



EMPLOYMENT TRIBUNALS

Claimant: Mr I Silkander

Respondent: First Choice Produce Ltd

Heard at: Watford Employment Tribunal (by CVP) **On:** 25 November 2022

Before: Employment Judge Price

Representation

Claimant: In person

Respondent: Mr O’Kane, employment consultant

JUDGMENT having been delivered orally on 25 November 2022 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 (“ET Rules”), the following reasons are provided:

REASONS

Introduction and issues

1. By claim for presented on 19 December 2021 the Claimant brings claims for outstanding holiday pay, notice pay and redundancy pay.
2. There is no dispute that the Claimant was dismissed and that this took effect on 31 August 2021. ACAS were notified under the early conciliation procedure on 15 October 2021 and a certificate was issued on 25 November 2021. The ET1 was presented on 19 December 2021. The ET3 was received by the tribunal on 16 February 2022.
3. The claims before the Employment Tribunal are:
 - 3.1. Failure to pay notice pay;
 - 3.2. Failure to pay redundancy pay and

3.3. Failure to pay holiday pay.

3.4. The issues were recorded by the tribunal in a case management order as follows:

1. Redundancy pay (s 135 Employment Rights Act 1996)

1.1 Has the claimant been dismissed by reason of redundancy?

1.2 What was the claimant's statutory redundancy pay?

1.3 Was the claimant paid that statutory redundancy pay?

2. Wrongful dismissal / Notice pay

2.1 What was the claimant's notice period?

2.2 Was the claimant paid for that notice period?

2.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

3. Holiday Pay (Working Time Regulations 1998)

3.1 Did the respondent fail to pay the claimant for annual leave the claimant

had accrued but not taken when their employment ended?

3.2 What was the claimant's leave year?

3.3 How much of the leave year had passed when the claimant's employment ended?

3.4 How much leave had accrued for the year by that date?

3.5 How much paid leave had the claimant taken in the year?

3.6 Were any days carried over from previous holiday years?

3.7 How many days remain unpaid?

3.8 What is the relevant daily rate of pay?

4. Remedy

4.1 How much should the claimant be awarded?

Procedure, documents, and evidence heard

4. This was a remote CVP hearing which had not been objected to by the parties. The form of remote hearing was video. A full face-to-face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

5. I was assisted by two bundles of documents, one prepared by the respondent and the other by the claimant.

6. The claimant provided a witness statement and gave oral evidence. Tatiana De-Couto, finance and HR manager and Dan McCullough, CEO provided witness statements on behalf of the respondent. They did not give oral evidence. Both Mr O'Kane and the claimant made oral submissions.

Preliminary application

7. The respondent was represented by an employment consultant who at the outset of the hearing made an application to adjourn the hearing. This was because one of the Respondent's witnesses was not able to attend as she was on holiday. This became known a few days ago, despite being a pre-booked holiday. In fact both of the Respondent's witnesses had not attended. No reason was given as to why the Respondent's other witness did not attend and the application to postpone was not put on the basis that neither witness could attend.
8. I took into account the procedural history of the case including the fact that the respondent had already sought and been granted a postponement on one occasion due to the fact that disclosure had been effected too late for them to prepare for the hearing.
9. I considered that the interests of justice and the need to deal with cases fairly and proportionality. The claimant was present and was representing himself. He objected to the hearing being postponed. I considered the conduct of the respondent. The application was made on the morning of the hearing and no reason was given for this delay. The respondent's conduct in applying at the last minute was of concern. There was a clear interest in hearing the matter in the time allocated. If the application was allowed tribunal time and resources would be wasted. Furthermore, postponing the hearing would cause prejudice and inconvenience to the claimant who had taken time to attend the tribunal and prepare the case. He would have to wait for a longer period to have his claim heard. Further, if the matter were postponed it would likely cause significant delay in hearing the matter, as it would have to wait until the tribunal was able to re-list it. For these reasons I rejected the respondent's application to adjourn.

Findings of fact

10. I start with what is agreed. Which is the simple outline of how this dispute arose. The claimant was the head of finance and operations at the respondent's company. He was initially employed on 3 May 2006 by SFD GB Ltd. His employment was TUPE transferred to the Respondent on 15 April 2021. This was not in dispute.
11. The claimant stated in his evidence that when he started work for the respondent it became clear to him that there was no work for him to do. Tatiyana, the HR

manager, Chris the managing director and the claimant had a discussion about this. This took place on or around 14 June 2021. The fact of this discussion is agreed.

12. However, what was said during this discussion was not agreed. The respondent's position is that this was the beginning of negotiation and no agreement was reached. The claimant's position is that it was agreed in this meeting that he would be made redundant as there was not sufficient work for him as First Choice had its own employees doing the work he had previously done. That this was in the Claimant's words something they 'shook on'. And it was agreed during the discussion that his employment would come to an end at the end of August 2021. It was further agreed that he would be entitled to redundancy pay, notice pay and holiday pay all to be calculated in accordance with the terms of his contract.
13. Further he gave evidence that the HR manager could not give the redundancy figure due to him there and then, however it was agreed she would go away undertake the calculation and let him know what the sum was. It was also agreed that his wages for June- August 2021 would be deducted from these sums, despite the fact he would work during period of time.
14. I prefer the claimant's account of what was said during this meeting. I found him to be an entirely credible witness who was openly and honestly answering the questions put to him. He was very clear about what was within his recollection and what was not. Further, his account of this discussion was substantiated by the subsequent contemporaneous documentation I have read.
15. An email was sent by the claimant on the 14 June 2021 which refers to an agreement that had been reached that the claimant would be made redundant. There is no response email from the respondent that disputed the claimant's assertion.
16. A further email dated 6 July 2021, was sent by the respondent's HR manager in which she states that the money the claimant would be entitled to as part of his redundancy would be deducted from his monthly payments, starting in June. This email refers to 'please confirm back to me so we have something I [sic] writing from our conversation/deal' and "as soon as I know the amount I will let you know'. Again, this supports the claimant's account of the earlier discussion and the fact that an agreement had been reached. The email also stated that the agreed sum that is owing is being 'deducted from June's salary'. This indicates that the agreement reached is already being enacted.
17. It was not disputed that the claimant continued to work until the 21 August 2021. The claimant's evidence was at this point he was told not to come into the premises anymore. This was verified by a screen shot of a text message from the HR

manager to the claimant which stated this in terms. He was therefore not required to attend work for the remainder of his contract of employment and did not do so.

18. On 23 August 2021, the respondent emailed the claimant and suggested that they were prepared to offer £15,000 to 'settle the offer'. I find that this was a change in approach from their earlier correspondence, as it was at odds with the position in the earlier email of 6 July 2020. This email also included a calculation of the claimant's statutory redundancy payment entitlement. The email stated 'according to your work contract, the below is your entitlement'.
19. The respondent's case was that the claimant was still employed. I reject this. The claimant has not worked since August 2021. He has not been paid in this period of time. I find the discussions and agreement reached on 14 June 2021 amounted to a dismissal and I find that the claimant's employment came to an end on 31 August 2021, as per the agreement that was reached when he was dismissed for reason of redundancy.
20. As to holiday, I find that the claimant's holiday year ran with the calendar year. This was not in dispute. The claimant explained in his evidence, that as he was very busy in 2020 due to the impact of covid-19 he was not able to take all his annual leave. I accept this evidence. I found the claimant to be an entirely credible and honest witness. There was no evidence that contradicted this account. I also considered it relevant that the respondent's representative accepted that the respondent held records as to holiday leave taken in 2020, including an 'old holiday diary', but had not disclosed them. I therefore find that the claimant had 17.5 days leave 'left over' from 2020. For the same reasons I accept the claimant's evidence that he had 17 days of holiday in 2021 that he had not taken prior to this dismissal.

The Law

21. The Working Time Regulations 1998 (WTR 1998) provides at regulation 13 for the right to four weeks' annual leave (with Reg 13A providing for a further 1.6 weeks' additional leave) and Regulation 16 WTR provides for the worker to be paid for that leave.
22. The Working Time (Coronavirus) (Amendment) Regulations 2020 amended the Working Time Regulations 1998 to create an exemption relating specifically to COVID-19. Where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are entitled due to the coronavirus, they have a right to carry the 4 weeks under regulation 13 into the next 2 leave years. The WTR 1998 apply to all workers, and there is no dispute that this includes the claimant who is as an employee.

23. Redundancy is defined in s.139(1) of the Employment Rights Act ("ERA") 1996. It has a broad definition and can cover the situation where the requirements of a particular business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed by the employer has ceased or diminished or is expected to cease or diminish.
24. Under section of the ERA, . section 162 of the ERA sets out how this payment should be calculated.
25. Under section 86 of the ERA there is a statutory entitlement to notice. This includes 'not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years'.

Conclusions

Redundancy payment

26. I accept the claimant's unchallenged evidence that his workload reduced when the TUPE transfer took effect. The company then had more employees than it needed undertaking the work available. As such the requirements of work of a particular kind had diminished such that there was as a redundancy situation within the meaning of section 139 of the ERA 1996.
27. I further find that there was an agreement reached on or around 14 June 2021 between the claimant and the respondent that the claimant would be made redundant and paid redundancy in accordance with the terms of his contract. There was no written contract and no evidence of any verbal agreement as to the terms of his contract. As the express claimant's contract of employment was silent on the issue of redundancy, he was entitled to the statutory redundancy entitlement.
28. The existence of this agreement is supported by the emails of the 14 June, 6 July and 23 August 2020 that the respondent sent to the claimant and the claimant's own oral evidence on the issue.
29. As the claimant was made redundant he is entitled to the statutory redundancy payment by operation of the ERA 1996. The redundancy payment the claimant is owed was calculated by the respondent to be **£10,808**. The claimant agrees with this figure.

Notice pay

30. I also find an agreement was reached in June 2021 at the meeting on or around the 14 June 2021, that the claimant would be paid notice pay in accordance with his contract. There was no written contract and no evidence of any verbal

agreement as to the terms of his contract. Therefore the statutory provisions regarding notice pay would apply. It was agreed that the claimant would work until the 31 August 2021.

31. During this meeting, it was agreed that the claimant would be paid a sum of money equivalent to 12 week's notice, again in accordance with the statutory provisions. This was the sum of £8,076.84. I take this sum from the email from the HR manager dated 23 August 2021.

32. It was further agreed between the parties that some payments already had been made and that these sums should be deducted from the notice pay owing. There is no dispute as to the sums of these deductions.

33. This leaves a sum of **£351.02**.

Holiday pay

34. I accept the claimant's evidence that he did not take all his holiday allowance in 2021. I also accept the claimant's evidence that he had 17.5 days of his holiday entitlement 'left' over that he did not take from 2020. He therefore was due 34.5 days of leave when his dismissal took effect.

35. The Working Time Regulations 1998 apply to all workers, and there is no dispute that this includes the claimant who is as an employee. I find that it was not reasonably practicable for the claimant to take some, or all, of the holiday to which they are entitled due to the coronavirus, therefore the claimant was entitled to carry forward his remaining leave from 2020 into the following leave year.

36. Therefore, at the time of his dismissal I find the claimant had 34.5 days holiday accrued that he had not taken.

2212 x 12 = 26,544 net pay.
Divided by 261 working days = £102 per day.
102 x 34.5 = £3519.

Employment Judge Price

Date: 18 January 2023

Sent to the parties on:

30 January 2023

For the Tribunal Office:

