EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 22/9/21

Claimant: Mr Garcia Rico

Respondent: Facilicom Cleaning Services Ltd

Before: Employment Judge Mr J S Burns

Representation
Claimant: Ms M Thomas-Davis (Union rep)
Respondent: Ms P Cunningham Peninsular rep
Spanish Interpreter Ms T Crespo

JUDGMENT
The Respondent must pay the Claimant £2082.50 by 6 October 2021

REASONS

1. This was a claim for arrear salary and wrongful dismissal (notice pay). I heard evidence from the Claimant via a Spanish interpreter and then from Mr Quito a service delivery manager employed by the Respondent. The documents were in a bundle of 108 pages. I was sent written submissions and a schedule of loss.

Findings of fact

2. The Claimant was employed by the Respondent from December 2019. His written contract was for ten hours a week Monday to Friday. These were his normal hours for which he earned £119 gross per week. He also worked some Saturdays when the work was available and he was willing, but this was not guaranteed and it was irregular work.
3. On 13/3/2020 the Claimant lost his father and asked for time off to travel from London to Colombia for the funeral. He was given two weeks' off work. He was supposed to return to work after two weeks. Because of the lockdown he was stuck in Colombia.
4. On 9/4/2020 he was put on furlough and paid at the rate of 80% based on his contracted hours namely ten per week.
5. The business was closed and no one could attend work until 20/7/2020 when work became available again. Mr Quito told the Claimant about this. However, the Claimant was not in the UK so he could not work for the Respondent. The furlough payments ended on 20/7/2020 and thereafter the Respondent did not pay the Claimant.
6. There were a few communications by Whatsapp between the Claimant and Mr Quito while the Claimant was in Columbia but on the whole the Claimant did not stay in touch and he did not maintain contact every two weeks as he had promised to do.
7. The Claimant tried to return to the UK as soon as possible and originally booked a flight in September 2020 but this was cancelled by the airline. He returned to the UK at the earliest opportunity on 19/11/2020 but did not tell the Respondent about this at the time, attend his work place or tender himself for work if it was available.
8. There was contact between the Claimant and his Line manager Mr Quito in early January 2021. The Claimant asked for his P45 and did not offer to work.
9. There was a further telephone conversation between Mr Quito and the Claimant on 8/3/2021. Mr Quito told the Claimant that the Respondent was planning to make redundancies and that the Claimant should get involved in the consultation. The Claimant

said that he "*did not want to get involved in that*" , that he wanted "*to finish*" and he asked again for his p45.

10. Mr Quito shortly afterwards sent the Claimant messages saying that the Claimant should confirm his resignation in writing, but the Claimant did not respond at the time to deny that he had or was resigning. Mr Quito naturally understood that the Claimant had resigned so he wrote to him on 29/3/2021 accepting his resignation and confirming his last day of employment as 8/3/2021.

Conclusions

11. The Claimant was entitled under his contract to be paid ten hours a week and no more save under an unenforceable casual arrangement in relation to Saturdays. He was paid for all the Saturdays he actually worked. The claim that he was entitled to higher furlough payments by reference to the Saturday work is dismissed.
12. With regard to the period after 20/7/2020, Ms P Cunningham for the Respondent submitted that an employment contract is one of performance and, in the absence of a contractual term which gives the benefit of pay where an employee is absent from work, no sums are due and that there was no such term in the contract.
13. However, Ms Thomas Davis referred me to North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387, where the Court of Appeal held (at paras 54-60 of the judgment): as follows; "*It is, not always easy to discern a clear set of principles from these authorities. However, the following seem to me to be uncontroversial: a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (Petrie). b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances. c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (Wallwork v Fielding). d) By contrast, an inability to work due to an "unavoidable impediment" (Lord Brightman in Miles v Wakefield) or which was "involuntary" (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful*."
14. I accept Ms Thomas Davis's submission that, applying these principles, the Claimant was involuntarily subject to an externally imposed constraint and/or unavoidable impediment in the form of: the death of his father in Colombia and the absolute suspension of flights from Colombia to the UK, from March until November 2020 due to the Covid-19 pandemic. Absent these external, unavoidable, involuntary circumstances, the Claimant was ready, willing and able to work.
15. This situation continued until 19/11/2020 when he returned to the UK. Hence, despite being unable to work, he is entitled to be paid. The period from 20/7/20 to 19/11/2020 was 17.5 weeks and the rate was £119 per week and the total sum due is £2082.50.
16. After 19/11/20, although he had to quarantine for two weeks, he should have contacted the Respondent immediately to explain the situation and tender his services. His failure to do so is not excused by his belief that his place of work was still closed. Had he contacted the Respondent on his return, then the Respondent would have been aware of the situation and been able to act and plan accordingly, perhaps by finding the Claimant alternative work or dismissing him.
17. After the 19/11/2020 the Claimant cannot show that he was ready, willing and able to work for the Respondent but was prevented by an insuperable obstacle not within his control, so from that date onwards he cannot rely on the principles in the Gregg case referred to above, and as he did not work, he is not entitled to be paid.
18. I find that the Claimant resigned or is estopped from denying that he resigned by his conduct and conversations with Mr Quito in January and March 2021. Hence, he is not entitled to notice pay.
19. The Claimant claimed an uplift because of the Respondent's claimed failures to comply with the ACAS code relating to Grievances and Discipline at Work. However, no such uplift is appropriate given (i) the Claimant's poor communication, (ii) the fact that he did not raise a grievance while at work and (iii) he was not disciplined but resigned and (iv) in all the circumstances it would be an injustice to require the Respondent to pay him more than his normal gross wages for the period I have identified.

J S Burns Employment Judge
London Central
22/9/2021
For Secretary of the Tribunals:
Date sent to parties: 23/09/2021