THE EMPLOYMENT TRIBUNALS

Claimant: **Miss K Seward**
Respondent: **Harper JD Limited**

Heard at: **Newcastle Hearing Centre (by CVP)** **On:** **16 April 2021**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **In person**
Respondent: **Mr M Harrison, Office Manager of the respondent**

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The respondent was in breach of the claimant's contract of employment when, during the holidays she took in April and May 2020, it paid her only her 'furlough' pay rather than her normal contractual pay to which she was entitled.

2. The respondent is ordered to pay £206.70 to the claimant as compensation for that breach of contract.

3. The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent did not pay her compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment is not well-founded and is dismissed.

4. The claimant's complaint under section 23 of the Employment Rights Act 1996 that, contrary to section 13 of that Act, the respondent made unauthorised deductions from her wages as detailed in the Reasons below is well-founded.

5. In accordance with section 24(1)(a) of that Act the respondent is ordered to pay the claimant the total amount of those deductions, being £315.70.

6. Thus, the total amount that the respondent is ordered to pay to the claimant is £522.40.

REASONS

Representations and evidence

1. The hearing was conducted by way of the Cloud Video Platform although due to technical difficulties Mr Harrison could only connect by telephone. The claimant appeared in person and gave evidence herself. The respondent was represented by Mr Harrison who gave evidence on its behalf.

The claimant's complaints

2. The claimant's complaints were as follows:

    2.1 The respondent had acted in breach of her contract of employment by not paying to her the notice pay to which she was entitled.

    2.2 Contrary to Regulation 14 of the Working Time Regulations 1998 ("the WTR"), the respondent had not compensated her in respect of her entitlement to paid holiday that had accrued but not been taken at the termination of her employment.

    2.3 The respondent had made an unauthorised deduction from her wages contrary to Section 13 of the Employment Rights Act 1996 ("the Act") in that she had not been paid in respect of the final week of her employment.

The issues

3. The issues in this case are as follows:

    Notice pay

    3.1 What was the claimant's notice period?

    3.2 Was the claimant paid for that notice period?

    Holiday Pay

    3.3 Did the respondent fail to pay the claimant for the annual leave she had accrued but not taken when her employment ended?

    3.4 In particular:

        3.4.1 What was the claimant's leave year?

        3.4.2 How much of the leave year had passed when the claimant's employment ended?

        3.4.3 How much leave had accrued for the year by that date?

        3.4.4 How much paid leave had the claimant taken in the year?

3.4.5 How many days remain unpaid?

3.4.6 What is the relevant rate of pay?

3.4.7 Was there a provision contained in the contract of employment between the parties or other relevant agreement that provided that the claimant had to compensate the respondent in circumstances where the proportion of leave she had taken when her employment ended exceeded the proportion of the leave year which had expired?

Breach of Contract/Unauthorised deduction from wages

3.5 Did the respondent pay the claimant full amount that was due to her?

3.6 In particular,

3.6.1 Were the wages paid to the claimant less than the wages she should have been paid?

3.6.2 Was any deduction required or authorised by statute?

3.6.3 Was any deduction required or authorised by a written term of the contract?

3.6.4 Did the claimant agree in writing to the deduction before it was made?

3.6.5 How much is the claimant owed?

Consideration and findings of fact

4. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or 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.

4.1 The respondent operates the Dun Cow public house, Gateshead.

4.2 The claimant was employed by the respondent as a member of its bar staff. Her employment commenced on 28 July 2017 and ended on 23 September 2020.

4.3 As required in her contract of employment, on 16 September 2020 the claimant gave one week's written notice of her resignation. She was then on holiday during that week's notice.

4.4 There is no dispute between the parties as to the key factual issues in this case, which included as follows:

4.4.1 In the last week when the claimant was actually at work (Week 25) she worked 18.5 hours and her hourly rate of pay was £8.20. Thus, in respect of that week she earned £151.70. She was not paid that amount, however, because, according to the respondent, she had taken more holidays than had accrued to her at the end of her employment.

4.4.2 Similarly, the respondent did not pay the claimant in lieu of her notice period for the same reason: i.e. even after having clawed-back the £151.70 referred to above, she was still in deficit by 23.5 hours more holiday than she had accrued.

4.4.3 So far as is relevant to this case the claimant had requested holiday on three separate occasions during 2020: 2 working days in April, 14 working days in May and three working days in August.

4.4.4 In respect of each of the relevant weeks in April (Weeks 1 and 2 – Pay Dates respectively of 7 and 14 April 2020) and May (Weeks 5 to 8 – Pay Dates respectively of 8, 15, 22 and 29 May 2020) the payslips show that the claimant received furlough pay of £137.81 gross.

4.4.5 In respect of each of the relevant weeks in August (Weeks 18 and 19 – Pay Dates respectively of 7 and 14 August 2020) the payslips show that the claimant received, respectively, £164.00 and £192.70 gross.

4.4.6 The claimant also requested holiday to cover her notice period during the final week of her employment from 18 to 25 September 2020.

4.4.7 The contract of employment between the parties provides, amongst other things, as follows:

> "*The Holiday year will run from April 1st to March 31st and will be paid for hours accrued. ….. Upon termination of employment the Employer will pay the Employee for any accrued but unused holiday*".

There is no 'reciprocal' provision to the effect that if the holiday that the employee has taken by the date of termination exceeds the proportion of the leave year that has expired he or she must repay to the employer the holiday pay received.

4.5 The principal basis for the dispute between the parties arises from the fact that by the time of the holidays the claimant had intended to take in April and May the Country was 'in lockdown'. From her perspective, therefore, she considered that she did not take those holidays; indeed she cancelled a holiday she had planned to take in Thailand for a full month (14 working days) where she had intended to go travelling. From the respondent's perspective, however, the claimant had requested the holidays (as is borne out by the written holiday request form), had not retracted her

request for those holidays and, therefore, the dates requested remained as holiday.

4.6 The situation relating to the intended holiday in August is different. The claimant accepts that she requested holiday during Weeks 18 and 19 (Pay Dates respectively of 7 and 14 August 2020) but, by that time, she had actually returned to work and worked 20 hours in Week 18 and 23.5 hours in Week 19. As set out above, the payslips show that the claimant received, respectively, £164.00 and £192.70 gross in respect of those two weeks. Mr Harrison accepted that the claimant "could well have worked those two days". He had gone through the respondent's record with "a fine tooth comb" but due to massive confusion regarding such matters as swapping shifts and the signing-in log, he was unable to say with any certainty whether she did or did not. He accepted that the spreadsheet the claimant had produced was "probably right" in that he could not prove to the contrary. Given this evidence of the parties, I accept that the claimant did work and was not on holiday during Weeks 18 and 19; as is borne out by the relevant payslips.

4.7 The respondent's position is that when the claimant's employment terminated she had accrued an entitlement to 52.6 hours' paid holiday but had taken 95 hours' holiday (19 days). Thus, an excess, in round terms, of 42 hours (95 - 53). To claw-back that excess the respondent did not pay the claimant at all in respect of the 18.5 hours work that she undertook during her final week actually at work (Week 25) but that still left a deficit of 23.5 hours and, therefore, it did not pay her in respect of her week's notice.

4.8 On behalf of the respondent, Mr Harrison acknowledged that if it was right that the claimant was on holiday during the weeks in issue in April and May 2020 she should have received 100% of her normal pay and not the 80% furlough pay that she had received. He explained, however, that the government guidelines in this respect had not been issued until, "after the fact", on 13 May.

The law

5. 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 over-simplification) 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

14 Compensation related to entitlement to leave
(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.*

Deduction from wages – the Employment Rights Act 1996

"13 Right not to suffer unauthorised deductions.
(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.

Application of the facts and the law to determine the issues

6. 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.

7. I first record what I said at the conclusion of the hearing that, unusually in proceedings in the Employment Tribunal, it was evident that there was no animosity between the claimant and Mr Harrison. It was simply that each had different perspectives on what was due to the claimant. I have some sympathy with the fact that each adopted different perspectives given that law in relation to entitlement to paid holiday is notoriously complex, and it is that issue that impacts

upon all of the claimant's claims. I therefore start with my consideration of that topic.

Holiday pay

8. As indicated above, in accordance with Regulation 13 of the WTR, the starting point is to identify the claimant's "leave year". In this case, as is provided in that Regulation, that leave year will begin on such date as is provided for in the claimant's contract of employment: namely 1 April.

9. There is no dispute between the parties that as at the date upon which her employment ended (23 September 2020) the claimant had accrued in the proportion of her leave year since 1 April (25 weeks) an entitlement to 52.6 hours' paid holiday.

10. The first question for me is whether the claimant had taken any holiday during that proportion of the leave year. The rules relating to the government's Job Retention Scheme are in many ways as complex as the Working Time Regulations in respect of holiday entitlement. Although it might appear strange, it does seem that if an employee has requested holiday and not amended that request (as did the claimant) he or she can be deemed to be taking that holiday. That could be considered to be somewhat harsh but in certain circumstances this could be to the advantage of an employee as it would mean that he or she will receive 100% rather than 80% of normal pay.

11. It is right that, in this case, despite the fact that the respondent should have paid the claimant 100% of her normal pay during the time that it says she was on holiday it only paid her the 80% furlough pay. That could be said to indicate that, in fact, the respondent did not deem the claimant actually to be on holiday but to be on furlough. I accept the evidence of Mr Marshall in this regard, however, that the respondent was of that opinion and simply did not pay the full amount to the claimant because the government guidance was not published until after the claimant had taken her April holiday and was part way through her May holiday.

12. Thus, I accept that the claimant was on holiday for 2 working days in April and 14 working days in May. It is apparent from the calculations of the respondent's accountant that entitlement to holiday pay is based upon five hours' work each day: for example 95 hours is said to equate to 19 days. On this basis, in respect of the total of 16 days' holiday in April and May the claimant took 80 hours holiday.

13. I accept the evidence of the claimant, which Mr Harrison also accepted if only because he could not dispute it, that the claimant was at work during the time that she intended to be on holiday for three days in August. Thus it cannot be said that she was on holiday and the respondent was wrong to bring those hours into account as taken holiday.

14. In one sense, however, the amount of holiday that the claimant had taken as compared with the amount of holiday that she had accrued is not particularly relevant. That is because although Regulation 14 of the WTR provides that if, on

the date upon which an employee's employment is terminated, he or she has accrued an entitlement to more paid holiday than has been taken, the employer must make a payment in lieu of the untaken holiday, there is no reciprocal provision that if the paid holiday taken by the employee is more than has accrued he or she must repay the excess to the employer: see the decision in Hill v Chappell EAT 1250/01. This general rule is subject to an exception if there is a provision contained in a relevant agreement, such as a contract of employment, that the employee shall compensate the employer in such circumstances but, as mentioned above, in this case there is no such provision in the claimant's contract of employment and there is no other relevant agreement.

15. This is of relevance to all of the claimant's claims, which I deal with turn below.

Breach of Contract

16. The first of the claimant's complaints is that the respondent breached her contract of employment by not paying her the notice pay to which she was entitled. I have dealt with this below as an unauthorised deduction from the wages due to the claimant.

17. There is also an additional aspect of the respondent breaching the claimant's contract of employment. As Mr Marshall accepted, during the weeks in April and May when the respondent deemed the claimant to be on holiday (which I have accepted it was entitled to do) the claimant was paid only her furlough pay rather than her normal contractual pay to which she was entitled. Thus, in respect of each of those weeks she was paid £137.81 gross. If that amounts to 80% of the claimant's normal contractual pay, she should have been paid £172.26 each week: a shortfall of £34.45 each week and, therefore, a total of £206.70.

18. I order the respondent pay to the claimant that amount of £206.70 as compensation for that breach of contract.

Compensation for holiday accrued but untaken

19. The claimant claims to be entitled under Regulation 14 of the WTR to compensation in respect of the entitlement to paid holiday that she had accrued but had not taken as at the termination of her employment. The figures produced by the respondent's accountant, on which it relied, indicate that the claimant had accrued holiday of 52.6 hours, which was rounded-up to 53 hours. The claimant accepts that calculation of her accrued entitlement to paid holiday.

20. I have found above that the respondent was entitled to require the claimant to take the holiday that she had requested in April and May, which amounted to 16 working days or 80 hours. Thus the claimant had taken 27 hours' holiday more than her accrued entitlement (80 - 53).

21. As such, her claim that she is entitled to a compensatory payment under Regulation 14 is not well-founded and is dismissed.

Unauthorised deduction from wages

22. I first record that none of the deductions of which the claimant complains was required or authorised by statute or by a written term of her contract of employment, and she did not agree in writing to the deduction being made.

23. The effect of there being no provision in the WTR that if the paid holiday taken by the employee is more than has accrued he or she must repay the excess to the employer is that the claimant did not have to reimburse to the respondent any holiday pay that she had been paid in excess of her accrued entitlement. That being so, the respondent was wrong to recoup what is described in its accountant's calculations as being the "deficit" of 42 hours; representing the difference between 95 hours taken against 53 hours accrued. This is relevant to the respondent not paying the claimant in respect of, first, the last week when she was actually at work (Week 25) and, secondly, the week of her notice period up to 23 September 2020.

24. Each of those non-payments by the respondent amounted to an unauthorised deduction from the claimant's wages and, therefore, was contrary to section 13 of the Act. The claimant worked 18.5 hours during Week 25 and, therefore, should have been paid, but was not paid, £151.70 as is shown in her pay slip for that week. The claimant was then on holiday during her notice period. Obviously there cannot be such a precise calculation of the pay that the claimant would have earned during the notice period had she not been on holiday. An assessment of the amount of pay due would normally be made by averaging-out the amount of pay received by the employee during the 12 weeks previously but the only records before me are in respect of the previous 11 weeks. I therefore work on that basis of 11 weeks. During those weeks the claimant worked a total of 223 hours, which averages out at slightly more than 20 hours each week. At the hourly rate of pay of £8.20 that would produce a payment of £164.00 (20 x £8.20).

25. In summary, the respondent not paying to the claimant the above amounts of £151.70 and £164.00 because of its erroneous belief that it was entitled to claw-back holiday pay, constitutes an unauthorised deduction from her wages contrary to section 13 of the Act. As such, in accordance with section 24 of the Act I order the respondent to pay to the claimant those amounts totalling £315.70.

Conclusion

26. In conclusion, my judgment in respect of the claimant's complaints is as follows:

    26.1 The respondent was in breach of the claimant's contract of employment when, during the holidays she took in April and May 2020, it paid her only her 'furlough' pay rather than her normal contractual pay to which she was entitled.

    26.2 The respondent is ordered to pay £206.70 to the claimant as compensation for that breach of contract.

26.3 The claimant's complaint that, contrary to Regulation 14 of the WTR, the respondent did not pay her compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment is not well-founded and is dismissed.

26.4 The claimant's complaint under section 23 of the Act that, contrary to section 13 of the Act the respondent made unauthorised deductions from her wages as detailed above is well-founded.

26.5 In accordance with section 24(1)(a) of the Act the respondent is ordered to pay the claimant the total amount of those deductions, being £315.70.

26.6 Thus, the total amount that the respondent is ordered to pay to the claimant is £522.40

27. The awards referred to above have 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 any of those awards, that shall be the liability of the claimant alone.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 26 April 2021

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