EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms A Deksne **v** **Ambitions Ltd**

Heard at: Cambridge Employment Tribunal

On: 24th May 2022

Before: Employment Judge King

Appearances

For the Claimant: In person assisted by Latvian interpreter Mrs Nalivaiko
For the Respondent: Ms Bewley (counsel)

JUDGMENT having been sent to the parties on 12th June 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. This is the judgment of the Tribunal in the above matter which was given orally with full reasons on the day. The case was listed for a 3 hours but this time estimate was exceeded on the day. The claimant has emailed on numerous occasions since the Judgment. English is not her first language but once the matter was referred it was taken as a request for written reasons. It has also been taken that this was a request within the permitted timescales but this has caused a delay in sending the written reasons for the judgment given with full reasons at the end of the hearing as the Tribunal sat beyond the time allocated to deliver it.

The issues

2. The claimant brought a claim bought a claim for unfair dismissal. We spent the initial part of the hearing discussing the correct employer.

Having recognised a potential jurisdictional issue I dealt with this first. The claimant had written to the Tribunal on 23rd December 2021 to confirm that she was still employed by the respondent "Yes I still work for 5 years for Ambitions Ltd".

3. At the outset of the hearing the claimant denied that Ambitions Personnel Ltd or indeed Ambitions were her employer. We spent a great time going through this and the correspondence she had sent with the benefit of the interpreter. During the course of this the claimant confirmed she was still being paid by the respondent when she sent those emails although at the time of the hearing she was off on long term sick.

4. Accordingly if the claimant was still employed when she brought her claim for unfair dismissal and there had in fact been no dismissal, the employment tribunal had no jurisdiction to hear her claim for unfair dismissal. The claimant had also confirmed this on the ET1 itself by ticking the box to indicate her employment was continuing. On this basis the decision was taken to strike out the claim initially.

5. We lost hearing time dealing with the correct respondent and then looking at the actual claims the claimant brought. The claimant had to be warned about her conduct and on one occasion not to shout at the respondent's counsel nor indeed her own interpreter provided by the tribunal service. The claimant felt that she was being deceived and that the contract of employment provided was not hers and then it was wrong even though it was clearly documented and signed and before the Tribunal. She accepted that she had signed it.

6. In the claim form the claimant brought claims of unfair dismissal (which was struck out as the Tribunal had no jurisdiction to hear it) and holiday pay claims. We went through her claim form to identify other claims she had brought so that the issues could be determined.

7. The claimant's claim for holiday was that this had been "incorrectly calculation and not pay holidays" and she made reference to compensation for discrimination and that her payslips and P60 were not correct. The claim had not had the benefit of any judicial intervention to determine a list of issues so we then went through the holiday pay claim. The claimant accepted she had received payment for some holiday but felt that the payment she had received were wrong. Her claim was therefore identified as an unlawful deduction from wages claim in respect of the holiday so this issue fell to be determined. **The issue was had the claimant been paid correctly for all holiday taken?**

8. The claimant's holiday pay claim could only relate to holiday taken and whether this had been correctly paid. As there had been no termination of employment, we could not look at holiday accrued but untaken as this would only be paid on termination of employment and the claimant remained employed.

9. Next, we explored the claim for discrimination. I went through s4 of the Equality Act 2010 with the claimant reading her the list of protected characteristics. It was not clear from the detail on the ET1 or the facts of the case which protected characteristic the claimant relied on. The claimant confirmed that none of those applied but that she felt she had been discriminated against because she had been treated like a dog. It was explained to her that this was not one of the protected characteristics within the Equality Act and thus could not be brought as a discrimination claim. It was therefore established that there was no such claim before the Tribunal and if there was this would be struck out as the Tribunal did not have jurisdiction to hear a claim on this ground.

10. We then took a further period to discuss the issue with regards the claimant's complaints about payslips. We went through s8 Employment Rights Act 1996 and identified that the claimant was complaining about her payslips and the information that was contained in them. The issue therefore was identified as **whether the claimant had received an itemised pay statement which met the requirements of s8 Employment Rights Act 1996?**

11. The claimant also raised queries about the wording on the P60 and this was set out within the ET1 but it was explained to her that this was a HMRC matter and not something that fell within the jurisdiction of the Employment Tribunal so this was not discussed further.

The law

12. As the claims for unfair dismissal and discrimination did not proceed, it have not set out the law relating to there needing to be a dismissal (s95 ERA 1996) or s4 Equality Act 2010 but had regard to the same as set out above in the list of issues.

13. The claimant's holiday pay claim was considered as an unlawful deduction from wages claim contrary to s13 Employment Rights Act 1996 which states as follows:

S13 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. The right to bring a claim in respect of an unlawful deduction from wages is set out in s23 of the Employment Rights Act 1996 as follows:

s23 Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount

exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) **An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.**

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

15. I brought to the parties attention the case of *Bear Scotland Ltd v Fulton and others UKEATS/0047/13* and the implementation of the Deduction from Wages (Limitation) Regulations 2014 which brought into effect s23(4A) Employment Rights Act 1996 highlighted above.

16. The issue between the parties was what the claimant had been paid and whether this was correct for the days that the claimant had taken holiday. The claimant worked variable hours as required and as such s224 of the Employment Rights Act 1996 is relevant to calculate a week's pay which states as follows:

> ***s224 Employments with no normal working hours.***
>
> (1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.
>
> (2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—
>
> (a) where the calculation date is the last day of a week, with that week, and
>
> (b) otherwise, with the last complete week before the calculation date.
>
> (3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.
>
> (4) This section is subject to sections 227 and 228.

17. With effect from 6th April 2020 the 12 week reference period above was extended to 52 weeks for the purpose of calculation of statutory holiday pay by virtue of the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018. As the claim is about statutory holiday pay the Working Time Regulations 1998 is also relevant. Here the issue is not what the claimant's entitlement is as there has been no termination but what she should have been paid for it.

18. The claimant's claim in respect of her payslip is set out in s8 Employment Rights Act 1996 which states:

> **s8 Itemised pay statement.**
>
> (1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable,

(d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment;

(e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—

(i) a single aggregate figure, or

(ii) separate figures for different types of work or different rates of pay.

The facts

19. The claimant commenced employment with the respondent on 20th February 2017 and at the time she brought her claim she was still employed by the respondent. The claimant did however work at another site Kitchen Range Foods as a food packer.

20. As set out above despite the initial confusion on the part of the claimant she did accept that the respondent was at all times her employer for the purposes of these claims and the respondent did not dispute that.

21. The respondent had prepared a joint bundle of relevant documents which ran to 324 pages. The claimant brought her own bundles which she did not bring sufficient copies of and which she had not shared with the respondent. The claimant was referred to documents in the respondent's bundle. Her own bundles bore little relevance to the issues and included medical information etc that post dated the issue of the claim. The claimant was given the opportunity to highlight any specific documents in those bundles that was relevant but did not do so.

22. The claimant had no records to contradict the payments made by the respondent for holiday. There were two issues that needed to be resolved. The first was when the holiday the claimant queried was actually taken and then the next issue was whether she had been paid correctly for it.

23. I attempted to go through with the claimant when she had last taken holiday for which he was paid. The claimant confirmed that this was

August 2020. The claimant did not commence ACAS EC until 5th August 2021 and the certificate was issued on 6th August 2021. The ET1 was presented on 10th August 2021.

24. The claimant was asked whether she took any holiday in the period January 2021 to July 2021 as this was the holiday year during which she presented her claim. She confirmed she only had one week off in July 2021. The claimant maintained throughout the holiday pay was incorrect but even with the use of the interpreter was unable to articulate clearly in what way this was incorrect.

25. The claimant accepted she only took five days holiday in July 2021 for which she was paid. There was another 10 days which she took in July 2021 which was not authorised and was unpaid. It was not in dispute that the claimant had not had this time authorised but she nevertheless took it. As such the tribunal was looking at the most recent claim for holiday in July 2021.

26. The claimant set out her calculations but this was for a whole holiday year as if employment had terminated and bore no correlation to times holiday was actually taken. Her calculation was based on her usual £9.04 hourly rate and based on 7.3 hour days which for 28 days holiday equated to 204.4 hours per holiday year. She felt that this meant she should have had £329.96 but at the time she was paid £196.05 at the time. It was not in dispute that the claimant was paid £196.05 for that holiday. The claimant was paid weekly.

27. The claimant was right she was underpaid for the holiday and when the respondent looked at this after the claim was issued and used the 52 week average, it accepted the claimant was underpaid. She should have been paid £228.52. It was not in dispute that on this occasion the claimant was underpaid £32.47 and this was paid to the claimant.

28. Having reviewed the respondent's calculations of holiday pay for the 52 week average I accepted its calculations. I also accepted the respondent's evidence which was that the time sheets were provided by the client and sent to them to be processed on a weekly basis. The claimant had no evidence to support any suggestion that the hours worked were incorrectly recorded.

29. The claimant's evidence was that the time before that when holiday pay was paid was August 2020. This was her case. The respondent had records which the claimant did not accept that holiday was taken in December 2020 and November 2020. The claimant's case at its highest was that the last payment before this one was August 2020. The

respondent accepted that but rightly pointed out the November and December 2020 periods. The claimant will have taken some time off over the Christmas period but perhaps she is confused about this as she did not take a holiday away.

30. The periods the Tribunal is concerned with are thus July 2021 and before that August 2020 on the claimant's case but in fairness to the claimant I have considered that the payments in November and December 2020 may impact on time. The claimant when this was raised about the law on the two year back stop highlighted to the Tribunal that she had been trying to resolve the matter internally for 2 years and she had sent 10 letters. This may well be the case and may be relevant on the question of time limits. The claimant had nothing else to add as to why she did not bring a claim sooner other than this matter of trying to resolve the matter internally. It is clear from the bundle that there was an internal appeal process and the outcome of the grievance appeal was dated 21st April 2021.

31. The claimant took issue with the calculations on the payslips and the respondent's policy of setting out the payments. The respondent pointed out (and there were 4 years worth of payslips in the bundle) that this had been dealt with consistently on every payslip but the claimant felt the summary was not right. The claimant was one of a large number of employees who received payslips in this format. The issue the claimant had was that she felt that the way the payslips were set out was confusing so she did not believe it was correct. She felt that the words/terms used in the payslip were confusing and the amounts were wrong. The respondent used the term units and the claimant said that this could not be understood.

32. In particular, the claimant took issue with the employee number. She felt that these must be fraudulent payslips as this number did not match her ID pass number at the end client's site. I do not accept that the payslips are fraudulent which is quite far fetched but I do accept that the claimant found them confusing. The respondent explained that it was quite normal for the internal employee number used for their purposes not to match an internal ID number for the end client. That the later ID number was for a security badge and I accept that evidence.

Conclusions

Holiday pay

33. We are content that the rules on holiday pay calculations for variable hours changed to 52 week average after the 6th of April 2020. Considering the

way the respondent has calculated the claimant's entitlement, the Tribunal is satisfied that this is in accordance with both the Working Time Regulations and s224 Employment Rights Act 1996. I conclude that the claimant was correctly paid for the July 2021 as she has now received the underpayment.

34. As the claimant was still an employee, any holiday accrued but untaken could not be paid unless employment terminated. I therefore do not accept that the claimant is entitled to payment for holiday beyond the days taken.

35. The claimant took holiday in December and November 2020 but has not specifically relied on that time as being underpaid. The next oldest period was August 2020.

36. Any claim for unlawful deductions can only be considered up to two years before the claimant presented the claim. Therefore the backstop in this case is August 2019. However, even if I were to consider the holiday periods taken in December and November 2020 there is then a seven month gap between those periods and the next period relied upon. On the claimant's own case the gap is longer between August 2020 and July 2021. Underpaid holiday pay in accordance with *Bear Scotland* cannot be claimed as the last in a series of deductions where more than three months has elapsed between deductions. The tribunal therefore does not have jurisdiction to hear any holiday claims prior to April 2021.

37. If the claimant had a claim for underpaid holiday pay in August 2020 such a claim if it is not a series of deductions would need to be brought within three months. It is clear from the history of this matter the claimant has been asserting her holiday pay rights for some time and that it was reasonably practicable to bring that complaint within three months.

38. There is no evidence that it was not reasonably practical to bring the complaint in time as the evidence was to the contrary in that she had been trying to get the respondent to pay this for over 2 years. She raised a grievance in February 2021 but then didn't commence ACAS early conciliation until August 2021 4 months after the internal grievance appeal was concluded.

39. Holiday pay has been correctly paid in July 2021 but even if it had not been, this meant any deductions from December 2020 and older are considerably out of time by the time ACAS early conciliation commenced. The claimant needed to bring the claim sooner or have gaps of less than three months between deductions and in this case we have significantly longer.

40. I am aware of a NI case which took a different view on this matter but the EAT in Smith v Pimlico Plumbers [2021] declined to follow Agnew (the NI case).

41. The tribunal therefore finds that the claimant's claim for unlawful deductions from wages for holiday pay is not well founded and is dismissed.

Payslips

42. The claimant did not like the payslips. This is not justification for a s8 complaint. The tribunal can only hear a complaint related to section 8 of the Employment Rights Act 1996 on those specific matters. The points the claimant raises do not breach section 8. The respondent has specified all the required information and there is no breach.

43. Although I appreciate that in the claimant's eyes the payslips are not clear, the respondent is not in breach of section8. The Tribunal therefore declined to make any such declaration. The claimant may not like the format of the payslips but they meet the minimum requirements set down in law and it is not for the claimant to dictate what they should look like.

44. As such the claimant's claim for breach of s8 Employment Rights Act 1996 was not well founded and was dismissed.

45. At the conclusion of the hearing the claimant expressed her displeasure that the employment tribunal had no jurisdiction to go back more than two years or consider her historic complaints further as the claimant was time barred for bringing older complaints. She felt that the Tribunal was allowing the respondent to commit fraud despite it being explained to her operate within the constraints of the law. The interpreter helpfully assisted the claimant to understand that that was the decision of the Tribunal and it was time to leave before security were called.

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Employment Judge King

Date: 28.11.22

Sent to the parties on:

29 November 22

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.