EMPLOYMENT TRIBUNALS

Claimant: **Mr Neil Sargent**

Respondent: **Capstan Group Services Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **24 August 2021**

Before: **Employment Judge Barrett**

Representation
Claimant: Mr Oliver Winters, Paralegal, Central Law Group CIC

Respondent: Miss J Denton, Counsel

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was unfairly dismissed.**

2. **The Claimant's compensatory award is reduced to nil on application of the *Polkey* principle.**

3. **The Claimant was wrongfully dismissed in breach of his contractual entitlement to notice.**

4. **The Claimant's claim for holiday pay is not well-founded and is dismissed.**

5. **The Claimant's claim for unauthorised deductions from wages is dismissed upon withdrawal.**

REASONS

Introduction

1. The Claimant says he was dismissed on receipt of his P45 on 5 November 2020. On 24 February 2021 he presented claims for unfair dismissal, wrongful dismissal (notice pay), unauthorised deductions of furlough pay and holiday pay. The Respondent resists the claims, saying that it did not dismiss the Claimant by sending the P45, and that it can be inferred from the Claimant's subsequent conduct that he resigned.

The hearing

2. The one-day hearing was conducted by Cloud Video Platform. There was an agreed bundle of evidence numbering 118 pages, plus 2 additional pages adduced on the Respondent's application during the hearing. The Claimant gave evidence and was represented by Mr Winters, paralegal. The Respondent was represented by Miss Denton, counsel. The following witnesses gave evidence on behalf of the Respondent:

    2.1. Ms Jacqueline Smith, Operations Director.

    2.2. Ms Jenna Hunt, Training and Admin Manager.

3. At the beginning of the hearing, it was agreed that the following issues needed to be determined:

    3.1. Were the applicable terms of the Claimant's employment contract contained in his 'Particulars of Employment' specified to commence on 17 October 2011 (as the Claimant contended) or the 'Particulars of Employment' specified to commence on 14 November 2016 (as the Respondent contended)? The latter terms included the provision *"Zero contractual hours… you have no contractual right to work any minimum level of hours".*

    3.2. Was the Claimant dismissed? As noted above, the Claimant argued that receipt of his P45 on 5 November 2020 amounted to a dismissal.

    3.3. If the Claimant was dismissed, was he dismissed in breach of his contractual entitlement to notice?

    3.4. If the Claimant was dismissed, what is the chance he could have been fairly dismissed or would otherwise have remained on nil pay to date? (The *Polkey* issue.)

    3.5. Was the Claimant entitled to holiday pay?

4. It was further agreed that other than the *Polkey* issue, other matters relating to remedy would be determined at a further hearing if necessary.

5. The parties helpfully confirmed that the following arguments were not pursued:

    5.1. The Respondent accepted that if there was a dismissal it was an unfair dismissal.

5.2. The Respondent accepted that the claim was presented in time.

5.3. The Respondent did not contend that a short break in the Claimant's employment in 2016 interrupted his period of continuous service.

5.4. The Respondent confirmed it did not allege contributory fault.

5.5. The Claimant did not pursue his claim for unauthorised deductions from wages in respect of additional furlough payments he originally argued were owing. That claim is therefore dismissed on withdrawal.

5.6. The Claimant confirmed he did not make a claim for unauthorised deductions or breach of contract in respect of his contractual pay after he left the furlough scheme on 17 August 2020. He confirmed he did not plead such a claim and did not seek leave to amend his claim to add it.

6. At the close of the hearing both parties' representatives made cogent and helpful oral submissions. Mr Winters provided a skeleton argument in respect of the unfair and wrongful dismissal claims, and case reports *Willoughby v CF Capital Plc* [2011] IRLR 985 and *McMaster v Manchester Airport plc* [1998] IRLR 112. Miss Denton provided and relied upon *Oram v Initial Contract Services Ltd* (Unreported, EAT, 25 February 1999).

Findings of fact

7. The Respondent is a firm providing asbestos removal, construction and passive fire protection services. The Claimant was employed by Cranegates Limited, a previous incarnation of the Respondent, from 17 October 2011 as an Asbestos Operative. He signed and returned a document entitled 'Particulars of Employment' setting out his terms of employment (the '2011 Particulars'). The hearing bundle contained the unsigned counterpart copy retained and disclosed by the Claimant. At some point subsequently the Claimant's employment transferred to the Respondent.

8. The Claimant was promoted to Asbestos Supervisor. At times when there was no asbestos work available, he also carried out construction work. He was paid on a daily rate and was only paid for shifts worked.

9. One of the sites the Respondent provides its services to is Buckingham Palace. The nature of the site means that additional security protocols are required and matters such as breaks are more regimented than at other sites. The Claimant found work on site to be "stop-start" and frustrating. He told Ms Smith on one occasion in 2016 that he *"really, really disliked working at the Palace".*

10. On Tuesday 1 November 2016 the Claimant was working a shift at Buckingham Palace. Because of his frustrations with the nature of the work and for other personal reasons he decided to resign. He telephoned Ms Smith and explained he wished to leave. Ms Smith understood that he had found another job, although in fact he had not. She agreed to waive his notice period.

11. On Sunday 6 November 2016 the Claimant contacted Ms Smith again and asked to be re-engaged. She agreed and he started work again the following Tuesday 8 November 2016.

12. The Respondent has disclosed a document entitled 'Particulars of Employment' relating to employment commencing on 14 November 2016, which appears to bear the Claimant's signature (the '2016 Particulars'). The material difference between this document and the 2011 Particulars is that it contains a new clause *"Zero contractual hours… you have no contractual right to work any minimum level of hours".* (The commencement date of 14 November 2016 was incorrect; the Claimant had restarted work on 8 November 2016 and in any event the short break did not interrupt his continuity of service since 2011.)

13. Ms Smith recalls that the Claimant had asked to come back to work on a 'casual basis' so he would be able to decline work at Buckingham Palace, and for this reason a new 'zero hours' contract was drawn up for him. The Claimant does not recall this conversation and says he had not seen the 2016 Particulars until they were disclosed by the Respondent for the purposes of this litigation. He says the signature looks similar but not identical to his signature. He believes he continued to work on the same terms contained in the 2011 Particulars after he returned to work in 2016.

14. On the balance of probabilities, I find that the Claimant did sign the 2016 particulars. It is more likely that he did so, and genuinely forgot, than that there could be any other explanation for the existence of the document bearing his signature. It was not suggested on behalf of the Claimant that anyone at the Respondent had forged his signature. Mr Winters submitted it was possible there had been some mix up resulting in an electronic signature being affixed on the Claimant's behalf without his knowledge, but no evidence was given or elicited relating to such a possibility, which seems inherently unlikely.

15. The Claimant had the right under his new contract to turn down shifts offered; but in fact, this never or rarely happened. In practice, the Respondent's managers were aware of his preference not to work at Buckingham Palace and offered him work at other sites whenever available. The Claimant was willing to do occasional work at Buckingham Palace when there was no alternative. Between 2016 and 2020 the Claimant worked there on only approximately 20 occasions. The Respondent's managers were aware that the Claimant's contract had changed. This is reflected in a 'team alert' email from Ms Smith of 18 February 2018 where she noted the Claimant was allocated to a particular site *"if he wants to go".* However, as far as the Claimant was concerned his working life continued much as before.

16. On 19 February 2020 the Claimant began working on a job at Duxford RAF airfield. This work continued until 23 March 2020 when a national lockdown was declared. The Claimant was placed on furlough from 24 March 2020. It appears that by agreement the Respondent paid its furloughed employees the 80% of their wages recoupable through the furlough scheme. Where employees had accrued and untaken holiday available, pay was topped up to 100% in respect of those dates attributed to holiday.

17. During the first national lockdown, the Claimant's mother-in-law, who was clinically vulnerable, came to live with his family. The Claimant and his family shielded and did not leave the house.

18. On 30 June 2020 the Respondent sent its employees their payslips with a standard cover email stating:

"We hope you and your families are all keeping well during this challenging time.

Your wages this month have been paid up to and including 30th June, where accrued holiday has been used to top up furlough payments this has been noted on your payslip.

To keep you all in the picture re work - at present, sad to say we have no good news at the moment.

The effects of the pandemic will, undeniably, effect our industry and all that work within it – we would not wish to mislead you all into thinking there is likely to be a return to business as normal within the foreseeable future.

Going forwards, it looks like the Palace will be our primary, and possibly, our only, work stream. We are still have no news re starting back to work in the east wing, we would hope that this maybe sometime in July, but as yet this is not confirmed.

On the construction side, regrettably there is nothing hopeful at all - the contracts we were expecting to start before COVID-19 have, unfortunately, all been put on hold with no real prospect of them starting up again.

In the meantime, the furlough scheme is still in place and we will continue to process payments and allocate accrued holidays throughout July."

19. The Claimant cannot remember receiving this email.

20. On 31 July 2020, the Respondent sent its employees their payslips with a standard cover email stating:

"We hope everyone is well, and at least enjoying the sunshine and spending some quality time with your families.

Your wages this month have been paid up to and including 31st July. Where accrued holiday is available, we have topped your pay using holiday allowance up until the end of August which is shown on your payslip.

Regarding returning to work we are still waiting a confirmed start date back at the Palace, who are struggling to accommodate the new social distancing rules.

We wish you and your families well and we will be in contact as soon as we know more about a return to work date."

21. The Claimant does remember seeing the 31 July 2020 email.

22. The Respondent sent employees including the Claimant a letter dated 7 August 2020 stating:

"Return to work from furlough for Employees on zero hours contracts.

In-line with the Government statement for us all to return to work along with the statement that there is no need for individuals to continue 'shielding', furlough for our employees will be ending. This means that you will need to return to the workplace on 17th August. We will call you very soon to tell you where you will be working.

We can assure you that all construction sites we are working at have implemented measures to COVID protect the working environments, and all have rigorous site specific COVID-19 plans in place in line with the CITB/CLC industry guidance – a

copy of the COVID plan and an updated electronic COVID-19 tool-box talk we will send you in advance of your arrival onsite.

After you return to work, your pay will be restored to your contractual pay. If you have any concerns or questions, you should contact Lynette in writing upon receipt of this letter.

Thank you for your flexibility during these difficult times."

23. The letter was sent by post only. The Claimant's evidence, which I accept, is that he did not receive this letter. He did not therefore contact the Respondent's Compliance Manager, Ms Lynette Brown, to raise any concerns.

24. On 13 August 2020 the Respondent's Store Manager Mr Jamie Hornsby telephoned the Claimant. I accept the Claimant's account of their conversation. Mr Hornsby told the Claimant that the Buckingham Palace works were restarting on Monday 17 August 2020. The Claimant asked for time to think then called back a few minutes later. He explained that he was living with a clinically vulnerable family member and did not want to risk infection. He was worried about having to travel to work by public transport. He asked whether there was any other work he could drive to and socially distance on site. However, Mr Hornsby told him that only work at Buckingham Palace was available. The Claimant asked him to pass his concerns on to Ms Smith, the Operations Director, and to contact him if any other work became available.

25. The Respondent's witnesses gave evidence that Mr Hornsby was instructed to tell any employees who declined to return to work (in the event, just the Claimant) to contact Ms Smith to discuss this. They explained there was a tick box on the list of employees to contact which Mr Hornsby had ticked to show the Claimant had been told to contact Ms Smith. That document was not provided, and the Respondent did not call Mr Hornsby to give evidence. Whatever Mr Hornsby may have said in this regard, the Claimant did not understand from the conversation that the ball was in his court. He was expecting the Respondent to contact him as and when work became available that he could drive to.

26. Ms Smith's evidence was that she believed the Claimant had simply turned down the available work because he disliked working at Buckingham Palace and therefore there was no need to contact him so long as that was the only site the Respondent was working on. The Claimant's safety concerns were not passed on to Ms Smith.

27. The Respondent's witnesses also gave evidence that in fact it would have been possible for the Claimant to borrow a vehicle from the Respondent and park on site, thus avoiding public transport to work at Buckingham Palace. However, unfortunately this was never explained to the Claimant.

28. The Claimant expected to continue to receive furlough pay. However, given that there was work available for him to do from 17 August 2020 onwards, the Respondent properly removed him from the furlough scheme. The Claimant did not notice this when he received his August pay because the Respondent paid him 10 days' holiday pay in that month's wages, plus a day's pay for the August bank holiday. It was recorded on the Respondent's HR system:

"**17 - 28th, employee did not return to work as requested, 10 days hol paid pending communication from employee**

Automatic - Summer bank holiday"

29. It seems that this was done because of the Respondent's approach of topping up furlough pay with holiday pay where available. The Respondent's leave year ran from 1 January to 31 December. The Claimant was contractually entitled to 28 days' holiday inclusive of bank holidays per year *pro rata*, calculated on the basis of hours worked over the previous 13 weeks up to 40 hours per week. He had already taken (or been paid for while on furlough) 17 days' holiday during the 2020 leave year. With the additional 11 days paid in August, this amounted to a total of 28 days, his maximum potential entitlement for 2020.

30. The Claimant realised that his furlough pay had been stopped at the end of September 2020 when no payment was made into his bank account on his usual pay date.

31. On 2 October 2020 the Claimant sent a text message to the Respondent's Compliance Manager. He wrote:

"Hi Lynette, hope you are well. I haven't received any furlough payment for September. Is there a reason? Neil"

32. She replied cordially:

"Hi Neil, we were not able to claim any furlough payment because we had work you were able to do, and we had to take on agency. I had been told you had been told in August, hope you and family all well…"

33. The Claimant replied that he had not spoken to anyone from the Respondent since March other than Mr Hornsby, and that he had explained to Mr Hornsby that he was shielding his mother-in-law. He referred to that situation continuing.

34. The Claimant did not inquire whether alternative work had become available or whether arrangements could be made for him to work at Buckingham Palace in a Covid-secure manner. Neither did the Respondent contact him to suggest any such arrangements.

35. The next communication between the parties was on 5 November 2020 when the Claimant received his P45 in the post. It stated that the Claimant's leaving date was on 30 September 2020. There was no cover letter.

36. On 7 November 2020 the Claimant sent a text message to Ms Smith at 15.21, which read:

"Hi Jaq, hope you are well. I've received a p45. Can you tell me why? Also I understood you were meant to give me some notice, is that not correct. Thanks, Neil."

37. I accept the Claimant's evidence that he believed at this point he had been dismissed and by asking why he had been sent a P45, he was inquiring as to why he had been dismissed. That is consistent with his reference in the same message to the requirement for notice, which applies to a dismissal but not to the issuing of a P45.

38. Ms Smith replied at 21.06 that evening:

"Hola Neil - I think these are generated automatically if you someone doesn't work for a certain amount of weeks if they have been offered work but declined it, so if someone needs to claim government income support they can - it doesn't mean anything on our part, let me know if you want to work - currently it's just as the Palace. Hope all good with you ;)"

39. The Respondent's witnesses were unable to explain the mechanism by which the Respondent's system generated a P45 'automatically'. To Ms Smith's knowledge this had not happened to anyone else previously.

40. The Claimant did not respond or suggest that he was still interested in working for the Respondent. He explained when giving evidence that this was because he could not work at Buckingham Palace, believing that it would have required him to travel by public transport and put his family at risk.

41. The Claimant notified ACAS on 27 January 2021 and his ACAS certificate was issued on 11 February 2021.

42. On 23 February 2021 the Claimant emailed Ms Smith as follows:

"Hello Jaq. Did try to ring you but no answer. Hope you are ok. Can you answer a couple of questions for me please. 1-have I been dismissed. 2– if I have not been dismissed why have I not received any wages (furlough) since 31/8/20. Thanks, Neil."

43. Ms Smith replied that evening:

"Hi Neil – hope all OK with you, sorry I missed your call.

Re your question– – as per my answer when you texted me in November, you have not been dismissed. Bit puzzled by your question Neil as you have been declining the work we had been offering you since August, I repeated the offer of work to you when you texted me in November, but did not get a reply from you.

Re furlough : we could not pay furlough to workers who declined work if we had to employ others to carry out their duties – as was the case with you. The purpose of furlough was so businesses could retain workers ready for the return to work, not to pay wages when work was available, and workers chose not to do it.

Hope this clarifies this situation – let us know when / if you wish to return to work 😊

KR, Jaq"

44. Again, the Claimant did not respond or indicate that he wished to return to work for the Respondent. He accepted when giving his evidence that had he really wished to return at that point he would have asked about work available.

45. The next day, 24 February 2021, the Claimant presented his ET1.

46. The Claimant has unfortunately suffered ill health and has not been well enough to work since 25 May 2021, as evidenced by GP notes provided in the bundle.

47. The Respondent continued to only have work at Buckingham Palace until July 2021.

Submissions

48. Miss Denton submitted that the Respondent reasonably believed the Claimant declined work at Buckingham Palace on 17 August 2020 because he did not wish to work there, taking into account his prior work history and well-known dislike of the site. He was on a 'zero hours' contract and so was entitled to turn down work. The P45 was not intended to communicate a dismissal, and in the circumstances, it was not taken as a dismissal. The Claimant's text message of 7 November 2020 showed that he was at most confused at the meaning of the P45, and this was swiftly cleared up by Ms Smith's reply explaining that it had been automatically generated. Further, the Claimant's email in February 2021 showed even by that stage he still did not believe he had been dismissed. Rather, the Claimant had himself resigned by his conduct, namely by not responding to the Respondent's enquiries whether he wished to return to work (applying *Oram*). What the Claimant really wanted was to be retained on furlough pay, which was not possible; he did not want to return to work. He had resigned without giving notice and was not entitled to notice pay. He had received his full holiday pay entitlement. Alternatively, if there had been a dismissal, under the *Polkey* principle the Claimant's compensatory award should be reduced to nil. He would not have returned to work while the only work available was at Buckingham Palace, and this remained the case for the entire period until 25 May 2021, when the Claimant became too unwell to work in any event. Therefore, even if the Respondent had been willing to keep him 'on the books' for so long without working, he would not have received any wages. Further, the Claimant had not mitigated his loss because he had not considered the Respondent's offers for him to return to work.

49. Mr Winters submitted that the Claimant had subjectively understood himself to be dismissed, which was why he asked Miss Smith about his notice period. Further, it was objectively reasonable for the Claimant to understand the P45 to communicate his dismissal. He was not being paid. He had not been contacted by the Respondent for some time. It was not surprising he took the P45 to mean he had been dismissed. There were no special circumstances in the case which required the Claimant to take the P45 at anything other than face value. His email in February 2021 was merely a request for clarification as he prepared to submit his tribunal claim and had no bearing on what the P45 objectively communicated at the time it was received. As a matter of contract law, the Respondent could not unilaterally rescind the dismissal regardless of whether there had been a subjective intention to dismiss (*Willoughby*). Mr Winters invited me to find that the Claimant had not seen the 2016 Particulars so the 2011 Particulars applied. In relation to the Respondent's *Polkey* argument, it was submitted that the Claimant would have returned to work at Buckingham Palace had the Respondent explained he could drive and park there and work in a safe manner. In relation to holiday pay, Mr Winters accepted that Miss Denton's submission might well be correct based on the evidence in the bundle but invited me to check that all the Claimant's accrued holiday pay was accounted for in his payslips.

The law

Dismissal

50. Section 95(1)(a) of the Employment Rights Act 1996 ('ERA') defines (express) dismissal as:

'termination of the employment contract by the employer, with or without notice.

51. Section 97 ERA defines the effective date of termination ('EDT'), as follows:

'(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect […]'

52. The burden of proof is on the Claimant to show on the balance of probabilities that there has been a dismissal.

53. The test for whether there has been a dismissal is an objective one; as explained in *Sandle v Adecco UK Limited* [2016] IRLR 941 at §26 &40:

'the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in the light of all of the surrounding circumstances…

The question is: given the facts found by the ET, given what was known to the employee and to the relevant circumstances of the case, what is the conclusion to be drawn? Has the employer communicated its unequivocal intention to terminate the contract?'

54. Sending a P45 might amount to a communication of dismissal, depending on the surrounding circumstances.

54.1. In *Sandle,* the EAT held at §30:

'<u>Where there are no contraindications</u>, the sending of a P45 can also be taken to communicate a dismissal, but it is the receipt of the P45 that is the crucial event (the communication of the employer's decision to treat the employment contract as at an end).' (Emphasis added.)

54.2. In *Kelly v Riveroak Associates Ltd* UKEAT/0290/05/DM the claimant was pressing for part-time work, and after refusing her request her employer issued a P45. The EAT held at §24:

'it is not common sense to suggest that the employment relationship continued after the sending of the P45 and its receipt on 3 April. The employment relationship concluded on the receipt of the P45, from both sides' point of view. Of course it is always open to a Tribunal to reach a conclusion looking at the facts objectively which neither of the parties, neither employer nor employee, understood or believed at the time. But there are no indicia whatever of the continuation of the employment relationship after 3 April, which could contra-indicate the effect of the P45 which stated, unequivocally, that the employment contract was at an end.'

55. I note that in *London Borough of Newham v Ward* [1985] IRLR 509, the Court of Appeal held that "*form P45 has nothing whatever to do with the date on which the employment terminates*". However, in that case the claimant's employment had terminated earlier than the date the P45 was issued, and the finding was that the P45 had no relevance in <u>extending</u> the employment contract; that is a different circumstance from this case, where the P45 is said to have terminated the contract.

56. A communication of dismissal cannot be withdrawn by the employer unless the employee agrees: *Harris and Russell Ltd v Slingsby* [1973] ICR 454, NIRC.

57. That principle was applied in the case of *Willoughby v CF Capital Plc* [2011] IRLR 985, relied on by Mr Winters. In *Willoughby,* the employer mistakenly believed the claimant had agreed to change her status from employee to freelancer, and so wrote to terminate her employment contract and offering new terms. When she protested that she did not agree to this, the employer reassured her that she could continue in employment. She maintained she had been dismissed. Her claims for unfair and wrongful dismissal were upheld on appeal. The Court of Appeal noted that the general rule is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. There may be "special circumstances" where notice is given in the heat of the moment such that there is a real question whether the words used were actually intended and a "cooling off" period is allowed. However, that did not apply to Miss Willoughby's letter of termination. Rimer LJ held at §38:

> **"I would, however, be reluctant to characterise the [special circumstances] exception as an opportunity for a unilateral retraction or withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn".**

58. A dismissal without notice takes effect on the date that the dismissal is communicated; where this is by letter, it is the date the letter is received and read: *Gisda Cyf v Barrett* [2010] ICR 1475 and *McMaster v Manchester Airport plc* [1998] IRLR 112.

Resignation by conduct

59. An employee can resign by conduct such as would lead a reasonable employer to believe the employee has terminated the contract of employment: *Harrison v George Wimpey and Co Ltd* [1972] ITR 188.

60. In *Oram v Initial Contract Services Ltd* (Unreported, EAT, 25 February 1999) the claimant was dismissed and then her dismissal was overturned at the appeal stage. However, she did not return to work. The respondent informed her if she did not reply to their correspondence by a certain date, she would be deemed to have resigned. It was found that by not replying, she had resigned.

Unfair dismissal

61. Section 94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

62. Section 98 sets out the test of fairness; in this case it is not disputed that if the Claimant was dismissed, it was unfair.

63. In calculating the compensatory award, the tribunal must consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

Wrongful dismissal

64. For an employer to be entitled to summarily dismiss an employee, that is dismiss him without notice, the employee's conduct must amount to gross misconduct. Otherwise, the Claimant will be entitled to contractual notice pay, at least at the statutory minimum level.

Holiday pay

65. The Working Time Regulations 1998 ('WTR') give workers the entitlement to 5.6 weeks' leave each leave year (including any bank holidays the worker is entitled to take). 4 weeks of this was to implement European law (reg. 13) and the further 1.6 weeks' leave is a matter of domestic law only (reg. 13A).

66. A claim for unpaid holiday can be made under s.13 ERA, for unauthorised deductions from wages, or under reg.30 WTR.

67. Employees are entitled to be paid in lieu of holiday accrued but untaken during their final leave year on termination of employment (reg. 16 WTR). If there is no express contractual right to payment in lieu of accrued leave, the claim would be under the WTR, for leave calculated in accordance with the statutory formula (reg. 14).

Conclusions

Unfair dismissal

68. Were the applicable terms of the Claimant's employment contract contained in the 2011 Particulars or the 2016 Particulars? I have found on the balance of probabilities that the Claimant did see and sign the 2016 Particulars. Those were therefore the applicable terms governing his employment contract at the time of the events giving rise to this claim. Under those terms, the Respondent was not obliged to provide the Claimant with work and the Claimant was not obliged to accept work when offered.

69. Was the Claimant dismissed? The question, applying *Sandle v Adecco,* is whether a reasonable employee in the circumstances of the Claimant would have understood that by sending his P45, the Respondent had communicated an unequivocal intention to treat the contract of employment as at an end. I conclude that is what the P45 would have communicated to a reasonable employee, for the following reasons.

    69.1. The P45 stated on its face that the Claimant's leaving date was 30 September 2020.

    69.2. There was no cover letter or other prior or simultaneous communication with the Claimant to explain the reason for the P45 being issued.

    69.3. The Claimant had not undertaken work for the Respondent since 23 March 2020.

    69.4. The Claimant had not been offered work by the Respondent since 13 August 2020.

69.5. The Claimant had not been furloughed by the Respondent since 17 August 2020.

69.6. The Claimant had not been paid by the Respondent since the end of August 2020.

69.7. Save for replying to his pay query on 2 October 2020, the Respondent had not contacted the Claimant since 13 August 2020. The text message of 2 October 2020 was neutral in this regard; it did not make any reference to the Claimant returning to work or to his employment continuing.

69.8. At the time when the P45 was received and read there was no contraindication to suggest the Respondent's intention was anything other than termination of the Claimant's employment.

70. When the Claimant texted Miss Smith on 7 November 2020, she reassured him on the same day that there was no intention to dismiss. However, it was not open to the Respondent to unilaterally retract the notice of dismissal, as communicated by the P45. The Claimant did not reply or indicate that he agreed to the dismissal being withdrawn and to his employment continuing.

71. The Claimant was therefore dismissed by the Respondent on the date he received the P45, 5 November 2011. As the Respondent properly conceded, in all the circumstances this amounted to an unfair dismissal.

Wrongful dismissal

72. If the Claimant was dismissed, was he dismissed in breach of his contractual entitlement to notice? No notice having been given; it follows that the Claimant was wrongfully dismissed.

Polkey

73. If the Claimant was dismissed, what is the chance he could have been fairly dismissed or would otherwise have remained on nil pay to date? (The *Polkey* issue.)

74. I accept the Respondent's submission that had the Claimant not been dismissed by the issuing of his P45, he would not have returned to work in any event. My reasons are as follow:

74.1. The Claimant did not contact the Respondent to inquire about Covid-safe arrangements or alternative work throughout the period from 13 August to 5 November 2020. This tends to suggest he would not have made such inquiries after 5 November 2020 either.

74.2. The Claimant did not accept Ms Smith's offer to return to work in her text message of 7 November 2020.

74.3. The Respondent continued to only have work available at Buckingham Palace, which the Claimant objected to on grounds of Covid safety, and also disliked.

74.4. The Claimant continued to shield at home to protect his mother-in-law throughout the relevant period.

74.5. From 25 May 2021, the Claimant was not well enough to return to work.

75. The Respondent did not object to the Claimant remaining 'on the books' while not working. Under the terms of the 2016 Particulars, he was entitled to refuse work and no disciplinary sanction would have been applied. I therefore do not make any finding that he would have been fairly dismissed. However, he would not have received pay and therefore it would be just and equitable for his compensatory award to be reduced to nil to reflect the absence of financial loss.

Holiday pay

76. Was the Claimant entitled to holiday pay? The Claimant's payslips and absence records show he did receive 28 days' holiday pay during 2020, his maximum potential contractual entitlement.

77. The result of the Respondent's approach to topping up furlough pay was that the Claimant's holiday entitlement was used to top up the difference between 80% and 100% pay while on furlough, and not available to take as holiday after he ceased to be on furlough or to be paid on termination of employment.

78. I have considered whether reg.15 WTR may be relevant. That regulation sets out that an employer requiring an employee to take holiday on particular days must either give advance notice or have a 'relevant agreement' to vary the notice provision. A 'relevant agreement' is defined at reg.2; at a minimum it must be made in writing and legally enforceable. However, the claim was not brought or argued on that basis. No specific evidence or argument was heard on whether reg.15 WTR had been breached or if so the consequences for the Claimant's annual leave entitlement.

79. The Claimant's claim was put simply that he had not received his full holiday pay entitlement, and on the evidence of his pay slips and absence record he had. The holiday pay claim is therefore dismissed.

Employment Judge Barrett
Date: 7 September 2021