



EMPLOYMENT TRIBUNALS

Claimant: Mr W O'Carroll

Respondent: Will Nixon Construction Group Limited (in Creditors' Voluntary Liquidation)

Heard at: Manchester (by CVP)

On: 22 December 2021

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: In person

Respondent: Not in attendance

JUDGMENT ON LIABILITY

The judgment of the Tribunal is that:

1. The claimant's claim for a redundancy payment fails and is dismissed because he was not employed by the respondent for the minimum two-year period required to qualify for a redundancy payment.
2. The claimant's claim for notice pay succeeds. He was entitled to one week's notice which he did not receive.
3. The claimant's claim for unpaid holiday pay fails and is dismissed. The claimant had already taken the holiday he had accrued as at the date his employment was terminated¹.
4. The claimant's claim that the respondent made unlawful deductions from his wages succeeds.
5. The claimant is to provide further details and evidence to enable the Tribunal to calculate remedy in relation to the above successful claims by **21 January 2022**.

¹ This decision differs from that given at the hearing for reasons set out at para 10 of the reasons.

The details of the information and evidence required are set out in the Case Management Orders of today's date.

REASONS

1. This was a public preliminary hearing held by CVP video link. The claimant's claim is one of a number against the respondent being dealt with by the Tribunal under multiple reference 14063. The claimant's case is the lead file in that multiple case. However, this hearing related to his case only.
2. At that preliminary hearing in May 2021 Employment Judge Holmes decided that the claimant in this case, Mr O'Carroll, was employed by the respondent, Will Nixon Construction Group Limited (in Voluntary Liquidation). Employment Judge Holmes decided that the claimant's employment had not transferred to the second respondent in the combined claims, Will Nixon Construction Limited.

Liability

3. The claims brought by the claimant in his claim form were:
 - (1) A claim for unfair dismissal compensation;
 - (2) A claim for a redundancy payment;
 - (3) A claim for notice pay/breach of contract;
 - (4) A claim for holiday pay; and
 - (5) A claim for arrears of pay.
4. At the hearing I heard evidence from the claimant. He had provided some documentation and during the hearing re-sent an email witness statement which he had sent to the Tribunal in April 2021.
5. Based on the evidence before me I found that:
 - a. the claimant was employed by the respondent as an Assistant Site Engineer from 1 February 2019 to 31 January 2020. That meant that he had not been employed for two years at the point when he was dismissed.
 - b. The claimant was entitled to the minimum notice set out in section 86 of the Employment Rights Act 1996 ("the ERA"). In his case, the notice entitlement was one week's notice.
 - c. The claimant was dismissed without notice on 31 January 2020.
 - d. The holiday year ran from 1 November to 31 October each year.
 - e. At the time he was dismissed, he had an untaken holiday entitlement of 13 days for the then current holiday year. The respondent confirmed he

had 15 days left in an email dated 20 December 2019 and the claimant confirmed he had taken 2 further days in the January 2020. He was not paid in lieu of untaken days when he was dismissed.

- f. The claimant worked until 31 January 2020 but was not paid for all the days he worked. He was not paid for all of the week of 27 January 2020. The claimant is to provide further evidence to confirm to what extent he was paid for the week of 20 January 2020 and for a week in hand at the start of this employment.
- g. The claimant's contracted hours were 35 hours per week Monday to Friday but in practice he worked in excess of that. In January 2020 he worked around 45 hours a week.

Unfair Dismissal

6. On 13 May 2020 the Tribunal issued a Judgment striking out the claimant's unfair dismissal claim because he had insufficient length of service to bring that claim. I directed that the claimant be sent a further copy of that Judgment, which he said he had not received.

Redundancy Payment

7. An employee is only entitled to a redundancy payment if they have been employed for two years or more at the effective date of termination. In this case the claimant accepted that he did not have sufficient length of service to claim a redundancy payment. His claim for such payment is therefore dismissed.

Breach of contract/Notice Pay

8. In the absence of an enhanced contractual notice entitlement the entitlement to notice is the entitlement to statutory minimum notice set out in section 86 of the ERA. In brief, that is not less than one week's notice if the period of employment is less than two years. The entitlement in this case is therefore for one week's notice. The claimant was not given notice or paid in lieu of notice. His claim that he was dismissed without notice in breach of contract succeeds.

Holiday Pay

9. Under Reg 14(1) and (2) of the Working Time Regulations 1998 a worker is entitled to a payment in lieu where his or her employment is terminated during the course of the leave year, and on the termination date, the proportion of statutory annual leave he or she has taken under Regs 13 and 13A is less than the proportion of the leave year that has expired.

10. I apologise to the parties and the claimant in particular that at the hearing, I said I had decided that the claimant's holiday pay claim succeeded on the basis that the evidence showed he had 13 days' untaken holiday at the time of dismissal. In finalising this judgment and reasons for promulgation I have realised that was an error on my part. The accrued but untaken entitlement to 15 days set out in the email from the respondent dated 20 December 2019 would only accrue if the claimant had

continued to be employed until 31 October 2020. As he was dismissed part way through the holiday year only part of that holiday entitlement had accrued.

11. Had he worked the whole of the holiday year of 1 November 2019 to 31 October 2020 the claimant would have accrued the minimum 5.6 weeks of holiday set out in regulations 13 and 13A of the Working Time Regulations 1998. The claimant worked a 5-day week so 5.6 weeks of leave equates to a total of 28 days. The claimant's employment ended on 31 January 2020. He therefore worked 13/52 weeks of the holiday year. His accrued entitlement would be $28 \text{ days} \times 13/52 = 7$ days. He had taken in excess of that amount (12 days) by the time of his dismissal so had no accrued but untaken holiday leave at that date. On that basis his holiday pay claim fails. I have amended my judgment to reflect the correct position.

12. If the claimant disagrees with my calculation and conclusion then he should apply for a reconsideration of my decision under rule 71 of the Employment Tribunal Rules 2013, giving reasons why the calculation and conclusion set out at paras 10 and 11 is incorrect. That application can be made in writing by email marked for my attention and using the case number in the subject heading.

Unlawful deduction from wages

13. The claimant claimed unlawful deduction of wages for the week commencing 20 January 2020 when he worked 27 hours, the week of 27 January 2020 when he worked 45.5 hours and for a week in hand of 45 hours. I am satisfied that the respondent did not pay him for the full hours he worked and that claim succeeds.

Remedy

14. The claimant had provided some documents relating to his pay including a timesheet for the week of 27 January 2020 and a payslip for the week of 17 January 2020. The claimant confirmed that he did have other relevant documents, including his payslips and timesheet for the week of 20 January 2020. He wanted to check what hours he had worked and what he had been paid for 20 January 2020. We also discussed whether there were any consequential financial losses flowing from the unlawful deduction from wages and the need to offset any payments already received from the Insolvency Service.

15. As the claimant was not in a position to confirm those matters or provide supporting evidence at the hearing, I made a case management order that he supply that information to the Tribunal by 21 January 2022. The Tribunal will then decide whether a remedy judgment can be issued based on the papers and without need for a further hearing.

Employment Judge McDonald
Date: 23 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 January 2022

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