



EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Barrett

Respondents: (1) B & Q Limited
(2) B & Q Plc

Heard at: East London Hearing Centre (by CVP)

On: Wednesday 29 July 2020

Before: Employment Judge Allen QC

Members: Ms M Long
Mr O'Callaghan

Appearances

For the claimant: In person

For the respondent: Mr Piddington, Counsel

This has been a remote video hearing which was not objected to by the parties. The form of remote hearing was V: video - fully (all remote) by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in the tribunal file, and in the written submissions, authorities and bundles of documents produced by the parties, which I had before me.

RESERVED JUDGMENT

1. B & Q Limited is added as a party.
2. The Claimant claim relating to non payment for work on 30 and 31 May 2019 fails and is dismissed.
3. The Claimant's claim for underpayment of accrued holiday entitlement upon termination of employment succeeds.
4. The Claimant's claim for underpayment of Statutory Sick Pay succeeds.

5. **The Claimant's claim relating to the national minimum wage fails and is dismissed.**
6. **The Respondent is ordered to pay the Claimant total compensation of £131.56.**

REASONS

1. The Claimant was employed as a part time customer advisor by B & Q Plc between 30 May 2019 and his resignation on 4 October 2019, working at the West Thurrock branch. Based on Mr Root's evidence, Mr Piddington for B & Q explained that the Respondent no longer exists as a Plc and that the correct successor body as Respondent should be B & Q Limited. There being no documentary evidence to back this up and the Claimant being uncertain of the position, the parties agreed to add B & Q Limited as a party to aid any enforcement rights that the Claimant might need.

2. Following a period of early conciliation between 31 October 2019 and 13 November 2019, by ET1 Claim Form presented on 14 November 2019, the Claimant ticked the boxes for claims for notice pay, holiday pay, arrears of pay and other payments. He also stated that he wished to make claims for non payment of sick pay; non-issuance of payslips; for payment below minimum wage; and for 'falsifying a P45 knowingly'.

3. At the outset of the hearing the tribunal discussed the issues with the parties. The tribunal explained that it had no jurisdiction in relation to the falsification of P45s – which would be a matter for other authorities such as HMRC. The issues were identified as follows:

- a. Whether the Claimant had not been paid for 2 days worked on 30 and 31 May 2019 (this turned on the mechanism of the Respondent's payment system);
- b. Whether the Claimant resigned with immediate effect on 4 October 2019 or whether he gave notice to expire on 4 November 2010 – and therefore whether termination payments to the Claimant should have been calculated on the basis of the October or November date. This made only a small difference, given that although the Respondent treated 4 October 2019 as the termination date, it had subsequently made a payment to the Claimant based on the 4 November 2019 date. However the Claimant still had a claim based on a difference in calculation of Statutory Sick Pay;
- c. Whether the 50p 'Hot Spot Rate' should have been included in the calculation of accrued holiday pay upon termination of employment (the Respondent accepted that this 50p amount was included in calculations of holiday pay during employment but that its practice was not to include it for calculation of accrued holiday pay upon termination);
- d. Whether the Respondent's calculation of the Claimant's accrued holiday entitlement on termination had validly subtracted 7 hours deemed to

have been taken as holiday on 30 September 2019 (which it was agreed was not a date on which the Claimant would have been working).

e. Whether the Claimant had been paid the national minimum wage.

4. The Claimant had been claiming that, having never been able to log on to the Respondent's system to view his soft copy payslips, he has effectively not been provided with payslips. However, having now been provided with paper copies of his payslips, he withdrew his claim relating to non-provision of payslips. The tribunal did not therefore have to consider whether the provision of soft copy payslips by the Respondent's Employee Self Service (ESS) online portal was compliant with Section 8(1), Employment Rights Act 1996 (ERA 1996).

5. The tribunal had an agreed bundle running to page 121; a witness statement from the Claimant; and a witness statement for the Respondent from Mr Glen Roots (a Compliance Partner who works in payroll). The Tribunal heard oral evidence from the Claimant and from Mr Roots and heard oral submissions from the Respondent. The Claimant was given the opportunity to make oral submissions but primarily relied on the evidence including his responses to questions asked in cross examination as speaking for itself.

Relevant Findings of Fact

6. The relevant parts of the Claimant's contract of employment state:

Commencement and Period of Employment

Your start date: 30 May 2019

The date when your continuous employment with us commenced is 30 May 2019.

...

Salary

Your annual basic salary is £6,078.80 subject to tax and social security deductions. This will be paid monthly directly into your bank or building society account on the last working day of each month.

...

Non-Contractual Discretionary Allowance(s)

The following non-contractual, discretionary allowances are currently applicable to your role, location and contracted hours:

- Hot Spot Rate: £0.50 per contracted hour

All allowances are non-contractual and discretionary and reviewed on an annual basis and may be amended or removed at any time at our discretion. If paid, they will be paid monthly in addition to your basic salary subject to tax and social security deductions.

Hours of Work

Your contracted hours are 14.00 per week and days of work are, Mon - Sun.

You may be required to work such additional hours as may be necessary for the performance of your duties and/or to meet the operational needs of the business.

Due to the nature of our business we need to have the flexibility to ensure our teams are in

place to deliver great service to our customers, particularly on our busiest trading days, and during peak trading periods (to include bank/public holidays). Therefore, we will require you to work a varied rota to accommodate these business needs. Even if you have a usual and/or agreed shift pattern you may still be rota'd to work on other days irrespective of this, either on a temporary or permanent basis to

meet business needs.

Annual Leave

Our holiday year runs between 01 January and 31 December.

You're entitled to 6.6 weeks' paid annual leave during each holiday year based on your weekly contracted hours. It's made up of two elements: 5 weeks' contractual holiday and the recognized bank/public holidays which accrue as and when a bank/public holiday occurs. You will be deemed to take annual leave on bank/public holidays unless you are rota'd and expected to work on a bank/public holiday or it is one of your rota'd day's off. If it's not one of your rota'd day's off, or you do not wish to work when you are rota'd and expected to, on a bank/public holiday, you will be required to submit an annual leave request. If there's more than 1.6 weeks' bank/public holidays in a year then the maximum holiday you'll receive is still 6.6 weeks.

If your employment starts or ends part way through a holiday year, your annual leave entitlement during that year will be calculated on a pro-rata basis. If you subsequently change your contracted hours your annual leave entitlement will also be adjusted accordingly.

We may require you to take (or not to take) annual leave on particular dates, including during your notice period. In particular, if your normal working day falls on a compulsory closure day you will be deemed to take annual leave on those days and must ensure you retain sufficient annual leave hours to cover such days. Again, you will be required to submit an annual leave request for these days.

Requests for annual leave must be made to your line manager in accordance with our Annual Leave Policy.

If you leave us before you've used all your accrued annual leave entitlement, the outstanding balance will be paid to you in your final salary less tax and social security deductions and any sums you owe to us. If, on leaving, you've taken more annual leave than your accrued annual leave entitlement, we will be entitled to deduct the excess holiday pay from any payments due to you.

Further details regarding annual leave are included in the non-contractual Annual Leave Policy which will be amended from time to time.

...

Notice Periods

Our notice period to you is 1 month's or that stated in the Colleague Handbook if greater.

You are required to provide us 1 month's written notice of your intention to leave.

We may decide to pay you in lieu of notice and, if this is the case, the payment in lieu will be equal to the basic salary you would have received during the notice period (or remaining notice period) less tax and social security deductions and any sums you owe to us. A payment in lieu will not include any benefits or allowances.

...

Our Policies and Procedures

Information regarding sickness absence and sickness pay is contained within the relevant Absence Policy.

...

7. It was agreed that the Staff Handbook at section 4.9 set out that there was no entitlement to Company Sick Pay until 6 months of continuous

employment. The Claimant therefore accepted that during his period of employment, he was not entitled to Company Sick Pay – but only entitled to Statutory Sick Pay.

8. Other relevant parts of the Staff Handbook state:

4.13 Sickness While on Annual Leave

Should you fall sick while on a period of **authorised** annual leave **we may consider this as a period of sickness providing** you have a valid medical certificate to support and cover the whole period of **your illness**.

In these circumstances we would not deduct this period from your annual leave entitlement and would record the period of your illness as sickness. Where this is the case. Company Sick Pay may **be paid instead, in accordance with** the company's relevant eligibility rules/arrangements. Any medical certificate(s) should be handed to your manager on the first day you return to work at the latest or earlier if possible. Back dated medical certificates will not be accepted.

...

4.19 Annual Leave

The annual leave year runs from 1 January to 31 December. Your annual leave entitlement is calculated in hours and is based on your contracted weekly hours.

Details of your entitlement are shown on your payslip. It is important that you use this information to keep a check on how you are using your annual leave entitlement.

6.1 Your Pay

...

Your salary will be paid monthly into your bank or building society account by the last working day of each month. Any additions or deductions to your salary will be made at the next available payroll run or, if that is not possible, made or recorded directly to or from you.

Details of your basic annual salary can be found on your payslip.

If you start work part way through a month, or if you leave before the last working day of the month, your salary will be amended accordingly.

Should you leave us, we may not be able to credit your final pay to your bank or building society on the final working day of the month because of adjustments. If this is the case, you will be paid at the end of the following month.

6.2 Pay Adjustments

Should you for whatever reason be underpaid in your salary, the difference will be made up in the following month's payment. Should there be an overpayment for any reason, fact or law, the amount will be deducted from your next available salary payment, or if you are leaving us, from your final salary payment or recovered directly from you.

...

9.1 Notice Period - Your Obligation

You are required to give us one month's notice of your intention to leave except where a different notice period is stated in your individual contract.

...

9.10 Your Annual leave Entitlement on leaving B&Q

Payment will be made for any outstanding accrued annual leave due to you when you leave us. If you have taken annual leave in excess of your entitlement when you leave. this will be deducted from your final salary payment or recovered directly from you if sufficient funds are not available.

9. Although contractually required to work flexibly, aside from his first two days of work on Thursday 30 and Friday 31 May 2019 (for training purposes), the Claimant always worked on Wednesdays and Thursdays. This was a regular pattern of work.

10. The Claimant had booked annual leave for at least a 2 week period for the week commencing Monday 30 September – for a period which would have covered his working days on Wednesday 2nd and Thursday 3rd October 2019 and those on the Wednesday and Thursday in the following week. In his evidence he was unsure if he had been intending to take the week after that off as well. The Respondent provided the tribunal with no evidence as to its computer system record of when the leave request was made and what specific dates were requested. It was suggested that it may have been for the Claimant to designate which days were to be deemed as holiday days – but no evidence of that was produced.

11. In any event, the Claimant obtained a statement of fitness for work dated 2 October 2019, which signed him off as unfit for work until 2 November 2019.

12. On 4 October 2019 the Claimant provided the sick certificate with a handwritten letter to the Respondent which merely stated “I hereby tender my resignation”. It did not state whether he was or was not giving notice and it did not state the date which he regarded would be his final day of employment. The Claimant’s evidence, which the tribunal accepted, was that he intended to give notice, as he understood he was contractually required to do, as set out in his contract and in the Staff Handbook. The Respondent’s position, which the tribunal also accepted as genuine (albeit that it did not think it was a reasonable position), was that it mistakenly thought that the Claimant was resigning without notice.

13. The Respondent promptly issued a P45 recording the leaving date as 4 October 2019. The Claimant was paid £161.66 as his October pay. The Claimant was not sent contemporaneous communication which might have indicated to the Claimant what this amount represented and how it was calculated.

14. On 1 November 2019 the Claimant wrote to the Respondent querying his pay for the month of October, seeking payment of sick pay and disagreeing with the calculation of holiday pay.

15. By email on 4 November 2019 the Respondent told the Claimant that:

You resigned from your role as customer advisor, in letter, on the 5th October 2019 this was with immediate effect. This is the date that your contract was terminated plus all holiday accruals and payments are calculated until. This was in breach of your employment contract which states a minimum notice period of one calendar month.

Prior to your resignation you had previously requested and subsequently used seven hours annual leave entitlement between 30th September until 4th October. The annual leave balance of £161.66 was credited to your account on 31st October 2019 via BACS transfer

There were no periods of absence during your employment which would negate any entitlement for sick pay.

All payslips were accessible to view and print via ESS (Employee self-service) in store. Your final pay slip and P45 document will be a paper copies sent to your registered address.

There have been no unlawful acts and all monies for hours worked and accrued annual leave entitlement have been credited to you.

That is not a clear communication. The Claimant responded and made it clear that he viewed his resignation as having been on one month’s notice and that

therefore he was seeking sick pay for the month and that he was unhappy with the calculation of accrued holiday entitlement.

16. By email on 5 November 2019 the Respondent told the Claimant:

Your P45 will represent your last working shift for B&Q as the 4th October.

Your length of service with the organisation did not exceed 18 months - Subsequently you do not qualify for sick pay irrelevant of GP certification - No sick pay is owed.

You have been paid for all shifts that were worked up to and including the date you tendered your resignation.

Your accrued holiday pay was settled via BACs payment on the 31st October for the sum of £161.66 to the bank details that you provided when you were recruited, and was for the sum exactly that you indicated from your original email. I would encourage you to check with your bank to ascertain this has been received.

We do not process nor distribute payslips, these are available to you electronically via the employee self-service function.

I am satisfied that we have concluded your employment legitimately and this matter is now resolved.

That communication is not accurate in that although the Claimant would not have been entitled to Company Sick Pay, he would have been entitled to Statutory Sick Pay.

17. In the background are allegations by the Respondent about the Claimant's behaviour at this time, which the parties have not asked the tribunal to adjudicate upon and on which the tribunal has not had full evidence. The Claimant's email correspondence, which we have seen, went beyond frustration and was intemperate. This may have been due to his medical condition but it did not help to resolve matters.

18. The Respondent attempted to put an end to the issue by asking Mr Roots to calculate what the Claimant would have been entitled to if he had remained employed but off sick during his notice period. Mr Roots calculated that on the basis that there would have been 10 days work during the notice period, with a waiting period for SSP of 3 days. On that basis, the Respondent calculated that the Claimant would have been entitled to 7 days of SSP at £42.02 totalling £294.14 and also an additional accrued holiday entitlement of 5 hours totalling £48.71. This gave a grand total of £342.85. This having been done, the Respondent authorised that payment to be made to the Claimant as an exceptional post employment payment. This meant that it was subject to tax and national insurance deductions (which the Claimant's ordinary pay wasn't subject to because he earned less than the relevant thresholds).

19. In his evidence to the tribunal, Mr Roots says that this was generous to the Claimant because in fact his sickness absence certificate only covered him until 2 November 2019 and did not cover 2 days on Monday 3 November and Tuesday 4 November 2019 meaning that he was only entitled to 6 days of SSP. The tribunal tried but failed to understand how the uncertified 'absence' on a Monday and Tuesday of someone who only ever worked on a Wednesday and Thursday and who was apparently treated as having worked on a Saturday and Sunday could have affected entitlement to SSP in that way.

20. The Respondent wrote to the Claimant on 11 November 2019 stating:

Further to your email dated 5th February [sic], we have reviewed your written resignation of 4th October.

It does not confirm that you were resigning with notice, which was why you were processed as leaving with immediate effect from that date. A copy is attached for your reference. As it appears now from your email that it was not your intention to resign with immediate effect, a recalculation has been made to establish what you would have been entitled to during your notice period.

You are not entitled to company sick pay (CSP) due to your length of service, however you would have been due to receive some statutory sick pay. You would also have accrued an additional 5 hours annual leave entitlement.

Based on the above, a one-off payment of £342.85 will be made to you via your bank account in the next few days. This payment will be subject to tax and NI.

21. The Claimant has provided a calculation of his entitlement to Statutory Sick Pay from the gov.uk website in which he has entered his regular working pattern for the period of his sickness absence and his income for the 2 months prior to his period of sickness absence and obtained a figure of £329.88.

22. The Respondent's pay system is not a thing of beauty. It is opaque. The Claimant says that he did not have access to his payslips because he couldn't log on the Respondent's system, but even if he had seen them at the time, they are not clear as to what payments relate to what work. Contrary to the assertion in the staff handbook, the Claimant's payslips did not state holiday pay entitlement and they did not state holiday pay separately from other pay (making it difficult to work out what holiday has been taken). The Tribunal was unimpressed with the information communicated on the payslips and with the failure to communicate adequately with the Claimant as to his entitlements following termination.

23. Mr Roots explained that the Respondent's system operated in relation to the Claimant in the following way:

- a. As set out in the Claimant's contract, he was paid a monthly salary – not an hourly or weekly rate;
- b. There was a cut off towards the end of each month, so that for example days worked on 30 and 31st May would be paid for in the June payslip. However, if a worker was on leave on a day at the end of the calendar month (e.g. 30 September), the system appears to have treated that as if the leave took place in that same month (i.e. September);
- c. A week was deemed to start on a Monday;
- d. When a worker worked for two days a week, the system would treat those days as having been the Saturday and Sunday at the end of the week (even if they actually worked on Wednesday and Thursday). However it appeared that if a worker was off sick, or had booked leave the Respondent's system did not treat the sickness absence or leave as if it had taken place on the Saturday and Sunday;

- e. When the Claimant booked a number of weeks holiday from the beginning of the week commencing Monday 30 September and then submitted a sick certificate stating that he had been sick from Wednesday 2 October, he was treated as having taken holiday on 30 September (when he wouldn't have worked anyway) and that is why 7 hours was taken from his accrued holiday entitlement. Mr Roots was unable to explain how this fitted with the general rule that the worker was deemed to have been at work on the Saturday and Sunday at the end of the week;
- f. Holiday pay was not specifically itemised on payslips – an employee like the Claimant simply got paid the same amount every month, whether holiday was taken or not. As a matter of practice, therefore, this meant that the Hot Spot allowance was paid for normal holiday – although it was not paid by the Respondent for accrued holiday entitlement. Mr Roots was unable to explain why this distinction was made.
- g. The minimum wage throughout the relevant period was £8.21 per hour. Mr Root explained that if the Claimant worked for 14 hours per week, this was 728 hours per year at £6,079 per annum giving an hourly rate of £8.35 – even before adding the 50p Hot Spot Rate.

None of that was made clear (if it is possible to make it clear) to the Claimant either when he started work or in the period after he resigned.

24. Mr Roots explained that although it might seem that the Claimant had 'missed out' on payment for 30 and 31st May, these matters worked themselves out in the round, once a number of months had been worked and if the matter was looked at in terms of the number of weeks that the Claimant had worked in the 4 months to the end of September 2019, he had worked for 18 weeks which is the number of weeks in 4 months – and therefore he had been properly paid for 4 months.

25. There is no payslip for the month of May 2019. Each of the Claimant's payslips for the months of June, July, August and September 2019 was identical – they record his basic salary (£506.60) and his 'Hot Spot' Payment of £30.34 with a total of £536.94. The gross figure is the same as the net figures because no deductions are made for tax or national insurance as the relevant thresholds are not reached.

26. The payslip for October 2019 records

"Description		Amount
Ann Leave Balance	19.36	161.66"

With the assistance of Mr Root, the Tribunal understood this to be an assessment of accrued holiday entitlement upon termination (taking the termination date to be 4 October 2019) at 19.36 hours at 8.35 per hour (not including any Hot Spot Payment) totalling £161.66.

27. The payslip for November 2019 records

"Description	Amount
Non Salary Excepti	342.85"

With the assistance of Mr Root, the Tribunal understood this to be the exceptional payment of the amount that the Respondent had calculated the Claimant would have been paid by way of SSP for the month to 2 November 2019 plus the additional amount of accrued holiday entitlement upon a notional termination date of 4 November 2019. Because of the deduction of tax and employee's national insurance, the Claimant actually received £253.23. Mr Root's understanding is that the tax of £68.40 would ultimately be recoverable by the Claimant but not the national insurance of £21.22.

Conclusions

2 Days in May

28. The Claimant was paid for 2 days a week. Those days were treated as having occurred at the end of each week on Saturday and Sunday. Therefore when he worked on 30 and 31 May 2019, they were treated as having been worked on 1 and 2 June 2019 and counted as days in the month of June. The tribunal was puzzled as to why this mechanism would be necessary but accepted that over the course of a number of months it would even out. The Claimant had been fairly paid for the 4 months / 18 weeks to the end of September and there was no unlawful deduction from wages or breach of contract claim here.

29. The Tribunal was also satisfied that for a monthly paid employee on an annual salary, the appropriate calculation to be made for national minimum wage purposes was to divide the annual salary by twelve and then to divide that by one twelfth of the annual hours worked. There was therefore no failure to pay the national minimum wage.

30. The tribunal also accepted that if payroll is to be calculated to enable pay on the last day or last working day of the month, there can be a need to have a cut off point prior to the end of the month but noted that the Respondent's system appears to run into trouble when an employee leaves employment and it does not deal well with sick pay or holiday pay entitlement.

1 month's notice

31. The tribunal concluded that the Claimant gave 1 month notice in his letter of 4 October 2019. It certainly could have been clearer and the Respondent's mistake was innocent but it should have been tolerably clear to the Respondent when the Claimant wrote on 4 October attaching a sick certificate for the period from 2 October 2019 to 2 November 2019 that he was meaning to give notice (albeit also clearly intending to be on sick leave for that period). If the Respondent had been in any doubt, it should have made an enquiry of the Claimant rather than proceeding to issue the P45 and bring the Claimant's employment to an end. The Claimant's communication was not objectively sufficient to amount to a termination on 4 October 2019.

32. The tribunal therefore concluded that the Claimant was entitled to SSP for the period from 2 October 2019 to 2 November 2019. The absence of certification for the

two days Sunday 3 November and Monday 4 November 2019 made no difference to this calculation. The Claimant worked a regular pattern on Wednesdays and Thursdays and therefore the tribunal accepted that the calculation of SSP was correctly set out in the gov.uk website calculation supplied by the Claimant. If he had not been sick, he would have worked 10 days in October 2019 on 2 & 3, 9 & 10, 16 & 17, 23 & 24, 30 & 31 October 2019. He was certified as sick on all of those days. SSP is not payable for the first 3 days and therefore he was entitled to 7 days of SSP totalling £329.88.

Hot Spot Payment

33. The Claimant's contract of employment contained a reference to a 'discretionary' payment of £0.50 per hour. He received it every month for 4 months. It was paid to employees who took time off for holiday but not included in calculations of accrued holiday pay. The tribunal concluded that it was part of normal remuneration and should be included in calculations of accrued holiday entitlement on termination. The correct hourly rate for calculation of accrued holiday pay should therefore have been £8.85 not £8.35.

Number of Hours of Accrued Holiday Entitlement on Termination

34. The deduction of 7 hours from the Claimant's holiday entitlement on the basis that his holiday period started on Monday 30 September 2020 made no sense whatsoever. Mr Roots struggled to explain it and failed to convince the tribunal of his explanation. The days that the Claimant would have not worked because of his annual leave were Wednesday 2 and Thursday 3 October 2019. The Respondent's system would have treated them as being Saturday 5 and Sunday 6 October 2019. Those dates were covered by the sick certificate. Neither in reality nor in the Respondent's system would the Claimant have been working on Monday 30 September 2020. The tribunal could perhaps have understood a system in which an attempt was made to spread the 14 hours per week out over the course of 5 days or 7 days (with a holiday week being regarded e.g. as 2 hours per day) – although there could be practical and legal difficulties with such an approach – but simply deducting 7 hours in the way that was done made no sense.

35. Therefore the Claimant's holiday entitlement should have been calculated from 30 May 2019 to 4 November 2019 (5 complete months) without any deduction. On the basis of the Respondent's formulation (which the Claimant did not disagree with) of 70 hours per annum accrued at a rate of 5.84 hours per completed month, plus 3 hours for the one bank holiday that occurred during this period (the August bank holiday), this amounts to $(5.84 \times 5) + 3 = 32.2$ hours, paid at £8.85 per hour = £284.97.

Summary

36. The Claimant therefore should have received £329.88 plus £284.97 = £614.85. He has actually received £253.23 plus £161.66 and he may be able to retrieve £68.40 from HMRC = £483.29. The difference is £131.56.

37. Therefore the Respondent is ordered to pay to the Claimant the sum of £131.56.

Employment Judge Allen QC
Date: 10 August 2020