



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107978/2021 (V)

5

Held on 12 May 2021 by Cloud Based Video Platform

Employment Judge Neilson

10

Ms P Chrzaszcz

**Claimant
In person**

15

BeDental Limited

**Respondent
Represented by:
Mr H Ibrahim,
Director of the
Respondent**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25

The Judgment of the employment tribunal is that (a) the claim for unlawful deductions from the claimant's pay under section 23(1)(a) of the Employment Rights Act 1996 is successful and that the respondent shall pay to the claimant the gross sum of £1,003.44; (b) the claim for accrued holiday pay under regulation 14(2) of the Working Time Regulations 1998 is successful and the respondent shall pay to the claimant the gross sum of £81.18 in respect of accrued holiday pay; and (c) the claim for failure to provide a written statement under section 38 of the Employment Act 2002 is successful and the respondent shall pay to the claimant the sum of £157.64.

35

E.T. Z4 (WR)

REASONS

1. At the Hearing on 12 May 2020 by CVP the claimant appeared in person and represented herself. The respondent was represented by Mr Hussein Ibrahim a director of the respondent ("Mr Ibrahim").
5
2. The claimant had lodged with the Employment Tribunal a bundle of Documents ("claimant Bundle"). The respondent had also lodged with the Employment Tribunal a bundle of documents ("respondent Bundle").
3. The claimant gave evidence on her own behalf and evidence was provided on behalf of the respondent by Mr Ibrahim and by Tracy Hayes, Practice Manager and by Visiliki Papinika, Business Audit Manager.
10
4. The issues to be determined in the case were as follows:-
 - (a) whether or not there was an unlawful deduction in pay in respect of the failure to pay salary to the claimant from 1 December 2020 to 8 March 2021; and
15
 - (b) whether or not the claimant is entitled to any payment in respect of accrued holiday leave in accordance with Regulation 14(2) of the Working Time Regulations 1998 in respect of the holiday year from 1 January to 31 December 2020 and in respect of the period from 1 January 2021 to 8 March 2021; and
20
 - (c) whether or not the respondent had failed to provide the claimant with a written statement of particulars of employment under section 1 of the Employment Rights Act 1996.
25

Findings in Fact

5. The respondent is a limited company that operates a number of dental practices. They operate three practices. Ocean Drive Dental Care and Vitality at premises in Ocean Drive, Edinburgh and a dental practice in Falkirk. They employ approximately 20 people.
30
6. The claimant commenced employment with the respondent on 15 July 2019 as a dental receptionist. The claimant was issued with and received a letter

on or about 19 August 2019 confirming that she was being offered employment as a receptionist with Ocean Drive Dental Care. The letter stated that the "offer of employment will commence with a three month trial period". The hourly rate of pay was stated to be £7.20 per hour. The letter did not set
5 out any other terms and conditions of employment.

7. The claimant worked for the respondent 30 hours a week until 9 September 2019.
8. In September the claimant was commencing a university course and it was agreed that she would reduce the hours that she did to 12 hours a week.
- 10 9. The claimant worked for 12 hours a week up to the end of December 2019.
10. The claimant sent a letter of resignation to the respondent dated 31 December 2019. In that letter the claimant gave notice to resign with effect from 12 January 2020.
11. The respondent discussed the letter of resignation with the respondent and it
15 was agreed that she should stay but working only every second Saturday for 6 hours (12 hours over a 4 week period).
12. The claimant was paid monthly.
13. The claimant was paid in respect of her annual leave for 2019.
14. The claimant worked on 14 March 2020. That was her last day at work.
- 20 15. The respondent was required to close its dental practices with effect from 21 March 2020 as a consequence of the Covid-19 pandemic.
16. The respondent placed the claimant on furlough leave under the UK Governments Coronavirus Job Retention Scheme ("CJRS") with effect from 21 March 2020. The respondent issued a letter dated 6 April 2020 (evidence
25 7 in the respondent Bundle) to the claimant setting out the terms of the furlough leave. This was a standard letter issued to all employees. The claimant accepted the terms of that letter on 8 April 2020. The letter provided

that whilst on furlough the claimant would receive 80% of her previous average wage per month. The letter further notified the claimant that she would not be required to carry out any work for the respondent whilst she was on furlough leave. The letter stated that this was "a variation to your contract of employment, designed to implement and provide you with the advantage of the Governments Coronavirus Job Retention Scheme."

5
17. The letter of 8 April had also specifically provided:- "When your "furlough" leave ends, while we will always endeavour to provide you with work, it is difficult for us to judge the volume of work which is going to be available. Please know that by signing this document, you agree and understand that we may be forced to place you on part time or lay off work without any pay except for statutory guarantee payments."

10
18. From March 21 through to 30 November 2020 the claimant received pay at a monthly rate of £341.54. This was substantially more than her contractual entitlement in the period immediately preceding the claimant going on furlough. The respondent paid to the claimant 80% of her average earnings since commencing work. Prior to being placed on furlough the claimant was contractually entitled to 12 hours every 4 weeks at £7.20. A total of £86.40 over 4 weeks. The claimant received a payment of £341.54 each month from April to November 2020.

15
19. The respondent believes that an error was made in calculating the claimant's entitlement to furlough pay and that she has been overpaid.

20. From 14 March 2020 until the termination of her employment the claimant did no further work for the respondent.

25
21. The respondent was able to recommence business in or about July 2020 in a restricted manner in light of the restrictions applying to dental practices at that time.

22. The claimant contacted the respondent by e mail in July 2020 to find out if she could return to work.

23. The claimant met with Yasser Othman, the respondents Operations Manager over a Zoom call in August 2020. At that meeting the claimant was notified that the respondent was not in a position to offer the claimant any hours and that the claimant would remain on furlough.
- 5 24. In early November the claimant received an e mail from Visiliki Papinika, Business Audit Manager, providing information about a potential return to work. That e mail highlighted the challenges the practice faced operating with the Covid-19 restrictions. It notified recipients that availability of work based on skills, previous work and a return to work interview would be used to
10 determine whether individuals could return to work or be made redundant. The e mail invited recipients to contact Visiliki Papinika to confirm whether or not they would like to attend a return to work interview on Monday 9 November 2020.
- 15 25. The claimant responded to that e mail by e mail on 6 November 2020 confirming that she would like to attend the return to work interview.
26. The claimant received no response to her e mail of 6 November 2020 and did not attend any return to work interview.
27. The claimant was paid her furlough leave payment of £341.54 in November 2020.
- 20 28. The claimant did not receive any pay in December 2020 and contacted Yasser Othman by e mail on 28 December 2020 to notify him that she had not been paid.
- 25 29. Mr Ibrahim contacted the claimant by phone on Friday 29 December 2020. Mr Ibrahim notified the claimant that they had stopped paying furlough to her and they had taken her off the CJRS and were investigating the payments made. Mr Ibrahim stated that there appeared to have been an error made as she resigned in January 2020 she should have been treated as just working two Saturdays per month. He told her that unfortunately they could not accommodate her working on just Saturdays. In order to support the claimant
30 Mr Ibrahim confirmed she would be paid £100 outside of the CJRS. The

claimant told Mr Ibrahim that she could work on other days and Mr Ibrahim agreed to consider that. Mr Ibrahim confirmed that the accountant was continuing his investigation. Mr Ibrahim followed up with an e mail to the claimant confirming the terms of this conversation on 8 January 2021.

5 30. The respondent paid to the claimant in or about December 2020 £100.

31. The claimant sent an e mail to Mr Ibrahim on 25 January 2021 explaining that she considered herself to still be employed and that in her view the furlough payments had been correctly calculated.

10 32. Mr Ibrahim sent an e mail to the claimant on 22 February 2021. In that e mail Mr Ibrahim offered to put the claimant back on the payroll and make payment in accordance with the CJRS provided the claimant agreed to pay back any amounts subsequently found to have been paid in error.

33. On 23 February 2021 Mr Ibrahim spoke with the claimant by phone and offered her 16 to 24 hours a week of work.

15 34. The claimant notified Visiliki Papinika by e mail on 24 February 2021 that she could not work those hours but could work on a Monday or Friday if Saturdays were no longer suitable. Visiliki Papinika responded by e mail on the same date to offer the claimant 8 hours a week on a Friday.

20 35. By e mail of 1 March 2021 the claimant sent a letter of resignation to the respondent that stated:-

"Dear Vicky,

25 Due to the ongoing lack of clarity regarding my contract and the terms of my employment, I have decided to resign from my role as a Dental Receptionist with a one-week notice.

This has been a stressful time for me, so I am leaving the issue in the hands of the employment tribunal.

30 I would like to sincerely thank you for the opportunities you have given me during my time at both Dental practices. I am very grateful for the experience of working with such talented staff.

Yours sincerely"

36. The claimant received a P45 from the respondent on 4 March 2021 by e mail and subsequently by letter.
37. The respondent did not any stage issue a written statement of particulars of employment to the claimant in accordance with section 1 of the Employment Rights Act 1996.
38. In the February and March 2020 payslips there is an additional payment for Annual Leave of 1.35 hours for February and 1.97 hours for March.

10

Submissions

15

39. The Claimant maintains that she is entitled to be paid in respect of the period from December through to the beginning of March 2021 as she remained employed throughout that period. The claimant seeks payment at the rate of £341.54 per month. She further contends that she is entitled to accrued holiday pay from 1 January 2020 up to the end of her employment. Finally, as she has not received a written statement of particulars she is entitled to compensation in accordance with the relevant legislation.

20

40. For the respondent Mr Ibrahim submitted that there had been a mistake in calculating the furlough payments for the claimant. She had been overpaid. They had tried to accommodate the claimant at all times throughout her employment and had tried to find suitable hours for her. The change in her arrangements in January 2020 was critical and she had moved on to casual basis at that time. She had effectively resigned at the end of December 2019. Her holiday pay had been included within her wages in 2020. They had not issued written particulars as her circumstances changed in January 2020. Mr Ibrahim stressed on behalf of the respondent that they had been very happy to employ the claimant and encourage her in her first job and he hoped that she did not feel discouraged by this experience and that they would be happy to provide a good reference.

30

The Law

Unlawful Deductions

41. Section 23(1)(a) of the Employment Rights Act 1996 ("ERA") provides a "worker" with the right to make a complaint to an Employment Tribunal that an employer "has made a deduction from his wages in contravention of section 13". Section 13 ERA provides a worker with a right not to suffer unauthorised deductions. Specifically, Section 13(3) states "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the workers' wages on that occasion."
42. Section 24(1)(a) ERA provides "Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer.. (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,.."
43. Section 24(2) ERA provides "Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of."

Accrued Holiday Pay

44. Under regulation 14(2) of the Working Time Regulations 1998 ("the WTR") where a workers' employment is terminated during a leave year and the proportion of leave taken by a worker in a leave year is less than the proportion of the leave year which has expired an employer is obliged to make a payment to a worker. The amount is to be calculated in accordance with regulation 14(3). Under regulation 30(1)(b) of the WTR a worker may present

a complaint to an employment tribunal where there has been a failure to make a payment under regulation 14(2). Where there has been such a failure the employment tribunal shall order the employer to pay to the worker the amount which it finds to be due to him.

5 45. Under regulation 13(9) of the WTR the basic four week entitlement to holiday leave must be taken in the leave year in which it is due. It cannot be carried over. The 1.6 weeks additional leave may be carried forward into the immediately following leave year if provided for in a relevant agreement (such as a written contract of employment).

10 46. Regulation 3 of the Working Time (Coronavirus) (Amendment) Regulations 2020 inserted a new regulation 13(10) into the WTR as follows:- "Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or
15 the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11)".

47. Where a worker has normal working hours their entitlement to holiday pay is based upon a week's pay which is the amount of pay they receive if they work throughout their normal working hours in a week - sections 221 to 224 of the
20 ERA.

Statement of Particulars

48. Under section 38 of the Employment Act 2002 where an Employment Tribunal, in respect of certain proceedings, either finds in favour of an
25 employee and makes no award or makes an award and in either case the employer was in breach of a duty to provide a written statement of particulars under section 1 of the ERA then the Employment Tribunal must make or increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, make or increase the award by the
30 higher amount. The minimum amount is two weeks' pay. The higher amount is four weeks' pay.

Discussion & Decision

49. Dealing firstly with the issue of the unlawful deductions from pay. This
5 essentially turns on whether or not the claimant remained in employment in
the period up to March 2021 or if her employment ceased at the end of
November 2020 or some other date prior to March 2021. If she did remain in
employment then the question arises about the correct rate of pay and
whether there is any other reason why the claimant would not be entitled to
10 receive her pay.
50. It was clear to the Employment Tribunal that the claimant was employed in
July 2019 as a dental receptionist. Initially that was on around 30 hours per
week. That was then modified at the request of the claimant to 12 hours a
week in September 2019. In December 2019 the claimant did issue a letter
15 of resignation. She was not able to accommodate 12 hours a week with her
studies. Although the respondent maintained that they accepted her
resignation and then entered into more casual engagement terms the
Employment Tribunal was not satisfied on the evidence that that is what
happened. The Employment Tribunal finds that there was a letter of
20 resignation sent. That triggered a discussion and an agreement that the
claimant would work every second Saturday. This was a continuation of the
existing employment but with a variation in hours. As a matter of fact the
claimant carried on working in her role as a dental receptionist – but on further
reduced hours. There was no termination of employment at that point in time.
- 25 51. The claimant was then placed on furlough and that continued through to the
end of November 2020 – which both parties accept. Whilst the respondent
ceased payment of wages after the end of November 2020 there was no
communication to the claimant to notify her that her employment had ended.
There was a discussion at the end of December between the claimant and
30 Mr Ibrahim. However, the Employment Tribunal could find no evidence that
that conversation amounted to an effective notice of termination. Termination
of employment might have been assumed by the respondent at that time but

it was not communicated to the claimant. The claimant was left to understand that an offer of a return to work might be forthcoming after that conversation. There was then an exchange of correspondence in January and February which was indicative of the employment relationship continuing. There was
5 no formal notification to the claimant that the employment had come to an end prior to the letter of resignation. The P45 was not received by the claimant until 4 March 2021.

52. Accordingly, the Employment Tribunal is satisfied that the employment contract continued in existence through to expiry of the one week's notice.
10 That was given on 1 March 2021 so the employment terminated on 8th March 2021.

53. As the employment contract continued through to 8 March 2021 the next issue is what rate of pay was the claimant entitled to in the period from 1 December to 8 March 2021. Her contractual entitlement prior to going on
15 furlough was to 12 hours every 4 weeks. This accords with what was expressly agreed in December 2019/January 2020. At a rate of £7.20 that equates to a weekly pay of $(12 \times £7.20 \times 13 / 52)$ £21.60. However, during the period from March through to November 2021 the claimant received a monthly payment of £341.54.

20 54. The letter of 6 April 2020 gave the claimant a right to receive 80% of her previous average wage per month. The letter was specific in stating that the variation to the contract of employment was designed to give effect to the CJRS. Under that scheme for someone such as the claimant her wages were to be calculated based upon an average of her pay over the 2019/20 tax year.
25 That remained the position for the period from 1 December 2020 through to March 2021. Whilst that calculation gives the claimant a higher rate of pay than she would actually have received had she been at work it does appear to follow as a logical conclusion of the application of the CJRS. The respondent has treated the claimant as someone on variable pay. Under the
30 CJRS the calculation is then based upon average pay in the 2019/20 tax year. That is how she was paid from March to November. Her contract terms

regarding pay are set out in the 6 April letter. Whether or not the respondent is able to recover what has been paid is a separate matter between the respondent and HMRC. The claimant as a matter of contract is, in the Employment Tribunal's view entitled to £341.54 per month whilst on furlough.

5 55. The Tribunal considered whether it could be said that following the conversation at the end of December 2020 the claimant had been removed from furlough and was employed but layed off in accordance with the letter of 6 April. However, the Employment Tribunal was not satisfied that the evidence disclosed that the claimant had been removed from furlough under
10 the contract. It is notable that the letter of 6 April does not provide the respondent with a right to unilaterally end the furlough leave. Although the respondent ceased payment that does not mean that they were unilaterally entitled to do that.

15 56. Accordingly, in the absence of a termination of the contract of employment the claimant remained on furlough and the variation to her contract entered into in April 2020 meant that she was entitled to continue to receive pay as calculated in accordance with the CJRS.

20 57. On the basis that the contractual entitlement of the claimant was to £341.54 per month the Employment Tribunal finds that there has been an unlawful deduction in respect of 14 weeks in the period from 1 December 2020 through to 8 March 2021. The total unlawful deduction is £1,103.44. However there falls to be deducted from that the £100 paid in December. In the circumstances the Employment Tribunal does not consider it appropriate to award any additional compensation under section 24(2) of the ERA as there
25 was no evidence of any additional loss and the claimant has indeed benefitted from what might be seen as a quirk of the system.

30 58. With regard to accrued holiday pay the claimant claims for accrued holiday pay in respect of 2020 and she would in addition have a right to any accrued holiday pay in the period of 2021 up to 8 March 2021. In respect of 2020 the claimant was entitled to 4 weeks leave under regulation 13 of the WTR and 1.6 weeks under regulation 13A of the WTR. However, her employment

terminated in 2021. The claimant can only carry over her regulation 13 holidays to the extent that it was not reasonably practicable to take these holidays "as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)" (regulation 13(10) of the WTR). The Employment Tribunal is not satisfied that it was not reasonably practicable for the claimant not to take these holidays. The claimant was not required to carry out any work. She was on furlough from 14 March to 31 December. She was in receipt of substantially more money that she would have received had she been working. There was no evidence adduced to show that it was not reasonably practicable for her to take these holidays.

59. With regard to the 1.6 weeks under regulation 13A of the WTR there was no evidence of any relevant agreement that gave a right to carry forward any holidays. There was no written contract of employment (other than the letter received on or about 19 August); no collective agreement and no workforce agreement. Accordingly, the Employment Tribunal was satisfied that there was no right to carry forward the accrued holiday under regulation 13A of the WTR.

60. The claimant does have a right to accrued holiday in the period from 1 January 2021 to 8 March 2021. The claimant remained on furlough throughout that period and continued to accrue holiday under the WTR. A total of 9 weeks 4 days' worth (9.57 weeks) of accrued holidays. That gives rise to accrued holidays of $(9.57/52 \times 5.6)$ 1.03 weeks. The weekly pay based on a monthly payment of £341.54 is £78.82. Multiplied by 1.03 = £81.18. The Employment Tribunal finds that the claimant is entitled to this sum in respect of accrued holiday pay for 2021.

61. With regard to the failure to provide a statement of particulars it is clear that
no such statement was provided. In the circumstances the Employment
Tribunal awards the minimum amount of two weeks' pay = £157.64. The
5 Employment Tribunal did not consider that it would be just and equitable to
award the maximum amount in all the circumstances.

10 Employment Judge: Stuart Neilson
Date of Judgment: 14 June 2021
Entered in register: 15 June 2021
and copied to parties