



EMPLOYMENT TRIBUNALS

Claimant
Mr Andrew Henman

Respondents
Lane 7 Ltd (R1)
Liquorette Ltd t/a Lane 7 (R2)
Lane 7 HR Ltd (R3)
Lane7 (R4)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP)
EMPLOYMENT JUDGE GARNON (sitting alone)

On 18 January 2021

Appearances

For Claimant in person
For Respondent Mr Graeme Smith , Director

JUDGMENT

1. The claim of breach of contract and all claims against R4 are dismissed.
2. The claim of unlawful deduction from wages is well founded. I order the respondents to repay to the claimant £294.83 +£582.04 = £876.87
3. The claim for compensation for untaken annual leave is well founded. I order the respondents to pay to the claimant compensation of £ 1868.02

REASONS (bold print is my emphasis)

1. Claims and Issues

1.1. The claimant born 12 November 1987 was employed from 22 February 2019 as a multi site General manager. R1, R2 and R3 are part of a “group” of companies which run hospitality venues. Their registered office is 70 Victoria Road, Darlington, England DL1 5JG. R4 is simply a trade name. All respondents say R3 has employed the staff since February 2020 but possibly there is a partnership of companies and the safer course is to enter judgment against all for which they are jointly and severally liable. Payment by any one discharges the liability of all.

1.2. On the claim form the boxes ticked are notice pay, holiday pay and arrears of pay. The last is a claim of unlawful deductions from wages by way incorrect calculation of pay for days worked between 7-15 July which should have been paid at a daily rate of £ 115.38 per day but were mistakenly calculated at an hourly rate leading to a shortfall. His one month’s notice was paid at

80% of normal pay which applied during furlough despite him returning to work a week earlier so should have been paid at 100% leading to a shortfall.

1.3. The remaining claim is for compensation for untaken annual leave The respondents say it was “paid via furlough” at 80% leaving 20% to be paid which it has paid. The claimant says more untaken leave should be compensated

1.4. The issues are (a) when did termination take effect (b) which parties arguments are factually correct as to what was paid and should have been (c) whether what the respondent purported to do in relation to annual leave was lawful.

2. Findings of Fact

2.1. The claimant was “furloughed” from 20 March 2020 when the venues he managed closed. They were allowed to reopen and he returned to work on full pay on 7 July 2020. He was dismissed at a meeting on 15 July 2020 due to the economic situation. A letter sent confirming this on 20 July reads he would be paid “ *your contractual notice of one month’s salary and any Holiday pay entitlement that may be owed to you and your P45 will issued in due course*”

2.2. He was paid **with payslips** on 31 July 2020 and 31 August 2020 but the amounts are not clearly explained. There are multiple elements to his July payslip. He believes he has been able to work out how his pay and notice pay been calculated incorrectly. His salary was £30,000 per year at the time of dismissal. This gives a day-rate of £115.38 for a five day week.

2.3. The case depends on the effect of two documents. The first is dated **27 March 2020**

Agreement for Furlough Leave

Further to my letter dated 18 March 2020 the government have announced financial measures to support business with wage costs.

Although the full details are not all known at this time we are writing to you to seek your agreement to again vary your contract of employment, to now be able to implement and take advantage of the government’s Coronavirus Job Retention Scheme and retrospectively place you on Furlough.

It is our understanding at this time that the Government will pay 80% subject to a maximum liability of £2,500 per month, including employer’s national insurance contributions and employer’s pension contributions of your salary during your Furlough Leave.

- 1. I agree to be on Furlough Leave, this means that my contract of employment continues, but I shall not be required to come into work.*
- 2. I agree that my salary will be limited to the 80 % of monies which the government will be paying the company during the period of Furlough Leave*
- 3. I agree that I will defer receiving from the company, payment of my salary until such time as the company receive the 80% monies under the Coronavirus Job Retention Scheme*

4. I agree that I will not be eligible to accrue any holiday while on Furlough leave until my period of Furlough leave comes to an end, I can also not use any accrued holiday until I return to full time work

5. I agree that my Furlough Leave shall end on the earliest of the following events:-

- (a) the government's Coronavirus Job Retention Scheme ending
- (b) either the company ceasing to be eligible for funding under that scheme; or,
- (c) the company deciding to cancel Furlough Leave and bringing me back to work.

6. During my Furlough Leave, I may not work for any other organisation, or on my own account. If I do, I must tell the company, and I may be liable to repay any sums the company has paid you under this scheme if the company become liable to repay it to the Government.

The remaining terms of your Contract shall be unaffected by these changes.

If you agree to these changes, please indicate your acceptance by signing and returning this letter to me (Tim Wilks) by Monday the 30th March 2020. The changes shall be immediately effective from the date of your signature. You should keep a signed copy of this letter safe, together with your Contract, which shall be amended by this letter.

If you have any questions, please contact me.

Thank you for your patience during these times

Yours sincerely,

Mr Tim Wilks

2.4. The claimant signed that and returned it on 28 March. He does not dispute his furlough pay was 80% of normal pay. In July's pay, he should have been paid at furlough rate up to 6 July, full pay 7-15 July and 1 month's notice pay. This point depends on whether he was given notice but not required to work it, or termination took effect on 15 July and he was paid in lieu of notice. My finding is the latter was what he understood but the former is what happened. In that case he should have been paid full pay 16 - 31 July and 1-15 August. The total should be £2500

2.5. As far as he and I can see the 1-6 July furloughed salary is correct at £553.84 This is likely to be part of the 'Furloughed Salary' line of the July payslip. For 7-15 July full pay for 8 days worked (he had one day off) £115.38 day rate x 8 days = £923.04. *The 'Salary' line of the July payslip details £628.21 paid for these days. £923.04 - £628.21 = £294.83* outstanding. The company appears to have paid him hourly for this line. This is incorrect as Mr Smith conceded.

2.6. Mr Smith also conceded Notice Pay was by mistake calculated at furloughed rate When the furloughed days at the start of July are removed (£553.84) from the 'Furloughed Salary' line (£1548.72), £1548.72 - £553.84 = £994.88 must be attributed to the notice period. His August payslip only covers notice pay, no other elements, and shows he was paid £923.08. £994.88 in July + £923.08 in August = £1,917.96. The correct notice pay is £2500 - £1917.96 means £582.04 outstanding.

2.7. The contested issues are in relation to Holiday Pay. The parties agree the holiday year runs 1 October - 30 September. 1 October 2019 to 14 August 2020 is 319 days and, 2020 being a leap year the full year is 366 days. His annual entitlement is 5.6 weeks expressed in his contract as 28 days. In October and November of 2019, he took 5 days of holidays individually which is one week based on a five day week. On the July payslip, the holiday line states he was paid £370.43 The

claimant says he had 20 days to be paid for at the date of termination . 20 days x £115.38 = £2307.60. Therefore £2307.60 - £370.43 = £1937.17 outstanding. The respondent says £370.43 is 20% of holiday pay entitlement. I will deal with the calculations after setting out the law

2.8. The purported effect of the emboldened paragraph in the March letter quoted above (a) to **stop** annual leave **accruing** during furlough (b) to prevent a worker electing to take such leave during furlough. It says nothing about the employer compelling a worker to take it thereby using up accrued leave during furlough. On the contrary, it recognises accrued leave will remain to be taken on return. A letter dated **7 July 2020** reads:

Dear Team

I hope you are keeping well.

*I am writing to provide a **further update** on holiday entitlement whilst being furloughed under the Coronavirus Job Retention Scheme.*

*As you will recall, due to the uncertainty of the situation **when the venues closed, it was proposed** that any annual leave accrued would **be reduced each week that employees remained furloughed therefore depleting your annual leave entitlement gradually**. This would have meant for many, that unfortunately annual leave would be lost due to not having the opportunity to take it prior to the government ordering the closure of the hospitality and leisure sector.*

We have been able to revisit this proposal and I am pleased to confirm we are now in a position to provide what we as a business believe is a much more suitable and fair solution for everyone's remaining leave entitlement.

Salaried Employees:

All salaried employees will be paid their remaining holiday entitlement balance.

(remaining balance = annual entitlement – leave already taken).

The payment will be made in line with Government legislation.

*80% of your holiday pay **has been paid** by the Coronavirus Job Retention Scheme and the additional 20% being paid by Lane7.*

This will mean your annual leave balance on return to work will be zero with your new entitlement starting as normal in line with the new holiday year.

Hourly Paid Employees:

All hourly paid employees will be paid the balance of the accrued holiday up until the end of this holiday year 2020

(balance = hours accrued – leave taken to date)

The payment will be made in line with Government legislation.

80% of your holiday pay has been paid by the Coronavirus Job Retention Scheme and the additional 20% being paid by Lane7.

This will mean your annual leave balance on return to work will be zero with your new entitlement starting as normal in line with the new holiday year.

All annual leave payments will be made during July with salaried team being paid in the pay run at the end of the month.

Should you have any questions regarding this, please don't hesitate to contact your line manager who will be happy to assist further.

2.9. The purported effect of this letter is that during furlough employees were deemed by the employer to have “used up” accrued annual leave and upon payment of the 20% extra there would be none left when the worker came back to work. The first point to make is that unlike the March letter this was a proposal not an agreement. Mr Smith said today the respondents, and others in the hospitality sector, took legal advice at the time they could require workers to take annual leave during furlough. He concedes, at no time did the respondents notify the claimant of specific days on which they required him to take.

3. Relevant Law

3.1. The common law provides a contract of employment may be brought to an end by reasonable notice. Dismissal without such notice is termed “wrongful”. Damages are the amount of pay due during the notice period (see Addis-v-The Gramophone Company). If a person is dismissed without the notice to which he is entitled, his claim is for breach of contract, but if he is given notice and not required come to work during the notice period (commonly called “garden leave”) his pay during that period is wages , see Delaney-v-Staples . That was the situation.

3.2. The law relating to unlawful deduction of wages is in Part 2 of the Employment Rights Act 1996 (the Act) and s 13 includes

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

*(a) the deduction is required or **authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract**, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

*(3) **Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.***

The effect is an underpayment is an unlawful deduction. The claim for notice pay, though brought as a breach of contract claim, is better viewed as part of his unlawful deduction of wages claim Neither amount is contested.

3.3. The law in relation to annual leave is contained in the Working Time Regulations 1998 SI 1998/1833 (WTR). Regulation 14 includes:

(1) This regulation applies where –

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or
(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula –

(AxB) -C

where -

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

3.4. The leave year **is agreed**. The amount of the claimant's week's pay calculated in accordance with Chapter 2 of Part 14 of the Act 1996 was £576.92 gross.

3.5. Regulation 15 includes :

(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days **as he may elect** by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13 and regulation 13A or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) **shall specify the days** on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker **before the relevant date**.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

12. Regulation 35 includes :

(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of these Regulations, save in so far as these Regulations provide for an agreement to have that effect, or

(b) to preclude a person from bringing proceedings under these Regulations before an employment tribunal.

3.6. The agreement of 28 March is void in so far as it purports to **stop** annual leave **accruing** during furlough. It is also void in so far as it imposes a blanket prevention on a worker electing to take leave it during furlough. Not only does it say nothing about the employer compelling a worker to take leave thereby using up accrued leave during furlough, but also I have seen nothing which could amount to a notice from the respondents under Reg 15 (2)(a) and 4 (a) **on particular days**

3.7. What the respondents purported to do, so Mr Smith argues, is lawful. I am aware of no cases, even at Employment Tribunal level, which directly address the issue of whether an employer can compel a worker to take leave during the pandemic. This is unsurprising as the pandemic started to have a devastating effect on everybody less than a year ago. I see both sides of the argument. What worker would choose to take annual leave, if he cannot travel or be with friends and family? What employer would not try to ensure its business, having already been adversely affected (none more so than the hospitality sector) did not have to pay workers on return to work for periods when they are not working because they are on leave?

3.8. Leave accrued but untaken during the leave year in which termination occurs must be compensated. The position is less clear as to leave accrued but untaken during previous leave years. It is well established by the Court of Justice of the European Union (CJEU) a worker on long-term sick leave who is unable **or unwilling** to take annual leave must be permitted to carry over that leave into a subsequent leave year Pereda-v-Madrid Movilidad SA 2009 IRLR 959. In domestic case law NHS Leeds-v-Larner addressed the issue NHS Leeds employed Mrs Larner, who was absent on sick leave for the whole of the leave year 2009/10, during which she neither took paid annual leave nor requested to carry it forward to the next leave year (2010/11). Very early on in that year she was dismissed. NHS Leeds refused to pay her for the leave not taken by her in 2009/10. The WTR which implemented Article 7 of the Working Time Directive, originally 1993/104/EC, now 2003/88/EC (the Directive), and must, if it is possible to do so, be interpreted and applied compatibly with it. Mummery LJ gave a summary of Article 7 rulings including

(2) A worker absent on sick leave, as the claimant was, is still a "worker" (though not at work) and may, during absence on sick leave, accrue entitlement to paid annual leave.

(3) If a worker on sick leave is unable or unwilling to take paid annual leave because of sickness, as was the case with the claimant, paid annual leave must be granted in another period, if necessary beyond the leave period concerned.

(4) A worker absent on sick leave throughout a leave year, as the claimant was, does not lose entitlement to paid annual leave at the end of that year, or the right to take paid annual leave at another time when the worker is not sick.

(5) The carry forward period for paid annual leave must be substantially longer than the reference period.

(6) Any allowance on termination of employment in lieu of paid annual leave must place the worker in the same position as if he had exercised the right to take paid annual leave during employment and so must be calculated in accordance with the normal remuneration payable for the period of paid annual leave which the worker has not been able to take because of sickness.

3.9. His Lordship's conclusions were:-

(1) Mrs Larner was entitled to paid annual leave in the leave year 2009/10.

(2) She was prevented from taking her paid annual leave because she was sick.

(3) She was entitled to carry her untaken paid annual leave forward to the next leave year in 2010/11 without making a prior request to do so.

(4) As her employment was terminated in that year, before she could take the carried forward leave, she was entitled to payment on termination for the leave she was prevented from taking.

3.10. The consistent message of CJEU is the Directive, and WTR, are a health and safety measure recognising the purpose of annual leave is to enable workers to take periods of time for rest and recuperation. Where leave is untaken in a relevant year, not because the worker is unable to take it, but because the employer has refused to allow it, any backdating of unpaid holiday pay due under Reg 13 can go back over the whole period of employment, King-v-Sash Window Workshop Ltd 2018 IRLR 142. In Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry-v-Hyvinvointialan 2020 ICR 336 the CJEU confirmed this does not apply to annual leave in excess of the four-week minimum provided for by the Directive. I mention these cases as an analogy

3.11. The Department for Business, Energy and Industrial Strategy guidance 'Holiday entitlement and pay during coronavirus (COVID-19)' was published on 13 May 2020. It addresses the position of workers who continue to work and those placed on furlough. It has no legal effect, however, and tribunals will not be required to follow it when deciding working time and holiday pay cases.

3.12. The guidance makes clear furloughed workers continue to accrue entitlement to annual leave under the WTR and can take holiday without bringing the period of furlough to an end. **It suggests** employers can require workers to take holiday while on furlough but notes '*the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday*'. The guidance does not give a clear view on whether holiday taken during furlough meets the aim of annual leave set down in CJEU case law, which emphasises such leave must enable the worker to rest and to enjoy a period of relaxation and leisure. The guidance states holiday pay during furlough must be 'the correct holiday pay in accordance with current legislation', which is normal remuneration. Where this is above the furlough rate of pay, the employer will have to pay the difference but will still be able to claim up to 80% (or £2,500 per month) under the CJRS.

3.12. The Working Time (Coronavirus) (Amendment) Regulations 2020 SI 2020/365, which came into effect on 26 March 2020, provide where it has not been reasonably practicable for a worker to take some or all of the basic four weeks' annual leave due to the effects of coronavirus, the untaken amount may be carried forward into the following two leave years. The guidance indicates, when considering whether it was not reasonably practicable for a worker to take leave, factors an employer should consider As for furloughed workers, the guidance notes say they will be unlikely to need to carry forward statutory annual leave as they will be able to take it during the

furlough period, so long as the employer pays the correct rate of holiday pay. If, however, the employer is unable to fund the difference between furlough pay and holiday pay owing to the impact of coronavirus on its operations, this would be likely to make it not reasonably practicable for the worker to take the leave, enabling the worker to carry it forward.

4. Conclusions on Holiday pay

4.1. In my judgment the respondents did not achieve what they wanted because they did not **properly** require the claimant to take leave on **particular** days in the manner required by Reg 15. I need not address at length the theoretical issue of whether, had they done it differently, they might have succeeded, but the parties wish me to briefly. My view is the CJEU case law and the guidance notes quoted tend, by analogy with the position of sick workers, to show forcing a worker to “use up” leave when it cannot be enjoyed as a period of rest and recuperation, is not lawful. However, as Sir John Mummery did in Larner, I resist the temptation to decide a point I do not have to interesting though it is.

4.2. The claimant’s calculations use a day rate to give a certain figure. Applying the Reg 14 formula literally (AxB) -C, **A** is 5.6.weeks **B** is 319/366. 5.6 divided by 366 x 319 = 4.88. C expressed in weeks is 1. 4.88 -1 is 3.88. A week’s pay is £576.92. Multiply by 3.88 = £2238.45. Less £370.43 already paid leaves £ 1868.02.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 18 January 2021