



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 20/10/2021

Supplementary written submission received and considered on 25/10/21

Claimant: Mr J Boateng

Respondent: Mitie Ltd

Before: Employment Judge Mr J S Burns

Representation

Claimant: Mr P Collins (Solicitor)

Respondent: Mr B Frew (Counsel)

JUDGMENT

1. Any claim for unauthorised deductions from wages is dismissed.
2. Any claim for breach of contract is dismissed.
3. To the extent necessary, the Claimant is granted leave to amend his claim without further service or formal consequential pleadings being required or permitted, to include a claim for a remedy under Regulation 30 of the Working Time Regulations 1998.
4. It is declared under Regulation 30 of the said regulations that in the leave year ending 31/3/21 the Respondent wrongly prevented the Claimant taking 2 of his 28 days' holiday to which he was entitled under Regulation 13 read with Regulation 13A, and that the Respondent must allow the Claimant to carry forward these 2 days as explained in the reasons.
5. Within 14 days of this judgment being sent to the parties, the Respondent must pay the Claimant compensation of £300.

REASONS

1. This was a claim "for holiday pay" in the sum of £294.72 representing 2 paid holiday days for the employment year 1/4/20 to 31/3/21 at the rate of £147.38 per day.
2. I heard evidence from the Claimant and from Mr M Howes, a senior HR business partner for the Respondent. I was sent an Excel spreadsheet during the course of the hearing which Mr Howes had drafted to show the Claimant's holiday payments over the period 17/5/2019 to 1/10/21. Mr Howes accepted during his evidence that some of the information he had inserted in that document (notably in column C) was inaccurate.
3. Despite the small quantum involved, as is common with holiday pay claims, a number of potential complex issues arose but during the hearing neither side provided any written skeleton argument, instead making ad hoc oral submissions to deal with points I raised at the outset.
4. The ET1 did not make it clear whether the claim was brought in contract, or as a claim for unauthorised deductions contrary to sec 13 ERA 1996. During the hearing it was agreed that as the Claimant was still employed by the Respondent, his claim could not be brought in the ET as a contract claim and the oral submissions focused on the claim as one for unauthorised deductions.

5. After the hearing had ended, it occurred to me that perhaps the claim should be considered as one under Regulation 30 Working Time Regulations 1998 for a remedy for the Respondent having refused to permit the Claimant to exercise his rights in Regulation 13 to four weeks leave and in Regulation 13A to an addition 1.6 weeks holidays in each year, so I sent emails to the parties giving them an opportunity to make supplementary written submissions about that. I received submissions from each party on the morning of 25/10/21 and I considered those submissions before I made my judgment.

Findings of fact

6. The Claimant is employed by the Respondent as a Security Guard.
7. The Claimant's employment commenced on 18th September 2009 and was transferred to the Respondent under the Transfer of Undertakings (Protection of Undertakings) Regulations 2006 ("TUPE") on 26 October 2018.

8. The Claimant's terms and conditions of employment (previously issued by the transferor Vision Security Group Ltd on 29/7/2011) contain inter alia the following provisions:

"the company reserves the right to make reasonable changes to these terms and conditions of your employment on 30 days notice or on the statutory consultation period as necessary"

'Annual holidays: the company holiday year runs from 1st April to 31st March. ...You are entitled to 28 (pro rata) days holiday. Each holiday will be paid at 1/5 of your annual weekly hours, for example:

4 on 4 off shift pattern; Normal hours worked each week 42; Holiday entitlement is 28 days paid at 8.4 hours per day (42/5 = 8.4)

7 on 3 off 7 on 4 off shift pattern; Normal hours worked each week = 56; Holiday entitlement is 28 days paid at 11.2 hours per day (56/5 = 11.2)

9. The Claimant's shift patterns were 3 days and 4 nights working, followed by 4 days and nights off, then 4 days and 3 nights working followed by 3 days and nights off. This comes to an average of 56 weekly working hours in total. So, similar to the second example given in the contract, he was entitled to be paid 28 days holiday at the rate of 11.2 hours per day.

10. The Claimant told me in evidence and I accept that until the beginning of the leave year 1/4/20 to 31/3/21 he was allowed to take 28 days paid holidays per year.

11. On 18/02/2020 the Claimant received a generic letter from the Respondent making reference to the fact that from the 1st April 2020, Regulation 16 of WTRs 98 was amended so that the period by reference to which a worker's holiday pay rate is to be calculated was to be changed from the previous 12 weeks to the previous 52 weeks.

12. The letter contained also the following further information which pertained to the Claimant's situation: *"If the shift pattern us 7/3/7/4 – i.e. 3 days. 4 nights, 3 off, 4 days, 3 nights, 4 off = average 56 hours pw, then the average working work is 4.7 shifts/days. The annual leave entitlement is 5.6 weeks x 4.7 shifts = 26.1 shift/days holiday."*
13. The letter was accompanied by a list of *"answers to frequently asked questions"*, which is difficult to understand and confusing.
14. The Claimant's line manager explained to him that this meant that the Claimant would be entitled to take only 26 days paid holiday per year and not 28 as before.
15. The Claimant notified his discontent about this immediately through his line manager and by subsequently instructing solicitors to challenge the matter and ultimately to issue these tribunal proceedings on 3/8/21, following an extended ACAS conciliation period.
16. However, as a consequence of his being instructed that he was entitled to only 26 days holiday pay, he booked and took and was paid for only 26 days holiday in the period 1/4/20 to 31/3/21.
17. At the end of May 2020 the Claimant's rate of pay increased from £11.96 per hour to 12.28 per hour.

Conclusions

18. The words *"pro rata"* in the extract from the contract quoted above do not mean that the Claimant is entitled to less than 28 days paid holiday a year. This is clear from the worked examples in the same quotation. The words probably mean that where an employee is not employed for a whole holiday year, either because his employment starts after the year has begun or ends before the end of the year, the 28-day entitlement will be reduced proportionately.
19. The Claimant's contract entitles him to be take and be paid for 28 days holidays per full holiday year during which his employment continues, with the amount of each day's holiday pay being one fifth of his averaged weekly earnings.
20. The fact that on 6/4/20 under the WTRs the reference period for working out the average weekly pay changed from the previous 12 weeks to the previous 52 weeks is irrelevant to the question of the number of paid holidays to which the Claimant is entitled. As was conceded by Mr Frew, the Respondent has erroneously conflated the question with the legislative change.
21. While the legislative change caused the Respondent to change the reference period for calculating the rate of the daily holiday pay, it did not follow from this that the Respondent was either obliged or entitled to reduce the Claimant's basic right enshrined in his contract (and also reflecting his entitlement under the WTRs) to take and be paid for 28 days holidays per year.
22. The extract quoted above from the Respondent's letter dated 18/2/20, insofar as it applies to the Claimant, is misconceived. If the Claimant works 56 hours per week on average, he is entitled to be paid $56/5 = 11.2$ hours each holiday but those holidays must still be 28 in number.
23. The Respondent stated in its ET3 : *"Prior to the change in the Respondent's policy, the Claimant's holiday pay was calculated on the basis of him working 12 hours per shift, at an hourly rate of £12.28. (£147.35 per shift) Under the Respondent's new policy, using a reference period of 52 weeks, his pay was calculated on the basis of 12.71 hours per shift. (£152.52 per shift) This means the Claimant receives an enhanced holiday pay in comparison to prior to the change in policy. Whilst the Respondent accepts that there has been a change to the terms*

and conditions of the Claimant's employment, their position is that the change has been favourable to the Claimant as it means he receives a higher level of holiday pay."

24. This Respondent's argument and the claimed increase in shift length were not referred to in the letter dated 18/2/20 and is in any event flawed. The suggestion that shift length is to be measured at 12.71 hours rather than 12 hours is not proved or shown clearly in Mr Howe's spreadsheet and in any event would be contrary to the proper approach - which is that the hours on which holiday pay should be calculated should not be arbitrarily extended or reduced but calculated by reference to the average hours actually worked over the previous 52 weeks.
25. The fact that the Claimant's hourly pay rate was increased at the end of May 2020 is also irrelevant and cannot be raised as an acceptable excuse for breaching the holiday obligation.
26. Under the contract the Respondent is not entitled to make an unreasonable unilateral variation. The unilateral variation it purportedly made from April 2020 by taking away 2 of the Claimant's 28 days holidays each year, was unreasonable because it was a substantial and unnecessary detriment for the Claimant, and also because it breached the minimum requirements in regulation 13 read with 13A WTR 98 that the Claimant is entitled to 28 paid days holiday per year.
27. By virtue of Regulation 35 it is not possible to contract out of the minimum entitlements conferred by the regulations.
28. Hence the Respondent's purported attempt to vary the Claimant's contract was ineffective.
29. The Claimant is not to be taken to have accepted this purported variation or to have affirmed the breach of contract because he made his discontent known and has in effect worked under protest regarding this point ever since.
30. I accept the Respondent's submission that as the Claimant did not arrange to take and did not in fact take more than 26 days holiday in the period 1/4/20 to 31/3/21, payment for more than 26 days holiday was not due, and hence the Claimant cannot maintain a claim for an unauthorised deduction from his wages for the missing two days. I apply the approach in Fraser v South West London St George Mental Health Trust [2012] ICR 403 in this regard.
31. Having considered the supplementary written submissions about the matter I have decided that I can and should deal with this matter as a matter of substance as a complaint under Regulation 30 WTRs and that doing so does not cause the Respondent significant procedural or forensic prejudice.
32. It is not always clear which provisions a claimant relies on for a holiday pay claim. Choudhury P in Smith v Pimlico Plumbers Ltd UKEAT/0211/19 at paragraph 96 indicated that it is not a requirement in all cases to state the legal provisions relied upon; it is the substance of the pleaded case that matters.
33. The Respondent has submitted in opposition to my considering Regulation 30 inter alia; *"the issue raised does not form any part of the claim that has been answered by the Respondent to date. It is submitted that it does not encounter a relabelling exercise but requires an amendment application that should be heard during the course of a Preliminary Hearing and if the amendment application is successful then the issue should be relisted to be heard whereby the Respondent is given an opportunity to consider and respond to the amended claim."*
34. However, as a matter of substance, the Claimant's main point throughout this matter has been that he has been deprived of his full measure of 28 days paid holiday. This is of course one of the main entitlements confirmed and protected by the WTRs as the Respondent will

have been well aware. The Respondent's whole approach of which the letter dated 18/2/2020 was part has been on the basis that it has made the variations that it has purported to make so as to comply with the WTRs.

35. In my view the identification of the WTRs as a means by which the Claimant can be given a remedy is a relabelling exercise and if this is a matter which requires amendment then applying the test in Selkent, such leave should be granted.
36. The next question is whether I should allow the Respondent to formally amend its GOR in response and then arrange another oral hearing. The Respondent's supplementary submission fails to identify any additional witness evidence or substantive legal submissions which the Respondent could usefully add in relation to the WTRs. Mr Howes has already explained the Respondent's version of events and it is clear what was done. The requirements of the WTRs and the facts I have found would not change.
37. The sum at stake in this matter is very modest and disproportionately so in relation to the likely costs of further pleadings or a further oral hearing.
38. The Respondent has had now a full opportunity to make any submissions about the WTRs and it has done so via Mr Frew. I have decided that no sensible or proportionate purpose will be served by requiring formal amendments and re-amendments and another hearing. I consider that it is in accordance with the overriding objective to deal with the point forthwith.
39. The EAT in Smith v Pimlico Plumbers held in March 2021 that a worker can carry over leave which has not been taken because they have been deterred from doing so by the employer not allowing paid leave. Choudhury P noted, at paragraph 80, that the burden of proof in establishing that the worker has been afforded an opportunity to exercise the right to take paid annual leave lies with the employer and, at paragraph 91, that, where the employer does not pay for leave, the deterrent effect of the employer's practices is likely to be assumed.
40. I find that the Claimant's rights under the WTRs have been infringed by the Respondent preventing the Claimant from taking his full paid holiday entitlement and that applying the above principles the Respondent must permit the Claimant to carry forward 2 extra days of paid holiday entitlement (to be added to his ongoing 28 day per year entitlement) to be used by him by no later than 31/3/2023 and (ii) taking account of the matters in Regulation 30(4), in addition the Respondent must pay the Claimant the sum of £300.

J S Burns Employment Judge
London Central
26/10/2021
For Secretary of the Tribunals
Date sent to parties : 26/10/2021
