



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107836/2020

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Held in Edinburgh on 01 November 2021

Employment Judge M Sangster

10 **Miss E Scott**

**Claimant
In Person**

15 **The City Partnership (UK) Limited**

**Respondent
Represented by
Mr R Smeaton
Managing Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

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- The respondent failed to make a payment to the claimant, on the termination of her employment, in respect of her accrued but untaken holiday entitlement and is ordered to pay the claimant the gross sum of £1,207.14 in respect of this.
- The claimant's wrongful dismissal claim does not succeed and is dismissed.

REASONS

Introduction

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1. The claimant presented complaints of failure to pay holiday pay and wrongful dismissal. The respondent denied that the claimant was dismissed in breach of contract or entitled to any further holiday pay. They asserted that all sums due to the claimant had been paid to her.

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2. The claimant gave evidence on her own behalf. The respondent led evidence from Robin Smeaton (**RS**) the respondent's Managing Director.
- 5 3. A joint bundle of documents was lodged with the Tribunal at the start of the hearing.

Issues to be Determined

4. Was the claim lodged within the requisite time limits?
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5. If so, was the claimant entitled to any payments from the respondent in respect either of the following:
- a. Notice pay; and/or
- 15 b. Holiday pay.
6. If so, what sums are due to the claimant?

Agreed Facts

- 20 7. At a case management preliminary hearing held on 29 March 2021, the following were identified as facts which were agreed between the parties:
- a. The claimant did not have a written contract of employment;
- b. The claimant was employed by the respondent from 21 January 2019 until
- 25 31 July 2020;
- c. The claimant was paid by the respondent one month in arrears on the last Thursday in each month;
- d. The respondent's holiday year ran from 1 January to 31 December;
- e. The claimant's daily rate of pay was £77.88 gross and £64.60 net;
- 30 f. The claimant's weekly rate of pay was £389.40 gross and £323 net;
- g. Her last day of employment with the respondent was 31 July 2020;

- h. She was on furlough for July and was paid 80% of wages (namely £1199.75 (80% x £1,399.66)
- i. The claimant was not required by the respondent to take accrued holidays during that period of furlough;
- 5 j. As at the termination date the claimant had accrued but unused holidays of 15.5 days (namely £1,001.03 net);
- k. There was no settlement agreement (involving an independent legal advisor) waiving her right to claim statutory notice or holiday pay;
- l. The balance of the claimant's statutory notice entitlement was £64.60 (i.e. 20% of £323); and
- 10 m. The claimant engaged in Acas early conciliation from 30 September until 30 October 2020.
8. Parties also confirmed at the outset of the final hearing that these points were
- 15 agreed between the parties.

Findings in Fact

9. In addition to the agreed facts, the Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
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10. At the end of April/start of May 2020, the claimant was placed on furlough leave. She remained on this until the termination of her employment.
11. On 11 June 2020, the claimant's line manager, Michael Findlay (**MF**), sent
- 25 her a text asking to arrange a time to speak to her. They had a discussion that afternoon by telephone. During that call, MF advised the claimant that she was to be made redundant at the end of July 2021 and would remain on furlough leave until that point. No correspondence was sent to the claimant confirming this. While RS had instructed MF to outline the option of either the
- 30 claimant's employment terminating at the end of June 2020 and then being paid notice and accrued holiday pay, or continuing on furlough until the end of July 2020 and not receiving these elements, MF did not state this to the claimant during their discussion on 11 June 2020: he simply informed her that

she would remain on furlough until the end of July 2020 and her employment would terminate then.

12. On 8 July 2020, the claimant sent a text to MF stating *'just a quick question...do you know if it's possible for me to receive my holiday pay/all notice pay in August instead of the end of July? I think it would just be helpful to know that I still have some sort of money coming in the next month also.'* MF responded that he would *'ask the question'*. He further responded the following day stating RS *'has come back to me to confirm that the rationale for keeping you on payroll until the end of July was that it was a better deal for you than making you redundant at the end of June – which was considered apparently. Therefore unfortunately, there will be no further payment beyond the end of July. Sorry.'*
13. On 30 July 2020, the claimant and another colleague, who had also been made redundant that day, emailed RS. They stated that they had received their final payslips, but noted that they had not been paid for accrued holidays or notice pay and requested that they received payment for these.
14. RS responded on 5 August 2020. He stated his understanding was that MF had given both the claimant and her colleague the option of either their employment terminating at the end of June 2020 and then being paid notice and accrued holiday pay, or continuing on furlough until the end of July 2020 and not receiving these payments. He stated that his understanding was that they had each chosen the second option.
15. On 27 November 2020 the claimant lodged a claim with the Employment Tribunal detailing complaints of failure to pay statutory notice pay and statutory holidays. The respondent was stated by the claimant to be RS. She had been corresponding with him in relation to her claims and was confused when filling out the form as to who she should include as the respondent.

16. By letter dated 1 December 2020, the claimant was advised by the Tribunal that her claim had been rejected. She received this a few days after it had been sent. The reason for rejection of the claim was stated to be as follows
5 *'you have provided an early conciliation number but the name of the respondent on the claim form is different to that on the early conciliation certificate.'* The claimant initially thought this meant there was a problem with the early conciliation number, which she checked with ACAS. They stated however that the number was correct. On 12 December 2020, the claimant realised that the actual problem was that she had stated that the respondent
10 was RS, who was the Managing Director, rather than the company itself. Later that day, she lodged another claim with the Employment Tribunal, in identical terms to the first other than the name of the respondent.

Relevant Law

15 *Wrongful Dismissal*

17. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more).

Holiday Pay

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18. Regulation 14 of the Working Time Regulations 1998 (**WTR**), sets out the entitlement where a worker's employment ends during a leave year and provides, at 14(2), that *'where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer*
25 *shall make him a payment in lieu of leave in accordance with paragraph 3'*

Time Limits

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19. The relevant time limits in relation to the holiday pay and breach of contract complaints are set out in Regulation 30(2) WTR and Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 respectively.

20. These provisions state that a Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of three months beginning with the date the payment should have been made/the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
21. In considering whether there is jurisdiction to hear such complaints, Tribunals accordingly required to consider the following questions:
- a. Were the complaints presented within the primary three month time limit?
 - b. If not, was it reasonably practicable for the complaints to be presented within that period?
 - c. If not, were they presented within such further period as the Tribunal considers reasonable?
22. The question of a what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (*Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).
23. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (*University Hospitals Bristol NHS Foundation Trust v Williams* UKEAT/0291/12).

Submissions

24. Each party made brief closing submissions.

25. The claimant submitted that she was entitled to payments in respect of notice and holiday pay, in the sums agreed. She stated that she had made a genuine error when submitting her claim in relation to the name of the respondent and had used all reasonable endeavours to rectify this as soon as she realised her mistake.
26. The respondent submitted that they had tried to deal with employees fairly, but appreciated that formalities were not observed and that confusion was caused, for which they apologise. They were happy to settle the difference due to the claimant if the other option put to her was more favourable.

Discussion & Decision

Jurisdiction

27. The Tribunal firstly considered jurisdiction and referred to the case of **Adams v British Telecommunications plc** [2017] ICR 382, a case in which Simler J, then the President of the Employment Appeal Tribunal, considered a similar scenario. The Tribunal noted that, when the claimant lodged her first claim on 27 November 2020, she had no reason to believe that it contained a defect. Had she been aware of the defect she would have done something about it. In the period between 27 November 2020 and 12 December 2020 she was proceeding in the mistaken belief that the first claim had been properly presented. Her mistake was genuine and reasonable in the circumstances. It created an impediment to her presenting the second claim on time. The Tribunal's focus, in the circumstances, is on the second claim rather than the first. The Tribunal determined that, given the circumstances, it was not reasonably practicable for the claimant to present the second claim on time. The second claim was presented on 12 December 2020, the same day the claimant identified what the defect was in relation to the first claim. She acted within a reasonable period. Time is accordingly extended in respect of the claims for notice and holiday pay.

28. The Tribunal then considered each head of claim in turn. The conclusions reached are set out below.

Notice Pay

5 29. The claimant's employment terminated on 31 July 2020. She was informed, on 11 June 2020, that she would remain on furlough leave until 31 July 2020 and understood that her employment would terminate on that date. She was accordingly given over 7 weeks' notice of the termination of her employment. This is in excess of her statutory entitlement to one week's notice. The claimant received furlough pay throughout that period, which was at that time her normal remuneration. HMRC guidance, at that time, was that employees on furlough leave could also be serving their statutory notice periods. The Tribunal accordingly concluded that no further sums are due to the claimant in respect of notice pay.

15 *Holiday Pay*

30. It was agreed between the parties that:

- a. The respondent's holiday year ran from 1 January to 31 December;
- 20 b. The claimant's daily rate of pay was £77.88 gross and £64.60 net;
- c. The claimant was not required by the respondent to take accrued holidays during her period of furlough leave;
- d. As at the date her employment terminated, the claimant had accrued but unused holidays of 15.5 days;
- 25 e. Payment in respect of the claimant's accrued but unused holiday entitlement would amount to £1,207.14 gross and £1,001.30 net; and
- f. There was no settlement agreement (involving an independent legal advisor) waiving her right to claim holiday pay.

30 31. Given that the claimant was not required to take her outstanding holidays during the period she was on furlough leave (which would have required formal notice to have been given to her in accordance with Regulation 15

WTR) and she did not validly waive her entitlement to receive a payment in respect of her accrued but untaken annual leave entitlement (which could only be done by way of an agreement meeting the conditions set out in Regulation 35(3) WTR), the claimant remains entitled to a payment in respect of her accrued but untaken annual leave entitlement.

32. The sum outstanding in respect of holiday pay is £1,207.14 gross.

10 Employment Judge: Mel Sangster
Date of Judgment: 01 November 2021
Entered in register: 03 February 2022
and copied to parties