



EMPLOYMENT TRIBUNALS

Claimant: Miss R Southward

Respondent: Heart2heart Staff Solutions Limited

Heard at: Nottingham **On:** Tuesday 16 June 2020

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: In person **Respondent:** Mr W Haines, Legal Consultant

JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

1. The Claimant's claim for breach of contract in respect of notice pay fails and is dismissed.
2. The Respondent has failed to pay to the Claimant her holiday entitlement and is ordered to pay to the Claimant the sum of £782.00.
3. The counter claim fails and is dismissed.

REASONS

Background to this hearing

1. The Claimant presented her claim to the Tribunal on 5 July 2019. She said that she had been employed by the Respondent as a Domiciliary Support Worker. It is now agreed that the Claimant was employed from 10 August 2018 until 16 May 2019. She originally made claims of: -

- Unfair dismissal
- Discrimination
- Holiday pay

2. The claim of unfair dismissal was dismissed and the discrimination claim was withdrawn and it was agreed that the claims that should proceed to hearing today would be of: -

- Notice pay
- Holiday pay
- The Respondent counterclaim for overpayment of holiday pay

The issues

Holiday pay

3. It is not in dispute between the parties that the Claimant was employed between 10 August 2018 and 16 May 2019. She therefore worked for the Respondent for 40 weeks. It is also not in dispute that the Claimant took just 2 weeks' holiday at the beginning of April 2019. The issue for me today relates to whether the Claimant could roll over her holiday entitlement that she had accrued up until 31 March 2019. The Respondent says she cannot because of the provision in the contract and the Claimant says that she had not been able to take her holiday even though she had made requests to do so.

4. The Respondents case is that because she had taken 2 weeks holiday in April they wish to make a counterclaim for the holiday pay which was taken over her entitlement during the period between 1 April and 15 May. This is the counterclaim

Notice pay

5. In respect of this I need to determine whether the Claimant was dismissed or whether she resigned. If she resigned as the Respondents say then did she have grounds to do so. Have the Respondents committed a fundamental breach of her contract of employment which entitled her to resign. If she did what would be the notice period? The Claimant says she is due one week's notice pay as per her contract.

Evidence

6. I heard evidence from the Claimant and from Peter Vince who was the Claimant's Line Manager while she was employed by the Respondents.

7. I have also seen an agreed bundle of documents and where I refer to page numbers it is from that bundle.

Facts

8. The Respondent is an agency gap filling service for care homes and residential care services and provides staff to support services. These are short term cover calls through homes on a must needs basis. The business is owned by Ellen Gray and Rebecca Fraser.

9. The Claimant commenced her employment for the Respondents on 10 August 2018. That is when she undertook her first assignment.

10. Her statement of terms and conditions of employment are dated 9 August 2018 and are at page 59 of my bundle. That statements refers to the company's handbook and the handbook provides a policy relating to annual leave.

11. Under the policy the Claimant is entitled to 28 days holiday including bank holidays which is the statutory minimum entitlement.

12. It provides that the annual leave runs from 1 April to 31 March each year. It says:

- “Untaken annual leave does not roll over
- Annual leave is worked out by averaging out your last 12 weeks worked unless this is paid at your basic rate of pay
- All annual leave is subject to the needs of the business and a minimum of 4 weeks' notice must be allowed prior to the annual leave date
- All annual leave will be processed on a first come first served basis
- All annual leave must be used prior to the end of the period stated above
- Management will endeavour to inform staff of their remaining balance on request
- Any overpayment of annual leave will be recovered should extra annual leave be taken”

This is at page 53 of the bundle.

13. The Claimant worked on a zero hours contract. The hours that she worked varied each week. It is not in dispute that during her employment the Claimant earned a total of £12,136.19 but her hourly rate varied as can be seen on her payslips but her normal rate of pay would be £10.00 per hour. The Claimant's payslips are at pages 93 to 168 of the bundle. It can be seen from this that her original rate of pay was normally £8.10 per hour but this soon increased to the £10.00 per hour which was her normal rate of pay. Where she worked in the office she would only be paid £9.00 per hour and she was also paid on some occasions at £8.50 per hour.

14. It is not in dispute that during the period August 2018 to 31 March 2019 the Claimant did not take any paid holiday. It is accepted by Mr Vince that the Claimant did try to book holiday but he said that this was on short notice and that he had refused these two requests.

15. He says that he sent reminders to the Claimant about making sure that she took her annual leave before the end of the holiday year. He referred to text messages being sent but has no evidence of any text messages because he says the company had changed its phones.

16. I do not accept this evidence and prefer the evidence of the Claimant who is much more credible when she says that she was not able to take any paid leave

during this period. I am satisfied that she did make requests of the owners to take holidays but was not able to do so.

17. I am satisfied and it is not in dispute that the Claimant did take two weeks holiday at the beginning of April 2019 which were paid. She received one payment for £336.09 (page 163) and a further payment of £340.00 (page 164).

18. On 15 May 2019 Mr Vince received a call from a client to say that the Claimant had not undertaken a call that she needed to do that morning and that she had not given the client their medication.

19. The Claimant was contacted and she said that she had completed the call and logged the paperwork.

20. At a meeting on 16 May 2019 (notes of which are at pages 66/67) the Claimant admitted that she had not completed the call or the relevant paperwork and had lied to the Respondent when questioned about it on the previous day. The Claimant was suspended along with her partner.

21. The Claimant was later told that she would be disciplined in respect of this matter and in that discussion (page 68) she said that she had a new job anyway and was leaving. I am satisfied that this amounted to a resignation from her employment.

22. Subsequently she was paid for all shifts that she had worked up until 15 May 2019 but did not receive any further holiday pay and the company did not try to seek reimbursement in respect of the holiday she had taken at the beginning of the financial year.

The law

Breach of contract claim

23. If the Claimant resigned I have to decide whether the Respondents had committed a fundamental breach of her contract of employment entitling her to resign without notice. It is not in dispute in this case that the notice period is one week as per the contract.

Holiday pay/counter claim

24. I have considered the representations made in particular by Mr Haines in respect of this. He reminds me that annual leave entitlement is provided for by Regulations 13 and 13A of the Working Time Regulations 1998. These provide that the Claimant is entitled to 28 days annual leave or 4.8 weeks and:

“13(9) Leave to which a worker is entitled under this Regulation may be taken in instalments, but: -

- (a) it may only be taken in the leave year in respect of which it is due, and;

- (b) It may not be replaced by a payment in lieu except where the worker's employment is terminated."

25. Regulation 14 provides for compensation related to entitlement to leave where a person's employment is terminated during the leave year.

26. In his submissions Mr Haines relies on the company's handbook which is referred to in the statement of terms and conditions of employment which makes it very clear that any worker who does not take their annual holiday year loses it unless they have the written consent from the management. He refers to it as a "use it or lose it policy".

27. He says that the employer took steps to ensure that people took their leave in line with the ECJ case of **Crusager v Land Berlin**.

My conclusions

Breach of contract

28. I am satisfied that in her meeting with Mr Vince on 16 May 2019 the Claimant resigned from her employment. He had discussed with her the issue of whether there was going to be a disciplinary hearing and she made it clear that her and her partner had other employment and "we are both leaving".

29. As she resigned from her employment I must consider whether she had resigned because of the conduct of the Respondents and whether they had committed a fundamental breach of her contract of employment. They had not. I am satisfied that it was proper for them to suspend the Claimant and her partner because of their behaviour on 15 May 2019. They had not undertaken a call correctly and then not completed the relevant paperwork and lied to the Respondent when questioned about it.

30. For these reasons the claim for notice pay fails and is dismissed.

Holiday pay

31. I am satisfied that the Claimant commenced her employment on 10 August 2018 and that it ended on 16 May 2019. The Claimant was therefore employed for a total of 40 weeks.

32. The Claimant had signed a contract which referred to the annual leave policy in the handbook which made provision that the Claimant could not roll over holiday entitlement.

33. I am satisfied that the Claimant had requested leave during the annual leave year that ended on 31 March 2019 but this leave had been refused and she had not been able to take her leave at the end of the leave year. I am therefore satisfied that she was entitled to roll over that leave.

34. The Claimant during her 40 weeks of employment had therefore accrued a total of 21.5 days or 4.3 weeks.

35. She had taken 2 weeks' leave which was paid at her normal rate of pay. I am satisfied that the appropriate rate of pay for calculation of her holiday entitlement is £340.00 per week which was the amount that she was paid for her second week of annual holiday.

36. The Claimant is therefore entitled to a further 2.3 weeks of holiday pay at the point of termination of her employment. At the rate of £340.00 per week that means that she is entitled to £782.00 for her untaken holiday.

Counter claim

37. For the reasons explained above the counter claim fails and is dismissed.

Employment Judge Hutchinson

Date 16 July 2020

JUDGMENT SENT TO THE PARTIES ON

Date 3 August 2020.....

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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