



EMPLOYMENT TRIBUNALS

Claimant: Mr D Sobo

Respondent: The Adventure Learning Charity

Heard at: Watford Employment Tribunal

On: 17 September 2021

Before: Employment Judgment Allen sitting alone by CVP

Appearances:

Claimant: Mr Sobo in person, unrepresented

Respondent: Did not attend and unrepresented

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 37 pages, the contents of which I have recorded. The order made is described at the end of these reasons. "

JUDGMENT

1. The claimant's claim for breach of contract (notice pay) and unauthorised deduction from wages (holiday pay) is well founded and succeeds.
2. The Respondent will pay the claimant 3 months' pay in compensation for breach of contract namely **£13,250 gross** (subject to tax and national insurance).
3. The Respondent will pay the claimant holiday pay of £1,208.06 gross; amended to **£203.84 gross** (subject to tax and national insurance) on reconsideration of judgment - see below.

RECONSIDERATION OF JUDGMENT

4. Upon drafting this judgment, I concluded I have erred in law and reconsidered my decision in accordance with Rule 73 of the Employment Tribunal Rules of Procedure 2013.

5. **Leave to request a hearing to make representations on Reconsideration of Judgment.**
 - 5.1. The claimant has 14 days from the date of despatch of this judgment to apply for a listing to be heard on the reconsideration and amendment of my original judgment.
6. **Non-attendance of Respondent - Rule 47**
 - 6.1. Rule 47 of the Employment Tribunal Rules of Procedure -
If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.
 - 6.1.1. The Respondent lodged a formal response to claim on 28 December 2020.
 - 6.1.2. The Respondent failed to attend or be represented at the full merits hearing on 17 September 2021 at 2pm.
 - 6.1.3. On the morning of the hearing no agreed bundle had been received by the court. At my request the clerk sent emails to the claimant and the respondent to enquire what documents would be relied upon during the full merits hearing. The Claimant responded the Respondent did not.
 - 6.1.4. At 2:10pm, the respondent not having attended the hearing, the court office telephoned the respondent on the number provided on its response form. The call went direct to voicemail.
7. Given the failure to respond to the court's email sent in the morning and no contact by telephone I granted the claimant's application for the case to proceed in absence.

REASONS

8. In a claim form submitted on 8 November 2020 Mr Sobo brings a claim for breach of contract namely notice pay and for unauthorised deduction from wages namely holiday pay.
9. The Respondent, the Activity Learning Charity, is a small registered charity with 11 employees.
10. The claimant commenced employment with the respondent as its Chief Operating Officer (COO) on 23 May 2019 (Contract para 2). Under the contract the claimant received:

Salary £50,000 per annum (Contract para 6.1.) & Car allowance £3,000 per annum

Holiday of 30 days per year (Contract para 8.1.) Leave year 1 November - 31 October

11. On 27 April 2020 the claimant had a conversation with Mrs Foister, Chief Executive Officer (CEO) about the charity; how it was affected by the pandemic and the impact that would have. At the end of that conversation the claimant understood only that the future was unclear however, later that same day he received an email from the CEO purporting to give him two months' notice as follows:

*'Therefore, from 1st July, when the furlough payments cease, we will not be able to afford to retain you in the role of COO, please accept this email as 2-months' notice that we will need to **cease or change your employment contract** with The Adventure Learning Charity from this date.'* (My emphasis).

12. At paragraph 4.1.2. of the contract of employment, the claimant is entitled to 3 months' written notice of termination of contract of employment.

*4.1.2 After the successful completion of any probationary period, your employment may be ended by you giving the Company or by the Company giving you **Three (3) month's** written notice.'* (My emphasis).

13. Subsequent correspondence refers to an intention to retain the claimant's employment beyond the 1 July 2020 (CEO email of 12 May 2020).

'I suggest that, if you wish to stay with us and I hope you do, we retain you beyond 1st July on furlough but we will not be able to top up your salary.'

14. On 25 June 2020 at 1:50 PM CEO sent an email to the claimant which commenced:

*'**Before I send this** are you OK with the paragraph that refers to you?'* (My emphasis).

And sought the claimant's approval of the following:

*'I mentioned earlier in this email, that sadly we are having to say goodbye to some team members. One of whom, is **David Sobo** (the claimant). David is a brilliant team member who has contributed a huge amount to the charity, **I hope that this is not a complete farewell and he will remain involved, just not as our COO.** We will not be replacing this role but sharing out the duties with other team members.'* (My emphasis).

15. The claimant responded to this email shortly after 10:00pm that same evening however, before he had responded he received messages and calls from other members of the team who had clearly seen the same email. The respondent provided a copy of this same email with the response to claim. That copy does not show it was copied to members of the senior management team.

16. Following the claimant's response that evening the CEO sent a second email at 10:27pm in which she stated:

'Yes, I sent it to the senior team when I sent to you for comment before I shared. Why? As I said on the phone, they all aware.'

17. The following day CEO sent another email in which she stated:

'For the avoidance of doubt. Sadly, we have made the post of COO redundant. I emailed you to formally let you know and to give you notice.'

18. The claimant immediately set about arranging a meeting between himself, the CEO and chairman of the board of trustees. I have seen email exchanges between the claimant and CEO to that end. Ultimately, he was unsuccessful and the meeting never took place. The Claimant explained he felt a face-to-face meeting was essential given he had lost confidence in the CEO's veracity and felt any meeting between them should be witnessed.

19. On 12 August 2020 the claimant received a letter from the Finance Officer, Ms Julie Pledge which stated:

'As confirmed in the e-mail to you on 27th April, the role of COO was not required nor affordable under the current conditions surrounding the charity from the end of June.

Since you were on a 3-month notice, we have paid your full salary during your notice from 1st May up to and including 31st July 2020. You have also been paid all outstanding holiday days owed to you at this date.'

20. The claimant does not dispute all holiday accrued but outstanding at 31 July 2020 was indeed paid (26 days).

21. The Claimant confirmed he was paid up to 31 July 2020 including an amount for accrued but outstanding holiday entitlement (26 days).

Conclusion

22. The issues in this case are:

- Was the claimant entitled to a period of notice of termination of the contract of employment? and if so
- Was notice given in line with the terms of the contract? And if so
- When? And
- When was the effective date of termination (EDT).

23. Was the claimant entitled to a period of notice of termination of the contract of employment? The contract is quite clear at 4.1.2. as set out above whether terminated by the company or the employee a period of 3 months' notice is required.

24. Was notice given in line with the terms of the contract? I have considered the correspondence sent by the respondent on 27 April, 12 May, 25 and 26 June 2020. I am satisfied that **all** are lacking in clarity to such a degree that no reasonable employee could be expected to understand if their contract was being terminated or varied.
- 24.1. Beginning with the letter of 27 April (para 10 above) not only did it get the notice period wrong stating 2 months' notice, but it also spoke of termination **OR** change of contract.
- 24.2. The email of 25 June 2020 (para 13 above) does talk of saying goodbye to the claimant but goes on to express the hope he would remain 'involved' and implying he would continue with the charity in a different capacity. In my view the language used undermines any suggestion the claimant's contract was being terminated.
- 24.3. I have no difficulty in concluding the email of the 27 April was not adequate notice of termination of the claimant's contract of employment. The email of 12 May compounds that by talking about the claimant's future with the charity beyond the 1 July in a positive tone. It is not until 26 June the claimant receives any indication his post has been made redundant. The claimant gave evidence the first he understood his employment to have actually been terminated was upon receipt of the 12 August letter.
- 24.4. I have considered if the CEO's email of 26 June announcing the COO post was redundant changes my view. It does not. Having been told in clear terms on 26 June that the COO post was redundant an employee would reasonably expect formal notice of the same in writing providing details of how that would be managed. Nothing like that features in this case.
25. When was the effective date of termination (EDT)? I agree with the claimant the date on which he was formally notified his contract had been terminated was on 12 August 2020.
- 25.1. I have concluded the EDT was 12 August 2020; the date on which the claimant received the letter from the finance officer. The correspondence up to this point was inconclusive as to whether the claimant's employment was to be terminated or not. The first date it can be said with certainty that the claimant was told his employment was terminated was 12 August 2020. That the letter purported to set the effective date of termination as 31 July 2020 is irrelevant. The author was relying on information she had received from elsewhere (most likely the CEO but not conclusively so). Since the claimant had not been properly notified that the contract of employment was to be terminated at all 31 July cannot be the EDT.
- 25.2. That the respondent believed the claimant was under notice from 27 April 2020 is irrelevant if that notice had not been clearly, adequately and competently conveyed to the employee. I have no difficulty in concluding it was not. In any event there is a clearly defined process to be followed in making someone redundant. None of the letters

referred to above include information about a consultation process and it is not until 26 June that the CEO states the post of COO is to be made redundant. In my opinion the letters from the CEO demonstrate unwillingness or inability to grasp the nettle and tell the claimant he was to be made redundant.

- 25.3. If 3 months' notice of termination had commenced on 12 August 2020 the Effective Date of Termination would have been 12 November 2020.

Reconsideration of Judgment

26. On drafting this judgment, I am concerned that I was wrong in law to calculate a new notice period. Such a calculation skews the calculation of holiday that accrued since holiday continues to accrue during the notice period. It is not in the interests of justice to allow a judgment to stand that has no foundation in law.
27. S3(2) of the Employment Tribunals Act 1996 allows the Employment Tribunal to hear claims for 'compensation' for breach of contract of employment. The key word here is 'compensation'. The claimant's claim is for breach of contract in respect of a failure to provide him with proper notice in accordance with the contract. Therefore, the tribunal's power is to award compensation for that breach of contract and not to provide a new notice period retrospectively.
28. Having concluded that I have erred in law by calculating a new notice period with a new effective date of termination in November (being 3 months from 12 August) I have no difficulty in concluding it is in the interests of justice to reconsider that judgment. I have reconsidered my judgment on my own initiative under Rule 73 to award the appropriate compensation and strike out the recalculated notice period.
- 28.1. By Rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Employment Tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the judgment may be confirmed, varied or revoked.
- 28.2. Under Rule 70, a judgment will only be reconsidered where it is necessary in the interests of justice to do so. This allows an Employment Tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. The discretion must be exercised judicially. This means having regard not only to the interests of the party seeking the reconsideration but also the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.
- 28.3. Where the Tribunal proposes to reconsider a decision on its own initiative in accordance with Rule 73, it shall inform the parties of the

reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

- 28.4. Rule 72(2) - If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
29. As set out above the Claimant was wrongfully dismissed since he was not given 3 months' notice of termination of his contract of employment as per clause 4.1.2. the correspondence being unclear as to whether his employment was terminated or would continue in some other way. The effective date of termination from which calculations of remedy are made is the 12 August 2020, the first day on which it can be said with certainty the claimant was informed in clear and unambiguous terms that his contract was terminated. That the writer of the letter had been informed termination was effective from 31 July is irrelevant.

Holiday Entitlement

30. It is correct to say that holiday entitlement continues to accrue during the notice period. In this case there was no proper notice period and I do not have the power to create one. Consequently, only holiday which accrued between 31 July 2020 and 12 August 2020, the EDT remains outstanding; the claimant having acknowledged he has received payment for holiday that accrued for the leave year commencing in November up to 31 July (26 days).

Remedy

31. The Claimant is entitled to 3 months' notice under the contract. Something the Respondent acknowledges in the response to claim. The claimant was paid at the rate of £50,000 per year together with a car allowance of £3,000. His monthly salary was therefore £4,416.66 and 3 months' salary was £13,250.
32. The Respondent will pay the claimant 3 months' salary and allowances (£13,250) in compensation for breach of contract. The usual deductions will be made from this gross sum in respect of income tax and national insurance before payment to the claimant.
33. Holiday continued to accrue until the EDT on 12 August. The claimant was entitled to 30 days holiday per year. holiday accrued at the rate of $1/261$ per day (365 days per year minus 104 days in weekends (2020 being a leap year) = $1/261$ or 0.115 per working day. 8 working days to 12 August = 0.91 days - £203.84.

34. The Respondent will pay the claimant the gross sum of £203.84 having first made usual deductions (e.g., income tax and national insurance).

Employment Judge Allen

8th October 2021

Date:

4th Nov 2021

Sent to the parties on:

THY

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For the Tribunal Office