



EMPLOYMENT TRIBUNALS

Claimant: Mr C Sanderson

Respondent: Fission Recruitment Services Limited

HELD AT: Liverpool (by CVP)

ON: 7 October 2020

BEFORE: Employment Judge Benson

REPRESENTATION:

Claimant: In person

Respondent: Mr M Heatherington, Managing Director

JUDGMENT having been sent to the parties on 20 October 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

Claims and issues

1. The claimant brings claims of:
 - a. breach of contract in that he says he was not given notice or paid in lieu of his notice period. He says he was entitled to one weeks' notice. The respondent says that the claimant resigned with immediate effect on 6 January 2020 and even if he hadn't he would have been dismissed for gross misconduct and therefore it was not obliged to give notice.
 - b. Unlawful deductions from pay being:
 - i. Holiday pay; the claimant says he was due 2 days accrued annual leave

- ii. Commission payments; the claimant says he is owed £600 for commission on a £10,000 placement.

Evidence

2. I heard evidence from the claimant and on behalf of the respondent from the following: Mr M Heatherington - Managing Director, Ms S Shaw – Recruitment Manager, Ms L Humphrey – Administration Department Manager and Mr A Tarrant – Operations Director. I was referred to a bundle of documents of 188 pages which had been agreed between the parties. Page numbers in this judgment are references to pages within the bundle.

The Law

Unlawful Deductions from Pay

3. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by her. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

Notice Pay

4. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

Findings of Fact

5. The claimant was employed by the respondent, a recruitment company between 2 September 2019 and 10 January 2020 as a Lead Recruitment Consultant. The terms of Mr Sanderson's contract required him to give one week's notice if he intends to resign.

Notice Pay

6. On 6 January 2020 just after midnight, the claimant emailed Mr Tarrant and Mr Shaw giving notice of his resignation. The relevant extract from the claimant's email said:

'Alan/Sam,

I'm really sorry to have to do this however, please accept this email as notice of resignation from my position with Fission.

[.....]

I'm not sure what office you're both in tomorrow so just let me know where to head as I know you will want my stuff back and of course more than happy to explain properly in person.

Kind regards

Curtis'

7. At 7:23am the following morning Mr Tarrant emailed the claimant (page 86) and asked him to head into Manchester. The email said:

'No worries mate. It's not come as too much of a surprise if I'm honest.

Can you head into Manchester and we can have a chat

Kind regards'

8. He also sent a text to the claimant around about that time (7.29am) (page 87) which said:

Hi Mate, just seen your email. Bit gutted but not totally unexpected. Can you come over to Manchester and we can have a chat. No rush just some point today. If you leave it till a bit later you can probably drive in.

9. I accept that at that time Mr Sanderson was making his way to the station in Liverpool to get the 7:35 train into work. On receiving the text, he changed his plans and decided to go into Manchester later that day. At approximately 10:00am Mr Tarrant called the claimant and during that conversation tried to persuade him to stay with the respondent. I accept that Mr Tarrant did discuss garden leave with the claimant and that there was an acceptance by him that Mr Sanderson would not be required to work through the rest of that week.

10. I have come to this conclusion for the following reasons. I consider that Mr Sanderson deliberately did not put a proposed termination date in his notice letter as this was something that he intended to discuss with Mr Tarrant. Mr Sanderson expected to be put on garden leave, as he explained, and as such that issue would have been one which he expected to discuss during that call, and I find was discussed. Mr Tarrant having later realised that he may have agreed to something which Mr Heatherington would not have accepted, sought to cover his mistake by later referring in an email to Mr Sanderson having been dismissed for gross misconduct, which makes no sense in the circumstances of this case.

11. I have to make judgments based upon the evidence I read and what I hear from the parties, and what is more likely to have happened. In claims such as these it is for the claimant to prove his case on the balance of probabilities. I have in this instance on balance decided to accept Mr Sanderson's evidence of this particular conversation.

12. Following on from that telephone call, Mr Sanderson drove into Manchester that afternoon to hand over his laptop and other items. He cleared the laptop before he left, wiping it as it has his girlfriend's confidential work on it. I do not accept as Mr Heatherington asks me to that it was deliberately cleaned to remove all of the information that was useful to Mr Heatherington. The result was however that useful information was removed and I know Mr Heatherington has obviously spent some considerable time trying to reconstruct what was on there. I accept that Mr Sanderson also understands that has happened and that he was sorry for the problems caused.

13. By the time of that meeting in the afternoon with Mr Shaw and Mr Tarrant, they both knew that the claimant was only coming in to hand over his laptop and that he would be finishing that day. There was therefore no need for any further discussion in relation to garden leave or what else was happening for that week.

14. Much of the evidence that I have heard has been about Mr Sanderson's intentions regarding his wiping of the laptop and sending of an email of 20 December to his personal email address. I accept Mr Heatherington's evidence that the contact which was sent was a valuable contact, but I consider that Mr Sanderson's intentions concerning that information at that time are not relevant to the issues which I have to decide today.

15. In relation to notice pay, the claimant's contract provides that the employer may put an employee on garden leave (paragraph 12.2) and that the employee would be paid for that period. I find that the respondent, through Mr Tarrant, had put the claimant on garden leave from 6 January for one week by not requiring him to work his notice. I consider, however, that Mr Sanderson did (and I do not use this word critically) manipulate the situation to his advantage. He had agreed a start date for his new role of 13 January and he expected to be put on garden leave by the respondent. His letter of resignation was in my mind key: he stated that he was "giving notice of resignation" not that he was resigning with immediate effect as suggested by the respondent. I consider he used those words carefully, expecting there to be some discussion about his termination date. Mr Sanderson anticipated that he would agree a final date or position with Mr Tarrant and that was what happened in that telephone call. As such Mr Tarrant agreed that Mr Sanderson was on garden leave during his notice period which was to run for one week. I can see no reason why Mr Sanderson would give notice with immediate effect when his new job did not start until 13 January, and that has had an influence on my findings.

16. I therefore find that the respondent did breach the claimant's contract by not paying him for his notice period.

Holiday Pay

17. The claimant claims 2 days accrued holiday. It has been accepted by the respondent that the claimant was entitled to seven days' holiday up to 31 December 2019. He took holiday on 20 September, 23 September, 16 December and 23 December. I do not consider that he took a day's holiday on 24 December. There has been no evidence produced to me that the claimant made a request for holiday for that date, and although I do appreciate that at the present time with COVID it is

difficult to obtain information and documents, I can only work on the information and the evidence which is provided to me.

18. I have seen the exchange of texts with Mr Tarrant which demonstrated that Mr Tarrant was taking a very relaxed approach to working over 23 and 24 December. The claimant asked whether Mr Tarrant wanted him to come in on Tuesday 24 December and Mr Tarrant replied:

'No. Tuesday will be a right off as planned! I've said to Mark we should go on the lash Monday afternoon in Chester if you're up for it? Not a late one just a little pub crawl then home..! Emma and Steph are game..!'

19. I consider that this was not intended to be a formal holiday by Mr Tarrant.

20. As such the claimant's entitlement to accrued but untaken holiday was three days as at his date of termination. One of those days has been paid.

21. The respondent argues that Mr Sanderson was overpaid in respect of other days when the respondent considers he was not working and it is entitled to deduct such amounts from his accrued holiday pay. It says that it overpaid the claimant for 3 December (there was some confusion as to whether this was 3 or 4 December) and also for a number of days when the claimant was supposed to be working over the Christmas period but did not log onto his computer.

22. I accept that on 3 December the claimant worked from home following an injury to his back and that Mr Heatherington had told him that he could take it easy that day. At that time the respondent had no intention of deducting a day's pay from the claimant. At that point, he was doing well within the business and they were happy to give him some leeway. It was only after his resignation when the respondent considered that the claimant was seeking to take work from them, that it sought to re-name this as a day's sickness and suggest therefore that the claimant was overpaid.

23. Although this was not raised in the response filed by respondent, during this hearing the respondent says the claimant was also overpaid for 27 December, 30 December and 31 December 2019. It says that the IT report shows that his PC was not switched on during those dates and therefore it was entitled to deduct this from his accrued holiday pay in accordance with a deductions clause in the contract. It states that the claimant did no work on those days. The claimant accepted that he just did a few bits and pieces of work as required as he was told that the office was closed. I accept that on or around 10 December, Mr Heatherington told his staff that the respondent expected its employees to check emails whilst at home over that period, but they should not 'take the mickey'.

24. I find however that the respondent's expectations of its staff over the Christmas period were imprecise and they took a flexible and relaxed approach to the work that their employees were required to do. This is supported by Mr Tarrant's approach to 23 and 24 December. This was the first Christmas that Mr Sanderson had experienced with the respondent and although Mr Heatherington may now be of the view that Mr Sanderson was taking advantage of his direction that the staff did not have to go into the office (or as Mr Sanderson understood, the office was

closed), I can accept that Mr Sanderson could have taken that as meaning that during that period he just had to keep matters ticking over.

25. The difficulty is when employees are told that there is no need to come into the office or the office is closed and they are given vague instructions such as that provided by Mr Heatherington, it is left to the employee individually to interpret what this means. It may mean different things to different people. Employees could consider that it means that they should keep an eye on things by checking their emails, perhaps on their phones and responding where necessary, or they could read the instruction as the company telling them to have a break over Christmas, or they might alternatively consider it means sitting at the PC from 8.00am to 6.00pm as usual. The difficulty is that it is not entirely clear.

26. As such the claimant was not overpaid for that period and it is therefore not open to the respondent deduct monies on that basis.

27. As such I find that the claimant is owed two days' holiday pay.

Commission

28. Finally, in respect of the commission payments, there is reference as a heading in the claimant's contract of employment to 'Salary and Commission'. No mention of commission is then made in the clause or contract but there is detail of the commission scheme in the company handbook which I accept that the claimant was given when he commenced employment. He may not have read it or even remembered it, but he did receive it. In the handbook in the section concerning commencing work, it states that

'[the] contract of employment, together with other details within this handbook, deal with conditions of employment applicable to you at Fission Recruitment Services Limited.'

29. In that handbook are details of commission arrangements, including the requirements as to when payments are to be made to employees who are leaving employment. Page 68 of the handbook states:

"Subject to the rules contained in the commission plans, the criterion for eligibility is that all supplier allowance credits and all customer invoices relating to the transaction are paid in full. Commission will be paid in the month following settlement of all credits and invoices on the transaction."

It later says:

"In the event of a member of staff leaving the company's employment, commission on any deal that becomes eligible under the company's commission rules up to the end of the month in which the employee leaves will normally be paid to them in the following month. No commission will be payable beyond that date."

30. The handbook itself is not contractual and it is not the contract of employment, but it provides additional detail and explanation of the conditions of employment. It is not disputed by the respondent that there was a contractual commission arrangement in place for the claimant. I accept the evidence of the respondent that as stated in the handbook, individual plans were issued annually, but there were a set of standard rules which applied across the company in respect of commission payments as set out above and these rules and this was the process which was always undertaken by the respondent when paying commission. Further it was the basis of the commission arrangements when the claimant accepted employment. By custom and practice, the standard rules in paragraph 26 above have become incorporated into the company's terms of employment in respect of commission and were a term of the contract between the claimant and the respondent.

31. Although the candidate was placed by the claimant, he did not start his new role until 3 February, and the invoice was not issued until April. As such the Mr Sanderson was not eligible to be paid commission in respect of that candidate and there has been no unlawful deduction from pay or breach of contract by the respondent.

32. What Mr Heatherington said or did not say in his ET1 or his statement as to what he believed about the progress of Mr Westwood's application/recruitment, the fact is that the terms of the contract override this.

Awards

33. Mr Sanderson provided a Schedule of Loss. His gross weekly salary was £675 (£135 per day) to include his car allowance. It was agreed by the parties that the net salary was £545.00. The claimant was required to provide one weeks' notice for which he was not paid. I therefore award damages in the net sum of £545.00.

34. The respondent had failed to pay the claimant two days accrued holiday entitlement. His daily gross pay was £135.00. The respondent is ordered to pay to the claimant the gross sum of £270.00.

Employment Judge Benson

Date: 23 February 2021

REASONS SENT TO THE PARTIES ON

25 March 2021

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