EMPLOYMENT TRIBUNALS

Claimant: **J Casey**

Respondent: **GCP Facilities Ltd**

Held at: London South Employment Tribunals by CVP

On: 16 November and 1 December 2021

Before: **Employment Judge L Burge**

Representation
Claimant: In person
Respondent: Ms Montaz, Consultant

JUDGMENT having been sent to the parties on 10 December 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

1. The Claimant gave evidence on his own behalf and Carlos Yepes (Operations Director) and Alison Quinn (PA and Office Manager) gave evidence on behalf of the Respondent. The Tribunal was provided with numerous scanned images of documents. Disclosure and exchange of witness statements had been made very late in the day and so the proceedings were considerably delayed on the first day of the hearing to ensure that the Claimant had enough time to review everything. The Claimant confirmed that he had read everything and both parties were content to proceed. The hearing had originally been listed for one day but the Tribunal decided it was in the interests of justice for a second day to be listed to ensure that both parties had a full opportunity to give evidence/ask questions.

2. The issues to be decided by the Tribunal were whether the Respondent failed to pay the Claimant:
    a. for his three month notice period;
        i. The Respondent said that his probationary period had been extended and so he was only entitled to a week's notice;
    b. for accrued but untaken annual leave;
        i. The parties agreed that the Claimant accrued 15 days' annual

leave during 2020. He was paid for 5 days' leave and took 5 days' bank holidays. The dispute centred around whether or not the Claimant took leave in January 2020;

c. his salary in March 2020
    i. The Claimant says he was working, the Respondent says he was off sick; and
d. by deducting the Claimant's season ticket loan from his final salary payment.

Findings of Fact

3. The Respondent provides a variety of facilities management services to businesses and institutions around London and the South East. The Claimant worked as a Business Development Manager from 9 September 2019 to 13 July 2020. The Claimant had been introduced to the Respondent by a recruitment consultant but a month later Mr Yepes had got in touch with the Claimant to offer him the job directly. They agreed that the Claimant's salary would be £40,000 and that the Respondent would pay for just over half of his season ticket.

4. The Claimant signed a season ticket authorisation deduction form for his half of the season ticket in the sum of £2,240. He also signed his contract which stated that:

   "*6.1 Unless terminated in accordance with clauses 13 or 14, the Employment shall continue until terminated by either party giving to the other not less than [three] months' notice in writing…."* and

   "8.5 The company shall be entitled at any time during the Employment and upon its termination (howsoever arising), to deduct from salary and/or any other sums due to the BDM under this Agreement, any sums owed by the BDM to the Company;" and

   "9.2 The BDM shall, also comply to the travel expenses cost as followed: upon joining the company the first year of service travel card will be purchased by GCP Facilities which the company will contribute 53% (£2,500) to the annual full ticket price at £4740.00. The remaining balance will be deducted at a monthly basis beginning from the second month of employment. On going each year after the first year of contract the BMD will be expected to purchase the travel card and GCP Facilities will contribute 53% towards the annual travel card purchase."

5. The Claimant gave evidence to the Tribunal that he returned to work after Christmas on 3 January 2020. The Respondent initially said that he did not return until 14 January 2020. However, in his witness statement the Claimant referred to documentary evidence showing that he was at work on 9 and 10 January 2020. Mr Yepes agreed that the Claimant had resumed work on 9 January 2020. There was very little evidence to indicate that the Claimant was working prior to 9 January 2020. The Claimant said that the fact that holiday was not uploaded onto the system or showed on his pay slips showed that he had not taken leave. This is rejected as it only shows that both parties' record keeping of leave was deficient. The Claimant only

provided evidence of him performing work from 9 January 2020, not before. The Tribunal decides, on the balance of probabilities, that the Claimant returned to work on 9 January 2020.

6. Mr Yepes gave evidence that he was not happy with the Claimant's performance. He said that the Claimant did not meet targets set for him and did not bring new business to the Respondent. These concerns were not set out in any documentation before the Tribunal. In the Respondent's documents, there was a sentence at the end of a list within an "End of Probation Review Meeting" invite which said "Probation period extended further six months". However, the Claimant's version of this invite did not have the sentence relating to a probation extension in it. Mr Yepes gave evidence to the Tribunal that the end of probation review meeting did not take place but that before it he was 50-50 on whether or not to extend the probation. He later gave evidence that the meeting did take place but was by telephone. Whether or not the meeting took place, if Mr Yepes decided to extend the probation period the Tribunal finds it implausible that he would not have written to the Claimant to inform him of his decision. There was no other documentary evidence that suggested that the Respondent was unhappy with the Claimant's performance. The Tribunal finds as a fact that the Claimant's probation was not extended and that the meeting on 6 March was the "end" of the Probation Review Period, as the invite suggested.

7. At the end of March 2020 the country was in a national lockdown. The Claimant had hurt his back and so his wife forwarded some work that Mr Yepes asked him for. Mr Yepes said that the Claimant was off sick and should have entered the days as sickness on the HR app. The Claimant said that the HR app was a place that you could find payslips and not much more. He also said that he had never been told that he should enter his sickness on there. However, in later evidence Mr Yepes said that app did not link into the payroll. In closing submissions the Respondent accepted that it had unlawfully deducted the Claimant's pay by 3 days and said that the Claimant was off sick for 7 days and that they should have paid him sick pay during that period instead of withholding his pay for 10 days. Documentary evidence shows that there were numerous phone calls between Mr Yepes and the Claimant during that 10 day period and that the Claimant had accepted that he was off sick for two of those days. The Tribunal finds, on the balance of probabilities, that the Claimant was off sick for 2 days.

8. The Claimant provided an image of his season ticket to the Respondent so they could claim it back as the train companies were offering refunds at that time. Initially Mr Yepes and Ms Quinn had said that they could not obtain a refund as the Claimant provided it to them late. However, to the Tribunal they both said that they never received the Claimant's hard copy of the season ticket. The Claimant said that he had sent them the hard copy ticket. There were only 4 months left on the ticket and so the amount that the Respondent could have been refunded was minimal.

The law

9. Section 13(1) Employment Rights Act 1996 ("ERA") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to s.23 ERA. The definition of "wages" in s. 27 ERA includes holiday pay.

10. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages relating to notice pay are therefore subject to tax.

Conclusions

11. The Tribunal has found that, on the balance of probabilities, the Claimant returned to work on 9 January 2020 which meant that he had taken 5 days' annual leave. He also took 5 bank holidays, totalling 10 days' taken leave. The parties agree that the Claimant was entitled to 15 days' holiday. The Claimant's last pay slip says he was paid for 5 days outstanding leave. There is therefore no holiday pay owing to the Claimant.

12. In March 2020 the Claimant took two days off sick with a bad back and should have been paid sick pay for those two days. He had passed his probation and so was entitled to contractual sick pay. He also should not have had his pay deducted for the remaining 8 days and so he suffered an unlawful deduction to his wages of £1538.46. This amount was agreed by the parties.

13. The Claimant had passed his probation and so pursuant to the terms of his contract he was entitled to 3 months' notice pay, yet he only received one week. The Respondent therefore breached the Claimant's contract and owes the gross amount of £9230.77. This amount was agreed by the parties.

14. It is disappointing for the Claimant that the Respondent did not mitigate their losses by obtaining a refund for the four months left on the season ticket. Both parties say the other is to blame for why the refund was not obtained. In relation to this claim, it does not matter, the question for the Tribunal was whether the Respondent made an unlawful deduction from the Claimant's wages when they deducted the outstanding amount for his season ticket. They did not, the terms of the contract of employment and season ticket authorisation deduction form, both signed by the Claimant, authorised the Respondent to make the deduction from his salary. This part of the Claimant's claim is therefore unsuccessful.

Employment Judge **L Burge**

Date: 7 January 2022

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