



EMPLOYMENT TRIBUNALS

Claimant:

Miss H Ballerino

Respondent:

v The Racecourse Association Limited

Heard at:

Reading (by CVP)

On: 11 July 2022

Before:

Employment Judge Anstis

Mrs A Gibson

(the parties having consented under s4(1)(b) of the Employment Tribunals Act 1996 to a two-person tribunal)

Appearances:

For the Claimant: In person

For the Respondent: Ms J Shepherd (counsel)

JUDGMENT

1. The respondent's employer contract claim is dismissed on withdrawal.
2. The respondent must pay the claimant £4,435.04 as compensation for breach of contract, comprising:
 - £4,000 notice pay,
 - £184 for employer's pension contributions, and
 - £251.04 interest.
3. The respondent must pay the claimant £1,437.13 for unpaid holiday pay under the Working Time Regulations 1998.

REASONS

INTRODUCTION

1. These written reasons are prepared at the request of the claimant, which was made at the end of the hearing.
2. This remedy hearing was convened to decide what remedy the claimant was entitled to as a result of our liability judgment of 16 May 2022.

3. The third member of the tribunal panel was indisposed and unavailable on the day of this hearing. We continued as a two-member tribunal panel, with the consent of the parties.

THE ISSUES

4. By the time of the hearing, it was agreed that the amount of salary the claimant was entitled to during her notice period was £4,000 (subject to mitigation arguments). Matters that remained in dispute between the parties were how any additional pension contributions due during the claimant's maternity leave were to be calculated, whether she was entitled to interest on this payment (and if so at what rate) and what holiday pay she was entitled to.

OUR DECISION

5. The first point for decision was whether the claimant's entitlement to pay during her notice period should be reduced on account of failure to mitigate her losses. It was common ground that the claimant had not attempted to find other work during this period, but also that if she had remained at work she would have been on maternity leave in her notice period. The claimant had a second job that she was absent from on maternity leave throughout what would have been her notice period with the respondent.
6. Given that the claimant was entitled to be on maternity leave period during what would have been her notice period (and we find she would in fact have remained on maternity leave during her notice period) we do not consider that her failure to apply for other jobs in this period amounted to a failure to mitigate her loss. She is entitled to the full amount of her notice pay (subject to any necessary deduction of tax).
7. It was the respondent's position (which we accept) that they paid 4.6% into the employee's pension, subject to payment of 3.9% employee contributions. We reject the respondent's position that this somehow balances out during the claimant's notice period so that she is only entitled to the difference of 0.7%. In cases such as this the employer pension contributions are effectively treated by the tribunal as being additional remuneration. The claimant is entitled to 4.6% on top of the £4,000 notice pay, to compensate her for the loss of employer pension contributions.
8. The parties agree that it is within our jurisdiction to award interest in respect of a breach of contract claim. We do not accept the respondent's position that the claimant should not be entitled to interest given previous overpayments – see our liability decision for our previous rejection of the respondent's argument on overpayment. The claimant is entitled to interest, but the traditional 8% that she claims is not in present circumstances a realistic interest rate to be applied. We apply 2% a year for the three years between the end of her employment and this hearing.

9. There was some controversy over what the claimant may be entitled to by way of holiday pay. The claimant contended that her holiday pay should be calculated over a reference period of 52 weeks (see reg 16(3) of the Working Time Regulations 1998), so as to include periods during 2018 when she had worked more than her standard hours. The respondent's preferred the strict contractual approach of 2.33 days x £400/day holiday pay.
10. We accepted that the claimant should be able to argue her case by reference to the Working Time Regulations. This seemed to us to be a question simply of how holiday pay should be calculated, and so was not a challenge to our previous finding that it was 2.33 days due. Determining how that amount of holiday pay should be calculated was the essence of this hearing, and the claimant should not be limited in her arguments.
11. We traced the calculation from regulation 16(3) through to s224 of the Employment Rights Act 1996, which set out how a week's pay should be calculated for workers such as the claimant. This was that it should be the average of the previous 52 weeks, not including any "*week in which no remuneration was payable*". While in a typical maternity leave period remuneration would not be payable (and so the period would not count) we have explained in our liability judgment that a special arrangement was made in the claimant's case so that remuneration would be payable during her maternity leave period. The period that counts is the 52 weeks leading up to her dismissal.
12. In some of what follows we have had to make calculations on the assumption that 52 weeks is the same as 12 months and a year. We are aware this is not the case, but given the way in which various figures have been presented we are not in a position to calculate strictly by reference to 52 weeks, and the difference it makes should not be substantial.
13. The claimant's original schedule of loss (which we do not understand to be in dispute so far as this is concerned) show her to have worked and been paid in respect of 33.8 days work for August – December 2018. This is $33.8 \times £400 = £13,520$.
14. During 2019 she was paid according to her standard salary of £16,000 a year, so was paid $£16,000 \times 7$ (7 months of employment)/12 = £9,333.33. Thus her payments in the year prior to her dismissal were £22,853.33. This gives us a week's pay (calculated at 52 weeks/year) as being £439.49.
15. Having worked for 7 months of the holiday year, and not taken any holiday, the claimant was entitled to 7/12ths of 5.6 weeks holiday under the Working Time Regulations – that is, 3.27 weeks. This should be simply an expression in weeks of our previous assessment of 2.33 days. If it is not, it suggests that the claimant's contract did not provide the minimum holiday provision required by the Working Time Regulations.

16. 3.27 weeks at £439.49 gives an accrued holiday entitlement of £1,437.13.
17. We accept the respondent's submission that there is no basis for the payment of interest on unpaid payments under the Working Time Regulations. It appears to us that there is also no basis for the addition of any non-pay benefits such as pension contributions to this element of holiday pay. The claimant has opted for, and is better off under, a Working Time Regulations calculation than a contractual calculation, but it seems to us that if the claimant opts for the Working Time Regulations calculation she must take with that the absence of any entitlement to interest or additional benefits being paid on top of the holiday pay entitlement. She is in any event considerably better off on this basis than she would be with a contractual calculation including interest and pension contributions.

POSTSCRIPT

18. We note that the claimant indicated that she wished to apply for a preparation time order. If that is her intention she should make it in writing in accordance with the tribunal's rules on such applications.

**Employment Judge Anstis
11 July 2022**

Sent to the parties on:.....

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For the Tribunal Office

Note:

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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