



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr C Scully

AND

Respondent

Digital Communication Systems Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth

ON

8 May 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr Sayers, Solicitor

For the Respondent: Mr Johns of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant succeeds in his claim for accrued but unpaid holiday pay and the respondent is ordered to pay the claimant 15 days' pay in the sum of £1,726.05; and
2. The claimant succeeds in his claim for unlawful deduction from wages and the respondent is ordered to pay the claimant 11 days' pay in the sum of £1,265.77.

RESERVED REASONS

1. This judgment should be read in conjunction with my earlier reserved judgment dated 11 December 2018 following a preliminary hearing, which determined that the claimant was a worker of the respondent, but had never been an employee. His claims for unfair dismissal and breach of contract were accordingly dismissed, which left two surviving claims for accrued but unpaid holiday pay, and for unlawful deduction from wages, which the claimant remained entitled to pursue by reason of his worker status. This is the judgment which follows the determination of these two claims.
2. I have heard from the claimant, and I have heard from Mr Brendan Mulvenna and Mr David Lawler on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I also remind myself of

- my comments about the claimant's credibility at paragraph 14 of the earlier reserved judgment. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. I deal first with the accrued holiday pay claim. The parties now agree that the relationship between them came to an end on 11 December 2017. The claimant asserts that he had taken no holiday during the calendar year of December 2017 and that he is entitled to the pro rata equivalent from the commencement of the respondent's holiday year on 1 January 2017 to the termination of the relationship on 11 December 2017. The respondent asserts that its holiday year commences on 1 October annually, which is consistent with the respondent company's financial year. The respondent asserts that any calculation should be based on the period from 1 October to 11 December 2017 only.
 5. Because of the working relationship of the parties the matter was not really addressed. Effectively the claimant was allowed to take holiday whenever he chose. However, I have seen the original contract of employment which was offered to the claimant in 2013, but subsequently withdrawn. I have also seen a contract of employment between the respondent and its account manager Mr Gibson dated 4 September 2017. Although the respondent suggests that it contracts are now being reviewed to record the fact that the holiday year commences on 1 October annually, Mr Lawler also conceded that at the time of the claimant's departure at least his contractual terms reflected those of Mr Gibson. These all provide the same provisions relating to holiday entitlement and how it can be taken.
 6. I find that these were the normal holiday provisions for the respondent company with its employees. The claimant suggests that he understood these to be the relevant provisions because they were in the contract which was offered to him in 2013. In the rather unusual circumstances of this case, I find that these are the provisions which apply.
 7. Accordingly, I find that the claimant was entitled to 20 days annual leave in addition to any public holidays, of which five days were to be retained for the Christmas period, with the remaining 15 days to be taken throughout the year. The holiday year is expressed to begin on 1 January annually. I therefore find that the claimant was entitled to this holiday entitlement with effect from 1 January 2017 until the termination of the relationship on 11 December 2017.
 8. The claimant was entitled to take holiday whenever he chose, and there is no reason to suggest that he failed to take the bank holidays as they fell due which counted as holiday for which he was paid in the context of his normal monthly retainer fee. In addition, five of these days would have to be retained for Christmas 2017 and so I find that (rounding up any small fraction) the claimant was entitled to 15 days paid holiday from 1 January 2017 to 11 December 2017, and that this was not taken and became accrued and was therefore due.
 9. The claimant was paid a rolling monthly retainer of £3,500.00. Over the course of 12 months this equates to a daily rate of £115.07. The claimant succeeds in his claim to this extent, and the respondent is therefore ordered to pay the claimant 15 days' pay being £1,726.05.
 10. I turn next to the claim for unpaid wages. The parties agree that the claimant was not paid for the period between 1 December 2017 and 11 December 2017. The claimant also claims three months' notice, notwithstanding that the breach of contract claim has already been dismissed.
 11. I accept the evidence of the respondent's two witnesses that there was a conference call late on Friday 8 December 2017 at which the respondent said to Mr Mulvenna, as overheard by Mr Lawler, that he could "Fuck Off" and "Stick his job up his arse" before terminating the call. Mr Mulvenna wished to dismiss him then, but the claimant had already rung off, and did not cancel or return any further calls. The respondent then wrote to the claimant by email on Monday 11 December 2017 confirming that as a result of this conversation the relationship between them was terminated with immediate effect by reason of gross misconduct. That termination was communicated on 11 December 2017.

I find that the respondent was entitled to terminate the relationship by reason of gross misconduct as at that date.

12. The claimant therefore succeeds in his claim for unpaid wages but only for the period of 11 days from 1 December to 11 December 2017. Applying the same daily rate, the respondent is ordered to pay the claimant the sum of £1,265.77.
13. The relevant statutory provisions which I have applied are these.
14. The claimant claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
15. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3).

Employment Judge N J Roper

Dated : 8 May 2019