



EMPLOYMENT TRIBUNALS

Claimant: Ms S Lockett

Respondent: AC Care Services Ltd

Heard at: Watford Employment Tribunal (in public; in person)

On: 24 November 2022

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: In Person

For the respondent: No appearance or representation

RULE 21 JUDGMENT

- (1) The Claimant is entitled to a statutory redundancy payment from the Respondent.
- (2) Her redundancy payment is 2 x actual week's pay. The Claimant's actual week's pay, calculated in accordance with section 224 the Employment Rights Act 1996 was £135.77. Therefore the Respondent is obliged to make a statutory redundancy payment of £271.51.
- (3) The Claimant is entitled to damages of £873.90 for breach of contract. The Respondent is ordered to pay that sum to her .
- (4) For payment in lieu of holiday entitlement, the Claimant was entitled to receive £119.12. The Respondent is ordered to pay that sum to her.
- (5) The claim of unauthorised deduction from wages is not well-founded and is dismissed.
- (6) The recoupment regulations do not apply.

REASONS

Introduction

1. This was a hearing in accordance with Rule 21(2).
2. As per Limoine v Sharma EAT 0094/19, it is an error of law to enter judgment simply because the claim is undefended without proper consideration of the matter. Furthermore, the Presidential Guidance on the correct approach must also be taken into account.
3. Judgment should not be granted at a hearing under Rule 21 unless, taking account of the fact that the Claimant's assertion are uncontested, I am satisfied that, in law, the factual basis for doing so is made out. In doing so, I must decide, and take into account, where the burden of proof lies. I should also take into account all of the available information.

The Claims

4. The Claimant obtained two early conciliation certificates, both with the Respondent name "AC Care Services Ltd", but for different addresses. Both had start date 15 February 2022 and issue date 10 March 2022.
5. The Claimant presented a claim on 29 March 2022. Two respondents were named. This matched the two early conciliation certificates. In other words, each respondent was named "AC Care Services Ltd", but for different addresses.
6. She also gave her own place of work as "AC Home Care Services", Shire Park Welwyn Garden City.
7. The dates of employment were said to be 12 April 2019 to 31 December 2021. The job title "Senior Carer". The hours were 16 per week. Gross pay was said to be £1200 per month gross (£900 net).
8. The claims were for redundancy payment, notice pay, holiday pay, arrears of pay (and "other", but the Claimant confirmed that there was nothing else).
9. Claim forms and response packs and "notice of claim" letter were sent to each the Respondent. On 4 May 2022, someone called Sarah Gee sent an email to the Tribunal stating the claim should not have been sent to "the Gordon Street address" (one of the two that had been used) and should "be only addressed to the Carlisle address" (the other one that had been used).
10. A judge made a decision, sent to parties on 25 August 2022, that the claim should continued only against AC Care Services Ltd using the Carlisle address. The same date, a letter was sent to the parties stating that no response had been received, and so the Claimant should quantify her claims so that a decision could be made as to whether to issue judgment. These letters were sent to the Respondent's using the Carlisle address.

11. The Claimant did send some details to the Tribunal. On 18 September 2022, a letter was sent to the parties (again using the Carlisle address for the Respondent) explaining the consequences of Rule 21, and that judgment might be issued.
12. On 27 September 2022, a notice of hearing for a one hour hearing on 24 November 2022 was sent (again using the Carlisle address for the Respondent). This made clear that the hearing was under Rule 21, and set out the Respondent's rights.
13. A confirmation was sent on 17 November 2022.

The Issues

14. What was the identity of the Claimant's employer at relevant dates? Did the identity of the Claimant's employer change, because of a TUPE transfer or for any other reason, and, if so, when?
15. What were the dates of the Claimant's employment?
16. What wages was the Claimant entitled to during her employment? Was she paid that entitlement during the 6 months June to December 2021, or was there a shortfall?
17. What was the Claimant's holiday entitlement? How much holiday had she used in the final part leave year? How much unused entitlement did she have on termination, and what payment (if any) is she entitled to receive in lieu of that?
18. What was the reason for termination of the Claimant's employment. In particular, was the reason redundancy?
19. Was the Claimant given notice? If not, was she entitled to receive notice, and what damages, if any, is she entitled to receive because of lack of notice.

The Hearing and the Evidence

20. The hearing had been due to start at 12pm. Unfortunately, it started late because my previous hearing over ran. (My understanding is that the Claimant was also late arriving, but she arrived before I was ready to start this hearing in any event).
21. The Respondent did not attend. There was no request by the Respondent to be able to participate in the hearing, or to have any written submissions taken into account. I was satisfied that there was no need to make any further effort to contact them, given the history of the correspondence which had been (with the exception of the email from Sarah Gee) ignored.
22. The Claimant presented copies of payslips and correspondence.
23. During the hearing, I also examined public records held at Companies House and discussed those with the Claimant.
24. The documents were incomplete (and I am not criticising the Claimant for that; she was not seeking to hide anything). I told the Claimant that she had not provided evidence to show that she had been entitled to an hourly rate of £18.00 for any

hours in the period June to December 2021, and had not provided evidence of what number of hours (if any) she should have been paid that rate, but was instead paid at a lower rate.

25. I told the Claimant that, based on the evidence provided, I would not be able to make any award for arrears of pay. The hourly rates were stated in the contemporaneous payslips, and the Claimant had not challenged those rates at the time. I gave the Claimant the opportunity to write in after the hearing with (i) an analysis of what hours she had worked that were supposed to attract £18 per hour and (ii) an analysis of what she had been paid for those hours and (iii) any further documents that were relevant to that. The Claimant said that she did not wish to do that, and preferred that I make the decisions based on the documents available.
26. During the hearing, the Claimant supplied me with the net pay received in certain months by checking the banking app on her phone and reading the figures out to me.

The Facts

27. The Claimant was a truthful witness. I accept that she did her best to provide what documents she could. She did not seek to hide anything. I have accepted the Claimant's evidence as being truthful and (save as otherwise stated below) to be accurate, even where she was unable to supply documentary evidence.
28. The Claimant's employment with AC Care Services Ltd commenced on 6 March 2019. This date is slightly earlier than the Claimant said in the claim form, but is included in the Respondent's letter dated 18 January 2021 (sic), which was produced on or around 18 January 2022, and which was, I infer, produced by someone with access to records showing the Claimant's start date.
29. This was company number 09450580.
30. Registered office address changed from Pure Offices Bridge Road East Welwyn Garden City Hertfordshire AL7 1HL England to Unit 18a Ridgeway Welwyn Garden City AL7 2AA on 8 May 2019.
31. Registered office address changed from Unit 18a Ridgeway Welwyn Garden City AL7 2AA England to 93a Manchester Road Rochdale Greater Manchester OL11 4JG on 19 November 2020.
32. Registered office address changed from 93a Manchester Road Rochdale Greater Manchester OL11 4JG England to Unit 11 Fisher Street Galleries 18 Fisher Street Carlisle CA3 8RH on 18 January 2022.
33. Thus I am satisfied that all the paperwork for this claim intended for the named Respondent has been correctly addressed by being sent to that latter address (from 3 May 2022 onwards).
34. Based on companies house records, and the document "notification of sale of AC Care Service Ltd" (the absence of the letter "s" at the end of "Service" is as per the original), I am satisfied that there was a change of share ownership of AC Care

Services Ltd and a change of directors. However, there was no TUPE transfer. The owner of the business did not change. Furthermore and in any event, the records suggest that the changes took place on 10 January 2022. As discussed below, this was after the termination of the Claimant's employment.

35. Thus the Claimant's employer was AC Care Services Ltd company number 09450580 at all times relevant to this dispute.
36. The Claimant was not able to supply me with contract documents, or offer letter, or a written statement of employment particulars. There was no document which expressly stated her duties or pay (other than the correspondence sent after the end of employment). This is because her employer did not issue her with such documents.
37. The Claimant was able to supply some payslips from 2020 which showed her monthly pay (and, in some cases, sick pay or bonus pay) but not her hourly rate.
38. A June 2021 payslip showed (amongst other things) she had been paid 10 hours at £12.00 per hour and 6.5 hours at £18.00.
39. In September 2021, she was paid for 13.25 hours @ £11.70 (described as Covid 19 fund) and 2 hours at £12.55. These two different rates of £11.70 and £12.55 are shown on the November and December 2021 payslips as well (though without reference to "Covid 19 fund").
40. The Claimant's position is that she was supposed to be paid £18 per hour for her substantive role. That was as a senior carer.
41. In addition, she would voluntarily do additional shifts for the Respondent. However, the additional shifts were in the role of carer, rather than senior carer. She was supposed to be paid at £12.55 per hour for hours worked on weekdays prior to 6pm. She was supposed to be paid £13.55 for hours worked at weekends or after 6pm on weekdays.
42. She did not have set hours either for Senior Carer or Carer. The work was allocated by the Respondent.
43. There was also supposed to be on call payments of £50 for any Friday or Monday, and £100 for any Saturday or Sunday. These were to be paid whether she was called out or not, and she would be paid an hourly rate when called out. She would be on call every other weekend, and so should have got at least £300 every other weekend, even if not called out, and even if she did not have other duties.
44. The Claimant does not acknowledge that the £11.70 rate is correct for any work that she performed for the Respondent.
45. Towards the end of her employment, the net pay which the Claimant received was
 - 45.1 September 2021. Net pay received. £703.97
 - 45.2 October 2021. Net pay received. £500.57

- 45.3 November 2021. Net pay received. £902.81
- 45.4 December 2021. Net pay received. £361.62
46. She did not have any sickness absence or sick pay during those months.
47. The Claimant's leave year was 1 April to 31 March. In the period commencing 1 April 2021, she took no actual holiday. That is there was no period which she "booked" as holiday, and nor did the Respondent formally serve any notice on her requiring her to take a period of deemed holiday absence. However, the Respondent did include some amounts in some payslips that were purported to be payments in lieu of holiday.
48. The Claimant's understanding of what she was told on 12 December 2021 by the Respondent was that her employment was being terminated with immediate effect.
49. The Claimant had been paid for work done up to 10 December 2021, but disputes that the correct hourly rate was paid. She believes that she had been underpaid since June 2021 (as alleged in Box 9.2 of claim form).
50. She did not do any work on 11 December 2021 or 12 December 2021 (or any later date). Therefore, she was not due payments for any work done after the final payslip (the one for the month ending 10 December 2021) and before the termination date.
51. The Respondent wrote to the Claimant by letter dated 31 December 2021, with signatory Helen Marwood Operations Manager.
- 51.1 On the face of the letter, the Respondent did not accept that the Claimant's employment had terminated with effect from 12 December 2021, or that – as of that date – termination was already decided as the outcome.
- 51.2 On the face of the letter, it alleged that the Claimant had been invited to a redundancy consultation meeting (on 23 December 2021) and had not attended. This is consistent with an email which the Claimant has dated 22 December 2021 inviting her to a consultation meeting by video the following day. However, the Claimant did not see that email in time, as it went to her junk folder.
- 51.3 The letter said was that the Respondent's decision was that the Claimant's employment would terminate on 31 December 2021, by reason of redundancy, and she would receive payment in lieu of notice.
- 51.4 The letter acknowledged the Claimant's entitlement to a redundancy payment, and that she had more than 2 years' service.
- 51.5 It said she would receive a notification of the sums due to her.
- 51.6 It said that the Claimant had the right to appeal "against your redundancy dismissal" by writing to Sarah Gee.

52. The Claimant heard nothing further by 17 January 2022, and sent reminders. The letter dated 18 January (and I am satisfied it was January 2022, not 2021) was sent to her by the Respondent with signatory Helen Marwood Operations Manager.
53. This letter acknowledged that the Claimant had a contractual notice period of 1 month. It acknowledged a right to be paid in lieu, based on termination date 31 December 2021. It acknowledged the right for the Claimant to receive a statutory redundancy pay calculated on 2 years' service. It acknowledged a right for the Claimant to receive pay of 3 weeks, for the period 11 December 2021 to 31 December 2021.
54. It commented on payment for holiday entitlement (purporting to say that the only entitlement would be for a sum equivalent to 12.07% of the pay for 11 December 2021 to 31 December 2021).
55. It purported to say that the Claimant's average pay in the preceding 12 weeks had been £91.14. However, it gave no details of the calculation other than to assert that this was 7.79 hours x £11.70 per hour. It then used that figure to specify the entitlement to other payments.
56. The Claimant has never been paid any of the sums stated in the 18 January 2021 letter, or any sums at all for:
 - 56.1 Payment in lieu of holiday accrued prior to termination
 - 56.2 Payment in lieu of notice entitlement
 - 56.3 Redundancy Pay
57. The company sent her a document dated 24 January 2022 with signatory Dr Sayani Sainudeen. This letter did not say that the business had been sold by AC Care Services Ltd. It said that there had been a change in ownership in the company. It gave contact details for the new director, Lynsey Suzanne Allan Rose McCandles, and said all enquiries should be addressed to her. The letter did not purport to retract any redundancy notices, or dispute the figures previously given, but rather asserted that Lynsey McCandles was aware of the liabilities, and that the Claimant and the other employees should contact ACAS or the employment tribunal, and not Dr Sayani Sainudeen, if the company failed to pay.

The Law

58. Part II of the Employment Rights Act 1996 deals with Protection of Wages. The right not to suffer unauthorised deductions is described in section 13. Wages are defined by section 27. Employees (and other workers) have the right to receive the wages properly payable on each pay date. Deciding what wages are actually properly payable may require the Tribunal to analyse the meaning of the contract, and to find facts.
59. Part XI of the Employment Rights Act 1996 deals with redundancy payments. As required by section 135, an employer shall pay a redundancy payment to any of its employees of his if the employee is dismissed by the employer by reason of redundancy.

60. The meaning of “by reason of redundancy” is defined in section 139. The amount is determined in accordance with the calculation in section 162. Due to the Claimant’s age, in her case, the calculation is a week’s pay per year of continuous service. So 2 x [a week’s pay] in total.
61. A “week’s pay” is defined by sections 220 to 229 of the Employment Rights Act 1996. There is a maximum amount for a week’s pay when calculating redundancy pay (Section 227(1)(c)). When an employee has “no normal working hours”, the calculation is performed in accordance with section 224.
62. Employment tribunals have jurisdiction to award damages for breach of contract, subject to the requirements of the Extension of Jurisdiction Order. The tribunal has jurisdiction to consider the Claimant’s complaint that she was entitled to (notice or) a payment in lieu of notice, and that, in breach of contract, she did not receive that.
63. In the absence of gross misconduct, an employee who is dismissed, has the right to receive notice which is either the statutory minimum (section 86 the Employment Rights Act 1996) or the contractual notice period, whichever is greater. However, if provided for by the contract, employers can terminate with immediate effect and make a payment in lieu of notice.
64. The Working Time Regulations 1998 set out minimum entitlements to holiday, and holiday pay. Regulation 14 provides details of the entitlement to a sum in lieu of entitlement which had accrued, but not been used up, during the partial leave year which includes the termination date.
65. Regulation 16 sets out that, when working out entitlements related to holiday pay, and payment in lieu of holiday, the definition of a week’s pay from the Employment Rights Act 1996 is used, except that, instead of using a reference period of 12 weeks, a reference period of 52 weeks is used.

Analysis and conclusions

Arrears

66. As I told the Claimant during the hearing, the evidence supplied does not persuade me that there were shortfalls in the sums paid for any of the periods June 2021 to 10 December 2021.
67. There is a photocopy of the right hand side of a payslip referring to 6.5 hours at £18 in June 2021. However, I do not have the left hand side of that same payslip. This is, in my judgment, the only document referring to £18 per hour. (There was also a document stapled together which, on page 1, said it was the payslip for September 2020, and on page 2 referred to £18 per hour. However, comparison of all the contents of that page 2 show that it actually matches the 10 June 2021 extract. It cannot belong to September 2020, because the gross pay in September 2020 alone exceeded the year to date total on the page stapled to the back of it).
68. I do not doubt the Claimant’s honesty in her answers to me that £18 per hour is what she was supposed to be paid for Senior Carer work. However, there is no calculation from her of exactly what Senior Carer hours she did in June to

December 2021. Even with such a calculation/breakdown, in order for me to be persuaded that there had been deductions, I would also need the breakdown of what sums the Claimant believed she was entitled to for the carer work as well (in order to compare the actual payments received to the amounts which should have been paid based on £18 for Senior Carer hours.) Although the Claimant is not to blame for not having the documents, the onus is still on her to prove both (a) that there has been some shortfall and (b) what the amount of the shortfall was.

69. Further, she accepts that she did not challenge the amounts paid for June 2021 to December 2021 at the time. While that is not a legal obstacle as such (because she would be in time with her claim, assuming that there were deductions each month), it does create an evidentiary problem. There are not, for example, contemporaneous emails from the Claimant saying that the calculation was wrong, and/or what the correct calculation should have been. Nor, therefore, are there any responses from the Respondent. Since termination, the Claimant has not written to the Respondent (or the Tribunal) with a breakdown of what she says she was owed, or what the correct calculation should have been.

Termination

70. My finding is that the termination of the Claimant's employment was on 31 December 2021 (rather than the slightly earlier date of 12 December 2021). The Claimant was told that there was no more work for her, and she regarded that as meaning that she was being dismissed on 12 December itself. However, based on the contemporaneous documents, on balance of probabilities, she was told that her hours would be zero, pending redundancy consultation, and was not told that her employment contract was terminated.
71. Furthermore, it is clear that the Claimant was told that she was being dismissed by reason of redundancy. This is not an unfair dismissal claim. For the purposes of the redundancy pay entitlement, my finding is that the dismissal reason was redundancy.

Calculations of Pay (redundancy)

72. The comparison between the amounts received by the Claimant into her bank account, and what is shown on the payslips, shows that she was under the amounts for which she would have to have PAYE deductions tax or national insurance. As the final payslip shows, from 6 April 2021 to 10 December 2021, she earned £4929.04 gross, and there were no deductions.
73. I do not have specific weekly breakdowns of what she earned, just the monthly amounts for some months and (as just mentioned) the running total for the tax year.
74. The best I can do is to take the 13 week period from 11 September 2021 to 10 December 2021. In that period, the aggregate gross was £500.57 plus £902.81 plus £361.62, which is exactly £1765. Dividing by 13 gives the figure £135.77, as the average for that 13 week period. This is the closest I can get to working out the 12 week average.

75. Her redundancy pay entitlement was therefore approximately £271.54.

Calculations of Pay (holiday)

76. I do not have any payslips, or other evidence, of the Claimant's earnings from 11 December 2020 to the end of that tax year.
77. From 6 April 2021 to 10 December 2021 is 35 weeks and 4 days, so 35.57 weeks. Since the gross total earned in that period was £4929.04, the weekly average was £138.57. This is the closest I can get to working out the 52 week average.
78. Based on the evidence I have (and I do not have all the payslips from April 2021), the following payments were made and called "holiday pay": £66 in August; £140.40 in September; £132.68 in November; £123.79 in December. Therefore the aggregate paid was £462.87.
79. The Claimant accrued holiday for the period 1 April 2021 (start of leave year) to 31 December 2021 (termination). The full years entitlement would have been to 5.6 weeks. However, for the part year, she was entitled to 0.75 of that.
80. So her entitlement to pay in lieu of holiday pay was $[0.75 \times (5.6 \text{ weeks}) \times (\text{weeks pay})]$ less [payments in lieu made during employment].
81. So $[0.75 \times 5.6 \times £138.57] - £462.87 = £581.99 - £462.87 = £119.12$

Breach of Contract

82. The Respondent's letter of 18 January acknowledges a contractual liability to pay the Claimant £273.43 gross for the period 11 December to 31 December. That is also the net amount. I see no basis for me to amend that either up or down.
83. The Respondent's letter also acknowledges a contractual liability to pay one month in lieu. I think the fairest calculation is to take average pay for the tax year (£138.57 and convert to monthly). So $£138.57 \times 52/12 = £600.47$.
84. Therefore, the aggregate owed to the Claimant for breach of contract is £873.90.

Employment Judge Quill

Date 23 December 2022

RESERVED RULE 21 JUDGMENT & REASONS SENT TO THE PARTIES ON

30/12/2022

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FOR EMPLOYMENT TRIBUNALS