



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms A Duher

v

Magda Fun House Limited

Heard at: via CVP

On: 19 March 2021

Before: Employment Judge Tuck QC

Appearances

For the Claimant: In Person

For the Respondent: Ms Magda Bartkoska

JUDGMENT

The claimant is awarded £1680 in respect to holiday pay, and £600, consisting of two weeks' pay, for failure to provide a written statement of particulars of employment.

Total Award: **£2280**.

REASONS

1. By an ET1 presented on 15 August 2020, following a period of early conciliation between 27 May 2020 and 27 June 2020 the claimant brought complaints of failure to pay holiday pay and failure to pay notice pay. The respondent denied both claims and in its ET3 set out its contention that the claimant had been dismissed on 8 May 2020, but paid until 31 May 2020, and that she did not work school holidays but was paid for them- receiving 56 days of paid holiday during her employment.
2. This case was scheduled to be heard in person, but due to the COVID restrictions was converted to be heard by CVP. IT seems that the conversion to CVP only took place two days prior to this hearing. Ms Bartkoska said that she had prepared two copies of a paper bundle for the hearing, but did not have the technical ability to scan those documents to email them to the tribunal. She did, with the assistance of her friend, Ms Musiol, email during the course of the hearing the Respondent's list of documents. Both parties were able to read relevant texts out loud to me.

3. The issues for determination by the tribunal were whether the claimant received holiday pay during her employment, and whether she was paid notice pay.
4. I heard submissions from the claimant, who was assisted by a court appointed Polish interpreter, Ms Walaszek, and from Ms Bartkowska, who was present with her friend, Ms Gosia Musiol, who was evidently assisting her. I accepted as truthful all the submissions given to me.

Facts

5. The respondent has a contract with “the council” to provide after school childcare during term time. Ms Bartkowska had a written contract in front of her, and told me that she is not paid in respect of school holidays – and therefore asked rhetorically “how could I pay holiday?”.
6. The claimant worked for the Respondent as a child carer from 1 May 2019 until her EDT on 31 May 2020. Ms Bartkowska said they had a “verbal contract”, and that she told the claimant that she would work for 38 weeks per annum. She told me that the agreement was for the claimant to work 25 hours per week at a rate of £12 per hour.
7. I had been emailed payslips (it is not apparent which party sent them to the ET) for each month of 2019, setting out payments of £710 each month. The payslips had a tax code, the claimant’s NI number – although no deductions were made for tax or NI. They did not set out the number of hours worked or hourly rate, and none of them set out any entry for holiday pay. I note that there was a payslip for August 2019 – when no work would have been carried out given the school holidays.
8. Ms Bartkowska was unable to explain how the figure of £710 was arrived at. She said her accountant provided payslips, and that she had changed accountants in 2020. Her list of documents included payslips for 2020, and I asked for details of the February payslip to be read out (as this included a week of half term, and therefore “holiday”). Ms Bartkowska was unable to locate that payslip, and unable to identify any payslip which indicated some holiday pay. She said that her bank statement indicated a payment of £500 to the claimant on 17 February 2020, and £500 on 2 March 2020.
9. Both parties told me that from January 2020 the claimant’s pay increased to £1000 per month. Ms Bartkowska said there was a “payrise” – but could not tell me what the alteration in hourly or daily rate had been.
10. From 20 March 2020 due to COVID restrictions, the claimant was told not to attend work. The last period of leave she had taken before this time was February half term, I am told at the end of February 2020; her “pay” in relation to this period was paid in two parts, the second of which as set out above was on 2 March 2020.

11. Both parties agreed that Ms Bartkowska sent the claimant a text on 8 May 2020. This was interpreted for me as saying: "I will now suspend our co-operation due to the pandemic. I will not need you, because of Covid, until further notice". On 11 May 2020 there was a text exchange when I understand that the claimant enquired as to whether she would receive 80% furlough pay, and received a reply "I am not your carer, you must look it up on www.gov.uk".
12. The claimant was paid to 31 May 2020, and puts this as her effective date of termination on her ET1.

Law

Holiday Pay.

13. The Working Time Regulations 1998 provide:

13 Entitlement to annual leave

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(2) . . .

(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—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(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.

[13A Entitlement to additional annual leave]

[(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

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

...

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

14. Regulation 30 WTR provides for complaints of any breach of the regulations to the ET. Claims may also be presented for non-payment of holiday pay under the provisions of Part II of the Employment Rights Act 1996, and in particular section 23.

15. The operation of holiday provisions for 'part year' workers, such as the claimant, was considered by the Court of Appeal in *Harpur Trust v Brazel* [2019] EWCA Civ 1402. Workers are entitled to be paid at the rate of a weeks' pay for each week of leave in accordance with sections 221-224 of the Employment Rights Act 1996.

16. The EAT in *Smith v Pimlico Plumbers* UKEAT 0040/20, 17 March 2021 considered the position of workers who have taken their annual leave, but not been paid for it. The judgment confirmed that if there have been a series of deductions claimed in relation to holiday pay, a gap of more than three months will break that series; as per *Bear Scotland v Fulton* [2015] IRLR 150.

Notice Pay.

17. Section 86 ERA 1996 provides that an employee shall be entitled to a weeks notice per year of service up to a maximum of 12 weeks.

Failure to provide written terms of employment.

18. Section 38 of the Employment Act 2002 applies to this claim. It provides:

38 Failure to give statement of employment particulars etc.

...

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996

(c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or (in the case of a claim by an [worker] under section

41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

Conclusions

19. It is apparent that the Respondent failed to provide to the claimant a written contract of employment, and the accounts of both parties demonstrate that there was no clarity as to the hourly rate of pay, or arrangements for holidays.
20. Ms Bartkowska said the agreement was for 25 hours per week, at £12 per hour. This equates to £300 per week, and if multiplied by 52 and divided by 12, would give a monthly “salary” of £1300. The claimant received less than this, so I concluded she was not, as asserted in the ET3, paid for 13 weeks holiday per annum. It is apparent her pay was annualised. The £300 per week for 38 weeks gives an annualised monthly figure of £950. The claimant says she was being paid £1000 per month gross, and £966 net; doing the best I can on the very scant evidence provided, I have reached the conclusion that it is most likely that the claimant was being paid for her 25 hours per week for the 38 weeks of term time, on an annualised basis spread over 52 weeks.
21. I am unable to conclude that an additional 5.6 weeks of holiday pay was included in that annualised calculation as (a) Ms Bartkowska did not assert this to be the case – in fact stating that if she was not paid for holidays by the council, “how can I pay holidays” , and (b) payment of £300 per week for 43.7 weeks (the 38 weeks of term time plus 5.6 weeks of holiday) would amount to £1090 per month. In any event, I am not satisfied that such payment would be in accordance with dicta of the Court of Appeal in *Harpur Trust v Brazel* [2019] EWCA Civ 1402.
22. I have concluded that the claimant has not therefore been paid any holiday pay during her employment. She took holiday at least every three months in accordance with school term dates. The last time on which she took leave was the end of February 2020, and she suffered a deduction in relation to that period when she was paid on 3 March 2020. I am therefore satisfied that she suffered a series of unlawful deductions in relation to her holiday, and accordingly award her 5.6 weeks for the year between her start date of 1 May 2019, and the date on which she was given notice of termination of her employment on 8 May 2020.
23. I do accept that the text message of 8 May 2020 amounted to giving notice of termination of employment, and as she was paid until the end of the month, this satisfied the obligation to pay one weeks’ notice pay under section 86 ERA.
24. In addition to the 5.6 weeks holiday pay, I considered the Respondent’s failure to provide written terms of employment. Section 38(2) provides that the tribunal must make an award of the minimum amount – i.e. two weeks pay,

and “may, if it considers it just and equitable in the circumstances, award the higher amount” of four weeks’ pay. I have taken into account that Ms Bartkowska engaged accountants, and did provide payslips; I also accept she had her accountants prepare the appropriate P60 and P45 forms. I consider it therefore appropriate in this case to award the minimum amount of two weeks’ pay, of £600.

Employment Judge Tuck QC

Date:19 March 2021

Sent to the parties on: 19/5/2021

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For the Tribunal Office