



EMPLOYMENT TRIBUNALS

Claimant

Maja Dimova-Handley v

Respondent

Multiliving Limited

Heard at: Watford

On: 30 July 2021

Before: Employment Judge Allen sitting alone

Appearances

For the Claimant: In person

For the Respondent: Ms John's of counsel

Also in attendance: Mr Anatoly Antov for the respondent

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by Video. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The order made is described at the end of these reasons."

JUDGMENT

The claim for unauthorised deduction from wages in respect of holiday entitlement accrued and outstanding at the date of termination is not well founded and is dismissed.

REASONS

1. The central issue in this case is the effective date of termination.
2. The claimant was employed by the respondent as a designer. Her employment commenced on 25 June 2018. She was furloughed in accordance with the Government's job retention scheme following the emergence of the Covid pandemic and was subsequently dismissed by the respondent on 27 May 2020.
3. Termination provisions of the contract of employment
 - 3.1. Paragraph 10.2. of the contract states once the period of probation has been completed the employee is entitled to 1 month written notice of termination of contract.

- 3.2. The final line of paragraph 10.3 of the contract states “You have no right to receive a payment in lieu of notice instead of working your notice period unless the company exercises its discretion to pay you in lieu under this clause”.

In the context of this case the appropriate dictionary definition of discretion is - the freedom to decide what should be done in a particular situation. There is no wording in the contract that would fetter the employer’s freedom to exercise its discretion. It does not rely on an employee’s request to come into effect.

4. On 27 May 2020 the claimant was given a letter of termination which stated her contract of employment was terminated with immediate effect (paragraph 1, page 52 Respondent’s bundle). She was at that time within 1 month of her second anniversary of the commencement of her employment (25 June 2018).
5. The letter of 27 May 2020 stated that:
- 5.1. It took immediate effect; and
 - 5.2. A payment would be made in lieu of notice.
6. On 28 May 2020 the claimant received an email from her employer Mr Peter Hadzi referring to her right to a statutory notice period. This email created some confusion in the claimant's mind who interpreted it as meaning the date of termination was changed by the email.

Section 86 of the Employment Rights Act 1996 states at subsection (1) that 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 under subsection (a) is not less than one weeks' notice if her period of employment is less than two years.

In this instance the contract of employment is more generous than statute law and as stated at paragraph 3 above the claimant was contractually entitled to one month’s notice. In the circumstances the email of 28 May is in error on this point.

7. The calculation of holiday pay is based on:
- 7.1. the accumulation of holiday entitlement at the rate of 2.33 days per month (or 0.076 per day); and
 - 7.2. 148 days of the holiday year had expired on 27 May 2020.

I have seen the individual employee holiday entitlement records which show the claimant had accrued 11.35 days and that she had used 11 days of that entitlement by the date of termination. I can also see from the final itemised statement of pay that she received a payment to account for 0.35 days holiday outstanding.

The Law

8. The Effective Date of Dismissal or Termination (EDT) will vary according to which of two scenarios applies as set out in the case of Adams referred to below.
 - 8.1. The EAT in Adams v GKN Sankey Ltd 1980 IRLR 416, EAT set out the categories as follows:
 - Scenario 1. - the employee can be regarded as having been dismissed with **notice** but given a **payment in lieu** of working out that **notice** (this is the colloquial usage of the phrase '**payment in lieu**'), the EDT is the date on which the **notice expires** in accordance with S.97(1)(a) or S.145(2)(a) ERA. or
 - Scenario 2. - the employee can be regarded as being dismissed immediately with **payment in lieu** of the **notice** of which he or she has been deprived. (This is the legal usage of the phrase, and the **payment in lieu** when used in this sense represents the equivalent of the damages that a court would award for wrongful dismissal). If it is the second category, then termination counts as a dismissal without **notice** and the EDT is the date upon which termination takes effect — S.97(1)(b) or S.145(2)(b) ERA.

Conclusion

9. Applying the case law set out at paragraph 8 above, I have no difficulty in concluding the letter of 27 May 2020 was a letter of termination with immediate effect and is a Scenario 2 situation.
10. The claimant's claim for payment in respect of holiday entitlement accrued and outstanding on the effective date of termination is based on one month's contractual notice extending the EDT to 27 June 2020 if interpreted in line with scenario 1 as set out in Adams (para 8 above). The claimant is incorrect in her interpretation. The letter of 27 May 2020 states clearly that termination will take place with 'immediate effect'.
11. The claimant was paid one month's pay in lieu of notice in accordance with scenario 2 and such a payment does not extend the effective date of termination.
12. The email of 28 May 2020 is the cause of the claimant's confusion but it does not affect the effective date of termination because the contract had ceased the day before; the letter of 27 May clearly states the contract is terminated with immediate effect. [To put it another way the email of 28 May 2020 does not re-engage the claimant, amend the circumstances of her dismissal and then dismiss her again in those new circumstances.]
13. The claimant's claim is dismissed in its entirety.

Employment Judge Allen

Date: 5 August 2021

Sent to the parties on:

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For the Tribunal Office