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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100003/2022

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Final Hearing Held by CVP on Thursday 17 March 2022 at 11.00am
Employment Judge Russell Bradley

David Wilson

Claimant
In person

Kingdom Bakeries Limited
(In creditors' voluntary liquidation)

Respondent
Not present or represented
No ET3

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

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1. The respondent is ordered to pay to the claimant a statutory redundancy payment of THREE THOUSAND FIVE HUNDRED AND THIRTY SIX POUNDS (£3536.00);
2. the claimant's claim that the respondent has made deductions from his wages in contravention of section 13 of the Employment Rights Act 1996 is well founded;

3. The respondent is ordered to pay to the claimant the sum of TEN THOUSAND FIVE HUNDRED AND SIXTY FOUR POUNDS AND FIVE PENCE (£10,564.05) in respect of those deductions;
4. That the claim for accrued entitlement to paid annual leave (due upon termination) is well-founded;
5. The respondent is ordered to pay to the claimant the sum of FOUR THOUSAND SIX HUNDRED AND FIFTY FOUR POUNDS AND TWENTY FOUR PENCE (£4654.24) in respect of that entitlement.

REASONS

Introduction

1. On 3 January 2022 the claimant presented an ET1 in which he made claims for; a statutory redundancy payment; notice pay; holiday pay and arrears of pay. He confirmed that those were his four claims.
2. No ET3 was lodged. The respondent was neither present nor represented at this hearing.
3. On 14 February 2022 the respondent entered into creditors' voluntary liquidation. Kenneth Pattullo and Yiannis Koumettou were appointed joint liquidators. By letter dated 22 February the claimant was advised of their appointment. Amongst other things that letter advised the claimant that the respondent could not make payment of any statutory redundancy payment.
4. The issues are clear from the discussion, decision and remedies noted below.

Findings in Fact

5. Based on the ET1 and various papers within the hearing bundle I found the following facts proved.
6. The claimant is David Wilson. His date of birth is 18 April 1977. Between 18 June 2016 and about 14 February 2022 he was employed by the respondent as technical manager. At or about the start of his employment he was told that

the period of notice to be given by both parties was 3 months. Despite occasional commitments from the respondent it did not issue to the claimant a written contract, or statement of his employment terms.

7. The claimant's place of work was at Mitchelston Industrial Estate, Kirkcaldy. Its premises there were the respondent's principal asset. On that site it produced bakery goods for sale to retailers such as Tesco, Aldi and Lidl. It had no retail outlets of its own. At or around mid-February 2022 the respondent employed about 47 staff of whom 6 were managers. The six included the claimant. In the period of his employment the claimant had communications with Prashantsen Gonpot. Mr Gonpot was a director of the respondent until his resignation on 12 December 2020.
8. The claimant's gross monthly pay was £2666.67. His net monthly pay was £1920.81. The respondent's holiday year was between 1 April and 31 March.
9. At or about the start of the COVID-19 pandemic in March 2020 the claimant was sent home by the respondent. From April 2020 until July 2021 he received furlough payments from the respondent.
10. In the holiday year 1 April 2020 to 31 March 2021 the claimant took no paid leave. Notwithstanding his resignation as director, Mr Gonpot continued in post with the respondent and communicated on its behalf with the claimant. Some of those communications included a commitment on behalf of the respondent that holiday pay would be paid by it. The respondent has not honoured that commitment.
11. At the end of July 2021 all staff were contacted to say that the respondent was going to be liquidated but staff were still employed by it. There was no contact by the respondent to the claimant since. The claimant attempted to contact the respondent since the end of July. Those attempts were ignored.
12. On 22 February 2022 joint liquidators of the respondent wrote to the claimant. The letter advised him of their appointment following the creditors' voluntary liquidation of the respondent. The letter suggested that the claimant understood that the respondent terminated his employment on 14 February. The claimant had not received any communication prior to this letter to that effect. He accepts that his contract ended on 14 February.

13. The letter of 22 February advised the claimant that subject to certain qualifications (which he meets) he may qualify for a redundancy payment. The letter advised that the respondent cannot make payment of any of that amount.
- 5 14. The claimant has received no pay from the respondent (furlough or otherwise) for the period from August 2021 to 14 February 2022.
15. In the holiday year 1 April 2021 to 14 February 2022 the claimant took no paid leave. The respondent has not paid the claimant in lieu of any accrued and untaken holidays in the two holiday years preceding his dismissal.
- 10 16. The claimant received no notice of the termination of his employment. He has received no payment in lieu of that period. The claimant has obtained alternative employment. In it, he receives a net sum in excess of his net pay with the respondent.
- 15 17. On 10 March, the tribunal sought information from the claimant as to the progress of claims for holiday pay, notice pay and unpaid wages and in particular whether he had received payment from the Redundancy Payments Office. The claimant has made those claims to it, but has not received any payment.

Comment on the evidence

- 20 18. The claimant's evidence was both credible and reliable. He was able to explain the relevant background. He did not exaggerate. He accepted, quite properly, that by reason of mitigation, there was no sum due to him as damages for breach of contract (payment in lieu of notice).

Submission

- 25 19. The claimant did not make a submission as such beyond the evidence that he gave in support of his various claims.

Law

20. Section 23(1) (a) of the 1996 Act provides that:- *“(1) A worker may present a complaint to an employment tribunal —(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))”*.
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21. Section 24(1)(a) of the Act provides that *“(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13”*.
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22. Section 135(1) of the 1996 Act provides *“an employer shall pay a redundancy payment to any employee of his if the employee—(a) is dismissed by the employer by reason of redundancy.”* Section 162 of the Act sets out the basis of calculation of a redundancy payment. Section 163 provides that on a reference to the employment tribunal of a question as to the right to, or amount of a redundancy payment, the claimant is presumed (unless the contrary is proved) to have been dismissed by reason of redundancy.
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23. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that *“Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and(c) the claim arises or is outstanding on the termination of the employee's employment.”*
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24. Regulation 13(1) of the Working Time Regulations 1998 provides that *“Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.”*
25. Regulation 13(5) provides that *“Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant*
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agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.”

5 26. Regulation 13A(1) and (2)(e) provide “Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2)”. “(2)(e) The period of additional leave to which a worker is entitled under paragraph (1) is in any leave year beginning on or after 1st April 2009, 1.6 weeks.”

10 27. Regulation 13A(3) provides “The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.”

15 28. Regulation 13A(5) provides “Where the date on which a worker’s employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.”

29. Regulation 14(2) provides “Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).”

20 30. Regulation 14(3)(b) provides “The payment due under paragraph (2) shall be— where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula— $(A \times B) - C$ where— A is the period of leave to which the worker is entitled under regulation 1 and regulation 13A; B is the proportion of the worker’s leave year which
25 expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date.”

Discussion and decision

31. On the claim for notice pay, the claimant accepted that it was a claim for damages for breach of contract, that breach being the failure to give any notice of termination. He also accepted that his claim was liable to reflect what he had done to mitigate his losses, and in this case he had mitigated them in full by obtaining alternative work with a salary in excess of his pay from the respondent. Strictly speaking his claim of breach of contract succeeds, but I award no damages.

32. On the claim for a statutory redundancy payment, the letter from the liquidators assumes that subject to the usual qualifications, the claimant is entitled to that payment. The statutory presumption arising from section 163(2) of the 1996 Act has not been contradicted. The claimant is entitled to a statutory redundancy payment. Given his gross weekly pay (£615.38), length of service (5 years) and age (44) at 14 February 2022 the sum due to him is £3,536.00.

33. On the claim for arrears of pay, the claimant has received no pay from the respondent for the months August 2021 to January 2022, and for the first half of February (1 to 14). His net monthly pay was £1920.81. That series of deductions was made unlawfully. The total arrears of pay to which he is entitled is therefore £10,564.05.

34. On the claim for accrued and untaken holiday pay I accepted the claimant's evidence as to the holiday year and about the fact that he had taken no paid leave in the current holiday year and in the previous year. Using the agreed net monthly pay results in net weekly pay being £443.26. For the holiday year to 31 March 2021, the claimant is entitled to be paid in lieu of the full 5.6 weeks. He is thus entitled to £2,482.26 for that year. In the current year he is entitled to an amount representing 10.5/12, 10.5 being the proportion of the holiday year to the date of his dismissal. That amount is £2,171.98. The total is £4654.24.

35. Reflecting my decisions on the claims, the claimant is entitled to:-

- a. Payment of £3,536.00 as a statutory redundancy payment
- b. A declaration that the respondent has made a deduction from his wages in contravention of section 13 of the Employment Rights Act 1996 in respect of pay due to him from August 2021
- c. An order for those wages, £10,564.05, to be paid
- d. An order for payment for accrued paid annual leave of £4654.24.

36. The judgment reflects my decision on the claims and the remedies that follow.

10 Employment Judge: Russell Bradley
Date of Judgment: 18 March 2022
Entered in register: 21 March 2022
and copied to parties

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