the main or only reason for her dismissal was because she asserted a statutory right in that she had asked for holiday entitlement and that, therefore, the dismissal was automatically unfair under Employment Rights Act 1996, section 101A or 104 by reason of requesting she was paid her holiday entitlements.

   b. There is a dispute over the date of her notice letter. The respondent says that she was dismissed on 26 March 2021 whilst the claimant says that she was notified on receipt of the letter as per the terms of her contract of employment which stipulates how notice must be given and when. She claims that she was entitled to 5 weeks' notice. The respondent believes that she was only entitled to 4 weeks' notice. Consequently, she believes that a termination date should have been 6 April 2021, five weeks after the letter was served on her according to clause 16.2 of her contract of employment. By only giving her four weeks' notice, the respondent acted in breach of contract.

   c. The respondent failed to pay her for hours that she worked.

   d. For part of the time that the claimant was on furlough, the respondent failed to top up her salary to 100% and she only received 80% of her pay.

   e. The claimant is entitled to be paid for 39 days holiday accrued but untaken as at the date of termination of her employment.

   f. The claimant was contractually entitled to be paid £30,000 per year but was only paid £28,000 per year.

   g. The claimant was entitled to payment of the statutory redundancy payment.

3. The respondent denies liability.

4. I conducted a public preliminary hearing on 31 August 2021. We worked from a digital bundle. Miss Nowell provided a skeleton argument and made oral submissions. Mr Guildford made oral submissions.

5. It was agreed that the only matters that I would deal with on substantive points of law at this hearing were as follows:

a. Did the claimant require two years' service as per clause 14.2 of her contract of employment to be entitled to 5 weeks' notice? The contract was produced in the hearing bundle [118-122]. The respondent's position is that she did. The claimant's position was that she did not. For the purposes of the breach of contract claim (failure to provide the requisite notice of termination of employment) the parties agreed that the commencement date of the contract of employment was 1 November 2019. Furthermore, there was no dispute that the claimant signed the contract of employment on 30 June 2020 and the respondent signed it on 30 July 2020.

b. What was the effective date of notice of termination of the claimant's employment? This was relevant insofar as to determine whether the respondent had failed to pay the claimant for three days as part of her notice period. The claimant relies upon clause 16.2 of her contract of employment to the extent that any notice given by letter will be treated as being given at the time at which the letter would be delivered in the ordinary course of second-class post. Her contract was terminated by letter and consequently, she argued that notice ran from 2 March 2020. The respondent maintains 26 February 2021 is the date of giving notice given that Mr Guildford had acknowledged receipt of the letter which was also sent by email terminating the claimant's employment. There is no dispute between the parties that Mr Guildford saw the letter terminating the claimant's employment 26 February 2021.

c. In relation to the claimant's claim for accrued holiday pay in the time that she was on furlough, did the respondent give the claimant sufficient notice requiring her to take holiday? The respondent's position is that sufficient notice was given in terms of emails sent to the claimant [132 & 135]. The claimant says she was not given sufficient notice.

6. The claimant's contract of employment has been produced in the bundle [118-122]. Clause 14 provides for termination of employment. Clause 14.2 states:

> *The period of notice to be given by the employer to the employee to terminate the Employment is 4 weeks during the first year, an additional week is added to this notice period for every year worked, up to a maximum of 12 weeks.*

7. Miss Nowell submitted that the correct construction of this provision was to require a complete year to be worked in order to acquire an additional week's notice. Once one year of employment had been completed, the claimant would be entitled to 4 weeks' notice. The natural interpretation of this provision was that the claimant must complete another year thereafter to acquire the right to 5 weeks' notice. The provision was clear and unambiguous. If the claimant argued that the provision was ambiguous and to be determined in her favour, my attention was drawn to the fact that the contract had been negotiated and further changes had been made prior to the claimant signing it. Finally, the wording of the provision was similar to that used in calculating entitlement to statutory minimum notices of termination of employment which increases incrementally on completion of each year of service. Applying this interpretation to clause 14.2, continuity of employment for the purposes of the contract of employment ran from 1 November 2019

until its termination. At that point, the claimant had worked for one year, four months and four weeks and was, therefore, entitled to 4 weeks' notice of termination of employment.

8. Mr Guildford argued that on completing one year of service, the claimant had acquired the right to 4 weeks' notice. Thereafter, there was no requirement to complete a further year of service to increase the notice entitlement to 5 weeks. In other words, the right to the additional week of notice "clicked in" after working for one year.

9. The construction of a written document is a question of law, and it should be interpreted not according to the subjective view of either party, but in line with the meaning it would convey to a "reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (**Spectrum Agencies v Benjamin EAT 0220/09** (quoting Lord Hoffmann in **Investors Compensation Scheme v West Bromwich Building Society (No. 1) 1998 1 WLR 886, HL**). This means that if a contract is badly drafted and its literal interpretation would lead to a result that had clearly never been intended by the parties, it should be interpreted by taking into account the context and commercial background behind it.

10. I agree with Miss Nowell's interpretation of clause 14.2. I do not think that clause 14.2 is badly drafted and a literal interpretation of the mechanism for determining the length of notice required to be given is clear. During the first year of employment, the employer is required to give 4 weeks' notice of termination of employment. An additional week is added to that notice period for every year worked up to a maximum of 12 weeks. A literal interpretation of that provision means that the right to additional weeks of notice increases on each yearly anniversary of employment by the employee. It is capped to a maximum of 12 weeks' notice which echoes the statutory provision for minimum periods of notice. As at the date of termination of employment, the claimant had accrued between one- and two-years' service based on the contractual commencement date of 1 November 2019. Therefore, she was entitled to 4 weeks' notice of termination of employment.

11. Turning to the question of the effective date of termination of the claimant's employment the starting point is the undated letter terminating the claimant's employment [180]. The letter states, amongst other things:

> *Unfortunately, we cannot identify any alternative work for you because there simply are no events. You are entitled to 4 weeks' notice to end your employment with Thicket Priory Ltd based on your contract of employment. We will therefore pay your full pre-furlough monthly pay on March 26th. We do not require you to work for us during your notice period. Your last day of employment will be 26th March.*

12. Although the letter is undated, the parties accept that it was written on 26 February 2021, and it was received by email and seen by Mr Guildford on the same day. The letter is clear. It serves 4 weeks' notice on the claimant. Her employment would end on 26 March 2021.

13. Clause 16 of the contract of employment is relevant because it deals with the mechanism for serving notices and when notices are deemed to have been given. It provides:

> *16.1 Notices by the Employee must be by letter addressed to the Employer at its principal place of business. Notices by the Employer must be by letter addressed to the Employee at his last known address in Great Britain.*
>
> *16.2 Any notice given by letter will be treated as being given at the time at which the letter would be delivered in the ordinary course of second class post. Any notice delivered by hand will be treated as being given upon delivery. In proving service by post it will be enough to prove that the notice was properly addressed and posted.*

14. Miss Nowell submitted that service of the letter by email was akin to hand delivery. Under such circumstances, notice of termination would be treated as being given upon delivery. Consequently, the period of notice ran from 26 February 2021. Mr Guildford submitted that notice of termination was deemed to commence three days after 26 February 2021 (i.e. 2 March 2021). He said that three days was the time at which the letter would have taken before being delivered in the ordinary course of second-class post.

15. The wording of clause 16 is clear. It provides that if the employer wishes to serve a notice on the employee (e.g. a notice of termination of employment) it must do so by letter addressed to the employee at their last known address in Great Britain. Thereafter, the employer is given two options. It may either post the letter or it may deliver the letter by hand. If the letter is posted, the notice will be treated as being given by reference to the time that it would be delivered in the ordinary course of second-class post. Royal Mail second class delivery is in 2 or 3 working days. It is irrelevant whether the letter was sent by a faster mode of delivery (e.g. first-class post) when determining the date upon which notice is deemed to have been given. The contract of employment is silent regarding delivery of notices by electronic means such as email. Consequently, if a notice is sent by email, it will be ineffective.

16. In this case, the notice of termination of employment was both sent by email and by signed for post. Email was not a valid method of serving notice. However, the letter was also posted which is one of the two prescribed methods of giving a notice. The notice of termination of employment was deemed to have been given on 2 March 2021. This would be 2 working days after 26 February 2021. The 4-week period of notice would run from that date. If the respondent wished the effective date of termination of employment to be 26 March 2021 as set out in the letter, in order to comply with the provision of clause 16.2 it should have done one of the following. It should either have physically hand delivered the letter to the claimant on 26 February 2021 or it should have posted the letter at least two working days earlier. It did neither. Consequently, notice of termination of employment ran from 2 March 2021 and expired on 30 March 2021.

17. I now turn to the question of notice concerning holidays. On 26 March 2020, Anna Winkworth and Bruce Corrie of the respondent emailed the claimant [131-132]. The email dealt with, amongst other things, holiday arrangements during furlough. It states:

> *With regards to holidays, this will work on a pro-rata basis so, if you are furloughed for three months, will equate to ¼ of your annual holiday entitlement. Let me know if this needs further clarification.*

18. The claimant responded to the email on 27 March 2020 [131]. She confirmed that she understood all the details and appreciated their clarification on the situation.

19. On 20 April 2020, Anna Winkworth emailed the claimant and other members of the team [135]. The email stated, amongst other things:

> *During the current situation, all employees, whether on full pay or furlough will have 2.5 days holidays deducted each month which equates to the "pro-rata" buildup of your holiday days, to ensure holidays then manageable for the business upon your return to work.*

20. Regulation 15 of the Working Time Regulations 1998 ("WTR") states:

> ***Dates on which leave is taken***
>
> *15(1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*
>
> *(2) A worker's employer may require the worker—*
>
> *(a)to take leave to which the worker is entitled under regulation 13(1); or*
>
> *(b)not to take such leave,*
>
> *on particular days, by giving notice to the worker in accordance with paragraph (3).*
>
> *(3) A notice under paragraph (1) or (2)—*
>
> *(a)may relate to all or part of the leave to which a worker is entitled in a leave year;*
>
> *(b)shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
>
> *(c)shall be given to the employer or, as the case may be, the worker before the relevant date.*
>
> *(4) The relevant date, for the purposes of paragraph (3), is the date—*
>
> *(a)in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates.*

21. The Government released guidance entitled "Holiday entitlement and pay during coronavirus (COVID 19)". The relevant parts are as follows:

> ***Taking Holiday***

Employers can:

Require workers to take holiday…… if they give enough notice to the workers

The Required notice periods are:

Double the length of the holiday if the employer wishes to require a worker to take holiday on particular days…

Employers can ask workers to take or cancel holiday with less notice but need the workers agreement to do so..

Furloughed Workers

***...**If an employer requires a worker to take holiday while on Furlough, the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time which is the fundamental purpose of holiday."*

22. **Craig and ors v Transocean International Resources Ltd and ors 2009 IRLR 519, EAT** illustrates that the employment contract — provided its terms are sufficiently clear — can amount to a valid regulation 15 notice by the employer specifying the days on which workers can or cannot take annual leave. The main issue in the case) was whether the statutory holiday entitlement of a group of workers employed on offshore oil rigs was capable of being satisfied by the provision of regular onshore 'field breaks'. The EAT held that it was, and its decision was subsequently upheld by the Supreme Court in **Russell and ors v Transocean International Resources Ltd and ors 2012 ICR 185, SC**. However, a separate issue was whether the employers had given effective notice under regulation 15 that annual leave must be taken during field breaks or, alternatively, that it could not be taken at the times requested. On this point, the EAT observed that reg 15 does not require an employer to give notice in any particular form. Furthermore, while the notice must tell workers what days they may or may not take as leave, there is no requirement to specify dates. An employer may, for example, prohibit a worker from taking leave until after the completion of a particular project where specific dates are not yet known. By a majority, the EAT held that, in the case of three of the claimants, the employment contract itself was sufficiently clear to amount to a regulation 15 notice requiring annual leave to be taken during field breaks. Although the wording of the contracts varied, it was clear that the field breaks were free time and that, subject to training courses and other appointments, the claimants could use them as they chose. The fact that the contracts largely pre-dated the application of the Regulations to the offshore industry did not affect that conclusion.

23. Miss Nowell submitted that the claimant had not accrued holiday entitlement during the period when she was on furlough. Pursuant to WTR, regulation 15, the respondent had been required to specify when her holiday had to be taken and to give her notice at least of that period of time (i.e. twice the period of time of the holiday). The government guidance simply reiterated what was required in regulation 15. The respondent was entitled to require a furloughed worker or an employee to take holiday during the furlough period.

24. The respondent had notified the claimant on 26 March 2020 that it required her to take holidays while she was on furlough. The claimant had accepted this in her response dated 27 March 2020. This was repeated in the email of 20 April 2020. The notice of 26 March 2020 had, in Miss Nowell's submission, given the claimant requisite notice every three months while she was on furlough. The claimant was required to take holidays accruing at 2.5 days per month which equated to 7.5 days every three months. This was to be taken at the end of the three-month period. The three-month period ended 25 June 2020. Fifteen days' notice was required to be given to the claimant. If the claimant took her 7.5 days holiday at the end of the three-month period, notice required to be given on 10 June 2020. It had, in fact, been given 26 March 2020, well in advance.

25. Miss Nowell also submitted that Mr Guildford might argue that the respondent had not complied with WTR because it failed to specify the date on which the claimant was required to take her holiday. She said that the claimant had not sought clarification on the matter at the time and that it was clear in the email of 26 March 2020 that holiday would be treated as taken by the end of the three-month period. It might have been possible for the respondent to specify that the claimant should take them in the last seven days of the final month, but it was fairer for her to take 7.5 days at any time during the period.

26. Miss Nowell argued in the alternative that if the email of 26 March 2020 did not give the claimant the requisite notice, she had been so notified in the email of 20 April 2020. It clearly said that 2.5 holidays would be deducted each month. Holidays would be deemed to have been taken or deducted each month. This would mean that notice was only given on 20 April 2020 and would not have covered any holiday taken before then. Five days' notice would require to be given.

27. Mr Guildford argued that on 24 March 2020, the claimant had been notified that her contract of employment had been eliminated [133] and there was discussion about how the work would continue during the furlough. The claimant had cancelled her holidays which had already been booked. There was no reason for her to take 7.5 days holiday. He said there was never any discussion about 7.5 days holidays being taken over a rolling three-month period. She had simply asked for her 11 days holiday that she had booked to be cancelled. Furthermore, the email of 26 March 2020 said nothing requiring the claimant to take holidays every month and if she had been told that, she would have questioned it. She could not have taken a proper holiday in any event because of the lockdown and her husband was a key worker. The government guidance did not come into force until May 2020.

28. This is a case where an employer purports to have issued a positive notice instructing a worker to take leave on particular days. Whilst dates have not been specified, it is reasonable to infer days have been specified. By this I mean the days on which the claimant was on furlough. The email of 26 March 2020 is not a positive notice instructing the claimant to take holiday leave. It tells the claimant that if she is furloughed over three months this will equate to ¼ of her holiday entitlement. She was not expressly instructed to take holiday. Nor do I think that such an instruction is implicit.

29. Turning to the email dated 20 April 2020, this is clearer. Employees on furlough or full pay were told that they would have 2.5 days holiday deducted each month. It is reasonable to infer from this that an employee will effectively take holiday leave 2.5 days every month whilst on furlough or full pay. Consequently, the respondent was required to give at least five days' notice. Reasonable notice for holidays accruing after 25 April 2020 was given.

Employment Judge Green

_____

Date 2 September 2021