



EMPLOYMENT TRIBUNALS

Claimant: Mr D Burgess

Respondent: Cabot Carbon Limited

Heard at: by video

On: 26 November 2021

Before: Employment Judge Webb

Representation

Claimant: Representing himself.

Respondent: Miss Johns, Counsel

JUDGMENT having been sent to the parties on 29 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant, Mr Burgess, was employed by the respondent, Cabot Carbon Limited, as a process technician, until his dismissal on 16 July 2020.
2. The claimant claims that the respondent failed to pay him properly and owes him holiday pay.
3. The respondent says that the claimant paid everything that he was owed in his final pay.
4. This is a reconsideration hearing. There was a previous hearing on 25 January 2021 following which I gave a judgment in relation to the claimant's unfair dismissal claim. However, in that judgment I did not deal with his unpaid wages or holiday pay claims. I concluded it was in the interests of justice that the matter be reconsidered but only in relation to the unpaid wages and holiday pay claims, as set out in my judgment dated 23 February 2021. As I had not heard evidence in respect of the unpaid wages and holiday pay claims, this hearing was to enable both parties to give evidence on those claims.

5. The claimant represented himself and gave evidence. The respondent was represented by Miss Johns, counsel, who called evidence from Mr J Halls, Operations Manager. The respondent also relied on the witness statement of Donna James, although she was not called to give evidence and be cross examined. No application was made to postpone the hearing to enable her to attend.
6. In addition to the oral evidence, I considered the documents from an agreed 334-page bundle of documents which the parties introduced in evidence, along with the resubmitted schedule of costs and a pay slip that had been provided prior to the previous hearing.
7. I set out here my thanks to Miss Johns, Mr Burgess and Mr Halls for their help. All acknowledged this was a complicated and confusing case and the evidence and submissions I heard have assisted me in clarifying the issues and coming to my conclusions.

Application to Amend Claim

8. At the start of the hearing Mr Burgess raised the possibility of a breach of contract claim. I took this as being an application to amend his claim as it had not been clear on the original claim form that this was being claimed.
9. Mr Burgess submitted that he had put details of his losses for breach of contract in his schedule of loss and that it was mentioned in his claim form.
10. In response Miss Johns said that including losses in a schedule was not a way by which a claim could be amended. The respondent had not been made aware of a breach of contract claim before today and would not be able to deal with that claim.
11. I considered that the addition of a new claim for breach of contract to be a substantive amendment. I took into account that the Tribunal is only able to deal with breach of contract claims that are presented within 3 months of the effective date of termination of the contract, or where not reasonably practicable within such period as the Tribunal considers to be reasonable.
12. Mr Burgess had not raised the claim for breach of contract in his original claim form but had it in mind when submitting the schedule of loss. However, I agree with Miss Johns that putting losses into the schedule could not be considered an application to amend. There had been a delay in making his application to the Tribunal.
13. Having considered all the relevant factors I concluded that, having regard to the interest of justice and the balance of hardship on the parties, the application to amend the claim would be refused.

Mr Burgess' Autism

14. Although it was only raised at the end of the hearing during his submissions, Mr Burgess told me that he had recently undergone tests that show he may have an autistic spectrum disorder, although he has not yet had an official

diagnosis, he believes he has Asperger syndrome. I took this into account when assessing his evidence.

Issues for the Tribunal to decide

15. Having dealt with the preliminary matters, I agreed with the parties the issues for me to decide.

Unpaid Wages

16. Were the wages paid to Mr Burgess on 17 June and 17 July 2020 less than he should have been paid.

17. If so, how much is Mr Burgess owed?

Holiday Pay

18. Did the respondent fail to pay the Mr Burgess for annual leave accrued but not taken when his employment ended?

19. If not, how much is Mr Burgess owed?

Findings of fact

20. The relevant facts are as follows. Where I have needed to resolve any conflict of evidence, I set out how I have done so at the relevant section. References to page numbers are to the agreed bundle of documents.

21. The claimant was employed by the respondent company as a Process Technician from 7th January 2014 to 16th July 2020. He was provided with a contract at the beginning of his employment setting out the terms and conditions of his employment. This did not provide for a particular shift pattern.

22. Following a previous hearing I gave a judgment with reasons; finding that his dismissal on 16th July 2020 was fair.

23. At the date of his dismissal Mr Burgess' annual salary was £42699.00, gross, consisting of £33699 basic and £9000 shift allowance.

24. In his evidence Mr Halls stated that payment of the salary was done equally over 12 months, giving a gross monthly salary of £3558.25. I accept his evidence on this.

25. In addition, Mr Burgess told me he was paid overtime, this is supported by the HMRC print out provided at page 314 of the bundle and I accept that he was paid overtime on some occasions. I find that the HMRC document and the pay to date details in his final pay slip show that in the 12 months prior to his dismissal Mr Burgess was paid a total of £44602.99

26. Mr Burgess also said that at the end of the year a production bonus is paid to members of staff by the respondent. I accept that such a payment may be made at the discretion of his employer. However, I find this payment is not

contractual. It is not shown in the contract documents provided in the bundle, nor was I referred to any other document that shows it was an entitlement.

27. Mr Burgess was contracted to work 38 hours a week. Although this would be averaged as he was a shift worker. I was told by Mr Burgess that a year was 52.2 weeks as set out in the employee handbook, and this was confirmed by Mr Halls. Over a year the total hours worked would be 1983.6.
28. Mr Burgess says that he is owed 48 hours from May 2020 for which he was not paid. He accepted that during May he had only worked 114 hours as he was on a partial return to work following illness but should have been credited the hours he would have worked on a full shift. He told me that had he been credited with full shifts he should have been working and the end of that month he would have had 48 hours in credit.
29. Mr Hall in his evidence said that Mr Burgess' salary was not calculated on an hourly basis but was his annual salary divided equally by 12. Mr Hall also confirmed that the payment for May was not reduced despite Mr Burgess working reduced hours. Mr Burgess in his evidence to me confirmed that he had been paid properly in May, but the issue was the extra 48 hours he would have worked.
30. I find that Mr Burgess was a salaried employee. His hours would be averaged over a period of time. I find that had Mr Burgess worked full shifts in May, he would have been paid the same. The 48 hours he says he was owed would have been set off against a shortfall in hours in other months.
31. Mr Burgess accepted that he was paid the correct amount in his June pay slip.
32. Mr Burgess also accepted that there had been an overpayment in his July pay slip because he had only worked until the 16th of the month but the payment he received reflected a full month. His July pay slip paid him £3534.81. This was recalculated following Mr Burgess' dismissal. I have seen the post leaving adjustment showing a different breakdown of the money paid, but with the same gross amount.
33. Mr Burgess' leave year was from 1st January to 31st December.
34. Mr Burgess was entitled to 35 days holiday a year at the time dismissal. This is multiplied by an 8 hour day to come to a total of 280 hours that is subtracted from the contracted hours to leave total hours to be worked in each year as 1703.6.
35. In his evidence Mr Halls explained that holiday accrued at the rate of 0.77 hours for each day employed. In his calculation at paragraph 13 of his witness statement Mr Halls set out that no holiday was accrued during June. The explanation for this was that it was agreed with the employees that, due to the exceptional circumstances and the change in shift patterns holiday would not accrue during that month.
36. However, this contradicts Mr Halls' evidence that during June Mr Burgess took leave but had still accrued leave at the end of that month. I find that during June Mr Burgess was accruing leave as normal.

37. Mr Burgess was employed for 196 days between 1st January and 16th July and I find he would have accrued 150.92 hours of holiday during this period.
38. Mr Burgess was also entitled as a shift worker to floating holidays of 72 hours or 9 days based on 8 hour days. This arrangement exists because shift workers may be expected to work bank holidays as is explained in the employee handbook at page 140 of the bundle.
39. Mr Halls in his evidence said that the floating holidays accrued at the rate of 0.197 for every day the shift pattern was followed and that it stopped when the shift pattern at the plant changed on 22nd March 2020. From that date Mr Hall says this holiday did not accrue.
40. It appears from the shift patterns documents and the records of Mr Burgess hours worked that he was still working 12 hour shifts although the patterns had changed. The employee handbook that deals with the floating holiday says they apply to 12 hour shift workers. The respondent did not provide any further evidence to support that the changes suggested by Mr Halls took place. I find that the clear contractual term was not amended in the manner he suggests
41. I find that Mr Burgess' contract provided that as a 12 hour shift worker he was entitled to accrue this holiday even when the shift patterns changed.
42. Mr Burgess was employed 196 days from 1st January 2020 to 16th July 2020. I find that Mr Burgess Accrued 38.6 hours of floating leave during this period.
43. The total hours of accrued holiday during the leave year before Mr Burgess was dismissed was 189.52 hours or 23.69 days.
44. Mr Halls took into account 72 hours leave in his calculations and I find that Mr Burgess took 72 hours, or the equivalent to 9 days leave, during the leave year prior to dismissal. The total leave accrued and not taken at the end of Mr Burgess' employment was therefore 117.52 hours or 14.69 days.
45. The post leave adjustment on page 313 of the bundle shows that in his final pay Mr Burgess was paid for 88.45 hours of holiday pay, calculated using an hourly rate of £16.98, a total of £1502.66

Law

46. The right not to suffer unlawful deductions is found in section 13 of the Employment Rights Act 1996.
47. Enforcement of the right is by a complaint to the Tribunal under section 23 of that Act.
48. Regulation 14 of the Working Time Regulations 1998 provides for a right to be paid for leave not taken but that has been accrued at the date of termination of employment.

49. A week's pay for the amount of compensation is calculated in accordance with Regulation 16, this requires me to average the pay received over the previous 52 weeks.
50. There are two types of leave that are provided for in the Regulations. The leave in Regulation 13 provides four weeks annual leave that arises from European Law. For the purposes of this leave, following the decision in **Bear Scotland Ltd & Others v Fulton and Others [2015] ICR 221**, a week's pay is calculated to include overtime that has been paid.
51. Regulation 13A provides for additional leave of 8 days. A week's pay for this leave is calculated on the basis of the claimant's salary and does not include any overtime payments. In the absence of a term of contract to the contrary, pay for any additional contractual leave is calculated in the same way.
52. The right in Regulation 14 is enforced by a complaint made to the Tribunal under Regulation 30.

Conclusions

53. In relation to the unpaid wages claim, I conclude that there was no unlawful deduction from wages. The claimant was paid for the work that he undertook during May, June and July as set out in his contract. The claimant's complaint under section 23 of the Employment Rights Act 1996 is not well founded.
54. I have found that Mr Burgess was paid a total of £44602.99 including overtime in the 52 weeks prior to his dismissal. I conclude that, for the purposes of Regulation 13 leave Mr Burgess' gross weekly pay was £854.46, or £22.48 an hour based on a 38 hour week.
55. I have found that Mr Burgess' normal salary was £42699.00. I conclude that for the purposes of Regulation 13A and contractual leave Mr Burgess' gross weekly pay was £817.98, or 21.52 an hour based on a 38 hour week.
56. The purpose of the Working time Regulations 1998 is to encourage workers to take holiday entitlement. The leave provided by Regulation 13 is better remunerated when an employee receives overtime and there is no right to payment for leave not taken by choice during the leave year. The leave provided by Regulation 13A is called additional leave, which suggest the drafter intended that it would come after the leave in Regulation 13. I conclude that the leave under Regulation 13 would be taken first by the claimant before leave provided for under his contract or by Regulation 13. I conclude that any leave taken by Mr Burgess would first reduce his leave entitlement under Regulation 13.
57. I have found that Mr Burgess' total normal leave accrued was 150.92 hours. I have found that he had taken 72 hours leave during the years. I conclude the payment due to Mr Burgess for untaken Regulation 13 leave was $22.48 \times 78.92 = £1774.12$.
58. I have found that Mr Burgess had accrued 38.6 hours of floating leave. Mr Burgess had not taken any of this leave. I conclude the payment due to Mr

Burgess for untaken Regulation 13A and contractual leave would be $21.48 \times 38.6 = \text{£}830.67$.

59. The total payment due to the claimant for unpaid leave was $\text{£}2604.79$. The claimant was paid $\text{£}1502.66$ for untaken holiday in his final pay slip. I conclude the amount of accrued holiday pay outstanding to the claimant is $\text{£}1102.12$.

60. The claimant's complaint under Regulation 30 of the Working Time Regulations 1998 is well founded.

Employment Judge Webb

Date: 07 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 8 December 2021

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FOR EMPLOYMENT TRIBUNALS Mr N ROCHE