



EMPLOYMENT TRIBUNALS

Claimant

Mr C Izaguirre

AND

Respondents

XML Limited

Heard at: London Central

On: 25 September 2018

Before: Employment Judge J S Burns

Representation

For the Claimant: In person

For the Respondent: Mr R Golan, Director

REASONS

1. I heard evidence from the Claimant and from Mr. Golan.
2. The documents were in a blue bundle which the Respondent had produced.
3. I was also handed some additional documents at the beginning of the Hearing by the Claimant which I have considered.
4. I ascertained that the Claimant was claiming ordinary unfair dismissal but he did not have two years' service with the Respondent and therefore his unfair dismissal claim was outside jurisdiction of the Tribunal and was dismissed for jurisdictional reason.
5. I ascertained that the remaining claims were for notice and holiday pay.
6. Under the written contract there is no provision as to the minimum notice which must be given by the Respondent to the Claimant and therefore the statutory provision under the Employment Rights Act applied and, were he entitled to notice, Mr. Izaguirre would have been entitled to one week's notice. I calculated that that would be £346.15 being gross pay for five days.

7. The claim for notice pay turned on whether or not the Respondent was entitled to summarily dismiss Mr Izaguirre for gross misconduct. If it was so entitled he was not entitled to notice pay. If it was not so entitled then he was entitled to his notice pay which it is agreed he was not paid.

8. The second claim was for one week's pay in lieu of holidays not taken and again, if that claim succeeded, it would have been in the sum of £346.15.

9. On 21 August 2017 Mr Izaguirre the Claimant started work with the Respondent, which is a recruitment consultant.

10. Unfortunately, Mr Izaguirre has had some serious health problems starting in September 2017 when he was hospitalised with a brain hemorrhage and he had to have operations to treat that illness. He was in hospital in September and October 2017 and he came back to work eventually on a part-time basis but even then, he had numerous absences, which the Respondent was very tolerant of. The Respondent acted generously, in paying Mr. Izaguirre throughout and giving him abundant fully-paid sickness absences going beyond his contractual or statutory entitlements.

11. The problem started on 12 March 2018 when Mr. Izaguirre approached Mr Golan and told him that he had an urgent medical appointment in Spain to be checked out in relation to his health problems. He requested leave from 12 March to 20 March, a period of seven working days, and he sent an email confirming this on 12 March to Ms. Nadia John (another Director or Manager within the company) as follows: - *"Hi Nadia, I am kindly requesting some days off, perhaps I could use some of my holidays from 12 March 2018 to 20 March basically for health reasons as I need to do some doctor appointments and exams back in Spain regarding my brain injury, I hope this is ok?"*

12. In response the Respondent allowed him to go off again on a paid absence as the directors believed he had to go to Spain to have his problems examined by a Spanish doctor.

13. When he got back on or about 21 or 22 March he had a conversation with Mr. Golan. He gave the impression to Mr Golan that he had been to Spain and had consulted with the doctors and that the doctors had told him that his medical situation was even worse than the English doctors had previously suggested.

14. In fact, he had not been to Spain at all. From the 9 March 2018 at the latest Mr Izaguirre had been planning and arranging to carry out work in the UK painting wardrobes for a third-party as part of his own private business. He then carried out that work and supervised it during the time he was supposed to be in Spain.

15. In his ET1 claim in Section 8.2. the Claimant referred to this episode as follows: *"I asked for holidays because my mother offered to help with the doctor's consultation as a second opinion and it was authorised but, in the middle of the holidays the plans changed and we could not afford the private neurologist and a*

job painting a wardrobe came along and I decided to earn a bit of extra money during my holiday.”

16. This is a false version of events, as it is quite clear that the wardrobe job did not come along half way through the so-called sickness-absence, but had come along long before that. In effect Mr. Izaguirre obtained a further lengthy period of paid leave on the basis of false pretenses.

17. That was an act of gross misconduct. Therefore, the company was entitled to dismiss him summarily and the company is not obliged to pay him notice.

18. In relation to the holiday pay claim, the facts are not in dispute and are effectively agreed, and they are as follows: The employment started on 21 August 2017 and ended on 28 March 2018. During that period the pro-rata entitlement to holidays was 11.67 days. The Claimant received pay and took seven paid holidays during 2017, and he took another two paid holidays on 15 and 16 February 2018, and that left a further 2.67 days outstanding which was paid in lieu on 31 May 2018.

19. I am satisfied that all monies due to the Claimant have been paid.

20. For the avoidance of any doubt the Claimant was not dismissed because he was ill, or because he came to work only intermittently because of his illness, or because of performance, or because he had used the company laptop for third party work. He was dismissed because he effectively lied to get seven days leave in the middle of March and then tried to cover that up after his return.

21. The Respondent had treated him generously and its directors were naturally disappointed when that was not reciprocated by him.

Employment Judge J S Burns

Dated: 10 October 2018

Judgment and Reasons sent to the parties on:

16 October 2018

.....
For the Tribunal Office