



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ryba

Respondent: Perfect Polish Enterprises Limited

Heard at: Newcastle Hearing Centre (by CVP)

On: 24 March 2021

Before: Employment Judge Morris (in person)

Appearances

For the claimant: in person

For the respondent: Mr S Zarzycki, director of the respondent

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent was in breach of his contract of employment by not giving to him the notice of the termination of his employment to which he was entitled in accordance with Section 86 of the Employment Rights Act 1996 is not well-founded and is dismissed.
2. The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent had not paid him compensation in respect of his entitlement to paid holiday that had accrued but not been taken by him at the termination of his employment is well-founded.
3. The amount of that compensation that is due to the claimant is £1,048.14.
4. During the course of the claimant's employment up to and including the date upon which these proceedings were begun, the respondent was in breach of its duty under Section 1(1) of the Employment Rights Act 1996 to give the claimant a written statement of initial employment particulars. In this respect, in accordance with section 38 of the Employment Act 2002, the Tribunal has increased the award referred to above by the minimum amount of two weeks' pay: namely £610.40.
5. Thus the total award payable by the respondent to the claimant is £1,658.54. The respondent is ordered to pay that compensation to the claimant.

6. The award referred to above has been calculated by reference to the claimant's gross pay and should there be any liability to income tax or employee's national insurance contributions in respect of that award, that shall be the liability of the claimant alone.
7. Any claim by the claimant in respect of arrears of pay (brought either as a contract claim or with reference to section 13 of the Employment Rights Act 1996) was withdrawn by the claimant and is dismissed.
8. The Recoupment Regulations do not apply to the above award.

REASONS

Representation and evidence

1. The hearing was conducted by way of the Cloud Video Platform. The claimant appeared in person and gave evidence himself with the aid of a Polish-speaking interpreter. The respondent was represented by a director, Mr S Zarzycki, who gave evidence on its behalf.
2. I also had before me a number of documents that had been submitted by all on behalf of the parties such as a schedule of loss from the claimant, a number of payslips, HMRC forms P45 and P60, work rotas and a sample contract of employment that Mr Zarzycki said represented that which he gave to all employees of the respondent.

The claimant's complaint

3. The claimant's complaints were as follows:
 - 3.1 The respondent had acted in breach of his contract of employment by terminating that contract without giving to him the notice of that termination to which he was entitled.
 - 3.2 Contrary to Regulation 14 of the Working Time Regulations 1998, the respondent had not compensated him in respect of his entitlement to paid holiday that had accrued but not been taken at the termination of his employment.
 - 3.3 Although not a 'freestanding' complaint as such, the respondent had never given the claimant a contract of employment or other written statement of the particulars of his employment contrary to its duty to do so under Section 1 of the Employment Rights Act 1996 ("the 1996 Act"), and that situation has continued up to and including the date upon which the claimant presented his claim to the Employment Tribunal.
4. I record, for completeness, that contrary to the indication in the Case Summary arising from the preliminary hearing conducted on 10 December 2020, the claimant has clarified that he is not pursuing any complaint in respect of arrears of pay.

The issues

5. The issues in this case had been identified for the purposes of the parties during the above preliminary hearing. They are as follows:

Wrongful dismissal / Notice pay

- 5.1 What was the claimant's notice period?
- 5.2 Was the claimant paid for that notice period?
- 5.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss him without notice?

Holiday Pay (Working Time Regulations 1998)

- 5.4 Did the respondent fail to pay the claimant for the annual leave he had accrued but not taken when his employment ended?
- 5.5 In particular:
 - 5.5.1 What was the claimant's leave year?
 - 5.5.2 How much of the leave year had passed when the claimant's employment ended?
 - 5.5.3 How much leave had accrued for the year by that date?
 - 5.5.4 How much paid leave had the claimant taken in the year?
 - 5.5.5 How many days remain unpaid?
 - 5.5.6 What is the relevant daily rate of pay?

Consideration and findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by all on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.
- 6.1 The respondent is a business providing a wide range of services including cleaning services.
 - 6.2 The claimant's employment with the respondent commenced on 6 July 2019 and was terminated by letter of 12 June 2020. The claimant was given two weeks' notice of termination of his employment from 12 June and, therefore, the effective date of termination of his contract of employment was 26 June 2020. The

letter of dismissal provided that he was “required to remain on Furlough for the duration of your notice period”. The claimant was given the right to appeal against the decision to terminate his employment but he did not do so.

- 6.3 There was a dispute between the parties as to whether or not the respondent had given the claimant a contract of employment. At a hearing that I conducted on 4 March 2021 the claimant was adamant that he had never received a contract of employment. He maintained that position at the hearing today. Mr Zarzycki was equally adamant at the previous hearing that the claimant had been given a contract, had signed it and, he stated, “I’ve got it”. I directed Mr Zarzycki to produce a copy of the contract during the period between that hearing and today. He had been unable to do so. He remained clear, however, that he had issued a contract, had had it in his possession, was sure that he had had it at the time of the previous hearing in December but he was no longer able to find it. With great frankness he added, “I honestly don’t remember – now I’m not sure whether he signed it or not”. Whether or not a contract was given to the claimant is a difficult issue to determine especially as both he and Mr Zarzycki appeared to give genuine evidence recounting the facts honestly as they each recalled them. Although the point is balanced, in the circumstances including the frankness of Mr Zarzycki’s above comment, I find, on balance of probabilities, that the claimant was not issued with a contract of employment.
- 6.4 The final payslip issued to the claimant is dated 30 June 2020. In fact, there are two versions of this payslip. The first of these payslips indicates payment of “furlough up to 12 June” of £392.20. The second indicates payment of “furlough up to 26 June” of £849.77. I accept the explanation given by Mr Zarzycki that all payslips were issued by his accountant. When she issued the first of these two payslips she made an error and made payment only up to the date of the dismissal letter of 12 June. Mr Zarzycki corrected that error and instructed her to pay to the end of the notice period of 26 June; hence the second payslip.
- 6.5 The claimant’s claim in respect of holiday pay is governed by the Working Time Regulations 1998 (“the Regulations”). The starting point is to identify the claimant’s “leave year” in accordance with Regulation 13. In oral evidence Mr Zarzycki explained that he had spoken to all his employees in 2019 (before the claimant had become an employee) and it had been agreed that the leave year would run from 1 April to 31 March. I drew his attention to the fact that that was inconsistent with the sample contract of employment that he had submitted, which provides at clause 4 as follows, “The Employee shall be entitled to 28 days’ holiday per calendar year, inclusive the normal public holidays.” Thus, in accordance with that contract the leave year would commence on 1 January each year. Mr Zarzycki accepted that but reiterated that it had been agreed with all employees that the leave year would run from 1 April.

- 6.6 The parties are agreed that the claimant was entitled to 28 days' holiday inclusive of public holidays. The next question, therefore, is how much paid holiday the claimant had taken during the leave year. The claimant accepts that during his employment he took seven days' holiday, which he describes in his schedule of loss as being "1 week (35 hours)". This is borne out in the payslip issued to the claimant dated 31 March 2020, which indicates, "Holiday Pay 35 hrs (7 DAYS)" of £292.25. Additionally, the payslip dated 31 May 2020 refers to "top up to 4BH" of £32.68. Mr Zarzycki explained that he did not understand what this payment referred to as it had been done by his accountant but it was in favour of his employees. Finally, each of the two versions of the payslip dated 30 June 2020 refer to "Holiday Pay" of £69.76, which Mr Zarzycki explained in oral evidence represented 8 hours' holiday pay at the minimum wage of £8.72.
- 6.7 The final question is the rate of pay. Again the parties are agreed that the rate of pay was initially £8.35 per hour but that had increased on 1 April 2020, in line with the minimum wage, to £8.72 per hour.

The law

7. So far as is relevant to the issues in this case, the principal statutory provisions are as follows:

Breach of Contract – notice pay

Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, with reference to section 3(2) of the Employment Tribunals Act 1996, provides (at the risk of oversimplification) that proceedings can be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages for the breach of a contract of employment if the claim arises or is outstanding on the termination of the employee's employment

Holiday pay – the Working Time Regulations 1998

Entitlement to annual leave

13. — (1) *Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).*

(2) *The period of leave to which a worker is entitled under paragraph (1) is —*

.....

(c) *in any leave year beginning after 23rd November 1999, four weeks.*

(3) *A worker's leave year, for the purposes of this regulation, begins*

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

.....

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

Compensation related to entitlement to leave

14. — (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(1) 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 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 —

$$(A \times B) - C$$

Where —

A is the period of leave to which the worker is entitled under regulation 13(1);

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.

Application of the facts and the law to determine the issues

8. The above are the salient facts relevant to and upon which I based my judgment having considered those facts in the light of the relevant statutory law and the case precedents in this area of law.

Wrongful dismissal – notice pay

9. The issue in respect of the claimant's complaint of wrongful dismissal (failure to give him notice) is relatively straightforward. As set out above, it is a matter of identifying the claimant's notice period, whether he was given that notice or paid in lieu and, if not, whether the respondent was entitled to dismiss him without notice.
10. Addressing these three questions in turn:
 - 10.1 I have found that the claimant did not receive a contract of employment and, therefore, his entitlement to notice is the minimum statutory notice provided for in section 86 of the 1996 Act. When his contract of employment was terminated the claimant had been employed for more than one month but less than two years. That being so, he was entitled to not less than one week's notice.
 - 10.2 In fact, he was given two weeks' notice from 12 to 26 June 2020. As such, he actually received more notice than that to which he was entitled.
 - 10.3 The third of the above questions is irrelevant and, therefore, I need not address it further except to record that the respondent did not seek to argue that it was entitled to dismiss the claimant without notice.
11. In these circumstances the claimant's claim that he did not receive the notice (or notice pay) to which he was entitled is not well-founded and is dismissed.

Holiday pay

12. As indicated above, in accordance with Regulation 13, the starting point is to identify the claimant's "leave year". As is provided in that Regulation that leave year will begin on either, first, such date as may be provided for in a relevant agreement (such as a contract of employment) or, secondly, if there is no provision in a relevant agreement, on the date on which the worker's employment began and each subsequent anniversary of that date.
13. I have found above that the claimant was not issued with a contract of employment. That being so the second alternative applies and the start of his leave year is the date of the commencement of his employment on 6 July 2019. Had his employment continued, the start of each subsequent leave year would have been 6 July in every year thereafter.
14. The claimant was entitled to 28 days' holiday in each leave year. When his employment ended he had worked during that leave year from 6 July to 26 June, i.e. approximately one week less than a full year. Thus, the claimant had accrued an entitlement to some 27.5 days' holiday in that year.

15. As indicated above, the claimant accepts that he took 7 days' or 35 hours' holiday during the year. It is also clear that with his final pay he received a further payment of £69.76 in respect of 8 hours' holiday accrued but untaken at the end of his employment. There is also, however, the reference in the payslip dated 31 May 2020 to "top up to 4BH" of £32.68. Although Mr Zarzycki was unable to explain what that referred to I am satisfied that I understand it. My understanding is as follows:
- 15.1 By Easter 2020 the Country was in the first national 'lockdown'. There were two public holidays over the Easter weekend that were followed by a public holiday on 8 May and another on 25 May. Pay under the government's job retention scheme ("furlough scheme") is at 80% of an employee's normal wage but payment in respect of holidays falls to be calculated by reference to the full amount of normal pay and not the 80% sum.
- 15.2 It is apparent from the payslip that was issued to the claimant dated 30 April 2020 that in respect of that month (which as indicated above included two public holidays) he received only the amount of his furlough pay of £980.50; that representing 140 hours at the 80% rate of £7 an hour. Thus, he did not receive his full wage of £8.72 per hour in respect of those two public holidays.
- 15.3 The payslip dated 31 May 2020 again refers to a furlough payment of £980.50. Once more, therefore, the claimant was not paid his full wage in respect of the two public holidays in that month. As indicated above, however, that payslip then provides, "top up to 4BH" of £32.68. I am quite satisfied that in that narrative the "4BH" is a reference to the four public or bank holidays that had occurred during April and May 2022; the sum paid of £32.68 representing the difference between the claimant's furlough pay and his normal pay.
16. It follows from this analysis that I am satisfied that the claimant was provided with four days' paid holiday in respect of the public holidays in April and May 2020. That is in addition to the seven days' holiday that he took and the eight hours' holiday pay that was paid to him in lieu on the termination of his employment.
17. A confusing feature of this calculation of holiday pay is that the parties move between referring to holiday entitlement as a number of days and a number of hours with (as is apparent from the payslip of 31 March 2020) 35 hours equating to 7 days or, as set out in the claimant's schedule of loss, 35 hours equating to 1 week.
18. For the purposes of my calculation I have worked on the basis of holiday entitlement being calculated by reference to hours (rather than days), a working week of 35 hours and (in the absence of clear evidence from either party but on the basis of the working rotas provided) an average of five working days in each week. On these bases the product of the government's calculation tool is that in respect of the proportion of the holiday year from the commencement of his employment to its termination, the claimant is entitled to 191.20 hours' holiday from which I have then

deducted 35 hours in respect of his week's holiday, 28 hours in respect of the four public holidays referred to above and the 8 hours that he was paid with his final pay: a total deduction of 71 hours. This makes a net entitlement for the year of 120.20 hours.

19. The agreed hourly rate of pay is £8.72. On the basis of the evidence available to me the claimant's employment involved normal working hours of 35 each week albeit he might have worked overtime hours in addition. That being so, it is not necessary to calculate an average hours over a period of 12 weeks. In any event, in the 12 weeks prior to the termination of the claimant's employment he was on furlough and was paid by reference to the 35 normal hours of work each week.
20. On the basis of the above assessment, therefore, the claimant is entitled to receive a total compensatory payment of £1,048.14: i.e. $191.20 - 71 \times £8.72$. I award that sum to the claimant.
21. I have found above, on balance of probabilities, that the respondent failed to give the claimant a contract of employment. As such it was in breach of its duty under Section 1(1) of the 1996 Act to give the claimant a written statement of initial employment particulars. That being so, Section 38 of the Employment Act 2002 provides that in the circumstances of this case the tribunal must increase the award made above by the minimum amount of two weeks' pay or the higher amount of four weeks' pay. That general provision is subject to an exception if there are exceptional circumstances which would make an increase in that award unjust or inequitable but I do not find there to be any exceptional circumstances in this case.
22. In all the circumstances of this case, I am satisfied that an award of the minimum amount of two weeks' pay is appropriate: i.e. $£8.72 \times 35 \times 2 = £610.40$.
23. I therefore increase the above compensatory payment of £1,048.14 in respect of holiday pay due to the claimant by that sum of £610.14 making a total award of £1,658.54.

Conclusion

24. In conclusion, my judgment in respect of the claimant's complaints is as follows:
 - 24.1 The claimant's complaint that the respondent was in breach of his contract of employment by not giving to him the notice of the termination of his employment to which he was entitled in accordance with Section 86 of the 1996 Act is not well-founded and is dismissed.
 - 24.2 The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent did not pay him compensation in respect of his entitlement to paid holiday that had accrued but not been taken by him at the termination of his employment is well-founded.

- 24.3 The amount of that compensation that is due to the claimant is £1,048.14.
- 24.4 During the course of the claimant's employment up to and including the date upon which these proceedings were begun, the respondent was in breach of its duty under Section 1(1) of the Employment Rights Act 1996 to give the claimant a written statement of initial employment particulars. In this respect, in accordance with section 38 of the Employment Act 2002, I have increased the award referred to above by the minimum amount of two weeks' pay: namely £610.40.
- 24.5 Thus the total award payable by the respondent to the claimant is £1,658.54. The respondent is ordered to pay that sum to the claimant.
- 24.6 The award referred to above has been calculated by reference to the claimant's gross pay and should there be any liability to income tax or employee's national insurance contributions in respect of that award, that shall be the liability of the claimant alone.
- 24.7 Any claim by the claimant in respect of arrears of pay (brought either as a contract claim or with reference to section 13 of the 1996 Act) was withdrawn by the claimant and is dismissed.
- 24.8 The Recoupment Regulations do not apply to the above award.

EMPLOYMENT JUDGE MORRIS

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 28 March 2021**

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