EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. P. Smith	v	College of North West London

Heard at: Watford **On**: 21 July 2017

Before: Employment Judge Heal

Appearances

For the Claimant: Mr. I. Sen, lay representative
For the Respondent: Mr. G. Anderson, counsel

RESERVED JUDGMENT

The claims of breach of contract, unauthorised deductions from wages and unpaid annual leave are all dismissed.

REASONS

1. By a claim form presented on 30 October 2016 the claimant made complaints of unfair dismissal, unpaid redundancy payment, breach of contract, unauthorised deductions from wages, and unpaid annual leave.

2. At a preliminary hearing held on 16 March 2017, Employment Judge Smail dismissed the complaints of unfair dismissal and unpaid redundancy payment. The remaining complaints continued to this hearing.

3. Employment Judge Smail identified claims under 3 headings:

   notice pay,
   holiday pay, and
   over time.

4. He ordered the claimant to re-serve on the respondent on or before 7 April 2017, all the calculations and supporting documents on which he relied in support of those claims.

5. The claimant did not supply any calculation in support of his overtime claim. It was therefore only at this hearing that the tribunal and the respondent discovered how he based that claim.

6. The parties argued the issues on the basis of documents and legal argument only.

7. This hearing was listed for 3 hours starting at 10 am on 21 July 2017. The tribunal spent the morning working through the issues as described by Mr Sen. That proved a time-consuming exercise and indeed it was only at about 4:30pm that it emerged that there was a dispute of fact as to how many days the claimant had really worked.

8. At the outset of the hearing, Mr Sen was concerned that he did not have the original of the document at page 191 bundle. The respondents said that the page at 105 A of the bundle was a screenshot of the same document. After some discussion, Mr Sen was satisfied with the documents in the bundle.

9. The issues emerged through discussion with Mr Sen as follows:

Breach of contract

10. There was an express term in the claimant's contract of employment (clause 20.1) that the respondent would give a minimum of,

'*2 calendar months in writing to expire at 31 December or 30 April and 3 calendar months in writing to expire at 31 August*.'

11. The claimant says that he was given notice on 23 June 2016 that his contract would terminate on 31 July 2016. He says that termination could only take place on one of the 3 dates set out above, 31 December, 30 April or 31 August. If notice was to expire on 31 August, then the claimant was entitled to 3 calendar months' notice.

12. The respondent says that the contract was a fixed term contract by which the claimant's employment began on 23 November 2015 and would conclude on 31 July 2016. The respondent says that the contract terminated on 31 July for that reason and/or that the claimant was in fact given notice of termination by letter dated 18 November 2015 which set out the term of the contract.

13. Was the respondent therefore in breach of contract in failing to give the claimant notice of termination in accordance with clause 20.1 of the contract?

Holiday pay

14. The claimant bases his claim on his contract of employment, not therefore on the Working Time Regulations 1998.

15. Clause 5 of the claimant's contract of employment contains, amongst other things, these express terms:

'*5.1 The leave year shall run from 1 September to 31 August the following year.*

5.2 Lecturers will be entitled to 45 days annual leave per year, in addition to paid leave on public holidays. They will also be entitled to normal contractual pay during the 5 designated College closure days (in addition to Public Holidays) at Christmas.'

16. The claimant does not dispute that the claimant was paid properly for national holidays and closure days.

17. The claimant said that his claim had 3 component parts:

1. The claimant says that during the period 2 November to 22 November 2015 he was paid £43.67 for his holiday while employed through an agency called NASA and he should have been paid more because the respondent should have calculated his holiday entitlement as if he was an employee during that period. The respondent says that it calculated his holiday entitlement from 23 November when the claimant became an employee. Therefore, it appeared that this was really a dispute about the claimant's employment status from 2 to 22 November 2015. This dispute had not previously been clear to the respondent and it was not prepared with the evidence needed to argue it. Furthermore the claimant himself had not seen the need to produce a witness statement dealing with this point. I gave the claimant a short break in order to consider whether he did wish to pursue this matter and having considered it, he confirmed that he did not wish to pursue it.
2. There was a dispute between the parties as to whether the claimant actually took 5 or 15 days' holiday. After discussion the claimant conceded that the respondent was correct and that he did take 15 days holiday. He did not therefore pursue this point further.
3. The claimant said that the daily rate of pay for holiday pay should be £134.01. This was agreed by the respondent. However the respondent says that the claimant was paid £2010 for his holiday pay at the end of his employment. If that is divided by the 15 days which it is now agreed the claimant actually took, the claimant was paid a higher rate than that so there is nothing owing.

<u>Overtime</u>

18. Was the claimant entitled to overtime?

19. There were the following express terms in the claimant's contract:

'*7.1 Within formal attendance hours, lecturers may be required to undertake a maximum of 25 hours scheduled teaching per week. This will*

be subject to an annual maximum of 828 hours (excluding up to 15 hours 'additional' standby cover - see 7.5 below). The actual scheduled teaching hours within this maximum for a particular lecturer shall also be subject to the provisions set out below and shall have regard to the other duties and responsibilities which s/he is allocated in order to ensure that workloads are not unreasonable.

7.2 Lecturers will normally be required to teach on a maximum of 180 days in an academic year. This may be extended to 190 days after consultation with the lecturer.

…

7.5 In addition to teaching cover for absent colleagues which may be required within the teaching limits described in 7.1 above, lecturers may be required to provide up to 15 hours additional cover per annum during scheduled attendance time. This cover is limited to substitution for another lecturer's absence. Such powers shall be accounted for annually and any excess either compensated for by teaching time off in lieu or payment at an appropriate hourly rate.

8.2 Scheduled teaching in excess of the limits described in section 7 above shall only take place in exceptional circumstances and shall be undertaken only on a voluntary basis. Such additional duties shall be compensated by payment in accordance with the terms of 8.4 below or where practicable by equivalent time off in lieu.

8.3 Where cover (see 7.5 above) for absent colleagues has exceeded 15 hours per annum, such cover, which shall be voluntary, shall be paid in accordance with the terms of 8.4 below at the end of a lecturers scheduled teaching programme for the year.

8.4 Approved additional teaching duties shall be compensated by the payment of an hourly rate (fractional payments to be made for periods of less than hour). Currently, such payments shall be as follows:-

Up to GCSE or equivalent work: Category V
Work above GCSE or equivalent: Category IV
(London Area supplement is not payable for additional teaching duties).'

20. The claimant relied on clause 8.4 above.

21. There was no dispute between the parties that the full-time overtime threshold was 828 hours and that had to be pro-rated according to the period the claimant actually worked for the respondent +15 hours for providing cover.

22. What was the appropriate approach to the pro rating exercise?

23. The respondent says that, properly calculated, the pro-rated threshold for overtime for the claimant was 573.1 hours.

24. In that exercise the respondent does not count the 3 weeks through which the claimant worked for an agency, and it takes into account 3 weeks during which he worked part-time.

25. The claimant said that the hours worked through the agency should count because they were 'established hours'.

Facts

26. I heard no oral evidence: in particular the claimant had not prepared any. Apart from the express terms of the contract of employment set out above, the following facts were not in dispute.
27. The claimant was employed by the respondent college as a lecturer from 23 November 2015 to 31 July 2016. From 2 to 23 November 2015 the claimant's services were supplied to the respondent through an agency and during that period he worked 37.5 hours.
28. The claimant was provided with a written statement of terms of his employment the relevant terms of which are set out above.
29. From 23 November 2015 to 13 December 2015 the claimant worked for the respondent as an employee for 3 days a week (0.6 of full-time) and he began to work full time hours as an employee on 14 December 2015.
30. By letter dated 23 June 2016 the respondent sent to the claimant a letter confirming the termination of his contract on 31 July 2016.
31. The claimant took 15 days' holiday during the course of his employment.
32. The claimant actually worked 571.25 hours from 2 November 2015 to 31 July 2016 but 37.5 of those hours were attributable to his time working through an agency.
33. A full-time employee who worked a full year would have 180 teaching days available to work.
34. There were 116 such teaching days available to the claimant between 14 December 2015 and 31 July 2016 (taking out bank holidays and non-teaching days).

Analysis

<u>Breach of contract (notice)</u>

35. The law on the termination of a fixed term contract is this. If the maximum duration of the contract is fixed at its outset, the contract will terminate automatically when the agreed date of expiry arrives. It is not relevant that the contract may be determinable according to its terms within the agreed period (*Wiltshire County Council v National Association of Teachers in Further and Higher Education [1980] IRLR 198*, *[1980] ICR 455, CA*).

36. Therefore, I consider that although there is a provision in the contract for the contract to be terminated by notice at particular dates, that is

immaterial. The contract terminated on 31 July 2016 automatically because that was what the parties had agreed. Although the respondent sent the claimant a letter on 23 June formally telling him that his contract would come to an end on that date, strictly this was unnecessary.

37. There is therefore no breach of contract by failing to give contractual notice.

38. The claim for breach of contract is therefore dismissed.

Holiday pay.

39. The claimant was entitled to 30 days' holiday. It is now agreed that he took 15 days' holiday, so 15 days were owing to him. His final wage slip shows that he was paid £2,110.24 for the outstanding holiday owed to him. He was paid therefore at a daily rate of £140.68 which is higher than the rate he now claims. There is therefore no failure to pay him for his untaken holiday.

40. Therefore, I dismiss his claim for unpaid holiday pay.

Overtime.

41. I consider that Mr Anderson's is the correct approach to calculating the threshold for overtime payments. I consider it most accurate to carry out the calculation using days, not weeks, because there is an ambiguity as to what a 'week' means in this context, whether it consists of 7 or 5 days, and whether it includes bank holidays and/or staff development days.

42. I consider that the correct approach is as follows:

23 November to 14 December 2015: 15 days

Therefore: 828 hours (full time threshold) divided by 180 days = 4.6 hours per day.

Multiply 4.6 by the 15 days of the part time period = 69

Therefore 69 is the overtime threshold for the three-week part time period.

But the claimant worked 0.6 of full time hours

Therefore 0.6 x 69 = 41.4

Therefore 41.4 is the claimant's overtime threshold for that part-time period.

14 December 2015 to 31 July 2016

There were 116 teaching days (taking out holidays and non-teaching days) during this period.

Therefore 828 divided by 180= 4.6 (as above)

X 116 days – 533.60 hours.

So 533.60 hours is the overtime threshold for the period during which the claimant worked full time.

To find the threshold for both periods:

41.4 (part time period) + 533.6 (full time period) = 575 hours.

Therefore 575 hours is the pro-rated overtime threshold for the entire period of the claimant's employment from 23 November 2015 to 31 July 2016.

However there is another 15 days to be added on for cover:

575 + 15 = 590 hours.

Therefore the claimant had to work 590 teaching hours before he qualified for overtime.

43. Mr Sen accepted the hour rate for calculating the threshold. He said however that one has to divide 828 by 185 not 180 because the claimant's teaching continued for 37 weeks not 36. So, he said, the threshold should be lower.

44. After discussion and examination of the documents Mr Sen said that the claimant taught for 181 days, not 185 although he continued to argue that one should use 185 days because the claimant taught for 37 'weeks'. On examination of the documents the claimant taught only for the first day of week 37. I consider that this reinforces the point that to use weeks as a unit of calculation in this context is unreliable. I prefer to use the precise number of days.

45. If one divides 828 by 181, the final overtime threshold figure becomes 572.05, so that the claimant would still not have crossed the overtime threshold.

[828 divided by 181 = 4.57

X 116 days = 530.65

Plus 41.4 = 572.05

The claimant's actual teaching hours were 571 according to 'Celcat' although this included his hours working through the agency. He worked 37.5 hours through the agency. So, his total hours as an employee were 533.5]

46. Even if one divides 828 by 185, the resulting threshold is 560.58, so that the claimant still would not have passed it.

47. Mr Sen's argument was based on an average calculated on *37 weeks*, even if the claimant worked only one day in a particular week. He did not provide a calculation to show how this worked or how it enabled the claimant to cross the threshold. I have rejected his arguments for those reasons and because I consider the week-based approach is flawed.

48. I find that on a correct calculation the claimant was not entitled to be paid overtime. So I dismiss this complaint (whether made as breach of contract or unauthorised deductions from wages) as well.

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Employment Judge Heal

Date: 26 July 2017……..

Sent to the parties on: ..19/08/2017....

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For the Tribunal Office