EMPLOYMENT TRIBUNALS

Claimant: **Miss H Moreton**

Respondent: **Swanbridge Veterinary Group Limited**

HELD: **By CVP** **ON:** **4 February 2021**

BEFORE: Employment Judge Wade

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr Levison (Director/Principal Vet)**

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 4 February 2021, the written record of which was sent to the parties on 5 February 2021. A written request for written reasons was received from the claimant on 5 February 2021. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 4 February 2021 are repeated below:

JUDGMENT

The claimant's complaints of unlawful deduction from wages/a failure to pay holiday pay on the termination of employment and/or notice pay are dismissed.

REASONS

Introduction

1. This claim is in relation to holiday pay after the claimant was furloughed during the early stages of the pandemic. She subsequently resigned on good terms and for an unconnected reason from the respondent veterinary practice, where she was employed as a student veterinary nurse. This has been a hearing by remote video link (CVP) because of the third national lockdown. The parties were content that the hearing proceed by video link. It was a short track hearing completed in a one hour listing and very brief directions. Both parties were litigants in person.

2. I heard oral evidence from Ms Moreton and from Mr Levison on the matters set out in the claim and response, and with each having the opportunity to ask the other questions. I had some limited documents on the Tribunal's file. There was very little factual dispute and I considered the oral evidence I heard honest and reliable.

3. The claimant had ticked the boxes in the claim form saying: "I am owed, notice pay, holiday pay, other payments". After setting out a chain of events she said this: "I feel I am owed the annual leave I did not receive, plus the 1.5 days that were deducted from my final pay…It is not stated in my contract that this can be done." She then quantified that sum (11.5 days) as £704.14 (including credit for sums she had received as a top up to her furlough pay). There was no dispute between the parties as to her calculations.

4. The respondent said that it believed it had applied the furlough guidance at the time, had done everything fairly and correctly, and that it was agreed that on the claimant's departure 1.5 days would be deducted from her pay as over taken holidays.

Findings of Fact

5. The claimant started employment with the practice on 7 January 2019. She was a student veterinary nurse working a full time five day week, eight and a half hours a day. She had written terms of employment provided to her which were short and straightforward. She was paid weekly every Friday and was provided with a payslip. That was the normal course of events prior to the pandemic.

6. The claimant's written contract of employment entitled her to 20 days' holiday plus eight bank holiday days in each holiday year - the amount set as a minimum by the Working Time Regulations 1998 ("the WTR"). Those holidays were said to accrue across the holiday year. There was no provision about payment for holidays or in lieu of holidays, whether on the termination of employment or otherwise; nor was there provision for the recoupment of overtaken holidays on termination in the short written contract. The holiday year was from 1 January to 31 December. There was also an employee handbook but the claimant did not ever have reason to consider its provisions.

7. The respondent is a group of veterinary practices which employed around 24 staff, with seven branches. Mr Levison is the principal vet in the practice.

8. Of the 24 or so employees, a skeleton staff was maintained from the end of March 2020 in response to the government's decision to require people to remain at home. There were four or five employees, including Mr Levison, that did work to enable the practice to function over that time, for animal care and emergency treatment for example, but the majority of staff were sent home.

9. Ordinary weekly pay continued to be paid at first and then as soon as the furlough scheme was introduced, the practice started to generate payslips which recorded furlough pay at 80% of usual earnings and to pay employees in accordance with those payslips. For the claimant that was the case for eight weeks or so between 24 March and 18 May 2020. The paper payslips were kept at the practice during that time, until they were collected on the employees' return to work. The claimant made no complaint about those arrangements.

10. The respondent then considered the prospect of staff taking holidays during the remainder of 2020 because there had been an announcement or press comment from the Prime Minister about people being able to take their holidays later in the year. That alerted the respondent to the potential issue of struggling to cover operations if there was a build up of untaken holidays. There was also the prospect of the survival of the practice if there was little or no work being done, and possible redundancies as a result. It decided to ask furloughed staff to agree to be treated as having taken half of their holiday during their furlough time (ten out of twenty days, excluding bank holidays, for full time staff).

11. The claimant had returned to work on Monday 18 May. There was discussion amongst staff about the inequity between those who had been furloughed and those who had not. In the week commencing 1 June, the staff, including the claimant, were told about the holiday arrangement proposed. The reasons were explained. The respondent did produce a written agreement for staff in relation to these arrangements, but they were well understood, as were the reasons for them and they were the subject of agreement. On 5 June the claimant received her usual pay, and a 20% top up for the ten days, agreed to be treated as holidays during furlough.

12. Neither the claimant nor any other members of staff raised any complaint about this arrangement at the time, nor sought to return the furlough top up pay.

13. The claimant then worked as usual without protest and received her ordinary pay as before. She found a new role as a veterinary nurse starting on 3 August at a different practice. At the beginning of July she handed in the four weeks' notice required by her contract of employment. That was to bring her employment to an end on Thursday 30 July and was the last day that she worked. As part of her leaving arrangements she agreed with the practice manager to have half a day's unpaid leave to attend a funeral in that last week of her employment.

14. She also agreed that the holiday to which she was entitled by 30 July 2020 was 11.5 days and that she had taken four days in January 2020. With the ten days treated as holiday during furlough, she was therefore 2.5 days' "short" in holiday terms, but it was agreed that as she had worked one day's worth of overtime or thereabouts, the respondent would deduct 1.5 days' pay only. These arrangements were agreed orally. There was no agreement in writing about them.

15. The claimant raised no complaint in relation to the holiday pay arrangement during her notice period or during August or September. Her final payslip on 31 July 2020 showed a deduction of 1.5 days of overtaken holiday.

16. On 17 October 2020 the respondent received a grievance letter from the claimant by recorded delivery. It included that she taken some legal advice in relation to the holiday position, and had been told of the provisions of the WTR, "which say that in order to require people to take holiday on particular dates, more than two times the number of days are required to be given in notice". That is indeed a summary of the provisions of Regulation 15(2) to (4). She raised the matter as a grievance. The respondent replied indicating it believed it had acted fairly and reasonably and in accordance with government guidance.

17. On 21 October 2020 the claimant approached ACAS for early conciliation and a certificate was provided on 21 November 2020. The claim was presented on 1 December 2020.

18. <u>The Law and the Issues</u>

19. The legal basis for the claimant's claim had to be discerned from the claim form. The claimant clarified that in ticking the notice pay box of the claim form, she had not intended any other claim than that which related to the treatment of holiday on termination of her employment.

20. There were two potential legal claims arising from the facts and matters set out in the claim form: a breach of contract claim and an unlawful deduction from wages complaint pursuant to Section 23 of the Employment Rights Act 1996. As the claimant had raised the WTR in her letter to the respondent in October and that comprised the substance of the claim, I considered its provisions, including Regulation 14 (Compensation related to entitlement to leave where a worker's employment is terminated during the leave year), and Regulation 15 referred to above.

21. The WTR are a health and safety measure to ensure that the health and safety of staff at work is not compromised by a lack of rest and recuperation. They include measures relating to daily breaks, weekly breaks and so on. One of those measures is a requirement for annual leave, during which workers have a rest from work, that is they are at leisure and not required to carry out work.

22. The ordinary principles of contract law include that a contract may be concluded orally or in writing, and variations to a contract may equally be concluded orally or in writing; there must be an offer, an acceptance, the intention to create legal relations and "consideration" for any promises made and accepted: in return for you doing this, I will pay that, and so on.

23. The other relevant law potentially applicable to this claim is time limits: the Tribunal shall not consider complaints about breaches of contract on the termination of employment unless presented within three months of the breach, subject to ACAS conciliation extension. The position is the same in relation to an unlawful deduction from wages complaint (it must be presented before the end of the period of three months after the date of payment from which deduction is allegedly made (Section 23(2)). Complaints concerning WTR rights must be brought within three months of

the date on which it is alleged that the exercise of the right should have been permitted WTR Paragraph 30 (2). These time limits are all subject to extension by the Tribunal if is was not reasonably practicable to bring the complaint within the relevant time limit.

24. The issues that required to be determined then, were:

    24.1. Had the respondent breached the claimant's contract of employment in its treatment of holiday in her final payment? - the contract claim.

    24.2. Did the proportion of the leave which the claimant had taken in the 2020 holiday year differ to the proportion of the leave to which she was entitled such that she was entitled to a compensatory payment on termination of her employment? - the WTR claim

    24.3. Taking into account the above, was the total amount of wages paid to the claimant on or around 31 July 2020 less than the total amount of wages properly payable to her on that occasion?

Discussion and conclusion

25. Applying the law to the facts in this case, I consider the contract claim first.

26. There is a danger of looking at these matters through the lens of hindsight as the claimant did, when she took advice and raised her complaint in October. Given the unprecedented circumstances at the time and the possibility of redundancies and practices not surviving, it was likely and perfectly reasonable for an employer and employee to agree that holiday be taken while on furlough – this informs my findings above. Furlough involved not going to work and being at leisure. The claimant may not have been able to travel to take leisure, but there is no statutory right to be able to travel while at leisure; there is a right to annual leave – that is leave from work. The reasons for this agreement are set out above. There was an offer (that is a proposal that this be done); there was acceptance by the claimant - she accepted the uplift in pay; there was consideration: in return for you agreeing this to help the stability of the practice in the second half of the year, the practice will pay the uplift and provide stable employment going forward.

27. Furlough was a scheme between government and employers; it did not, of itself, regulate the relationship between employer and employee; that remained a matter of contract, and the relevant statutory provisions.

28. For the contract claim, I am satisfied that there was agreement to the allocation of ten days' holiday during the furlough period. That was done at a time when the claimant did not know that she might leave the practice mid year and encounter the difficulty, potentially, of overtaken holiday. Provided she remained she would have four bank holidays and a further six days to take later in the year. When she came to leave, there was further agreement about those leaving arrangements. The shortfall was discussed; I was not told of any written provisions about pay or in lieu time for overtime; the offer was to give credit for hours worked in excess of normal working hours and in return the practice would deduct 1.5 days' pay and give the claimant unpaid compassionate leave. The Tribunal does not enquire as to the sufficiency of consideration when parties agree matters during the course of

employment or in relation to its coming to an end – it is sufficient there is some consideration. Again, I am satisfied there was oral agreement to the arrangements for pay on leaving. There is no breach of the claimant's contract of employment and her claim does not succeed on this basis.

29. I then come on to deal with the WTR claim. Had the claimant wished to bring a complaint about the lack of notice or compliance with her Regulation 13 rights to annual leave (by the failure to give notice under Regulation 15 in the treatment of two weeks of furlough as holiday), this complaint had to be brought within three months plus any extension for ACAS conciliation. At the latest the alleged infringement had occurred on 5 June 2020. The claimant had until 4 September to commence ACAS conciliation to secure that extension. She did not do so. That complaint is out of time unless I am satisfied it was not reasonably practicable for the complaint to be brought on time. The claimant provided no reason why a complaint could not have been brought in August after she had left the respondent. It was reasonably practicable to have brought the complaint in time and that allegation cannot succeed.

30. Analysed as a Regulation 14 complaint, then, given my conclusions above, the proportion of the leave which the claimant had taken in the leave year did not differ such as to entitle her to a compensatory payment on the termination of her employment. She had been at leisure for 14 days in 2020 during which she had received her full pay. Her pro rata entitlement on termination was 11.5 days. The complaint does not succeed on that basis.

31. For similar reasons I cannot conclude that the amount of wages properly payable to the claimant on 31 July was less than that properly payable to her; the legal basis for the calculation were the agreements to which I have referred, and the payment made was the amount properly payable in all the circumstances, and not less than that. There was no unlawful deduction.

32. The complaints are dismissed.

Employment Judge JM Wade
Date 27 March 2021

REASONS SENT TO THE PARTIES ON
Date 31 March 2021