EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr HJ Ellul	**v**	FC Property Maintenance Ltd

Heard at: Cambridge (by CVP)

On: 31 August 2021 and 01 November 2021

Before: Employment Judge Dobbie

Appearances
For the Claimant: In person.
For the Respondent: Francis Coppola (Head Gardener)

RESERVED JUDGMENT

1. The Claimant's claim for a statutory redundancy payment succeeds and the Respondent is liable to pay the Claimant £207.00 in respect of this claim.

2. The Claimant's claims for overtime and/or deductions from wages fail for the reasons set out below.

3. The Claimant's claim for holiday pay fails for the reasons set out below.

REASONS

Introduction

1. The Claimant was a gardener employed by the Respondent from 15 February 2015 to 26 September 2020. The Respondent provided services in property maintenance and gardening.

Claims and issues

2. By a claim form presented to the Tribunal on 22 October 2020, the Claimant brought claims for:

a) Holiday pay (dating back to his start date in February 2015);

b) Redundancy payment (an underpayment of £207.00 in respect of this);

c) Unlawful deduction from wages (he says he was not paid for the correct hours he worked from 1 October 2019 until 26 September 2019, including his last month's pay).

3. The claim in respect of the Claimant's last month's pay was dismissed upon withdrawal in an earlier judgment.

Procedure, documents and evidence heard

4. The matter was originally listed for a full-merits hearing by video on 31 August 2021 with a time estimate of just three hours. On that occasion, I was presented with multiple electronic documents (41 in total) as individual attachments and some emails embedded within attachments, which also had attachments. There was no agreed bundle and whilst the Respondent had provided an index, it used document numbers not page numbers and there was no corresponding bundle provided to me. The Claimant had not provided any witness statements but the Respondent had provided three statements.

5. At the hearing on 31 August 2021, the Claimant applied to amend his claim to include a claim for underpaid notice pay. The application to amend was refused and reasons for this were given orally on 31 August 2021. I then started to hear evidence on the matter but within the time allotted, did not get further than the Claimant's evidence. The matter was therefore adjourned part-heard to 1 November 2021 and directions made in respect of disclosure of certain documents (which the Claimant said he was missing), a schedule of loss and witness statements. The Respondent was ordered to send all of these documents in one email to the Tribunal on 12 October 2021.

6. For the resumed hearing on 1 November 2021, also by video, I received 19 emails from the parties which had been sent to the Tribunal since the last hearing. Some had multiple attachments. Many of those were photographs of documents, not all of which were legible. The Respondent confirmed it had sent an email on 8 October 2021 containing all documents, as required by the case management order. However, the clerk could not find that email on the Tribunal email account and attempts by the Respondent to re-send it during the hearing were unsuccessful. Accordingly, I explained to the parties that I could only view documents I had and to which I was specifically taken. During the hearing, I had to take time to identify them from the many attachments to multiple emails I had been sent.

7. One document was a one-page statement from Amanda Cami, submitted by the Claimant, which was a photograph of a handwritten statement and

was just legible (although blurred). This was submitted after the first hearing on 31 August 2021. Amanda Cami is the Claimant's partner.

8. On 1 November 2011, I therefore heard evidence from Amanda Cami for the Claimant, then from Francis Coppola (Head Gardener and Director) Luca Coppola (gardener and son of Francis Coppola) and Bradley Kilner (gardener) for the Respondent. I also allowed Marnie Connor (Office Manager) for the Respondent to give evidence on the discrete issue of holiday records so that she could explain to me some of the documents previously provided in August 2021. She had not provided a statement but it became apparent during Francis Coppola's evidence that he was unable to explain some of the documents because he did not deal with payroll and record keeping. Marnie Connor had produced the documents and was present and able to give evidence to explain them. Therefore, I allowed this so that I could obtain the evidence I needed to determine the matters before me. I had already heard evidence from the Claimant on 31 August 2021.

9. I viewed only those documents to which I was specifically taken, as stated to the parties.

Fact findings

10. The Claimant commenced working for the Respondent on 15 February 2015 doing just two days' work a month.

11. The Respondent accepted that the Claimant was an employee at all material times.

12. From 1 October 2019, the Claimant started working three days a week. There were no written documents recording the agreement between the parties at any time. There was no written correspondence between them at this time at all. Everything was discussed and agreed orally.

13. On or around 3 December 2019, the Respondent provided a written contract to the Claimant but he refused to sign it and continued to work exactly as he had been prior to presentation of that contract. The written contract did contain provisions for holiday pay, hours, pay etc.

14. At the hearing, the parties agreed that the Claimant's hourly rate was £10 at all times since 1 October 2019. The parties disagreed as to what the Claimant's daily working hours were.

15. The Respondent did not keep time sheets nor operate any system of clocking in or recording hours. The Claimant stated that he was picked up for work at 04:30 at the lamppost near the local Shell garage. He stated that he returned home at or after 14:30 (i.e. he was dropped off at home by the Respondent's driver at that time). This would be a minimum 10-hour day if travel time and breaks were all paid. Amanda Cami stated in her evidence that the Claimant left the house at 04:20 for work every morning and arrived home between 14:30 and 15:30 each day.

16. The Claimant worked Tuesdays, Wednesdays and Fridays of every week. On one day of each week he worked with Bradley Kilner and on another of his three days, he worked with Luca Coppola. On the third day, he worked with Francis Coppola or with a driver identified as "Paul". The precise days he worked with each of these changed from week to week.

17. Bradley Kilner and Luca Coppola stated in their evidence to the Tribunal that when the Claimant worked with them (which amounted to two days every week from 1 October 2019) he was collected at 05:00 from the local Shell garage and returned home between 12:00 and 13:30 at the latest. Francis Coppola stated that on average the Claimant was picked up at 05:00 and returned home by 13:00. He stated that he knew this because even on the days he did not work with the Claimant, the driver of the van had to park the van and return the keys to Francis Coppola after dropping off the Claimant and often had a coffee with him at his home. Luca Coppola stated that on the days he did not work (Wednesdays) he often saw this driver (Eric Ellson) at their house around 13:00.

18. As a matter of practice, the Claimant (and other gardeners) were paid a fixed rate of £75 per day irrespective of the actual hours they worked. Mr Francis Coppola stated this day rate was based on presumed approximate hours of 7.5 hours a day (which were presumed to be 05:00-13:30, from which an hour was deducted for a 30-minute lunch break and two 15-minute tea breaks) at a rate of £10 per hour. He, and the Respondent's other witnesses all stated that the working day usually ended comfortably before 13:30 and sometimes as early as 09:00 if it was not possible to work (due to frost) or if the work was finished early. Francis Coppola stated that on some occasions, Eric Ellson returned the gardeners to their homes as early as 10:00.

19. All three of the Respondent's witnesses (and the Claimant agreed) that the working days tended to be shorter in the winter months when it was less necessary (if at all) to mow grass and plants grew more slowly such that the sites needed less maintenance. In the spring and summer, all witnesses agreed that the work took longer. Francis Coppola stated that from November to March the work needed to maintain each site was less than that needed between April to October.

20. The Claimant did not ever raise a complaint or query about his pay being too low for the hours he was working until he was dismissed. He did not keep a record of his hours. He received payslips at the time he was employed albeit that he often had to chase the Respondent for them. The payslips did not record the hours or even days worked. Each payslip simply listed the total pay and recorded whether it was pay for work done or sick pay. Holiday pay was not recorded on the payslips.

21. On one occasion, in an email to Francis Coppola, the Claimant mentioned that there were times he finished early and was "told off" by Francis Coppola for this. This email was shown to me by the Respondent during the hearing

and I was informed it formed part of the documents provided to the Tribunal. I took time to locate the document but was not able to find it. However, the Claimant accepted that the email had been sent from him and referred to occasions when he had finished work early. He accepted that there were occasions he returned from work early but he considered that to be the responsibility of the driver (Paul) who he said decided to finish early to attend his other job.

22. The Respondent's holiday year ran from 1 April to 31 March of the following year.

23. The Respondent closed for two weeks over Christmas every year for which the Claimant received two weeks' holiday pay.

24. Neither the Claimant nor the Respondent kept a record of the Claimant's holiday leave before autumn 2019. Instead, Francis Coppola's wife kept a record on a white board on which she would write each employee's name, their holiday entitlement for the year (based on their hours) and the dates or hours of holiday they had taken in that year. This was not retained as a permanent record.

25. From Autumn 2019, Marnie Connor kept a spreadsheet of each employee's holiday based on the information given to her by Francis Coppola. There was no formal process for requesting holiday. Employees simply informed Francis Coppola of the days they wanted to take and he informed Marnie Connor who recorded it in a spreadsheet. I was not provided with a copy of the spreadsheets but I was provided with documents showing the annual leave taken in the relevant leave years and Marnie Connor explained that the information in those documents had been taken from the spreadsheets.

26. The evidence, taken from the spreadsheets stated that:

    (a) In the leave year 2018/2019, the Claimant worked two days a month and it was calculated that his holiday entitlement was thus 18.09 hours' a year. It also records that he was paid for 15 hours' holiday over Christmas 2018 and that "Mr Ellul took the balance of his holiday in July 2018";

    (b) In the leave year 2019/20, the Claimant worked 2 days a month from 1 April 2019 to 30 September 2019 and 3 days a week thereafter. The Respondent calculated his holiday entitlement as being 72.05 hours for that year. As a result of the annual leave payment for the 2-week Christmas closure and holiday taken in August 2019 and February 2020, the Respondent calculated he had been paid 74.5 hours' holiday that year.

    (c) In the leave year 2020/21, the Claimant was dismissed part-way through the leave year (almost exactly half a leave year). The Respondent calculated that the Claimant was entitled to 63 hours'

holiday for that period and was paid for 11 days' holiday in July 2020 (82.5 hours).

27. There was no evidence of holiday dates or pay for the years 2015/16, 2016/17 or 2017/18.

28. The Respondent asserts that every year the Claimant took other paid holiday in addition to the two weeks he was paid over the Christmas closure. Francis Coppola stated that the Claimant would often take holiday over school holidays (because the Claimant has a school-age daughter). The Claimant disputed this but stated he was unable to recall specifically if he had taken more time off on holiday in each year. Even in respect of the February 2020 leave asserted by the Respondent (as being 3 days' leave) the Claimant was unable to recall whether this was accurate or not.

29. Given that the Respondent had records which it was able to explain, and which were specific and credible, I preferred the evidence of Marnie Connor and Francis Coppola to that of the Claimant in respect of the periods of holiday taken and paid each year. I noted there was no complaint from the Claimant in any leave year alleging that he had not had (or been paid) his full holiday entitlement. I accepted Francis Coppola's evidence that his wife used to record holiday on the white board to ensure employees were aware of their entitlement and that their holidays were logged.

30. The Claimant was placed on furlough for April and May 2020 and paid 80% of his normal pay in accordance with the government furlough scheme. He returned to work in June and suffered a stroke after just two or three days' work. He was then signed off sick until the end of July.

31. Upon returning to work, he requested that Mr Francis Coppola make him "redundant" because he was not able to continue doing manual work due to his health. Francis Coppola noted that the Respondent had lost clients due to insolvencies in the pandemic and that there was a reduced volume of work and a reduced need for gardeners. He therefore agreed to dismiss the Claimant for redundancy. By a letter dated 11 September 2020, the Claimant was informed that he was being dismissed for redundancy and that his employment would end on 26 September 2020.

32. By a letter dated 18 September, the Respondent informed the Claimant that it had calculated his redundancy payment as being £701.64. The letter further explained that there had been a deduction of £207.00 made from this sum due to holiday pay which the Respondent said had been overpaid for that leave year (as stated above).

33. On 29 September 2020, the Respondent wrote further to the Claimant stating that it had miscalculated the statutory redundancy payment and that he was in fact entitled to a total of £1687.50. The Respondent went on to explain that deducting the £701.64 already paid, and the £207.00 overpaid holiday, this left a balance of £778.86 owing to him from the Respondent. That sum was paid to the Claimant.

The relevant legal principles

34. The terms of a contract between an employer and an employee can be express (agreed between them verbally or in writing) or can be implied.

35. At common law, terms may be implied into a contract because they are too obvious to mention or because the parties assumed that they would be incorporated at the time the contract was entered into. Further, where it is necessary to imply a term to give the contract business efficacy, this too may lead to terms being implied even though they have not been agreed.

36. Finally, terms can be implied into a contract of employment by custom and practice provided that the terms are reasonable, notorious and certain and are followed with such regularity that it becomes legitimate to infer that the parties follow that practice because they regard it as a legal obligation.

37. Where there is no verbal or written agreement, and the parties cannot agree on the terms, they have to be determined by the Tribunal from the evidence.

38. In circumstances where an employer seeks to compel an existing employee to accept new contractual terms or a variation to existing terms, but there is no express agreement to them, courts can find that they were impliedly agreed by the employee's conduct. However, where the terms have no immediate practical impact, continuing to be employed (and not resigning) will not necessarily mean that the employee has impliedly accepted the terms. In Jones v Associated Tunnelling Co Ltd [1981] IRLR 477, the Employment Appeal Tribunal stated:

> "if the variation relates to a matter which has immediate practical application (for example, the rate of pay) and the employee continues to work without objection after effect has been given to the variation (for example, his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where…the variation has no immediate practical effect the position is not the same."

39. The test of whether the employee has impliedly accepted the change in terms is objective and depends on the employee's conduct rather than their intentions. In Solectron Scotland Ltd v Roper [2004] IRLR 4, Elias J stated:

> "The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? ...sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing: it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation in conduct."

40. Statute law imposes certain minimum rights in the absence of agreed terms that are more favourable than the statutory minimum.

41. The statutory minimum holiday owed to a worker under Regulations 13 and 13A of the Working Time Regulations 1998 is 5.6 weeks (28 days) a year for a full-time (five day a week) worker. Those working proportionately less than five days a week are entitled to a pro-rated period of holiday.

42. Under regulation 13(9)(a) of the Working Time Regulations 1998, the worker's four weeks annual leave a year set out in Regulation 13 must be used in the year to which it relates. If a worker fails to use up their leave in that year, they are likely to lose the entitlement altogether, save in certain exceptional circumstances. The leave cannot be replaced with a payment in lieu except on termination of the worker's employment.

43. Where a worker did not have an effective opportunity to take the annual leave which derives from European law (namely the 4 weeks a year set out in Regulation 13 of the Working Time Regulations 1998) their entitlement will roll over to a subsequent leave year. (*Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu (C-684/16) EU:C:2018:874.* This will apply where the employer did not provide sufficient information to the worker about their holiday entitlement, and did not warn them of the potential loss of untaken entitlement expiring at the end of the leave year.

44. Claims for breaches of statutory holiday entitlements are brought under Regulation 30 of the Working Time Regulations 1998 which requires the Claimant to bring their claim within three months less one day of the day on which the employer should have allowed the worker to exercise their right to leave. Claims can also be brought as a breach of contract where the worker is an employee whose employment has ceased. In such a case, the time limit is three months less one day from the effective date of termination.

45. Under section 135 of the Employment Rights Act 1996, employees with at least two years' continuous service are entitled to a statutory redundancy payment if they are dismissed by reason of redundancy. Where a claim is brought for a redundancy payment, there is a presumption that the reason for dismissal is redundancy. Under section 162 of the Employment Rights Act 1996, there is a fixed formula for calculating the correct statutory redundancy payment to which an employee is due.

46. There is no statutory basis for reducing a statutory redundancy payment. Statutory redundancy payments are specifically excluded from the definition of wages under section 27(2)(d) Employment Rights Act 1996. Accordingly, the unlawful deduction from wages regime, including the exception for overpayments, does not apply to a payment that relates to a worker's statutory redundancy payment.

47. The only way that an employee can agree to a reduced statutory redundancy payment is in a settlement agreement, even if the employer has the contractual right to made deductions in respect of an overpayment.

Application of the law to the facts

Redundancy payment

48. Both parties accept that the correct statutory redundancy payment to which the Claimant was entitled was £1,687.50. I have checked this calculation myself and agree it is correct.

49. The Respondent did not pay the Claimant the full sum due. It paid him two sums (£701.64 and £778.86) totalling £1480.50. Therefore, the Respondent deducted £207 from the statutory redundancy payment. This was alleged to have been an overpayment of his statutory holiday entitlement for the leave year 2020/21, because he was paid for 11 days' holiday in July 2020. I have no reason to doubt that the Respondent did in fact overpay him for holiday pay in the sum of £207.00 and the Respondent's records in respect of this seemed credible and genuine.

50. However, the Claimant did not compromise his rights to a statutory redundancy payment at any time under a settlement agreement. Therefore, as set out above, there is no legal basis for the Respondent deducting overpaid holiday from his statutory redundancy payment. As such, the Respondent is liable to the Claimant in respect of the underpayment of £207.

Deduction from wages/overtime

51. As to the Claimant's claim for overtime, I have had to consider what the contractual terms were between the parties in respect of pay and hours. These were never committed to writing. Neither party gave evidence about any specific terms having been expressly agreed. Whilst the Respondent sought to give the Claimant a written contract in December 2019, the Claimant actively objected to this. There were no terms in that contract that were immediately applicable that he took the benefit of. Therefore, in accordance with the legal principles stated above, I find that he did not impliedly accept the terms of that written agreement and it did not accurately reflect the agreement they had already been working to. For example, even Francis Coppola himself accepted that the hours stated in the written contract were incorrect.

52. I find that the true agreement between the parties was that the Claimant would work three days a week (Tuesdays to Thursdays) for a fixed rate of £75.00 a day and the hours varied. I make this finding because he had been paid at this day rate for many months (as were the other gardeners) and he had not complained about this. I accepted Francis Coppola's evidence that this day rate was based on notional working hours of 7.5 a day, from 05:00 to 13:30 (less breaks) at £10 per hour, but the hours worked in fact varied. There were days when the Claimant worked more than the notional hours and days he worked less than the notional 7.5 working hours. However, there was no requirement to record specific hours and minutes worked, nor any agreement for paying overtime or reducing pay for hours not worked.

The Claimant and the other gardeners were paid the same day rate irrespective of the hours they worked.

53. There were no express or implied agreements as to whether and if so which of the breaks from work during the day were paid, nor whether travel to and from the work site (arranged by the Respondent) was paid.

54. Therefore, I find that by custom and practice, the term as to pay was based on a day rate, not an hourly rate and there was no agreement in respect of pay for overtime. The Claimant was paid at the agreed day rate for each day worked (and for days off on holiday) and therefore I find that his claim for overtime or unlawful deduction from wages fails.

Holiday

55. The Claimant brings claims for underpaid holiday dating back to his start date in February 2015. The Respondent has only been able to provide records of holiday taken from 1 September 2018 until the date of his dismissal. The Claimant has provided no records or evidence of any periods of holiday taken during his employment and was unable to remember when he did take holiday other than the Christmas closures which he agreed were paid and were always two weeks.

56. There are therefore four distinct periods of holiday to consider:

    (1) 15 February 2015 to 31 March 2018 (for which there are no records);

    (2) 1 April 2018 to 31 March 2019 (for which there are records from 1 September 2018);

    (3) 1 April 2019 to 31 March 2020; and

    (4) 1 April 2020 to 26 September 2020.

57. For the earlier period, 15 February 2015 to 31 March 2018, the Respondent has calculated that based on the Claimant's working pattern of two days per month (which he worked until 1 October 2019) he was entitled to 18.09 hours' holiday per year. I have not been provided with any calculations for how this sum was reached. There is no evidence to show what dates the Claimant actually worked and whether they were fixed or whether they changed each month.

58. The Respondent's evidence was that Mrs Coppola (now deceased) used to record holiday entitlement on a white board for each employee and mark off their employee's entitlement as and when they took leave. No records of this have been kept. The Claimant was unable to state or specify any holiday which he took that was not paid during this period. When asked if he had used all his entitlement each year, he was unable to say. He maintained that because holiday had not been marked on his payslips, he could not be sure if he had been paid correctly.

59. I am satisfied, on the evidence available to me, that on balance of probabilities the Claimant did take and was paid for all of his holiday entitlement during these early years. Mr Francis Coppola stated that the Claimant used to take two weeks during the Christmas closure and other holiday during school holidays to spend time with his daughter. I accept this evidence. The Claimant never raised a complaint about having his wages reduced for time off on holiday or not being allowed his full holiday entitlement until he had been dismissed. I find that if he had been refused his holiday or had taken holiday but not been paid for it, he would have complained about this.

60. Therefore, the Claimant has failed to demonstrate that the Respondent refused to permit him to exercise his right to paid holiday (as required for a claim under Regulation 30 of the Working Time Regulations 1998) and he has failed to demonstrate that there has been a deduction from his wages (as is required for a claim for unlawful deductions from wages). Therefore, no holiday pay is due for the period pre-dating 1 September 2018. Any claim for a deduction from wages would be out of time in any event.

61. For the leave year 1 April 2018 to 31 March 2019, the Respondent presented a record of holiday taken and paid from 1 September 2018 onwards. The Claimant was again unable to recall whether he had taken any holiday other than the time off during the Christmas closure. Having heard evidence from Marnie Connor about how the records were generated, I accept that the evidence is reliable. That record stated that the Claimant took two weeks' holiday during the Christmas closure and the balance of his holiday in July 2018. Again, the Claimant did not complain about the holiday granted or paid during this leave year until he was dismissed. Therefore, I find that it is more likely than not that he did take and was paid for his full statutory entitlement.

62. For the leave year 1 April 2019 to 31 March 2020, the Respondent presented a full record of the Claimant's holiday for this year. I accepted this as accurate. It showed that he had taken and been paid for 10 days' holiday.

63. The Claimant worked six months of that leave year, working two days a month, and six months of that year working three days a week.

64. For the part of the leave year when he worked just two days a month, I calculate that he would have worked a total of 12 days in those six months. He was therefore entitled to 1.45 days' leave for the first part of this year (24 days worked a year / 232 working days a year worked by an equivalent full time worker x 28 days leave = 2.89 days per year). The Claimant only worked half of the year at this rate, so he will have accrued 1.45 days' leave for this six months of work. I have checked that against the 12.07% rule of thumb percentage of holiday accrual per hour worked and the sum is the same (24 x 0.1207 = 2.89 days' for the year, or 1.45 days' for half a year).

65. For the six months of this year when he worked three days a week, he would be entitled to 3/5 of the entitlement of a full-time worker, namely 3/5 x 28 = 16.8 days a year, or 8.4 days for half a year. Accordingly, in my calculation he was entitled to be paid for 9.85 days' holiday that year (8.4 + 1.45 = 9.85 days). On a working day of 7.5 hours, this equates to 73.88 hours' pay (7.5 x 9.85 = 73.88). The Respondent's records miscalculated his entitlement as being 72.05 hours for that leave year. However, the record also demonstrates that he was paid for 74.5 hours' holiday that year. A such, there is no underpaid holiday for this leave year either and the claim fails.

66. For the leave year 1 April 2020 to 26 September 2020 (the date of termination) he worked three days a week and was thus entitled to 16.8 days a year paid holiday. He only worked (just under) half of the leave year, hence he would be entitled to just under 8.4 days' holiday. He was paid for 11 days' holiday in July 2020. As such, he has been over-paid, not underpaid in the region of £195.00. Therefore, his claim for underpayment of holiday for the last leave year (2020/2021) also fails.

Conclusions

67. For the reasons stated above, the Claimant's claims for holiday pay and overtime/wages fail but his claim for the underpayment of his statutory redundancy pay succeeds.

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Employment Judge Dobbie

Date: 23 November 2021

Sent to the parties on: 26/11/2021

N Gotecha

For the Tribunal Office