EMPLOYMENT TRIBUNALS

Claimant: Ms N Winter

Respondent: OTGL Ltd

Heard at: **London Central**

On: **31 January 2020**

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the Claimant: In Person
For the respondent: Mr P Ferris, chief executive

JUDGMENT having been sent to the parties on 3 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim brought by Nicola Winter against OTGL Ltd. It is common ground that OGTL Ltd was previously known as Object Tech Group Limited. It is also common ground that the claimant was an employee of that company between 18 February 2019 and 12 July 2019. The claim was presented on 6 September 2019, following a period of early conciliation which lasted 16 August 2019 to 6 September 2019.

The hearing and the evidence

2. The hearing began without either party having brought sufficient copies of any documents to which they wished to refer, and without either party having prepared any written witness statements. The issues in dispute were discussed and clarified (see below).

3. I informed the parties of the need to supply sufficient copies of documents so that both parties, the witness table, and the judge all had the same documents. I informed the parties that I would allow a short adjournment until later the same day for them to agree a joint bundle or, failing that, to each prepare a bundle. I stated that the witness evidence could be given orally without the need for a written statement. In due course, the hearing resumed, with each side submitting a paginated set of documents.

4. The Claimant gave evidence and was questioned by the Respondent and by me. On behalf of the Respondent, Mr Ferris (chief executive) gave evidence and was questioned by the Claimant and by me.

Claims and Issues

5. The claims which I had to consider were breach of contract and for unauthorised deduction from wages and the breach of the Working Time Regulations 1998 ("WTR"). The claimant also alleged that she had not received payslips or her P45. As clarified before me today, the sums set out in the claim form were allegations of net amounts, rather than gross.

6. As further clarified the claimant accepted that she had been paid up until 30 June 2019 (other than for pension payments) and therefore her claim in relation to unpaid salary was for the period of 1 July 2019 to 12 July 2019. The claimant's case is that should be calculated with reference to her contractual entitlement to salary plus employer's pension contribution.

7. In addition, her claim for holiday pay, was for a number of days pay in lieu of the holiday entitlement which had accrued, but not been taken.

8. There was agreement between the parties that:
   8.1. The Claimant's annual salary was £75,000.
   8.2. The employer's annual pension contribution was to be £2250 per annum (which the Claimant said was supposed to be paid to her and had not been).
   8.3. The number of days contractual holiday entitlement for one full year was 25 days plus bank holidays.

9. The issues for me to resolve were:
   9.1. What wages were properly payable for the disputed period?
   9.2. Whether the contract entitled the respondent to make any deductions if so in what circumstances?
   9.3. Did the Claimant work or was she available to work for whole period 1 July to 12 July? If not, what days did she not work and why?
   9.4. What wages was the Claimant entitled to, and what did she actually receive for July?
   9.5. Has there been a deduction and, if so, what amount, and why?
   9.6. What holiday was the Claimant entitled to, and how much had she taken, (i) according to contract and (ii) according to WTR?

10. The Respondent asserted that it might have a claim against the Claimant, and might bring that claim elsewhere, but acknowledged that no employer's claim had been brought.

Findings of Fact

11. The agreements between the parties were entered into in February 2019. A confidentiality agreement was dated 18 February 2019. The service agreement was dated 12 February 2019. The parties were in agreement that a letter dated 12 February 2019 was to be treated as incorporated into the contract and treated as the "Personal Information Appendix" referred to in the service agreement. Unfortunately, the parties did not provide me with a complete copy of that letter, and I only had paragraphs (a) to (l).

12. Pension is mentioned in Clause 7 of the service agreement, but only to say that

the pension arrangements (if any) are set out in the Personal Information Appendix. In the part of the Personal Information Appendix that was provided to me, it states "*Workplace Pension contributions will be discussed and agreed with you in good faith and will be reflected in your contract of employment*."

13. The claimant's case was that she was actually at work between Monday, 1 July and Thursday, 11 July every day, leaving 6 or 6:30 PM on 11 July, and that 12 July was a day of annual leave. She was not paid any wages for that period.

14. The respondent's position was that they agreed that 12 July should be treated as annual leave. In relation to 11 July, it alleges that the claimant left halfway through the day due to migraine. On its case, that half day should be treated as sickness absence. In relation to the remainder of the period 1 July to 12 July, the respondent's position was that the claimant did attend the workplace, but was not performing the duties of the post. The Respondent asserted that it had been ready and willing to pay the Claimant for July until she wrote to them in August to say that she was looking for work with a competitor.

15. The Claimant's assertion was that it had been agreed that the employer's pension contributions were to be paid to her together with her salary. The Respondent's assertion was that it did not have specific information on that.

16. The Respondent asserted that it did provide payslips to the Claimant. On the basis of the evidence I heard, I accept that it did so, by making these available to the Claimant electronically for her to download. Although the Claimant did not actually download these, they had been available to her during her employment. Copies were provided to her during the hearing.

17. My finding is that the claimant did attend work and did carry out the duties of the post between 1 July and 11 July 2019 and that on 12 July 2019, she was on holiday. In relation to the assertion that she went home early on 11 July with a migraine, I prefer the Claimant's evidence that she was actually at work for the whole of 11 July, rather than for half a day. In relation to the assertion that she was not performing her duties when present in the office, I reject that assertion and find it unsupported by evidence. The Respondent asserts that an email sent by the Claimant after 12 July, which said that she was looking for other employment, indicates that she was not spending her whole time working for the Respondent, but was spending some (or all) of her time between 1 July and 12 July looking for work, rather than performing her duties. That is not an inference that can sensibly be drawn from the email.

18. The claimant admits that in addition to 12 July 2019. She also took one other day as holiday. This was prior to July. Therefore – according to the Claimant - she took a total of 2 days during the period of her employment.

19. The respondent's argument that the claimant had taken much more than two days was not based on an argument (or evidence) that she had taken more than one day prior to 1 July. On the contrary, the Respondent suggested that, from 1 July onwards, she should be deemed to have been on leave, and furthermore that this should be a period of unpaid leave.

20. Given that the claimant was actually attending work, and that my finding was that she had been complying with the requirements of her contract and doing work during that period, I reject the respondent's argument that the claimant used

more than 2 days of her annual leave entitlement. Furthermore and in any event, if – contrary to my findings - the days in July should be treated as unpaid leave, then that would not have used up her entitlement to paid annual leave.

21. It is not necessary for me to make findings in relation to whether the claimant breached her contractual obligations at all while performing her duties for the Respondent up to 12 July. However, in any event, no evidence was presented to me that she had done so. The respondent's evidence from Mr Ferris was that he believed that after 12 July, the claimant may have discussed confidential information of the company with unauthorised parties, namely a recruitment agency and an investor associated with the company. Regardless of whether there is any truth in Mr Ferris's accusations or not (and these were denied by the claimant), on his own case, the alleged disclosures occurred after 12 July. Therefore, they have no bearing on whether the Claimant carried out the duties of the post in the period 1 July to 12 July.

22. The service agreement contains clause 20, which deals with deductions. The contract purports to give the employer the right to deduct overpayment of wages or expenses. It purports to give the employer the right to make deductions for the value of any claim of whatever nature, and in whatever capacity the company may have against the employee, including but not limited to the following examples.
    22.1. Overpayment of wages or expenses,
    22.2. Breach of clause 9.2 (relating to the requirement to demonstrate the reasons for sickness absence).
    22.3. Loans or advances in wages which the company may have made.
    22.4. Cost of repairing any damage or loss of the company to property.
    22.5. Any losses suffered by the company as a result of any negligence or breach of duty by the employee.

The Law

23. Section 8 of the Employment Rights Act 1996 ("ERA") deals with the requirement to provide written pay statements. Sections 11 and 12 deal with the tribunal's powers of enforcement.

24. Part II of ERA deals with protection of wages. S13 gives employees (and workers) the right not to suffer unauthorised deductions. S27 gives the meaning of "wages". There is a non-exhaustive list of what is included within the definition. Crucially, the sums payable must be (i) a sum to be paid to the worker (as opposed to a third party such as a pension scheme) and (ii) in connection with the worker's employment. A sum payable to an employee and referable to the employment is not excluded merely because the agreement specifies that sum is a contribution by the employer to the employee's personal pension arrangements. Such payments are not excluded by s.27(2)(c) of ERA; pension contributions are not payments by way of a pension in connection with the worker's retirement.

25. WTR gives workers the right to a minimum period of paid time off. Regulation 14 specifies the entitlement to (and calculation for) a payment in lieu of holiday that had accrued but not been taken in the partial leave year up to the termination of employment. Where the employment contract provides for a greater entitlement, the employee can rely on either the Working Time Regulations rights or their contractual rights. As per Revenue and Customs Comrs v Stringer [2009] I.C.R. 985, a claim for a payment to which a claimant is entitled by virtue of WTR

can instead/alternatively be brought under Part II of ERA.

26. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives tribunal the jurisdiction to decide breach of contract claims (subject to the exceptions, limitations and time limits set out therein).

Submissions

27. The Claimant made submissions in support of her complaints. Mr Ferris made submissions which stated (amongst other things) that the Respondent had believed that the Claimant was pursuing a claim for pay in lieu of garden leave, and that - now it knew that that was not the case - the Respondent would be "happy" to pay her for 12 days of July.

28. A discussion ensued as to whether there might therefore be a consent order for some or all of the claim. The parties were not in agreement, and I therefore needed to make decisions on all of the complaints.

Analysis and conclusions

29. The evidence did not satisfy me that the circumstances set out in clause 20 of the contract applied. In relation to any information which the claimant allegedly did give to the recruitment agency or the investor no first-hand evidence from any witness was supplied. Mr Ferris alleged that he had been told that information had been given, but could not itemise specifically what confidential information was alleged to have been revealed, or when. More importantly, the evidence did not satisfy me that the respondent had actually suffered any losses.

30. Furthermore, the deductions made are not deductions of a type permitted by s14 ERA.

31. My finding, therefore, in relation to unauthorised deduction of wages claim is that the claimant was entitled to be paid wages, without deduction, for the period 1 July to 12 July, being:
    31.1. salary of a gross sum of £2465.75.
    31.2. pension contribution of a gross sum of £73.97.

32. The calculation method which I used (given the absence of anything in the contract to specify an agreed method) was to divide the annual entitlement by 365 (the number of days in a year) and to multiply by 12 (for the 12 days 1 to 12 July 2019). 12 July is part of the Claimant's holiday entitlement and she was entitled to be paid normally that day.

33. The Respondent was also in breach of contract by its failure to pay these sums to the Claimant. The Claimant would have had an entitlement to damages (to reflect the net loss to her of the Respondent's breach). Since the sums would be taxable in the Claimant's hands, a grossing up of the net amounts would be necessary. However, she is not entitled to double recovery, and I have therefore not done separate calculations of the sums for breach of contract.

34. In relation to holiday under the terms of the contract:
    34.1. Clause 8.1 says that the holiday year starts on 1 January.
    34.2. Clause 8.2 says that there will be entitlement to payment in lieu in respect of holiday accrued but not taken, but only in accordance with clause 8.5.
    34.3. Clause 8.5 states that the pro rata calculation will be worked out on the

number of completed calendar months worked during the current year.

35. The claimant has worked, in my judgment, 4 complete calendar months from 18 February to 17 June. The period 18 June to 12 July is not a complete calendar month. That gives her contractual entitlement to 4/12 of 25 days which is 8.33 days. She used up 2 days of that entitlement (including 12 July). That leaves 6.33 days.

36. As per the contract, the payment for each day is calculated at a rate of 1/260 of the full annual salary. That amounts to £1825.96 gross. The Claimant's actual losses are her net losses, but the award which I make is taxable and awarding her just the net sum (on which she would then have to pay tax) would not make good her losses. I therefore assess that the Respondent is liable to pay the gross amount.

37. The Respondent was also in breach of WTR by failing to pay an appropriate sum in lieu of the part year's entitlement on termination, such sum being recoverable either under WTR, or under Part II of ERA. However, the Claimant is not entitled to double recovery.

Employment Judge Quill

Date 19th Feb 2020

JUDGMENT SENT TO THE PARTIES ON

20/02/2020

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FOR THE TRIBUNAL OFFICE