



EMPLOYMENT TRIBUNALS

Claimants: 1. Mrs B Sim
2. Miss K Attenborough

Respondent: Dr S Barnsley

AT A HEARING

Heard at: Leeds by CVP video conferencing **On:** 21st, 22nd and 23rd
September 2020

Before: Employment Judge Lancaster

Representation

Claimants: 1. Mr J Crosse, solicitor (acting pro bono)
2. Mr L Bronze, counsel

Respondent: Mr M Howson, Peninsula Business Services Ltd.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was CVP video conference (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing

JUDGMENT

1. By Consent the claims of the First Claimant for unauthorised deductions from wages succeed and the Respondent is ordered to pay to her the following sums:

32.5 hours worked in July 2019	£410.48 gross
4.75 hours overtime outstanding	£59.99 gross
70 hours accrued holiday	<u>£884.10 gross</u>
	£1354.57 gross
2. The claim of the First Claimant for constructive unfair dismissal is dismissed.
3. The claim of the Second Claimant for unfair dismissal is dismissed upon withdrawal.
4. The claims of the Second Claimant for unauthorised deductions from wages succeed to the following extent, and the Respondent is ordered to pay to her the following sums:

8 days statutory sick pay @ £31.42 per day	£251.36 gross
3 days' (30 hours) holiday 21 st to 23 rd August 2019	£548.10 gross
9.29 hours accrued but untaken holiday	<u>£169.72 gross</u>
	£969.18 gross

REASONS

1. Written reasons are requested in the case of Miss Attenborough.
2. Her remaining claim is properly categorised as one for unauthorised deductions from wages. The issue is what is properly payable under the contract: section 13 (3) Employment Rights 1996.
3. There are two parts to that: a claim for payment of wages due in August 2019 up to the date of expiry of her notice of resignation on 27th August, and for accrued but untaken holiday up to that date.
4. When the Claimant tendered her resignation on 15th July 2019, giving six weeks' notice, she had already been off sick since 1st May 2019. Her contractual entitlement to sick pay, full pay for 6 weeks and half pay for a further six weeks therefore expired on 24th July 2019. Sick notes have been produced up to the end of July 2019.
5. She was paid at the end of July for that month. Although she raised a complaint because she claimed she had been paid three days late, on 28th July, that is not material to this case. The pay slip records that she received a combination of contractual and statutory sick pay, and she never queried the calculation of this payment.
6. Although they are not in the bundle of documents it is common ground that the Claimant then submitted further sick notes to take her up to 20th August 2019.
7. The significance of that date, 20th August, is that in her resignation letter the Claimant had indicated an intention to take the last week of her employment as holiday. That request was never met with any counter notice declining her request, and the Claimant's evidence was that she did in fact therefore treat it as three days holiday for the Wednesday, Thursday and Friday that she would have worked from 21st to 23rd August.
8. The Claimant did not ever return to work at the surgery in August 2019.
9. She did not notify the Respondent, Dr Barnsley, or anybody else that notwithstanding her submission of sick notes she was in fact intending to return to work from home.
10. She did not put in any particularised request to be paid for work allegedly done at that time.
11. For the first time in the course of this hearing, and therefore some 13 months after the end of employment, the Claimant has produced a supplemental list of contacts made by her with various people during July and August 2019, for which she now seeks to be paid at her contractual hourly remuneration. That list does not provide any timings for the work allegedly done. There is no reference to this basis of claim in the ET1 and nor is it mentioned at all in the Claimant's witness statement
12. The Claimant accepts that the matters referenced in her list are not the performance of her ordinary duties as a practice manager within the terms of her job description. They are what she describes as a "handover", though it is, with the exception of a single email from her to the Office Manager, Carol Smith, requesting that she liaise with NHS Digital, which was on 28th July, a record of her communications with external third parties to notify them of her impending departure. Other limited contacts with the surgery are apparently purely administrative, regarding the arrangements for termination.
13. At no stage did Dr Barnsley ever request or require the Claimant to do any work whilst she was signed off. His evidence, when appraised of the supplemental statement, that

Cases: 1805384/2019,
1806807/2019 & 1806780/2019 (V)

- he was surprised that the Claimant was still working when off sick cannot properly be construed as any admission that she was to be treated as still at work. I do not accept, absent any documentary evidence whatsoever in support, that the Claimant was involved in any substantive project work at this time.
14. There is no reason to imply a term that the Claimant be paid a “quantum meruit” for the time spent in communication with third parties, let alone that she should receive her full daily rate. In those circumstances I am fully satisfied that the Claimant is only entitled to be remunerated at the rate of statutory sick pay from 1st to 20th August 2019. That is at the then rate of £94.25 per week, which is eight working days at £31.42 per day.
 15. She is however entitled to be paid for the week’s leave that she booked for the end of the notice period and after expiry of her last sick note. Although her contract was only for 25 hours per week, it is agreed that she ordinarily worked 30 hours over three days in the week.
 16. The Claimant’s contractual holiday entitlement was to be calculated pro rata on 38 days, including the eight specified bank holidays.
 17. I agree with the Claimant’s calculation as to how that was to be apportioned. $38 \times 3/5 = 22.8$ days (7.56 weeks, on a 3 day week) and @ 10 hours per day that is 228 hours per annum.
 18. In the final leave year from 1st January 2019 the Claimant had therefore accrued, up to 27th August, 149.29 hours. $239/365 \times 228 = 149.29$.
 19. Up to time she went off sick she had taken 16 days (160 hours) leave. The Claimant’s record is only 15 days but she has omitted to take in to account the Good Friday Bank Holiday on 19th April, Friday being one of her ordinary working days but where she had only recorded the preceding Wednesday and Thursday in the week before Easter as holiday.
 20. That means that she had already exceeded her annual entitlement by 10.71 hours.
 21. The express terms of the contract of employment provide that: “The Principal Has the authority to approve requests to carry over up to 5 days of untaken annual leave to the next year. These days must be used within 3 months or they will be forfeited.”
 22. Although the Claimant never expressly sought the authorisation of Dr Barnsley it is accepted that in reality she, as practice manager, had the authority to carry over 5 days in accordance with this provision – although on a part-time contract that would allow her carry more than one week. The Claimant did herself have authority to approve similar carry forward provisions for other members of staff. There is however no evidence that any one else was thereby ever in fact allowed to carry more than 5 days, nor that anyone ever failed to take up the additional entitlement within the first three months of their next holiday year.
 23. Adding that full possible 50 hours carry over to her holiday allowance for 2019 brings the Claimant into credit by 39.29 hours. As I have already awarded her a further 30 hours holiday pay that leaves 9.29 hours outstanding.
 24. The Claimant however claims to be entitled to carry over 109 hours from 2018 into 2019, which would give her an additional 59 hours holiday.
 25. In previous years the Claimant had, without any consultation with or knowledge on the part of Dr Barnsley, carried forward more than the permitted 5 days. This was in breach of contract and her unilateral act does not serve to effect any variation of the express term of the agreement.
 26. The position had however regularised so that as from 2016 to 2017 she only carried forward 3 hours, well within the permitted number of days.
 27. In 2017 the Claimant took 15 days holiday. She records 14 days, but again she has omitted to include the Good Friday Bank Holiday on 14th April. That is, of course, in

Cases: 1805384/2019,
1806807/2019 & 1806780/2019 (V)

- excess of the minimum 4 weeks (12 Days) holiday prescribed under regulation 13 of the Working Time Regulations 1998. In this and in subsequent years therefore no issue arises as to failure to afford the statutory minimum period of leave.
28. Together with the 3 hours carry forward she then assess the untaken allocation as 91 hours. This she purports to carry over to 2018. In reality she has overstated the position by 10 hours, because of the missing bank holiday. Again, whether the carry over be 91 or 81 hours, this is a clear breach of contract: she is at most able to carry 50 hours.
 29. In 2018 the Claimant in fact took 23 days leave. In this year she has failed to include in her own calculation two bank holidays which fell on a Wednesday to a Friday: Good Friday and also Boxing Day. She calculates that at the end of the year she still has 109 hours owing. This however depends on perpetuating the miscalculation from earlier and also does not properly account for the additional two days holiday taken. That would bring the carry over down to 79 hours, and deducting the 31 hours incorrectly carried forward the previous year that would in fact reduce the figure to 48 hours.
 30. As it has, however, effectively been conceded that the Claimant may carry over 50 hours and the argument has been over whether she may also carry over the claimed additional 59 hours, I do not reduce the award.

EMPLOYMENT JU DGE LANCASTER

DATE 23rd September 2020