



EMPLOYMENT TRIBUNALS

Claimant:

Mr B Ardron Sharpe

v

Respondent:

Todds Office Solutions Limited

Heard at: Nottingham (via CVP)

On: 16 May 2022

Before: Employment Judge Fredericks

Appearances

For the claimant: Mrs S Sharpe (lay representative)

For the respondent: Mr S Beesley (Director of the respondent)

RESERVED JUDGMENT

1. The claimant was dismissed by the respondent under the terms of his employment contract with effect from 23 August 2021.
2. In breach of the contract of employment, the respondent has not paid the claimant the one month's salary payment in lieu of notice due to him.
3. Consequently, the respondent is ordered to pay the claimant the total sum of **£1,884.57**, which is a gross sum subject to the usual PAYE deductions.
4. The claimant's claims for unlawful deduction from wages in relation to overtime and accrued but untaken holiday are not well founded and are dismissed.

REASONS

Introduction

1. This is the written reserved judgment following a two hour hearing by CVP. Both parties requested written reasons following the delivery of a provisional oral judgment in the hearing.
2. During the course of writing the decision and considering the available documents and evidence, I have come to the view that I made a mistake when coming to my

provisional decision and that it is in the interests of justice to correct that mistake when producing the final judgment in this matter. In short, I should not have taken account of any reduction to the claimant's payment in lieu of notice following his period of ill health. The ill health occurred post-termination of the contract and therefore cannot affect his payment in lieu of notice.

3. The claimant was employed by the respondent as an Installation Technician from 1 March 2021 until 23 August 2021, although the date of termination was disputed by the parties at the hearing. The claimant said that his employment was terminated by the respondent by letter and that, accordingly, he was owed a payment in lieu of notice by the respondent. He also brought claims in relation to what he said were unpaid overtime payments and accrued but untaken holiday.
4. The respondent said that the claimant resigned by a letter on 20 August 2021 and then failed to work his notice such that he is not entitled to any payment for his notice period. It also said that the claimant is not due any overtime because no overtime had been approved at the time of the ending of the claimant's employment, and that no payments were outstanding in respect of holiday pay.
5. During the course of the hearing, I heard sworn evidence from the claimant directly on his own behalf. For the respondent, I heard sworn evidence from Mr Beesley, the director of the respondent, and from Mr J Mckinder, an employee of the respondent.
6. I also had access to an unpaginated collection of documents and I refer to the relevant ones at the salient points below.

Findings of fact

7. The relevant facts are as follows. Where I have had to resolve conflicts of fact, I explain how I have done so at the relevant points. Each factual finding is made on the balance of probabilities having considered (1) the live evidence given at the hearing, (2) any witness statements provided by the parties, and (3) the documentary information provided.

The contract of employment

8. The claimant was employed by the respondent in the position outlined above. The parties agree that the employment relationship was regulated by a written contract of employment, a copy of which was provided at the hearing. That contract contains the following relevant terms:

8.1 Clause 2.2 –

“The appointment shall be deemed to have commenced on the Commencement Date and shall continue, subject to the remaining terms of this agreement, until terminated by either party giving each other not less than one months’ prior notice in writing”.

8.2 Clause 5 –

“The Employee’s normal working hours shall be 7.00am to 4.00pm on Monday to Friday (with lunch break at a time as agreed with the Company) and such additional hours as are necessary for the proper performance of his/her duties. The Employee acknowledges that he shall not unless previously agreed receive further remuneration in respect of such additional hours.”

8.3 Clause 10.5 –

“If either party has served notice to terminate the Appointment, the Company may require the Employee to take any accrued but unused holiday entitlement during their notice period or, if applicable, any such holiday shall be deemed to be taken during any period of Garden Leave”.

8.4 Clause 14.1 –

“Notwithstanding clause 2.1, the Company may, in its sole and absolute discretion, terminate the Appointment at any time and with immediate effect by paying a sum in lieu of notice (Payment in Lieu) equal to the basic salary (as at the date of termination) which the Employee would have been entitled to receive under this agreement during the notice period referred to at clause 2.1... less income tax and National Insurance contributions. For the avoidance of doubt, the Payment in Lieu shall not include any element in relation to:

...

(c) any payment in respect of holiday entitlement that would have accrued during the period for which the Payment in Lieu is made.”

8.5 Clause 14.3 –

“The Company may also terminate the Appointment with immediate effect without notice and with no liability to make further payment to the Employee (other than in respect of amounts accrued due at the date of termination) if the Employee:

...

(a) Is guilty of any gross misconduct affecting the business of the Company, or

...

(b) Is, in the reasonable opinion of the Board, negligent and incompetent in the performance of his duties...

8.6 Clause 22.1 –

“Any notice given under this agreement shall be in writing and signed by or on behalf of the party given it and shall be served by delivering it personally, or sending it in pre-paid recorded delivery or registered post to the relevant party at (in the case of the Company) its registered office for the time being and (in the case of Employee) the last known address...”

The claimant’s performance and overtime

9. I am satisfied that the claimant’s employment with the respondent was not successful. The claimant appears to have been unhappy with his employment and I am satisfied that he required support in excess to that which the respondent would ordinarily expect to provide to a new employee. Both respondent witnesses described how the claimant would take much longer with tasks than expected, and each recounted conversations they had had with the claimant to support this. The claimant, for his part, does not completely accept what is said about him. But he does accept that the job was not as he expected either.
10. It is apparent from the claimant’s pay slips produced that he regularly completed overtime. The pay slips show entries for overtime. There is a dispute over whether all overtime has been paid. The claimant has produced a number of overtime sheets, signed by him, which show periods for which he says he has not been paid. The sheets have not been signed by the respondent. I have seen a number of written accounts from the claimant’s former colleagues which indicate that the claimant would not necessarily submit accurate time sheets – he would copy what others wrote. Mr Mckinder noted that the claimant was occasionally late for shifts and this was not reflected in the sheets. Mr Beesley said that he had heard similar reports, and so had not always been able to authorise the full amount of overtime claimed without explanation from the claimant.
11. I am satisfied that the claimant entered and submitted the time sheets produced for the hearing. I am equally certain that not all of the time claimed was authorised as overtime by the respondent. Only the overtime paid has been authorised. If overtime had been authorised, then I am clear that it would have been paid. There is no suggestion that, if the claimant had worked all of the overtime for which he says pay is outstanding, he would have been paid less than the minimum wage for any relevant period.

The ending of the claimant’s employment

12. During the course of the claimant’s employment and prior to him submitting a letter of resignation, Mr Beesley met with the claimant to discuss his employment. Mr Beesley recalls that he had been asked to speak to the claimant about his lateness and concerns that others had about the claimant’s attitude to precautions in relation to Covid-19. He recalls that the claimant was unsure if the job was right for him, and that the claimant mentioned finding another job.
13. On 20 August 2021, the claimant hand delivered a letter of resignation to the respondent’s head office. The main substance of the letter reads –

“I write to inform you of my intention to resign from my position within your company, providing you with 4 weeks notice from today, 20/08/21. I understand I have accrued 10 days annual leave (ie 2 weeks) which I would like to take as the final two weeks of my notice period, therefore making my last working day 3/09/21.”

14. Around the same time, the respondent began production of a letter which was intended to terminate the claimant’s contract of employment. Mr Beesley said that he was not directly involved in the production of the letter, but that it was done by the person responsible for administration in the office.
15. The claimant also contracted Covid around this time. I have seen a whatsapp conversation, undated but from some point between the claimant’s notice being submitted and Sunday 22 August, where Mr Beesley informs the claimant that he is expected to serve 4 weeks’ notice from 1 September, or no further payments would be made. The messages refer to the contract of employment, but it is not apparent that there are any terms to this effect. The respondent seems to accept that this initial position was erroneous.
16. On Sunday 22 August 2021 conversation occurred between the claimant, Mr Beesley, and Mrs Sharpe. The claimant says that, on the telephone call, Mr Beesley informed the claimant that his contract of employment had been terminated and that a letter would be sent confirming this. The claimant says he understood this to mean that his employment had come to an end, which he found confusing. Mr Beesley denied telling the claimant his contract was terminated. He said he acknowledged the resignation letter and wanted to find out what it was about. Mr Beesley says that the claimant told him that he had found another job.
17. On Monday 23 August 2021, the respondent sent a letter, in the name of Mr Beesley, to the claimant. The main substance of the letter reads:-

“Please accept this letter as confirmation that your Contract of Employment has been terminated on 23 August 2021.

We wish you every success for your future employment.”

18. The claimant did not attend work following this letter being sent. He continued to be unable to work due to Covid-19 in any event. On 23 August 2021, the claimant sent Mr Beesley confirmation of his positive test result and advised that his isolation period had been extended to 3 September 2021.
19. Mr Beesley replied in the following terms –

“Hi mate,

So, I informed you of your termination on Sunday 22nd. A letter had been sent out.

Regards your final balance that hopefully will be done next week as we will need to check all tools, holiday pay etc. At the moment I'm focusing on covering the work we had down for you to do.

What's happened with Covid has nothing to do with me.

Hope your health is ok.

Shane".

20. Consequentially to the above, I find as a fact that the respondent terminated the claimant's contract with immediate effect by operation of the letter dated 23 August 2021. I find this for the following reasons:-
- 20.1 The claimant intended to serve his notice and his resignation letter did not operate to terminate the contract of employment immediately – it would be terminated at the end of the one month's notice given under the terms of the contract of employment;
- 20.2 The respondent's letter is served on the claimant in line with the notice provisions of the contract;
- 20.3 The respondent's letter is unequivocal in stating that the contract of employment had been terminated with effect from 23 August 2021, and the part describing termination is expressed in the past tense;
- 20.4 The respondent is the party effecting termination in the correspondence;
- 20.5 Mr Beesley confirmed that the respondent had an intention to terminate the claimant's contract of employment in whatsapp correspondence when describing the position on 22 August 2021; and
- 20.6 That position as described in whatsapp accords with what the claimant recalls about the telephone conversation held on 22 August 2021.

Conclusions on the claims

Payment in lieu of notice

21. The respondent terminated the claimant's contract of employment immediately through written notice. The respondent confirms that the termination was not due to any of the reasons outlined by clause 14.3 as outlined above. This means that the claimant is due payment in lieu of notice as required by clause 14.1. This is one month's pay, which has not been paid to the claimant. The claimant is therefore due this sum from the respondent. In setting the amount under this claim, I have taken the average monthly pay figure given by the respondent – an amount which was not disputed by the claimant in the hearing.
22. The respondent mentions several times that the claimant had no intention to serve his notice, and could not serve his notice as he was ill with Covid. Upon reflection,

I do not consider that either of these points serve to override the effect of the contractual termination of the contract. The claimant's contract of employment was terminated from 23 August 2021. Anything which did or could have happened after that point is irrelevant; once terminated, there is no obligation on the claimant to do any work for the respondent whatsoever, and so it would be unjust and unlawful for events post-termination to affect the claimant's contractual entitlement to payment in lieu of notice.

Overtime

23. Under the contract of employment, any payment over the basic portion of pay is subject to approval by the respondent. I am satisfied that the overtime had not been authorised prior to the contract of employment being terminated. Additionally, I do not consider that the claimant has proven on the balance of probabilities that this overtime was worked or legitimately claimed. In my judgment, the claimant has no entitlement to any overtime pay above that which was already paid by the respondent.

Holiday pay

24. Under the contract of employment, the respondent can require any accrued but untaken holiday pay to be wrapped into the provisions relating to notice. This is also what the claimant proposed to occur. Consequently, I consider that any days holiday which were left outstanding were taken during the period which would otherwise have been covered by the payment in lieu of notice provision. To avoid any double recovery, this element of the claim cannot lead to any award.

Post-script

25. I should also like to pass on my apologies to the parties for the delay in promulgation of this judgment.

Employment Judge Fredericks

Date: 8 August 2022

Sent to the parties on:

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For the Tribunal Office:

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