



EMPLOYMENT TRIBUNALS

Claimant: Mr W Purcell

Respondent: Screen Ink and Solvent Supplies Limited

HELD AT: Manchester (by Cloud Video Platform) **ON:** 27 September 2022

BEFORE: Employment Judge Fearon (sitting alone)

REPRESENTATION:

Claimant: Mr W Purcell (In person)

Respondent: Mr P Chong (Managing Director of the Respondent)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim for holiday pay is not well founded and is dismissed.
2. The claim for breach of contract is not well founded and is dismissed.

REASONS

Introduction

1. With apology for the delay in this judgment being provided due to judicial commitments and leave.

2. The claimant was employed by the respondent until 31 July 2021 as an Area Sales Manager. He was on furlough from 27 March 2020 until his dismissal by reason of redundancy.
3. The claimant is claiming the following:
 - 2.1 £3,076.53 for holiday accrued but not taken from 2020 (which he contends was still outstanding as at the termination of his employment). This is a claim under the Working Time Regulations 1998 and/or as an unlawful deduction from wages;
 - 2.2 £2,961.61 for holiday accrued but not taken in 2021. It is agreed that the claimant was paid £1,644.16 in respect of holiday on termination. The amount claimed is the difference between what the claimant claims he was entitled to and what he was paid. This is a claim under the Working Time Regulations 1998 and/or as an unlawful deduction from wages;
 - 2.3 £1,776.00 in respect of notice. The claimant was paid in lieu of notice, but the claimant contends that he was not paid the full amount which he was due. This is a claim for breach of contract;
 - 2.4 £71.04 in respect of pension contributions. Contributions of £400 were made to a pension scheme for the claimant in October 2021. The sum claimed is the additional contribution which the claimant says should have been made under the terms of his contract. This is a claim for breach of contract.
4. The respondent denies that any of the sums claimed are due. The Respondent's position is that:
 - 3.1 the claimant was not entitled to carry over annual leave from 2020 and he was able to take paid leave while on furlough;
 - 3.2 The holiday pay is not due because the claimant did, or would have been able to, take that leave during his notice period, had notice been given;
 - 3.3 The claimant was not entitled to the amount already paid for holiday, but, in any event, what has been paid is all that he was due;
 - 3.4 The payment in lieu of notice was correctly calculated (including because the claimant was entitled to 13 weeks' notice and not the 12 weeks statutory minimum);
 - 3.6 all pension contributions due have been paid.
5. There is a difference between the parties about what figures should have been used to calculate the various payments. The claimant's pay varied due to the potential commission payable from sales he made. He was paid 80% of salary during furlough. The claimant contends the payments made for holiday and notice

pay should be based on his full salary in the period prior to furlough. The respondent does not agree.

The Issues for the Tribunal to decide

6. Holiday Pay (Working Time Regulations 1998) and/or unauthorised deductions from wages

5.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when his employment ended?

5.2 Did the claimant carry over from 2020 any accrued but untaken annual leave?

5.3 Did the claimant take any accrued annual leave in 2021? What was the position with the claimant's notice/notice period and annual leave?

5.4 What, if any, days remain unpaid and outstanding?

5.5 What is the relevant daily rate of pay?

7. Breach of Contract

6.1 To what notice was the claimant entitled on the termination of his employment?

6.2 Was the claimant paid the amount to which he was otherwise entitled in respect of the notice period? How should that entitlement have been calculated? Did the respondent pay the claimant all that he was due?

6.3 Did the respondent breach the claimant's contract of employment by failing to pay a (further) £71.04 to his pension scheme for his benefit?

6.4 Was there a breach of contract?

6.5 How much should the claimant be awarded as damages?

Evidence

8. I considered the agreed paper bundle of evidence provided by the parties comprising 305 pages as well as the statement of the claimant and the statement of Mr Philip Chong. The claimant gave sworn evidence. I heard sworn evidence on behalf of the respondent from Mr Philip Chong, Manager Director of the respondent. After the hearing, on 5 October 2022, Mr Chong emailed the Tribunal and the claimant with a copy of the Rondec Statement of Terms and Conditions of Employment signed by the claimant on 16 October 2003. The unsigned version had previously been provided in evidence.

Findings of Fact

9. The claimant was employed by J.W. Bollom & Co. Limited from 15 May 1993 as a Technical Area Sales Manager. He first signed a contract with J.W. Bollom & Co. Limited (“the Bollom contract”) on 6 October 1997.
10. The Bollom contract confirms the claimant’s annual holiday entitlement was 20 days, plus 8 bank/public holiday and that his annual entitlement will increase with length of service as follows:

“After 5 completed years, you will receive 1 additional day’s holiday per annum for each completed year of service, up to a maximum of 5 additional days.”

11. The claimant as at 2020 and 2021 was entitled to 25 days’ holiday plus bank holidays.
12. The Bollom contract confirms the holiday year runs from 1 June to 31 May. It provide the following terms om carrying over holidays from one holiday year to the next:

“Unused accrued holiday entitlement can be carried forward only until 28th/29th February”

13. Regarding notice the Bollom contract provides:

“Over 2 years continuous service – 1 week for each complete year of service to a maximum of 12 weeks after 12 years.”

14. On 7 July 2003 the claimant’s employment was transferred under The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE Regulations”) to Rondec Screen Process Limited. Rondec issued a Statement of Terms and Conditions of Employment to the Claimant (“the Rondec T&Cs”). The claimant signed that document on 16 October 2003.

15. A letter from the Bollom Group to the claimant dated 25 July 2003 confirms a variation to the claimant’s contract with regard to holidays. It was confirmed that the claimant was entitled to carry forward 6 days holiday to his employment with Rondec, which had been calculated from the start of 2003 under the new scheme. The letter says:

“As you are aware, all other employment rights have been carried over to your new employers at the same or at an improved level, as detailed in their offer of employment letter.”

16. The Rondec T&Cs in regard to holidays state that the claimant is to take 31 days holiday by 31 May 2004 (due to the 6 days carried forward) and thereafter his holiday entitlement is 25 days per annum. The Rondec T&Cs state that the entitlement to and administration of holidays is set out in the Holiday Entitlement Statement which forms part of the contract.

17. The Holiday Entitlement Statement confirms *“The holiday year runs from 1st January to 31st December...”* and that entitlement for employees with more than 5 years’ service is 5 working weeks a year plus public holidays, ie 25 days plus

public holidays, which is the same number of holidays as the claimant was entitled to under the Bollom contract. The Holiday Entitlement Statement also provides at Section H *“The Christmas Shutdown forms part of the holiday entitlement. The number of days will be specified each year and must be taken at that time unless agreed in writing by your manager.”* At Section I it is stated *“Unless specifically requested or authorised by a main board director in advance, holidays must be taken within the year of entitlement, and booking is subject to departmental requirements.”* There is no entitlement for the claimant to carry over holidays contained in the Rondec T&Cs.

18. The Rondec T&Cs confirm the claimant's notice period is three months.
19. A letter dated 27 October 2005 from David Priestly, Managing Director of Rondec, to the claimant, confirms the claimant's employment was to transfer under the TUPE Regulations to the respondent with effect from 29 October 2005, with no changes to the Rondec T&Cs.
20. On 29 October 2005 the claimant's employment was transferred under the TUPE Regulations to the respondent and the claimant continued in his role as Technical Area Sales Manager. The respondent did not issue a new statement of terms and conditions of employment to the Claimant.
21. On 23 March 2020, given the Covid pandemic, Mr Chong, Managing Director of the respondent, emailed the respondent's employees confirming that they had been paid up to the end of March 2020 and that he was asking everyone to agree to be placed on furlough as that would allow him to use the government scheme to pay 80% of wages. He confirmed that the minimum pay everyone would receive would be 80% of their monthly wages and he was looking at the government scheme for businesses to borrow money in the hope that he would be able to top up wages to normal levels. He also confirmed he hoped the scheme would be flexible to allow everyone to work in turn. It was clear this was a fast evolving situation and Mr Chong was awaiting further information to be able to consider the approach for the business over the following three months. He asked staff to confirm their agreement to “the leave of absence” ie furlough.
22. By email dated 23 March 2020, the claimant confirmed his agreement to the proposed “leave of absence” ie to being placed on furlough.
23. The claimant's normal pay was £2,500 gross per month basic pay plus commission earned on sales.
24. The claimant was paid £2,500 gross per month whilst on furlough, which was calculated at 80% of £3,125. £2,500 was the maximum amount which the respondent could pay to the claimant under the furlough scheme. The sum paid to the claimant during furlough was calculated by the respondent on the basis that the furlough the scheme allowed for commission payments from the 12 months prior to furlough to be included in the calculation of wages for the purposes of furlough payments.

25. In April 2020, the claimant was paid £3,236 gross, (£2,504.12 net), comprising furlough pay of £2,500 plus £726 commission which had been earned on sales in March 2020.
26. The claimant did not earn any commission thereafter throughout the remainder of his employment with the respondent. The claimant accepted in oral evidence that based on the respondent's sales figures, no commission was due to him from the commencement of the furlough period to the termination of his employment.
27. The claimant did not book any holidays in 2020 or 2021. He says this was because he could not go away anywhere on holiday as he was caring for his terminally ill father and because his wife works in a hospital and she could not take time off. I find the claimant was not prevented from taking holidays by reason of his own work load or work commitments.
28. On 1 May 2021 the claimant discussed with Mr Chong returning to work from flexi furlough. Alternative positions to the claimant's existing role were proposed by Mr Chong but were not acceptable to the claimant. Mr Chong emailed the claimant on 4 May 2021 and confirmed in an attached letter that the claimant's role within the respondent company was redundant. The letter stated:
- "You are entitled to receive 12 weeks' notice of the termination of your employment. You are not required to work out your notice period and you will remain on furlough until 03/08/2021. We confirm that your date of termination on grounds of redundancy will be 03/08/2021...*
- ...you will be paid the following:*
- *your furlough salary up to the date of the termination of your employment*
 - *a contractual redundancy payment of £14257 (20 years max service) in July"*
29. At paragraph 13 of his statement Mr Chong confirmed the claimant was not on furlough during his notice period. In oral evidence Mr Chong clarified he had made an error in the letter dated 4 May 2021 in that the claimant could not be on furlough during his notice period; he also confirmed that the respondent did not claim any furlough payments for the claimant's notice period.
30. I accept the reference to 12 weeks' notice pay in the letter dated 4 May 2021 was an error as the period from 4 May 2021 to 3 August 2021 is a period of 13 weeks. Further, Mr Chong confirmed in evidence that the claimant was paid for his 3 months' (13 weeks') notice period in any event which was why he had not sought to explain the error, regarding the number of weeks, to the claimant earlier. In oral evidence the claimant agreed he was paid for 3 months' notice pay as is clear from his wage slips for May, June and July 2021.
31. The claimant's 13 weeks' notice pay was calculated on the basis of his normal monthly basic pay of £2,500 gross. No commission had been earned prior to or during the notice period so no commission was paid during the notice period.
32. The claimant was not required to work during his notice period.
33. The claimant's employment with the respondent ended on 3 August 2021.

34. After his employment had terminated and after receiving his redundancy payment the claimant queried with the respondent the amount of redundancy pay, holiday pay and notice pay.
35. In August 2021 the respondent paid the claimant holiday pay of £1644.16 gross, £1423.30 net.
36. The letter from the respondent to Prudential dated 23 December 2021 confirms the respondent paid £400 to Prudential on 7 October 2021 as an employer single premium contribution for the claimant.

Law

37. The right not to suffer an unauthorised deduction is contained in section 13(1) of the ERA: “An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”
38. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.
39. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by him. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1) or exempt under section 14.
40. The Working Time Regulations 1998 (WTR) provide workers with a guaranteed right to paid holiday. Subject to certain exclusions, all workers are entitled to 5.6 weeks, paid holiday in each leave year beginning on or after 1 April 2009 comprising 4 weeks’ basic annual leave under regulation 13 (1) and 1.6 weeks’ additional annual leave under regulation 13A (2).
41. If an employer denies a worker the entitlement to paid holidays, the worker has the right to complain to an employment tribunal under regulation 30 of the WTR.
42. Regulation 16(1) of WTR provides that a worker is entitled to be paid at the rate of a week’s pay in respect of each week of annual leave to which he is entitled under regulation 13 or 13A WTR. A week’s pay is calculated in accordance with Employment Rights Act 1996 sections 221-224 (“ERA”).
43. The general rule under the WTR is that the worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year: reg 13(9)(a).
44. The Working Time (Coronavirus) (Amendment) Regulations 2020 which came in to effect on 26 March 2020 introduced a temporary relaxation of the rule set out in Reg 13(9) WTR that the 4 weeks’ leave cannot be carried over and taken in a subsequent leave year. Regulation 13(10) provides where it was ‘not reasonably practicable’ for the worker to take some or all of their Regulation 13 leave in the relevant leave year as a result of the effects of COVID-19, they are entitled to carry forward such untaken leave. The ‘effects of COVID-19’ include the effects on the

worker, the employer or the wider economy or society. Reg 13(11) provides that the carried forward leave may be taken in the two leave years immediately following the leave year in respect of which it was due.

45. If the employment terminates before the leave has been taken, the worker can receive a payment in lieu of this carried-over leave: regulation 14 as amended.
46. There is guidance published by the government on 'Holiday entitlement and pay during coronavirus' which suggests certain factors which may be relevant when considering whether it was 'not reasonably practicable' for the worker to take leave for the purposes of Reg 13(10).
47. The guidance provides: When considering whether it was not reasonably practicable for a worker to take leave as a result of the pandemic, so that they may carry untaken holiday into future leave years, an employer should consider various factors, such as:
 - whether the business has faced a significant increase in demand due to COVID-19 that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures
 - the extent to which the business' workforce is disrupted by the pandemic and the practical options available to the business to provide temporary cover of essential activities
 - the health of the worker and how soon they need to take a period of rest and relaxation
 - the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year
 - the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the pandemic
 - the ability of the remainder of the available workforce to provide cover for the worker going on leave.
48. The Guidance further provides workers who were furloughed are unlikely to have needed to carry forward statutory annual leave, as it would have been easier for them to take it during the furlough period (in most cases at least).
49. In relation to the issues surrounding the claimant's notice pay the following sections of the Employment Rights Act 1996 have been considered:
50. Section 86 (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more -
51. (c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.
52. Section 87

(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).

(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

53. The principles by which a contractual term should be interpreted were set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 as follows:

“(1) Interpretation is the ascertainment of the meaning which the document 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.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945)

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had....”

54. That approach was restated by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 in paragraphs 10-13 of the judgment of Lord Hodge.

Discussion and conclusions

Holiday Pay

55. The claimant's contractual holiday entitlement was 25 days per holiday year plus bank holidays. The holiday year was January to December and the claimant was contractually obliged to take his holidays in the year of entitlement. The claimant did not use his holiday entitlement in 2020.
56. I find it was reasonably practicable for the claimant to use his holiday entitlement in 2020. Whilst he was restricted from travelling to holiday anywhere other than at home due to caring for his terminally ill father and the restriction placed on his wife's holidays due to her working in the NHS), he was on furlough and his work load did not prevent him from taking the holidays he was entitled to. He had not made any request for an exemption to be made to his contractual terms about carry over of holidays from 2020 to 2021.
57. The claimant was not entitled to carry over holidays from 2020 and therefore the claim for holiday pay from 2020 is dismissed.
58. The claimant had accrued 14.25 days holiday for 2021 at a daily rate of £115.38 for the period from the start of the holiday year on 1 January 2021. Up until 4 May 2021 when the claimant was informed of his redundancy, he had not used any of his holiday entitlement.
59. It is agreed between the parties that the claimant was paid £1,644.16 in respect of accrued holiday pay on termination of his employment. The claimant's claim for an additional sum was made on the basis that his holiday pay should not have been calculated on his basic rate pay.
60. The claimant accepted in oral evidence that if he had taken holidays in 2020 and 2021 whilst on furlough, the holiday pay he would have received would have been based on basic pay and commission and not the best month figure used to calculate furlough payments.
61. The holiday pay the claimant was paid in August 2021, for holidays accrued in 2021 in the sum of £1,644.16, calculated on the basis of the claimant's basic pay, is the sum to which the claimant was entitled for holiday pay for 2021. I therefore find the claim for additional holiday pay for 2021 is not well founded and is dismissed.

Breach of contract

62. By email dated 23 March 2020, the claimant expressly agreed in writing proposed to being placed on furlough.
63. The Rondec T&Cs confirm the claimant's notice period was three months; that notice period continued to apply when the claimant's employment was TUPE transferred to the respondent. The claimant was entitled to 13 weeks 'notice and

was in fact paid for a 13 week notice period as confirmed by his pays slips and the letter to him dated 4 May 2021 confirming his notice period for the 13 weeks from 4 May 2021 to 3 August 2021.

64. As the claimant's contractual notice period was 13 weeks, further to section 87 (4) ERA 1996, Sections 88 – 91 do not apply.
65. The claimant was not on furlough during his notice period. He was paid in lieu of notice and not required to work.
66. During his notice period the claimant was paid his normal monthly basic pay of £2,500 gross. The notice pay was based on the claimant's basic pay plus any commission arising. No commission was earned by the claimant after March 2020 and therefore as no commission was due, no commission was paid to him from April 2020 up to the termination of his employment. No commission had been earned prior to or during the notice period so no commission was paid during the notice period.
67. The claimant was paid his notice pay in accordance with his contractual entitlement to basic pay plus any commission arising and the sum due to the claimant by way of notice pay has been paid. The claim for additional notice pay is accordingly not well founded and is dismissed.
68. The pension contribution percentage of 4% is not in issue. What is in issue is the basis on which the contribution was calculated. The claimant claims his pension contributions, like his notice pay, should have been based on the average of his pay for January, February and March 2020 and not on the basis of his basic pay plus any commission for the period whilst he was on furlough.
69. The pension contribution payment was correctly calculated using the claimant's basic rate of pay and the correct pension contribution was made on 7 October 2021. The claim for an additional pension contribution of £71.04 is accordingly not well founded and is dismissed.

Employment Judge Fearon

Dated 18 January 2023

JUDGMENT SENT TO THE PARTIES ON

18 January 2023

FOR THE TRIBUNAL OFFICE