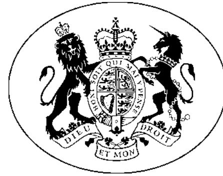
Case Number: 1803572/2021



EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs S Holmes	v	**Hemsworth Town Council**

PUBLIC HEARING

Heard: BY CVP **On: 2 September 2021**

Before: **Employment Judge JM Wade**

Representation:

Claimant: **Mr N Sharples (solicitor)**

Respondent: **Mr D Finlay (counsel)**

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Note: An extempore Judgment with reasons was delivered on the afternoon of 2 September 2021 after a very delayed hearing start due to connection difficulties, with the parties having an opportunity to take a note of those reasons. The written record of the decision was sent to the parties on 6 September 2021. A request for written reasons was made by Mr Sharples at the hearing. For reasons of speed and proportionality the reasons below are not a transcript of what was said but reflect my notes of the extempore decision and discussions in the hearing, with one exception which is explained below at paragraph 3. These reasons are 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 2 September 2021 are repeated below:

JUDGMENT

The claimant's claim for breach of contract as to unpaid holiday pay on the termination of employment partly succeeds and the respondent shall pay to her the sum of £1593 in damages.

REASONS

<u>Introduction</u>

1. This is a short track money claim for a specific sum set out in the claim form - £3,298.96. The claimant was a Deputy Town Clerk for the respondent council and the sum represents a calculation of said to be untaken holiday on the termination of employment.

2. I had a short file of relevant documents and heard oral evidence from the claimant and Mr Draper. The claimant had difficulties connecting to the hearing and in that lengthy delay I sought to clarify the issues with the advocates. Both were keen that the case be disposed that afternoon. I asked whether I would be assessing the claim under both Working Time Regulations 1998 Reg 14 and as a breach of contract claim (because that can be a time consuming exercise) and Mr Sharples said the main issue was the contractual claim. In discussion the advocates agreed that in both arenas, the essential factual issue was likely to be whether leave was regarded as "untaken" or "taken". This was a novel case in which one basis of the defence to the claim was a belief that the claimant had taken holiday during a period of furlough, when the claimant maintained she had taken no holiday.

3. In giving judgment I said that I declined to make a Regulation 14 award because I had addressed matters in the contractual claim. In confirming these reasons it is more accurate to say, it would be an error of law for me to give judgment in a Regulation 14 claim because that is not the claim set out in the claim form (in which no mention of Regulation 14 or the Working Time Regulations is made), and no such mention is made in the claimant's statement, nor was there an application to amend. Mr Sharples made submissions on Regulations 14 and 15 - that was because I had led him into that in error. I should not have opened discussion of Regulation 14 at all.

Findings

4. The claimant's contract of employment contained the following provisions:

   Changes to your Terms of Employment: We reserve the right to make reasonable changes to any of your Terms of Employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change.

   Sick Pay: 6 months' full pay and 6 months' half pay

   We shall not pay you in lieu of untaken holiday except on termination of employment. The amount of such payment in lieu shall be 1/260th of your salary for each untaken day of your holiday entitlement for the holiday year in which the termination takes place and any untaken days permitted to be carried forward from the preceding holiday year.

5. The claimant's relationship with her line manager Mr Draper was such that holiday was arranged informally by letting him know dates for his approval, but forms were not typically filled in; a chart reflected team holidays which had been arranged.

6. The council furloughed some of its staff in the Spring of 2020. The claimant was employed then as deputy town clerk. She was employed on a salary of around £30,000. Many of the respondent's staff were employed on much lower wages. A reduction to 80%, under the furlough scheme, for the lowest paid workers would have created real hardship. The respondent therefore decided to maintain full wages at 100% for furloughed staff at the start of the pandemic.

7. After three months or so on furlough the claimant became unwell from 26 June 2020. She did not return to work before her dismissal in February 2021. She agreed with Mr Draper that because the respondent could claim back 80% of her wages she

would remain on furlough (rather than be treated as on ill health absence). She said that if she was to receive less than full pay, she would, in effect, insist on being put on ill health absence (which at that time entitled her to 100% of pay). The staffing committee (on behalf of the respondent) agreed to that arrangement at the end of July 2020 - that she could remain on furlough at full pay.

8. The claimant had booked annual leave for a two week holiday to Turkey in July 2020. That was cancelled and she went to the UK coast instead, Monday to Friday 17 July, posting pictures on social media. She also made other trips during furlough, including holiday destinations and for other reasons – to visit her mother at the weekend for example.

9. The staffing/cost implications of holiday accrual for furloughed staff during lengthy furlough caused the respondent to introduce a contract variation on or around September 2020. It asked people to make a choice: stay on furlough at 80% of salary; or receive 100% of salary and forsake one day's annual leave for each week of furlough.

10. In a memo dated 17 November 2020 (Mr Draper to all furloughed staff), he said this: *Just to confirm what has already been communicated and agreed verbally, the agreement between each furloughed employee and the council as employer is that you continue to receive 100% of your salary and in return you forgo one day of your annual leave for each week you are furloughed (pro rata for part-time staff). Please let me know if you have any queries.*

11. The claimant was sent this memo by Mr Draper and asked to confirm in writing that she was happy with that arrangement. She wrote on 25 November to say there had been no verbal agreement and she had taken advice from her union and would not be signing the memo saying, "I will retain my leave should I need it in the future". There were ten working weeks between 17 November and 31 January.

12. At the end of January 2021 the respondent decided to reduce all furloughed staff to 80% of salary but permit them to retain holiday to be accrued during February and March. The holiday year end was 31 March. This too was confirmed in a memo to staff and sent to the claimant at the end of January. The claimant did not accept the reduction in her pay in return for furlough and therefore furlough for her ended on 31 January 2021 - she was, however, on ill health absence (receiving 100% of salary) from that point.

13. At the end of her employment in February 2021 (dismissal for conduct reasons which emerged in November 2020), the parties fell into dispute about the correct payment for untaken holidays. They were not (at least by the time of this Tribunal) in dispute about the underlying number of days – 35.8 days. That calculation appears to give credit for a full allowance for 2020/21 rather than eleven or so months accrued before termination but that was not raised with me and there may have been good reasons not to do so.

14. The respondent paid the claimant £773.57 gross for untaken holiday on the termination of her employment. The claimant said that was considerably less than her entitlement and set out her calculation her claim form.

Discussion, consideration and decision

15. The issues for the Tribunal were, to what extent the claimant could be regarded as having taken holiday? To what extent the council had implemented a contractual change from November 2020 (Mr Finlay volunteered that in law, any such notice of contract change could not take effect until communicated to the claimant) – he later said, query whether the respondent could back date such a change. In truth, it is settled law that a contract change cannot be retrospective nor is it reasonable unless a wholly innocuous change.

16. My findings include that the claimant had booked leave (for Turkey); and had not cancelled that leave. She had, as a matter of fact been away for at least half of the ten days booked – the respondent has proven that. She may have been away for longer - she was less clear in her evidence – a “couple of days”, “four days”, “four nights” and so on, but I give her the benefit of the doubt that it was five, and not ten days, taken. I may be wrong.

17. I consider that applying the terms of her contract – we shall pay you for each untaken day etc – the respondent is not obliged to pay for the five days proven to have been taken from the July booked leave, notwithstanding the fact that the claimant could have been free and at leisure during furlough in any event. The language has to be understood within the context when the parties agreed it, rather than overlain by the novel circumstances of furlough. Taken holiday is just simply that; when a member of staff has arranged to take holiday with their line manager, has not by agreement cancelled it, and has, objectively, done just that. The claimant could have arranged those July dates for decorating her house – not necessarily to be at leisure – and then there may have been evidence of her decorating as planned. In either case she could have legitimately said, “no”, to a return to work in such circumstances and was properly to be regarded, contractually, has having taken holiday such that no compensatory payment was due.

18. As for the November notice, the respondent argued that by her conduct in accepting 100% of pay the claimant had accepted that change. On the other hand, the claimant set out that she had explicitly not agreed to giving up holiday in return for 100% of salary. She did not, on this occasion, seek to be transferred to absence for ill health; the respondent did not, equally, end her furlough.

19. In my judgment, furloughing staff – that is providing no work – or putting people at leisure – in return for full, or a percentage of, pay - is such a dramatic change to the contract of employment (and not foreseen or foreseeable), that it requires express agreement - it is too fundamental to be envisaged by the contract change provision set out above.

20. Once agreed, however, changing that arrangement to be less beneficial, in light of all the circumstances at the time, is, in my judgment within the permission given by the contract of employment to reasonable changes: the respondent is entitled to rely on that change from its communication to the claimant. The consequent ten days’ leave comes to be deducted.

21. I also consider, if I am wrong on the reasonableness of the change, that the claimant has accepted it - holiday sacrifice - through her conduct. On this she was seeking to

preserve all financial benefits: retaining her leave and her ill health pay. To do so was to put herself in a different position to all other staff. She knew that full pay for ill health absence was finite – six months full pay and six months half pay; she transferred onto that rather than face 80% of pay at the end of January 2021 when all furloughed staff were reduced to 80% of salary. She could have insisted on that in November but to do so would have seen the using up of ill health pay. She could not, in my judgment unilaterally protest a change in a single email, whilst accepting the benefit that flowed from part of the arrangement – full pay.

22. The result of my conclusions (subject to the parties' calculations) is that 15 days' come to be deducted from the agreed entitlement. The respondent has breached the claimant's contractual of employment to this extent and the damages reflect the gross pay lost as a result. The parties' calculations converged and I round that sum to the nearest pound: £1593.

23. I do not address the Working Time Regulations issues for the reasons above.

Employment Judge JM Wade

7 September 2021