



EMPLOYMENT TRIBUNALS

Claimant: Ilhan Akyol

Respondent: Tenthpin Management Consultants Ltd

Heard at: London Central (via CVP)

On: 25 February 2022

Before: Employment Judge Bunting

Appearances

For the Claimant: In person

For the Respondent: Ms Catherine Urquhart, counsel

RESERVED JUDGMENT

The claim of unlawful deductions from wages, contrary to section 13 Employment Rights Act 1996, is not well founded and is dismissed.

The claim of breach of contract is not well founded and is dismissed.

The claim for accrued holiday pay pursuant to regulation 14 Working Time Regulations 1998 is not well founded and is dismissed.

REASONS

INTRODUCTION

1. By a claim form received by the Employment Tribunal on 15 August 2021, following a period of early conciliation between 22 June 2021 and 19 July 2021, the Claimant

(Ilhan Akyol) submitted a number of claims against the Respondent (Tenthpin Management Consultants Ltd – ‘Tenthpin’).

2. Several of these claims were subsequently struck out for various reasons that are not relevant to the issues before me. What remained was a claim for unlawful deduction from wages and a claim for a failure to provide pay in lieu of untaken holiday.
3. In a response that was attached to the ET3 and dated 21 September 2021, the Respondent gave detailed grounds of opposition. In brief, it was accepted that it had deducted £1,000 from the Claimant’s salary, but said that this was in accordance with the relevant policy and agreed by the Claimant.
4. In relation to the holiday pay claim, the Respondent denied that any pay was owed.

EVIDENCE

5. In coming to my decision, I had the following evidence :
 - a) The oral evidence of Arpita Singhal on behalf of the Respondent
 - b) The oral evidence of the Claimant
 - c) Witness statements from the Claimant and Ms Singhal contained in a 24 page joint bundle
 - d) An agreed bundle of documents of 119 pages
 - e) A 5 page document entitled ‘Respondent’s Note for Final Hearing’ prepared by Ms Urquhart
 - f) An email chain between Mr Rieck (HR Manager of the Respondent) and the Claimant, to which Ms Singhal was copied in to, between 25 May and 11 June 2021
6. In addition, Ms Urquhart and the Claimant provided oral submissions after the evidence.

7. Subsequent to the hearing the Claimant sent an email to the Tribunal containing an email dated 14 April 2021 which, he stated, showed that the Respondent's witness had not told the truth at the hearing.
8. I caused this to be sent to the Respondent. They submit, correctly, that this email was in the bundle that was before me, and the Respondent's witness had been asked about it during the hearing.
9. I consider that this takes matters no further and disregard it.

THE CLAIM

10. The circumstances of the Claimant's dismissal were not at issue in the hearing before me.
11. The claim, as it was presented at the hearing, is as follows.
12. Firstly, in relation to a laptop, there is a claim for breach of contract, and/or an unlawful deduction of wages.
13. Secondly, there is a claim for breach of contract and/or a Working Time Regulation claim relating to 9½ days of holiday pay.
14. The central issues in relation to both heads of claim related to what happened at the meeting of 14 April 2021.

FINDINGS OF FACT

15. The Claimant has a large amount of experience in the IT industry. On 23 March 2020 he was employed by the Respondent, a company providing consultancy services to businesses in the healthcare sector.
16. At (or shortly after) a meeting on 14 April 2021, the Claimant was dismissed with notice, which expired on 13 May 2021. He was put on gardening leave until then.
17. At that point, both parties agreed that he had accrued 9½ days of holiday pay.

18. The Respondent's case was that it was agreed at the meeting of 14 April 2021 that the Claimant would take his outstanding holiday entitlement during his notice period. The Claimant disputed that there was any such agreement.
19. The Respondent operated a Bring-Your-Own-Device ('BYOD') policy. The Claimant bought a laptop in March 2021 that cost approximately £1,200. In accordance with the policy, he was reimbursed £1,000.
20. The Respondent's case was that it was agreed that upon dismissal he could retain the laptop for his personal use (to give to his daughter). In return, it would deduct the £1,000 from his final salary.
21. Again, the Claimant disputed that there was any such agreement.
22. I was provided with a copy of the contract, and shall set out some of the relevant terms here :

4. Salary

We shall be entitled to deduct from your salary or other payments due to you any money which you may owe to the Employer at any time.

5. Hours of work and rules

...

You are required at all times to comply with our rules, policies and procedures in force. The Tenthpin Management Consultants Ltd Employment Staff Handbook as amended from time to time in an integral part of this contract. It is available from the UK Partner.

7. Holidays

The Employer's holiday year runs between January 1 and December 31. If your employment starts or finishes part way through the holiday year, your holiday entitlement during that year shall be calculated on a pro-rata basis rounded up to the nearest half day.

You are entitled to 25 days' paid holiday during each holiday year or the pro rata equivalent if you work part time. This excludes the usual public holidays in England and Wales.

Together with the employee the Company will determine the vacation dates of the Employee in the common interest of client, employee and company. Employees who wish to take vacation shall, reasonably prior to the intended vacation, inform the direct manager. The final decision on the actual vacation days is with the Company. Vacation should be taken in the calendar year in which the entitlement arises. A carry forward of vacation is to be considered an exception and is to be limited to a maximum of one week per calendar year.

A payment in lieu of untaken holidays is to be considered an exception and is to be limited to a maximum of 10 days per calendar year. The amount of such payment in lieu shall be 1/260th of your salary for each untaken day of your entitlement.

However, if we have dismissed you or you have resigned without giving the required notice, such payment in lieu shall be limited to your statutory entitlement under the Working Time Regulations 1998, and any paid holidays (including paid public holidays) taken shall be deemed first to have been taken in satisfaction of that statutory entitlement.

If you have taken more holiday than your accrued entitlement at the date your employment terminates, we shall be entitled to deduct the excess holiday pay from any payments due you.

9 Termination and notice period

The prior written notice required from you or the Employer to terminate your employment shall be 4 weeks.

We shall be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, or if you

cease to be entitled to work in the United Kingdom.

15 Garden leave

The definitions and rules of interpretation in this clause apply in this agreement.

Appointment: your employment by the Employer on the terms of this Agreement.

Following service of notice to terminate the Appointment by either party, or if you purport to terminate the Appointment in breach of contract, the Employer may by written notice place you on Garden Leave for the whole or part of the remainder of the Appointment. Any period of Garden Leave shall not normally exceed three months.

During any period of Garden Leave:

- a. the Employer shall be under no obligation to provide any work to you and may revoke any powers you hold on behalf of the Employer or any Group Company;
- b. the Employer may require you to carry out alternative duties or to only perform such specific duties as are expressly assigned to you, at such location (including your home) as the Employer may decide;
- c. you shall continue to receive your basic salary and all contractual benefits in the usual way and subject to the terms of any benefit arrangement;
- d. you shall remain an employee of the Employer and bound by the terms of this Agreement (including any implied duties of good faith and fidelity);
- e. you shall ensure that Arpita SINGHAL knows where you will be and how you can be contacted during each working day (except during any periods taken as holiday in the usual way);
- f. the Employer may exclude you from any premises of the Employer or any Group Company; and
- g. the Employer may require you not to contact or deal with (or attempt to contact or deal with) any officer, employee, consultant, client, customer, supplier, agent, distributor, shareholder, adviser or other business contact of the Employer or any Group Company.

16 Employer property

All documents, manuals, hardware and software provided for your use by the Employer, and any data or documents (including copies) produced, maintained or stored on the Employer's computer systems or other electronic equipment (including mobile phones), remain the property of the Employer.

Any Employer property in your possession and any original or copy documents obtained by you in the course of your employment shall be returned to Arpita SINGHAL at any time on request and in any event prior to the termination of your employment with the Employer.

23. The Respondent's BYOD Policy includes the following :

Objective

- *Any employee of the Company may register for the Bring-Your-Own-Device Program on their Personal Device.*
- *Any expense that may be required will be borne by the employee. The reimbursement will follow the local regulations and the local General Terms for Travel Expenses.*

Laptop

- *The Company allows the employees to buy a laptop on behalf of the Company.*
- *The Company allows the employees to use the laptop for private reasons.*
- *The employee can claim for only one laptop.*

24. In addition, there is a separate annex that contains the UK Travel and Expense policy. This includes the following :

6.1. Notebook

Employees are responsible for ensuring they provide a notebook of their choice for the purposes of their employment. Reimbursement will be made to the employee for the first 1,000 of the cost of a notebook purchased specifically for the purpose.

The value reimbursed for a notebook will be treated as a Tenthpin UK asset, and depreciated over the course of 3 years. The employee may take full ownership of the notebook by reimbursing the Net Book Value at any time, and the full ownership transfers to the employee when the Net Book Value is zero.

The company will provide reimbursement for a replacement / updated notebook every 3 years.

The notebook is, at all times, available for private use.

25. On 13 April 2021, Arpita Singhal (a Partner of the Respondent who was responsible for the management of the UK business) was made aware of concerns from one of their clients about the Claimant.
26. As a result, she arranged a meeting, to be held virtually by Microsoft Teams, the next day between herself, Johannes Riek (the Human Resources and Global Mobility manager for the Respondent).
27. I find that this was arranged by Ms Singhal, and an invite sent to the Claimant which would, in the normal course of events, have been synched to his device. The Claimant states that he was not aware of the meeting until he received a phone call on the afternoon of 14 April 2021 from Ms Singhal.
28. Given that he immediately joined the meeting on receipt of the phone call, and he had no apparent reason not to attend, I find that, for whatever reason he was unaware of it until that point.
29. There is a clear factual dispute as to what happened at this meeting. This covered a number of different areas, but the relevant one is what agreement there was (if any) as to the terms on which the Claimant would leave.
30. In relation to what happened, I prefer the evidence of Ms Singhal for the following reasons.

31. Both her and the Claimant were clear in their evidence. There was no indication from their oral evidence that they were trying to mislead me. There were both consistent in their account. For that reason, it is necessary to look at the other evidence that exists.

32. There are no minutes of the meeting of 14 April 2021. However, shortly afterwards (at 3.52pm) Mr Rieck sent the Claimant an email stating that the Respondent was terminating his contract.

33. Attached to that email was a letter signed by Ms Singhal and Mr Rieck. This includes, the following

As discussed earlier today, we terminate your contract of employment effective 14 April 2021

...

As you are aware, your contract of employment provides for a notice period of four (4) weeks, which means that your final day of employment should be 12 May 2021.

However, instead of requiring you to work your notice period, the Company has decided to place you on garden leave, effective 14 April 2021. Please refer to point "15. Garden Leave" in your contract of employment.

This means you will continue to receive your monthly salary until 12 May 2021. You will remain bound by the obligations and restrictions set down in your contract of employment, aside from the duty to attend work.

Further we agree on the following:

- *Your remaining vacation days of 9.5 days will be offset against the garden leave period.*
- *The company laptop cost will be adjusted in your last salary payment*

34. I consider it to be highly significant that there was no response to that from the Claimant, either that day or at all. Given that he had just been dismissed, it is clear that he would have read it carefully.
35. The letter is clear in its terms, and explicitly refers to an agreement between the Claimant and Respondent. Had there not been such an agreement, or there been any doubt as to what was agreed, the Claimant would, in my view, have contacted Mr Reick straightaway to correct the record.
36. At the very least he would have queried the email, and why it purported to record an agreement that had not been made.
37. One point that troubled me, which I raised with Ms Singhal, was why it was that someone would wish to take their holiday entitlement during gardening leave, rather than receiving payment for it.
38. Her explanation was that whilst he was on gardening leave the Claimant would be required to be logged in to the Respondent's computer system during working hours, even if he were not called upon to work.
39. The Claimant was understandably anxious about securing employment and this would present a significant obstacle to this.
40. He could avoid this by taking his holiday entitlement, which would leave him to be free to seek further employment (and attend interviews as necessary). I consider that that is a reasonable and plausible explanation.
41. Ms Singhal stated that it was agreed that the Claimant would take his holiday at the start of his notice period so that he could start to search for a new job immediately. This was supported by the screenshot that she provided of when the Claimant took his holiday. In light of that, I accept her evidence.
42. It was agreed that Ms Singhal met with the Claimant twice after the 14 April 2021 meeting.

43. Firstly, on 15 April 2021, they met outside a branch of Tesco where the Claimant returned all the property required of him. This did not include the relevant laptop, but did include another company laptop that he had.
44. I was provided with a screenshot of WhatsApp messages between the Claimant and Ms Singhal from 15 April 2021.
45. At 12.15 Ms Singhal said that she was arranging for the Claimant's personal items to be returned to him. She also said "*In the meantime could you please handover the laptop and other assets like charger, headphones etc to me*". This handover happened at shortly after 4pm that day.
46. I consider that had the Claimant believed that he could return the laptop to the Respondent and keep the £1,000 he would have brought this with him when he met Ms Singhal.
47. It is also notable that there was no reference to the laptop in the exchanges between the Claimant and Ms Singhal that day, or at all. Again, this is consistent with the Respondent's account.
48. The second meeting was on 13 May 2021 (the day after the Claimant's employment finished). This was at the Respondent's offices, and was in order for the Claimant to collect his personal belongings.
49. Again, the Claimant did not bring the laptop with him. Again, I consider that had he genuinely believed that he could return the laptop and keep the £1,000, he would have brought it with him for that meeting.
50. The first mention of the laptop was in an email sent by the Claimant to Mr Rieck on 11 June 2021. This followed an exchange from 25 May 2021 where the Claimant requested, and received, a breakdown of his last payslip.
51. The relevant part of the email of 11 June 2021 is "*And regarding laptop expense deduction, I was told when I bought the laptop, it was Tenthpin Laptop since I expensed it. So, I would prefer to return it to Tenthpin and keep the salary*".

52. I consider it to be highly significant that there was no reference to the laptop before this day. This was nearly two months after the meeting where, on the Claimant's case, he had agreed to return the laptop in exchange for keeping the £1,000.
53. Despite that, there was no attempt by the Claimant to exchange the laptop, or any correspondence asking why he still had it, and how he could return it. I consider that to be inconsistent with the account that he put forward at the hearing, and leads me to reject it.
54. In addition, the part of the email quoted above reads more like a request at that stage to exchange the laptop for £1,000 than a reference to a previous agreement. This email only makes sense if the meeting of 14 April 2021 proceeded as Ms Singhal states.
55. For those reasons, I find on the balance of probabilities that there was, as Ms Singhal states, an agreement by the Claimant to take his remaining holiday entitlement as part of his gardening leave.
56. Further, I find that it was agreed that the Claimant would keep the laptop in return for the Respondent deducting the £1,000 for this from his last months salary.

THE LAW

Unlawful deduction from wages

57. The relevant law is that contained at s13 and 14 of the Employment Rights Act 1996 which provides the right not to suffer unauthorised deductions from wages.

58. This reads, as far as is relevant, as follows :

13 Right not to suffer unauthorised deductions.

(1) *"An employer shall not make a deduction from wages of a worker employed by him unless—*

(a) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) “Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

14 Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker’s wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

Holiday Pay

59. The claimant seeks payment of accrued and untaken holiday pay at the appropriate rate and the relevant law is contained at Regulation 13 to 16 of the Working Time Regulations 1998.

60. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant’s employment in the first year and, in subsequent years, on the anniversary of the start of the

claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

61. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose. Since the payment for leave in this case was due before 6 April 2020 (when there was a change to the relevant provisions) an average of pay over the previous 12 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in **British Gas Trading Ltd v Lock and anor 2017 ICR 1**, all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European law but not for the additional 1.6 weeks leave which is purely domestic in origin.

Breach of Contract

62. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.

Conclusion

63. I will consider the two aspects of the claim (the laptop and the holiday pay) separately.

Laptop – breach of contract

64. In relation to the laptop there are, in fact, two separate claims. One is for damages for breach of contract and one for an unlawful deduction of wages.

65. What happened in relation to the laptop was that the Claimant purchased one for use in his employment (albeit he could also use it for personal reasons). As he was entitled to, he bought one that was more expensive than £1,000, and claimed £1,000 back from the Respondent in March 2021.
66. In his payslip dated 31 March 2021 he received a sum of £1,000 (albeit marked as 'bonus' there) to recompense him.
67. The terms of the BYOD policy is set out above. By virtue of term 6.1, 'the value reimbursed' for it will be treated as an asset that will be depreciated.
68. On a reading of that in isolation, it does not appear that ownership of the laptop (or £1,000 worth of it) passes to the Respondent at that point. Instead, it remains with the Claimant.
69. However, later in term 6.1 there is reference to the employee taking 'full ownership' of it by reimbursing the value of it. Further, after three years (when the value has deemed to be depreciated to zero) the 'ownership transfers to the employee' in full.
70. Whilst the BYOD policy is not named as an explicit term of the Claimant's employment contract, by virtue of Clause 5 the Claimant was required 'at all times to comply' with the Respondent's 'rules, policies and procedures' in force, which would include the policy at issue.
71. The relevant part of the contract is Clause 16, which provides that everything provided to the Claimant for use at work remains the property of the Respondent and is returnable on request.
72. I consider that the laptop was, by virtue of the policy, bought by the Claimant on behalf of the Respondent.
73. On a fair reading of the policy, it was part the property of the Respondent at the point of purchase, although the Claimant could claim full ownership of it by reimbursing the Respondent the £1,000 (or the lower value at a later stage).
74. In light of that, it was 'property in [his] possession' that belonged to the Respondent. By virtue of Clause 16 of the contract, the Claimant was contractually obliged to

return the laptop to the Respondent, by the termination of his employment at the latest.

75. The only exception to that would be if the Claimant were to exercise his right to purchase it outright for its value at the time.

76. The contract and policy is silent as to how this should be done. In those circumstances, there would appear to be no reason why the Claimant could not do so orally.

77. In light of my findings of fact above, I consider that there was a verbal agreement on 14 April 2021 for the Claimant to 'take full ownership' of the laptop in return for him reimbursing the Respondent.

78. What happened in the payslip of May 2021 was, in effect, that the Claimant was paid his salary by the Respondent and, at the same time paid the Respondent the £1,000 to keep the laptop as agreed.

79. This was effected by the Respondent deducting £1,000 from his salary (noted as 'Notebook Reimbursement' on the payslip).

80. I consider that the deduction in May 2021 related to 'money which [he] may owe to the Employer at any time' for the purposes of Clause 4 of the Contract. If I am wrong about that, then it became an express term of the agreement by virtue of the conversation on 14 April 2021.

81. Accordingly, the Claimant's claim for breach of contract fails.

Laptop – unlawful deduction

82. I consider that in those circumstances, as of the 14 April 2021 the Claimant owed the Respondent £1,000 for the laptop. He was, as he was entitled to, buying out the Respondent's rights to any of the laptop

83. By virtue of s13(3), the £1,000 withheld from the Claimant is a deduction.

84. I have set out above my findings as to what was agreed at the meeting and the contractual position.

85. However, there was no written agreement by the Claimant as required under s13(1)(b), or statutory basis for the deduction.

86. In those circumstances, whatever the position agreed at the meeting was, the deduction was not lawful unless it was authorised by the Claimant's contract or it was an excepted deduction under s14(1)(b).

87. For the reasons set out above, I consider that the deduction of £1,000 was permitted under Clause 4 of the Claimant's contract, and is therefore lawful under s13(1)(a).

88. For that reason, the Claimant has not made good his claim relating to this.

Holiday Pay - contract

89. Clause 7 of the Claimant's contract sets out the position with holidays, and the entitlement to holiday pay.

90. It provides that the Claimant and Respondent will determine 'together' when holidays are taken, but 'the final decision on the actual vacation days is with the' Respondent.

91. In a situation like the current where the Claimant is dismissed, payment in lieu is limited to the statutory amount under the Working Time Regulations.

92. In relation to whether the Claimant has a contractual claim against the Respondent, this will depend on whether the Respondent can, and in fact did, direct him to take his holiday when he took it.

93. On my findings of fact above, the Claimant had agreed at the meeting for this arrangement.

94. In any event, I consider that Clause 7 provides the Respondent with the right, under the employment contract, to do so. The evidence of the letter sent after the meeting provides strong evidence that that is what they did.

95. For those reasons, I do not consider that the Claimant has a contractual claim for holiday pay.

Holiday Pay – working time regulations

96. As of the termination of his employment, the Claimant had accrued 10.3 days of holiday under the Regulations, although this would have included Bank Holidays (which includes New Year's Day).

97. In light of that, I accept the Respondent's calculation of the amount of holiday accrued.

98. Under the Regulations the Respondent is entitled to direct that the Claimant take his holiday pay at specific times, provided that that notice is given at least 19 days before the required start of the leave period (Reg 15(4)(a)). This did not happen in the instant case.

99. However, this leave can be taken at any time by agreement. In light of my findings of fact as set out above, I accept that it was suggested that he take his accrued holiday during his notice period, and that he do so first. I further accept that the Claimant agreed to this. In those circumstances the claim for holiday pay fails.

Conclusion

100. For that reason, the Claim is dismissed.

DATE: 23 March 2022

Employment Judge Bunting

Sent to the parties on:

24/03/2022

For the Tribunal:

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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