EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109074/2021 (V)

Held by CVP on 23 June 2021

Employment Judge E Mannion

Ms E Arrighi	**Claimant** **In person**
Newsquest Media Group	**Respondent** **Represented by Mrs Ralph**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's claim for an increased redundancy payment based on her length of service and payment for untaken annual leave is successful. The respondent is ordered to pay the claimant £601.62 in respect of the redundancy payment and £1,620.20 in respect of untaken annual leave. The claimant's claim for the failure to pay a long service award is unsuccessful.

REASONS

Introduction

1. This is a claim of unlawful deduction of wages relating to the redundancy payment made to the claimant by the respondent on 31 October 2021, a long service award the respondent provides and accrued but untaken annual leave at the time of the claimant's termination.

2. The claimant gave evidence on her own behalf. Cheryl Johnston (HR business partner) gave evidence for the respondent. The Tribunal had documents from both parties and these were exchanged between the parties and made available to the witness.

Relevant law

3. Section 211 of the Employment Rights Act provides that continuous service begins:

> (1)(a) begins with the day on which the employee begins work, and
>
> (b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

4. An employee under Section 230 of the Employment Rights Act is someone who:

> (1) …… has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act *"contract of employment"* means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

5. Unlawful deduction from wages is considered under Section 13 of the Employment Rights Act and prohibits deductions from a workers wages unless these deductions are required or authorised by statutory provision or where the worker consented to the deduction.

6. Regulation 15(2) of the Working Time Regulations allows an employer to direction a worker to take leave so long as it complies with the notice provisions in Regulation 15(3) which state that:

> (3) A notice under paragraph (1) or (2)—
>
> (a)may relate to all or part of the leave to which a worker is entitled in a leave year;
>
> (b)shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and
>
> (c)shall be given to the employer or, as the case may be, the worker before the relevant date.

Issues

7. The respondent did not accept that the claimant was an employee at the outset of her working relationship with the respondent and asserted that the claimant's continuous service as an employee began in March 2001 and not on an earlier date. They also asserted that they directed the claimant to take any accrued but untaken annual leave in advance of her employment terminating on 20 October 2020. Therefore the Tribunal has to determine the following issues:

    7.1 Was the claimant an employee from 1999 onwards?

    7.2 If so, did the respondent calculate the redundancy payment correctly?

    7.3 If so, was the claimant entitled to a length of service award?

    7.4 Did the respondent direct the claimant to take annual leave prior to the termination of employment?

    7.5 If so, is payment for untaken annual leave due and owing to the claimant?

Findings in fact

8. The Tribunal makes the following findings in fact:

    (i) The Respondent is a media organisation engaged in traditional print media as well as online media publications and in particular The Herald at 200 Renfrew Street, Glasgow, G2 3PR.

    (ii) The Claimant was terminated by the Respondent by reason of redundancy and the effective date of termination was 20 October 2020.

9. The work relationship between the Claimant and the Respondent began in 1999. The Claimant initially undertook a period of work experience for 1 week at The Herald, working on the photo desk. She was studying journalism at Strathclyde University at that time. After her week of work experience, she continued working the photo desk at The Herald with the intention of continuing with her studies at Strathclyde University in three months' time. She was paid a day rate of £50 per day which she invoiced to The Herald. She accounted for her own tax and national insurance and was described as a freelancer. During this period, she was also working for the Royal Mail in the evenings.

10. At the end of this three month period, the Claimant took the decision not to return to her journalism studies and instead continued with The Herald. She also left her role with the Royal Mail as she found it too tiring to continue with both jobs. She was not provided with any contractual documentation by The Herald and continued to provide invoices for her day rate which increased to £60 per day. She continued to work primarily on the photo desk and described herself as a Girl Friday to the editors of the paper. At one point prior to 2001, she also began working on a magazine insert to the paper, and her tasks were then divided equally between the photo desk and the magazine.

11. The claimant's daily tasks and duties were set by the editors of the paper who supervised her work and directed her how these duties should be undertaken.

12. Her hours of work at this time reflected the hours undertaken by her editors, normally following a working pattern of 10-6. At times she worked later in the evenings from time to time and the following day, her working day would start later. This was done in agreement with her editors.

13. Apart from the initial three month period, the claimant only worked for The Herald. Although there was no formal restriction on her undertaking additional work or work for a competitor, she felt that she was unable to do so as there was an expectation that she would not take up work with a competitor that if she did so, she would not be provided with further work from The Herald.

14. The claimant described herself as being a part of the team in The Herald but recognised that her status was different to “employees” within the respondent organization as she had no employment rights such as annual leave or paid sick leave.

15. The claimant undertook her work personally for the respondent. She was not aware of a right to provide a substitute to undertake her work at The Herald and did not do so. When she tool (unpaid) annual leave, her tasks and duties were taken up by those also working for The Herald. There was no expectation that she would provide a substitute to cover her tasks and duties during her absence.

16. On 26 January 2001, the respondent wrote to the claimant was offered a role as a Fashion/Lifestyle Editor at The Sunday Herald (pg 44 of the Bundle) setting out the terms and conditions of employment. The appointment began on the 26 March 2001, and this letter confirmed that her continuous employment with the Respondent ran from that date.

17. The claimant did not question her continuous start date at that time or suggest that the period 1999 – March 2001 should also be considered as a period of employment with the respondent.

18. On 2 March 2009, the respondent wrote to the claimant with new terms and conditions for the role of Group Fashion Editor (pg 33 of the Bundle). This letter again confirmed that her continuous start date for the purposes of her

employment with the respondent was 26 March 2001. The claimant did not challenge or question this continuous start date and signed the terms and conditions on 23 March 2009.

19. The claimant also completed paperwork in respect of taking maternity leave in 2008, 2010 and 2012 (pages 118, 119 and 120 of the Bundle) which all cite the 26 March 2001 as the commencement date of the claimant's employment.

20. The respondent wrote to the claimant on 25 June 2020 advising her that due to the impact of the Covid-19 pandemic, her role was at risk of redundancy and that the respondent was engaged in a collective consultation process in respect of potential redundancies. (pg 54 of the Bundle) Attached to this letter was an illustration of the redundancy payment which would be payable if the claimant's role was found to be redundant. This was based on 19 years' service beginning on 26 March 2001.

21. Collective consultation meetings took place between the respondent and both Employee and Trade Union Representatives on 7 July and 9 July 2020 where various matters were discussed and agreed. During these meetings, the respondent informed the representatives that any employees who were made redundant were required to use up any outstanding annual leave during their notice period.

22. Individual consultation meetings took place on 16 and 30 July 2020 between the claimant and Gary Scott, Senior Assistant Editor. The claimant was accompanied to those meetings by John Toner, National Union of Journalists Representative. During these meetings, the claimant indicated that she did not agree that her continuous employment began in March 2001 and that her continuous service should be 20 years given her time she was classified as a freelancer by the respondent. She indicated that her redundancy payment should be calculated based on 20 years' service instead of 19 and that she would also be eligible for a long service award as she had 20 years' service.

23. This was the first occasion on which the claimant challenged her continuous length of service although she spoke about it previously with colleagues who

began as freelancers and then moved into employment with the respondent. She was aware of a colleague raising this issue in a redundancy exercise some years earlier and understood that his freelancer status was taken into account when calculating his redundancy pay.

24. Mr Scott emailed the claimant on 17 July (pg 78 of Bundle) stating that in response to the continuous service question, she was not an employee prior to March 2001, as she was paid on a gross basis , submitted invoices for work done and was responsible for her own tax and NI.

25. On the 6 August 2020, the respondent wrote to the claimant confirming that her role was made redundant with effect from 7 August 2020 and that her employment would terminate on 30 October 2020 (pgs 80 – 82 of the Bundle). This letter also confirmed that she was expected to use her annual leave during her notice period and that "Should you fail to request and book your annual leave in this way, it shall be deemed that you have taken all accrued annual leave during this period anyway and no further monies will be due to you." During the Claimant's notice period, she was furloughed and so not required to be at work.

26. The Claimant booked 10 days' annual leave which was 5 days beginning on 20 July 2020 and 5 days beginning on 3 August 2020. As at the 30 October 2020, there were an additional 13.32 days which the Claimant had not booked or taken as annual leave.

Observations on the evidence

27. All the witnesses gave their evidence in a clear way and I considered they were all giving an honest account of events as they remembered them. Given the passage of time, the respondent was not in a position to and did not challenge the majority of the claimant's evidence on how her work was arranged and the specifics of the relationship that existed which she used as a basis to assert she was an employee from 1999 - 2001. Their only argument was the fact the claimant invoiced the respondent on an agreed daily rate and accounted for her own tax and national insurance and failed to

challenge her continuous start date for employment prior to the redundancy consultation in 2020. The claimant's evidence as to the work relationship from 1999 – 2001 is therefore accepted.

Respondent's submissions

28. The respondent pointed to the contracts of employment which formed part of the bundle as well as various other items of correspondence in the bundle which stated the claimant's continuous employment ran from 26 March 2001 which was unchallenged by the claimant prior to the redundancy process.

29. The respondent's primary position is that the claimant was a self employed freelancer in the period before March 2001 as evidenced by her practice of invoicing the respondent for work done and so all monies regarding the claimant's redundancy payment were correctly paid to her based on 19 years' continuous service as an employee.

30. With regard to the annual leave, it was submitted that the claimant was aware she required to take annual leave prior to the termination of her contact given the content of her termination letter. and that she had ample opportunity to make bookings regarding this leave, but delayed in doing so.

Claimant's submissions

31. The claimant submitted that in her view she fulfilled the criteria for an employee prior to March 2001 and so her redundancy payment should be based on 20 years' service. She further submitted that she was entitled to the long service award as this was paid when an employee had 20 years' service, which she had. Finally in respect of the annual leave which was untaken at the termination of her employment, she waited until after her appeal against dismissal had been dealt with but that there was then a technical glitch which did not allow her to do so.

Decision

Was the claimant an employee from 1999-March 2001?

32. While neither the respondent nor the claimant referred me to case law on employment status, I am aware of the depth of caselaw which considers employment status. There are a number of factors which must be considered when determining employment status and these factors can be summarized as follows:

    (i) What level of control was held by the organization?

    (ii) Was the person required to provide personal service?

    (iii) Was there a mutuality of obligation?

    There was no contract of employment to review and consider for this period. It was accepted by both parties that the claimant was described as a freelancer in the period 1999 – 2001, that she submitted regular invoices to the respondent based on an agreed day rate and dealt with her own tax and national insurance. The fact that the parties did not describe the relationship as one of employer and employee and that the claimant was not part of the respondent's payroll and accounted for her own tax and national insurance is not determinative of self-employed status.

33. Control was considered in the case of Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 Q.B. 497 and MacKenna J stated that "control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done". The claimant's hours and days of work were set by the respondent who directed her in terms of the tasks and duties which they required her to undertake on a day to day basis. This work was done under the supervision of the respondent. She was required to seek permission before taking annual leave. Her place of work was determined by the respondent. I am satisfied that there was suitable control in place by the respondent.

34. Turning to personal service, the claimant was not aware of any right to provide a substitute and at no time did she provide a substitute either while she was absent or otherwise. Instead, during her absences, her work was undertaken by others within the respondent organisation. Further, the claimant was not in a position to provide her services to other newspapers. There was an expectation that she would provide her services to the respondent organisation only.

35. The final point is mutuality of obligation. This is where an employer is obliged to provide work and the worker is obliged to undertake the work. There was no documentation to consider whether there was an expectation that the claimant would accept every piece of work offered to her or the circumstances in which she could refuse to do work for the respondent. Instead, the claimant gave evidence that she worked for the respondent on a full time basis, that the editors gave her regular daily and weekly tasks to develop her skills and experience, firstly on the photo desk and later on a magazine insert. There was no mechanism for the claimant to decline work and she stated that she undertook whatever tasks she was assigned. She stated that she was not like a freelancer in the sense that they can work for a variety of different newspapers and choose what work to undertake and what work to reject. She understood that she could not work for a competitor and to do so would result in receiving no work from the respondent. It is clear from the evidence that there was a mutuality of obligation.

36. As the elements for an employment relationship are present, I find that the claimant was an employee during the period 1999- March 2001.

Did the respondent calculate the redundancy payment correctly?

37. The redundancy payment made to the claimant was based on 19 years' service and used 26 March 2001 as the starting point for this calculation. As the claimant was an employee prior to 26 March 2001, the redundancy calculation.

38. The claim put forward by the claimant asserted that her redundancy payment should have been calculated based on 20 years' service. As redundancy payments are based on completed years of service, while the claimant was an employee from 1999 onwards based on my above findings findings on employment status, I conclude that the calculation of the redundancy payment should be based on 20 years' service as claimed.

Was the claimant entitled to a long service award?

39. The respondent confirmed that they made a long service award to employees once they had 20 years' continuous service and this amounted to £200 worth of vouchers. Their failure to pay this to the claimant was based solely on the fact that in their view, her continuous service with the respondent amounted to 19 years rather than 20.

40. While I have concluded that the claimant's status prior to March 2001 was that of employee rather than a self-employed contractor, both the claimant and respondent confirmed that the claimant began working with the respondent in 1999. Therefore, she obtained 20 years' service in 2019 and so any entitlement to the long service award arose at that time rather than on termination of her employment in October 2020.

Did the respondent direct the claimant to take annual leave prior to the termination of her employment?

41. I heard evidence and was pointed to documentary evidence, specifically the claimant's letter of dismissal, where the respondent set out that they expected the claimant to take any remaining accrued annual leave before the termination of employment and informed the claimant of this. The claimant understood that this was expected and explained in evidence that this did not happen, partly as she was awaiting the outcome of her appeal against dismissal and partly as she had difficulty using the respondent booking system for annual leave while on furlough.

42. While an employer can direct an employee to take annual leave at particular times under Regulation 15 of the Employment Rights Act, the employer must

give the employee notice and this notice must comply with Regulation 15(3) of the Working Time Regulations. This requires an employer to "specify the days" on which annual leave shall be taken. Notice should also be given in the relevant time before the leave takes effect as per Regulation 15(4). In this case, the respondent informed the claimant that she was required to take annual leave before her employment terminated but did not direct that she take annual leave on specific dates. Choosing when the claimant would be absent on annual leave was left to her and so the notice given by the respondent in their letter of dismissal was not compliant with the notice requirements in Regulation 15(3) as it did not specify the days on which the claimant would take her leave.

If so, is payment for untaken annual leave due and owing to the claimant?

43. The respondent failed to give adequate notice to the claimant and the claimant did not use her full annual leave entitlement prior to the termination of employment. As such the respondent made an unlawful deduction from her wages by failing pay the claimant for 13.32 days annual leave in her final salary payment.

44. In conclusion, I consider that the respondent made an unlawful deduction from the claimant's wages in respect of her redundancy payment and annual leave payment. The claimant's claim for failure to pay a long service award is out of time and unsuccessful.

Employment Judge: Eleanor Mannion
Date of Judgment: 17 September 2021
Entered in register: 17 September 2021
and copied to parties