



EMPLOYMENT TRIBUNALS

Claimant: Miss M Daum

Respondent: Mr J Fletcher

Heard at: Bristol (by video-CVP) **On:** 8 July 2022

Before: Employment Judge Livesey

Representation

Claimant: In person

Respondent: In person

JUDGMENT having been sent to the parties on 14 July 2022 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claim and counterclaim

1.1 By a Claim Form dated 20 November 2021 the Claimant brought complaints of breach of contract relating to notice, unpaid holiday pay and unlawful deductions from wages. The Respondent brought an employer's counterclaim in his Response of 27 January 2022.

2. Evidence

2.1 The Claimant gave evidence in support of her claim and called Mr Alvarados to give evidence in support. The Respondent and his wife both also gave evidence.

2.2 Two witness statements were read; those of Mr Daum and Mrs Silva. The circumstances of their non-attendance is explained below.

2.3 Both parties produced documentary evidence;

C1; the Claimant's bundle;

R1; the Respondent's bundle.

3. Hearing

- 3.1 Both Mr Daum and Mrs Silva proposed to give evidence from overseas (Rome and Madrid respectively). Neither party had complied with the *Presidential Guidance; Taking Oral Evidence by Video or Telephone from Persons Located Abroad*. The parties were offered the alternative of applying for a postponement in order to secure the necessary permissions, or to proceed on the basis of the written statements which each had provided. Both were content to proceed.

4. Issues

The claim

- 4.1 The elements of the claim were established at the start of the hearing. The Claimant's claim was in the sum of £3,660. She asserted that her final payslip (see page 76 of the Respondent's bundle, R1) ought to have included the following elements
- (i) Notice;
The Claimant asserted that she was entitled to 4 weeks' notice (4 x 40 hrs/wk x £12/hr = £1,920). The Respondent asserted that the Claimant had been paid;
 - (ii) Accrued holiday;
The Claimant claimed that she was owed 2 weeks' holiday pay (2 x 40 x £12 = £960). The Respondent asserted that the Claimant's contractual entitlement was 244 hrs/yr and, for the time that she had worked on a pro rata basis, she had accrued 163.3 hours. He asserted that she had used 220 hours before she had given notice, leaving 43.3. He asserted that she took 3.3 hours as leave and a further 40 were allocated to her when she left a work trip to Spain. She therefore had no entitlement to a further payment for leave at the end of her employment;
 - (iii) Deduction;
The Claimant complained about a deduction of £540 that was made from her pay in respect of two weeks' illness absence at Easter. The Respondent asserted that she had been paid incorrectly at the time and that he was entitled to recoup the overpayment; she had originally been paid at the rate of £12/hr for 10 days (£4,800), not at the SSP rate. 4.5 days was therefore recovered to correct the error, as shown in the calculation on page 80 of the Respondent's bundle;
 - (iv) Overtime;
The Claimant claimed for two days of over time which she said that she had worked in Madrid, which was denied by the Respondent.

Employer's counterclaim

- 4.2 The Claimant had not responded to the Respondent's counterclaim, despite the Tribunal's letter of 13 May 2022, following notice to her on 1 April that she should have filed a response by the 29th of that month. The Claimant

had never responded to that correspondence, which was odd considering her active involvement otherwise.

- 4.3 The position was considered at the start of the hearing; the Claimant obviously wanted to be able to respond to the counterclaim and had prepared to do so. She could not explain why she had not received the Response Form, but she was adamant that she had not done so. The Respondent, whilst prepared to deal with the counterclaim, was entitled to judgment in his favour in lieu of a response.
- 4.4 Considering the fact that both parties had come armed to deal with the counterclaim and were not prejudiced in that respect and since the Respondent could not gainsay the Claimant's assertion that she did not receive key correspondence regarding it, it was in the interests of justice for time to have been extended in respect of her defence to it under rule 5 of the Tribunal Rules of Procedure. The contents of her witness statement were treated as the defence.
- 4.5 The Respondent's counterclaim was in the total sum of £400.07 which was withdrawn in five separate parts from the Fletchers' bank account in April and May 2021. The transfers, which were made to the Claimant, were unexplained. Mrs Fletcher had not been well at the time and could not recall the circumstances in which they were made. Her husband asserted that the Claimant had exercised undue influence over her to secure the payments.

5. Facts

- 5.1 The following factual findings were made on the balance of probabilities. Page references provided below are to the electronic pages in the Respondent's bundle, R1, unless otherwise stated and have been cited in square brackets.
- 5.2 Both the Claimant and the Respondent gave their evidence clearly and in a straightforward manner. Little additional assistance was gained from the evidence of Mr Alvarados, whose involvement was peripheral, or Mrs Fletcher, who was unable to remember many of the key events.
- 5.3 The Claimant was employed as a nanny between 5 October 2020 and 27 June 2021 at the Respondent's home in Bristol. Her responsibilities were focused upon looking after the Fletchers' twin children.
- 5.4 She was provided with a contract of employment [25-9] which stipulated a rate of pay of £12/hr for 40 hours of work per week. It also stated that the Claimant would receive Statutory Sick Pay in the event of any illness absence and that she was entitled to 5.6 weeks holiday (224 hrs/yr). The parties were to have given four weeks' notice to one another in the event of termination.
- 5.5 The contract contained the following further provisions;
"Where the Employee is absent from work and such absence has not been authorised by the Employer and where the Employee has no statutory right to such absence and no right to statutory pay for such

absence, the Employee shall not be entitled to pay for the period of the absence. The Employer shall be entitled to make a deduction from the Employee's normal pay for the period of the absence.

The Employer shall be entitled to deduct from the Employees pay amounts which the Employee has agreed to reimburse to the Employer."

Sums which fell to be reimbursed were entitled to be deducted from pay [27].

- 5.6 The day-to-day management of the Claimant and her duties was handled by Mrs Fletcher. As previously stated, Mrs Fletcher had not been well during the period of the Claimant's employment and, by her own admission, her condition had affected her memory.

Sickness

- 5.7 The Claimant was paid for her sickness absence at the normal rate of pay for 5½ days [80] (5.5 x 10 hrs x £12 = £660). Under her contract, she was entitled to SSP only (see above). The error was spotted at the point of her dismissal (see the email of 4 June [41]).
- 5.8 The Claimant, however, maintained that she had worked the 5.5 days back. She said that her working weeks were rarely fixed and that any extra time that she took off she normally worked back. Both Mr and Mrs Fletcher agreed that there had been flexibility in that way, but nobody appeared to have kept a record of hours that the Claimant had not worked and/or had worked back.
- 5.9 Having considered the evidence and, in particular, the Claimant's awareness of her illness absence and her desire to have them covered by additional work, I concluded that they probably had been worked back as she had asserted.

The Spanish trip

- 5.10 Mrs Fletcher visited her sister, Mrs Silva, in Madrid in May 2021. The Claimant was scheduled to attend in her employed capacity. The Claimant's boyfriend, Mr Alvarados, was also to have accompanied them but was refused departure for covid-19 related reasons on 19 May at Heathrow. The group stayed at a hotel near the airport overnight and, the following day, Mrs Fletcher and the Claimant flew to Spain with the twins, having rearranged their flights, leaving Mr Alvarados behind.
- 5.11 The Claimant did not remain in Spain for long and returned to the UK on 24 May. She had been due to work until 2 June, a further eight days. Not only did that cause problems for Mrs Fletcher in Spain, but Mrs Silva had to accompany her back to the UK because children under two had to be accompanied by at least one adult on flights.
- 5.12 Part of the Claimant's claim concerned two days' of overtime work that she claimed to have worked in Madrid and/or at Heathrow (see her email of 15 June [45]). Having heard the evidence of the Claimant and Mrs Fletcher on that point, whilst I was satisfied that the Claimant had undoubtedly

undertaken *some* extra work during that time, it was not possible to say what it was. Nobody had kept any records and the evidence that any particular amount was undertaken was not compelling.

Holiday

- 5.13 The Respondent's calculation of leave was not disputed. The only question was whether it was right that the Claimant had used her remaining leave when the Respondent said that she had.
- 5.14 The Respondent's case was that, when the Claimant returned to the UK on 24 May, she took 24-27 May and 1-4 June as leave because she did not work during that period. She had gone to Spain to work. She ought either not have been paid at all, because she had been absent without leave, or she could have been paid on the basis that the time was taken as leave.
- 5.15 The Claimant relied upon the proposed changed plan which was set out to her in a message from the Respondent on 20 May [C1, 37]. She asserted that 'Plan B' was followed;

"Plan b: [the Claimant] flies down with [Mrs Fletcher] and the kids tonight. [Mrs Silva] will arrange for other childcare to help [Mrs Fletcher]. [The Claimant] can return whenever you want, earliest being Saturday I imagine as you'll need a pct test to be done (test on Friday, result Friday/Saturday) fly on sat. As it stands, you'll need to quarantine for five days, which would be working paid days for you."

- 5.16 The message was not clearly worded and was a proposal only. Further, it was not clear where the quarantine was to have been done. As I understood it, it was proposed that she was to have a period of working time in Spain which had to be served upon her arrival in that country.
- 5.17 Given the events which followed, this message, in itself, was not a compelling reason for the Claimant to claim an entitlement to pay for no work in the event that she chose to leave her work in Spain, as the Respondent alleged.
- 5.18 In relation to the remaining 3.3 hours which the Respondent claimed that the Claimant took in addition to her time at home having left Spain, he relied upon the email of 6 June [42]. The email was, however, vague and did not refer to particular dates.

Termination

- 5.19 The Claimant raised a grievance, albeit not in a formal manner. She wanted to discuss the events prior to, during and after the Madrid trip [38]. Emotions were clearly raw; Mrs Fletcher had referred to the events as "*stressful and hurtful*". The Fletchers clearly saw no way forward and, on 30 May, the Respondent decided to terminate the Claimant's employment [39].

Counterclaim

- 5.20 The five bank transfers set out to the Claimant on 29 June [48], were unexplained by Mrs Fletcher [83]. Her short-term memory problems

prevented her from recalling the rationale for them, if there had been one. Mr Fletcher, however, stated that the Claimant's account, that they have been for extra hours worked, must have been wrong because the sums were not divisible by £12, her hourly rate.

5.21 The Claimant was adamant that she had worked extra hours and the transfers reflected that additional time. The WhatsApp messages [C1, 36] strongly supported her claim that extra hours were arranged over the relevant period because of Mrs Fletcher's health and "*until my meds have been sorted and I'm a bit more stable*".

5.22 I considered that the Claimant's account was probably correct and, since Mrs Fletcher could not really remember and Mr Fletcher was at least aware that the Claimant had worked some additional time, it was more probable than not that the sums withdrawn from her account reflected those additional hours. The Claimant also recovered additional expenses incurred from time to time, which would explain why the payments had not been divisible by £12 and/or because some of the extra time worked had not been in complete hours.

6. **Conclusions**

6.1 On the basis of the findings set out above, the following conclusions were therefore made;

(i) Notice;

The Respondent's calculation on this issue was not understood. The Claimant was entitled to the net equivalent of four weeks' pay; 4 x 40 hrs x £12 = £1,920. She was paid £1,824 gross in her final salary, a difference of £96 between the two gross figures, being approximately £76.80 net.

(ii) Leave;

The holiday pay claim succeeded to the extent of 3.3 hrs only. Whilst it was clear how the Respondent had rightly regarded the Claimant's time back in the UK from Spain as leave, it was not clear how he could have insisted upon her simply sweeping up any additional leave within the period during which she had received her notice pay. Only 3.3 hrs were outstanding on the basis of the Respondent's unchallenged calculations; £39.60.

(iii) Deduction;

The Claimant had probably worked this time back and the Respondent was therefore not entitled to make the deduction from her final pay; £540.

(iv) Overtime;

Evidence on this issue was vague and it could not be said that any particular sum was due for any particular additional work undertaken.

- (v) Employers' counterclaim;
The Claimant had probably been paid for agreed extra work. Even if that was not correct, it was difficult to understand what breach of contract had been perpetrated by her. There was no satisfactory evidence of undue influence and/or coercion.

Employment Judge Livesey
Date: 2 August 2022

Amended Judgment & Reasons sent to the parties:
31 October 2022

FOR THE TRIBUNAL OFFICE