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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107853/2020 (V)

Held on 17 February 2021 by Cloud Based Video Platform

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Employment Judge S Neilson

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Mr B Williams

**Claimant
In person**

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Milton & Stirling Limited

**Respondent
Represented by:
Mr J Lindsay,
Director of the
Respondent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that (a) the claim for breach of contract is successful and that the respondent shall pay to the claimant the gross sum of £240.38; (b) the claim for accrued holiday pay under regulation 14(2) of the Working Time Regulations 1998 is successful and the respondent shall pay to the claimant the gross sum of £875 in respect of accrued holiday pay.

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REASONS

1. At the Hearing on 17 February 2020 by CVP the claimant appeared in person and represented himself. The respondent was represented by Mr John Lindsay a director of the respondent ("Mr Lindsay").
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2. The claimant had lodged with the Employment Tribunal screen shots of a WhatsApp conversation dated Monday 28 September 2020 and subsequent dates. He had also lodged a wage slip from the respondent for the month ending 31 January 2021 (although ultimately nothing turned on this document). Mr Lindsay was provided with copies of these documents. Mr Lindsay had lodged with the Employment Tribunal a spreadsheet purporting to show the holidays the claimant had taken in 2020; an unsigned letter dated 14 September 2020 from the respondent to the claimant headed "Employee termination of contract letter" and a Witness Statement signed by a Mr Stuart Stirling, Operations Manager of the respondent ("Mr Stirling"). Copies of these documents were provided to the claimant. Mr Lindsay explained that Mr Stirling would not be attending to give evidence. The Tribunal explained to Mr Lindsay that in those circumstances the witness statement would not be admissible as evidence as Mr Stirling was not available to be cross examined. However Mr Lindsay was made aware that he could cover in his evidence what Mr Stirling may have said to him about any of the matters in this case.
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3. The claimant also sought to lodge on the day a recording of a telephone conversation that allegedly took place in November 2020 between the claimant and Mr Lindsay. The Tribunal decided not to listen to that recording but to hear oral testimony from both Mr Lindsay and the claimant about that call instead. The claimant also sought to lodge, after close of evidence in the case, video files that he claimed were relevant to the case. The Tribunal declined-to-accept-them as evidence-as they came-after-close of-the
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evidence.

4. The claimant gave evidence on his own behalf and evidence was provided on behalf of the respondent by Mr Lindsay.

5. The issues to be determined in the case were as follows:-

5 (a) Whether or not there was a breach of contract arising out of the failure by the respondent to provide to the claimant 1 weeks' notice of the termination of the employment; and

(b) Whether or not the claimant is entitled to any payment in respect of accrued holiday leave in accordance with Regulation 14(2) of the Working Time Regulations 1998.

10 Findings in Fact

6. The claimant commenced employment with the respondent on 28 January 2020.

15 7. The claimant was employed as a debt advisor in the respondents Manchester premises at Trafford House, Chester Road, Manchester M32 0RS. The claimant was employed on a full time basis.

20 8. There were four employees working in the Manchester office. The claimant; Danielle Bergin; Lewis Osborne and Anthony Osborne ("Mr Osborne"). Mr Osborne was the manager of the Manchester office. The claimant, Danielle Bergin and Lewis Osborne reported into Mr Osborne as the manager. Mr Osborne reported into Mr Lindsay, a director of the respondent based out of the respondent's Glasgow office.

25 9. It was the responsibility of the manager of the Manchester office, Mr Osborne, to provide any paperwork such as contracts, letters to the claimant and the other employees.

10. The claimant did not receive a written statement of terms and conditions of employment at any stage during his employment.

11. The claimant was paid a salary of £17,500 per annum during his employment.

12. The claimant was entitled to 20 days holiday plus 8 bank holidays per calendar year.
13. The bank holidays in 2020 were 1 January; 10 and 13 April; 8 and 25 May; 31 August; 2 and 28 December.
- 5 14. The claimant had booked two weeks of annual leave from Monday 28 September to Friday 9th October 2020 inclusive.
15. The claimant did not take any other annual leave, other than the bank holidays, in 2020.
16. The claimant was notified by WhatsApp message from his manager, Mr
i o Osborne, on 28 September 2020 that the office was being closed with immediate effect. The claimant took this to be notification of the termination of his employment.
17. The claimant did not receive any prior notification of the termination of his employment before 28 September 2020.
- 15 18. The claimant was paid salary up to 30 September 2020.

Submissions

19. The claimant seeks payment from the respondent in respect of 1 weeks' notice and payment in respect of accrued holidays. The respondent maintains that notice of termination of employment was given to the claimant by letter
20 of 14 September 2020 so there was no breach of contract. The respondent maintains that the claimant exhausted his holiday entitlement and makes reference to a spreadsheet that purports to show the dates the claimant took holiday.

The Law

- 25 20. Under Section 86(1) of the Employment Rights Act 1996 the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not

less than one week's notice if his period of continuous employment is less than two years.

21. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a claim by an employee for breach of contract can be brought before an Employment Tribunal provided the claim arises or is outstanding on the termination of the employment. Such a claim is subject to a cap of £25,000.
22. Under regulation 14(2) of the Working Time Regulations 1998 where a workers employment is terminated during a leave year and the proportion of leave taken by a worker in a leave year is less than the proportion of the leave year which has expired an employer is obliged to make a payment to a worker. The amount is to be calculated in accordance with regulation 14(3). Under regulation 30(1)(b) of the Working Time Regulations 1998 a worker may present a complaint to an employment Tribunal where there has been a failure to make a payment under regulation 14(2). Where there has been such a failure the employment Tribunal shall order the employer to pay to the worker the amount which it finds to be due to him.

Discussion & Decision

23. The claimant had been working for the respondent since 28 January 2020 in the respondents Manchester office as a debt advisor. This was a new venture for the respondent and it was not disputed that business during this period was not as good as the respondents, and the claimant, might have hoped.
24. The respondent had intended to place the claimant and his three colleagues in the Manchester office on furlough as a consequence of the covid-19 pandemic. That was supposed to be for the period of April, May, June and July 2020. Mr Lindsay instructed Mr Osborne as the office manager for Manchester to issue letters to the other three employees placing them on furlough. This was not done and the employees in Manchester continued to work throughout April, May, June and July. Mr Lindsay does not dispute that this is what occurred.

25. Although the Manchester business was not doing well the respondent decided to continue trading the business in August and through to early September. However in early September a decision was made by Mr Lindsay and his colleague Mr Stirling to close the Manchester office. A draft letter was prepared giving notice of termination of employment (being the draft letter Mr Lindsay produced in evidence). Mr Lindsay gave the letter to Mr Osborne and instructed him to issue it the Manchester employees, including the claimant. However the Tribunal is satisfied on the evidence that this was not done. Mr Lindsay admitted that he did not know whether or not the letter had been issued. The claimant was adamant it had not been received by him. Unfortunately for the respondent it does appear that their manager in the Manchester office had a track record of not attending to administrative tasks. He had not issued the furlough letters and he had not issued any statement of terms and conditions of employment to the claimant. Accordingly the Tribunal accepts that the more likely explanation is that, for whatever reason, Mr Osborne did not issue the letter.

26. The claimant maintained in his evidence that it was only on 28 September 2020, whilst he was travelling to Mexico to go on holiday, that he was notified by Mr Osborne that the office was closing with immediate effect. The Claimant produced screen shots of WhatsApp messages bearing to be a conversation between Mr Osborne and Mr Lindsay. Mr Lindsay accepted these were accurate. In one of the messages dated 29 September Mr Lindsay stated to Mr Osborne that it was only on the 28 September that they had decided to close the office. It is clear to the Tribunal from these messages that it was reasonable for the claimant to treat his employment as being terminated with effect from 28 September. In any event the respondent only paid the claimant up to 30 September 2020.

27. The claimant was entitled under section 86(1) of the Employment Rights Act 1996 to 1 weeks' notice of the termination of his employment. He did not receive that notice and accordingly the respondent has breached the claimant's contract of employment. Had the claimant received that 1 weeks' notice his employment would have terminated on Monday 5th October 2020.

He has lost 5 days wages as a direct consequence of the breach. Based on his annual salary of £17,500 this equates to £336.54 as a week's pay (gross). As he was paid up to 30 September 2020 he is entitled to 5/7 of this amount = £240.38 gross. The Tribunal understands that that payment is likely to be taxable.

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28. With regard to holidays the claimant's position was that he was told verbally that he was entitled to 20 days holiday per annum. He thought this included the bank holidays. The respondent's position is that the claimant was entitled to 28 days inclusive of bank holidays on a per annum basis. There was no written statement of terms and conditions of employment. The Tribunal finds that his holiday entitlement was to 28 days per annum as this complies with the position under the Working Time Regulations 1998 in terms of the statutory minimum.

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29. There was a very clear dispute between the parties as to how many days holiday the claimant had taken in the period between 28 January and 28 September 2020. The claimant insisted the only holiday that he booked was the Mexico trip from 28 September to 9 October. The respondent produced a spread sheet that purported to show holidays taken by the claimant as follows:- February - 5 days annual leave; March 5 days annual leave; April - 2 days bank holiday; May 2 days bank holiday; August - 4 days annual leave and 1 day bank holiday and September 4 days annual leave. Mr Lindsay maintained that this spreadsheet would have been compiled from records provided from the Manchester office and that Mr Stirling would have pulled this information together. Mr Lindsay admitted that he had no direct knowledge as to whether the holidays were taken or not.

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30. The Claimant also made reference to the telephone conversation in November 2020 between the claimant and Mr Lindsay where it was alleged Mr Lindsay acknowledged accrued holiday pay was due. Mr Lindsay for his part accepted he may have said something to the effect that if accrued holiday pay was due it would be paid. He explained he did not know at that time whether any was due or not.

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31. The Tribunal accepts the evidence of the claimant that he did not take any of his 20 days holiday prior to 28 September. The respondent had no direct evidence to contradict the claimant. In addition record keeping in the Manchester office does not appear to have been wholly reliable. The Tribunal
5 thinks it more likely than not that the claimant did have the benefit of the bank holidays as that would be consistent with his belief that his entitlement was 20 days. Accordingly he took 5 days bank holiday and 1 day of annual leave (28 September), 6 days.
32. Applying the formula for calculating accrued holiday pay under regulation
io 14(3) of the Working Time Regulations 1998 gives the following - 26 (as he started on 28 January) $\times 8/11 - 6 = 13$. 13 days is 2.6 weeks. A weeks pay gross is £336.54. The total is £875. This payment will be subject to the deduction of appropriate tax and national insurance.

Employment Judge: S Neilson
Date of Judgment: 26 February 2021
Entered in register: 11 March 2021
and copied to parties