



EMPLOYMENT TRIBUNALS

Claimant: Mrs. E. Vosloo

Respondent: Vanco UK Ltd t/a Global Cloud Exchange

Heard at: Watford (by video)

On: 2 November 2022

Before: Tribunal Judge Callan

Representation

Claimant: In person

Respondent: Mr. S. Way (counsel)

RESERVED JUDGMENT

1. The respondent has made an unlawful deduction from the claimant's wages and is ordered to pay to the claimant the total sum of £2,307.72 gross.
2. The above sum is the accrued holiday pay due for the period 1 January to 31 December 2021 (18 days), minus the day's holiday pay paid by reason of the mistake that the claimant was employed by the respondent between 1 and 3 January 2022 and giving credit for 5 days accrued holiday paid in January 2022.

REASONS

Introduction

3. The claimant was employed by the respondent from 18 February 2020 as Manager Payroll. Her salary was £50,000 p.a. gross. At the time of her resignation on 4 October 2021, her notice was three months and the leave year was the calendar year with a provision for carry over into the next leave year of up to 5 days. She had accrued leave during 2021. The issue in the case concerned the date of termination of her employment, how many untaken holidays she had accrued (taking into account the carry over

provision, if applicable) and whether there were any days which remained unpaid.

Issues

4. What was the date of termination of the claimant's employment?
5. How much leave was the claimant entitled to at that date?
6. How much paid leave had the claimant taken?
7. How many days remained unpaid following termination of the employment?

Evidence

8. I heard evidence from the claimant, and from Ms. Anja Blumert, Chief Financial Officer, on behalf of the respondent. I considered the documentary evidence referred to in the bundle provided which included the claimant's contract of employment (pp38-49) which set out the original holiday entitlement as 20 days' holiday plus public holidays, the annual leave policy for 2021 (pp50 and 51), letter to the claimant from the respondent regarding an increase in the notice period dated 23/03/2021 (p52), email of 04/10/2021 from the claimant to Anja Blumert handing in her notice (p76), letter from Regional Head of HR dated 09/12/2021 to the claimant confirming her last day was 31 December 2021 (p53) and an email dated 16/12/2021 headed "Amended resignation – leave date" stating that Anja Blumert "needs you to complete your notice period up to and including 3 January 2022" (pp98-99).

Relevant Legal Framework

9. Counsel for the respondent, Mr. Way, provided a helpful skeleton argument to which he had appended the Court of Appeal judgment in *Sunrise Brokers LLP v Rodgers* [2015] ICR 272 which he relied upon for his contention that the claimant's contract of employment terminated on 3 January 2022.
10. The issues concerned the termination of the contract of employment by resignation, accrual of leave under the contract and the application of the Working Time Regulations to mandatory leave.

The Facts

11. The claimant was employed by the respondent commencing on 18 February 2020 as Manager Payroll. Her salary was £50,000 p.a. gross. Her terms and conditions of employment (signed by her on 18/02/2020) originally provided for one month's notice of termination by either party. The leave year was from 01 March to 28 February with 5 days carry over of leave into the next leave year permitted which did not require the consent of a director of the company. There was a clause permitting the company to require the

employee to take any outstanding accrued holidays during the notice period but otherwise leave was not permitted to be taken during notice (pages 38-49). Clauses 10.3 and 10.4 of the contract at page 42 provided for payment in lieu of outstanding accrued holiday on termination of employment at the rate of 1/260th of annual basic salary for each day. Clause 3 dealt with termination of employment by notice. It did not stipulate to whom the employee was to give notice other than the company. I was not provided with a document setting out to whom specifically a resignation should be tendered.

12. The respondent reviewed its leave policy with effect from 01/01/2021 so that the leave year changed to the calendar year. The claimant's leave entitlement was 25 days plus public holidays (page 51).
13. On 23/03/2021, the respondent changed the claimant's notice period to 3 months with immediate effect. She signed her consent to the change on 07/04/2021 (page 52).
14. Following a telephone conversation with Ms Blumert in which she intimated she was resigning her employment, the claimant emailed Ms Blumert on 04/10/2021 (page 76). The claimant expressed the hope that a replacement could be found with immediate availability so that the process of a handover could start as soon as possible. If that were the case, the claimant asked that her notice period be revisited in a month's time, otherwise, her last day of work would be Friday 31/12/2021.
15. Following receipt of the claimant's email, Ms Blumert emailed Ms L. Grant, Regional Head of HR stating "Fyi. Please can you advise the official date based on notice?". Ms Grant responded that the last day of work based on 3 months' notice given on 04/10/2021 would be 03/01/2022. Neither of these emails was copied to the claimant,
16. In respect of the claimant's work on payroll matters, Mr. M.U. Khan took a leading role and appeared to be handling the recruitment of the claimant's replacement (page 84).
17. On 08/11/2021, Ms Grant emailed the claimant querying whether she had written a resignation letter and stating she needed to confirm her last day would be 04/01/2022 (page 83). There was no response to, or follow up of, that email.
18. On 06/12/2021, the claimant emailed Mr. Khan requesting that her last day of employment be changed to 29/12/2021. Mr. Khan responded by rejecting her request. Neither email stated what was the understanding as to the date the employment would end (page 88).
19. On 09/12/2021, Ms Grant sent the claimant a signed letter stating that her last day of service would be 31/12/2021 and that she had 21 days outstanding holiday which would be paid in her final pay (page 53).
20. The issue of the claimant's leaving date was discussed between Ms Blumert, Ms Grant and Mr. Khan on 14/12/2021 following which Ms Blumert sent an email to Ms Grant and Mr. Khan stating "Elizabeth Vosloo should

plan to leave per her notice period” and “when Elizabeth leaves on 3 or 4 Jan, she will be paid out 5 days carry over holidays with Jan payroll” (page 93).

21. In response to Ms Blumert’s email, Ms Grant emailed her 12 minutes later stating that her understanding was that the claimant had an agreement to leave on 31 December, that her line manager was now Mr. Khan and the claimant had been liaising with him about her leaving date and not Ms Blumert (page 94).
22. On 16/12/2021, Ms Grant emailed the claimant with the subject heading “Amended resignation – leave date”. Ms Grant stated the claimant’s manager continued to be Ms Blumert and it was not Mr. Khan’s decision to allow her to leave before the completion of the notice period. The leaving date “should therefore have been 3 January 2022 which is 3 months from 4 October 2021 the date on which you resigned by email to Anja Blumert”. Ms. Grant stated that the claimant would be held to 5 days carry over of leave into 2022 but would be required to take leave from 24 December 2021 to 3 January 2022 (4 days). This meant that she would lose any other outstanding leave other than the 5 days carried over into 2022 (pp98-99).
23. The claimant responded the next day stating she had clearly set out that her last day of employment would be 31/12/2021 and that date still stood (page 104). She pointed out she had not received any correspondence regarding her departure date until 10/12/2021 (the letter referred to at paragraph 19 above). The claimant stated she had not been able to use more of her leave during the year due to the needs of the business. She had taken 1-3 days leave per month but had been told she could not take leave during her notice period in accordance with clause 10.5 of her contract.
24. On 17/12/2021, Ms Grant responded to the claimant’s email in the following terms: “...the date of 31 December 2021 was given erroneously and you are aware of this. Your correct date was advised by your manager as 3 January 2022. As per your terms of employment your notice period is 3 months” (page 104).
25. The claimant took some sick leave from 15/12/2021 and returned to work on 21/12/2021. On 23/12/2021 at 16.54 she emailed Ms Grant to “reconfirm and clarify” some points (page 111):
 - (1) On 09/12/2021 Ms Grant had a discussion with Mr. Khan and Ms Grant obtained agreement/approval from him to allow the claimant to leave on 31/12/2021 with 21 accrued days of holiday paid to her;
 - (2) That Mr. Khan had the authority to make that decision;
 - (3) This was subsequent to him refusing the claimant’s request to leave on 29/12/2021;
 - (4) Ms Grant then sent the claimant an email with the letter dated 09/12/2021 attached confirming the leaving date of 31/12/2021 and accrual of 21 days of leave to be paid;

- (5) 31/12/2021 was agreed and is legally binding. To renege on it would be a breach of contract;
- (6) The claimant did not accept a revision to her leaving date to 03/01/2021;
- (7) Her leaving date/last date of employment would be 31/12/2021; and
- (8) She had an entitlement to 21 days of accrued holidays on termination of her employment on 31/12/2021.
26. On 23/12/2021 at 17.52, the claimant emailed Ms Blumert in response to Ms Blumert's email to the Finance Team setting out mandatory holidays between and including 24/12/2021 and 03/01/2022. The claimant reconfirmed her last day of work would be 31/12/2021 (page 112). In response, Ms Blumert stated the last day of work for the claimant was 03/01/2022 as per the notice period in her contract and should she be in doubt then that was the date. Ms Blumert also said that she had asked the claimant several times to take her holidays and that it had been her own decision to accumulate such a high leave balance. The claimant would only be able to carry forward 5 days per the company policy (page 112).
27. On 24/12/2021, Ms Grant provided responses to the issues raised by the claimant in her email of the previous day. With regard to point one, Ms Grant stated that Mr. Khan was not the claimant's manager at the time and was not in a position to agree a final leaving date. Ms Grant asserted that the claimant should not have been negotiating her leaving date with him. As to the letter of 09/12/2021, Ms Grant said the letter had been "corrected for the reasons given above", that is, that Mr. Khan was not the claimant's line manager. Ms Grant denied there had been a breach of contract and that the notice period was 3 months which meant notice given on 04/10/2021 would expire on 03/01/2022. Any agreement to change that date should have been agreed by the claimant's line manager. The claimant was required to honour her contractual notice period. Any accrued holiday in excess of the 5 days carry over would be lost.
28. The claimant emailed Ms Blumert on 24/12/2021 at 13.54 reasserting that her last day of employment would be 31/12/2021 and her expectation she would be paid her accrued holiday pay (page 116). Ms. Blumert replied to the effect that she was the claimant's line manager and had never agreed anything other than contractual notice which could not be changed unilaterally.

Discussion and Conclusions

29. It was an issue as to what was the date of the termination of her employment because if the claimant's employment continued into 2022, she would be subject to the carry over of leave limit of 5 days.
30. I find that the claimant gave notice shorter than that she was required to give under her contract of employment. Her resignation email stated her resignation would take effect on 31/12/2021 but she expressed the hope that her resignation could be 'revisited in a month's time', by which she

meant she hoped she could be released earlier. However, the respondent did not inform her that the short notice was not accepted. She continued to work under the supervision of Mr. M. Khan who was handling the recruitment of her replacement.

31. Ms. Grant emailed the claimant on 08/11/2021 requesting confirmation that her last day of employment would be 04/01/2022. I find that this was not a rejection of the claimant's proposed leaving date of 31/12/2021, merely an enquiry. In any event, on 06/12/2021 the claimant attempted to negotiate an even earlier leaving date of 29/12/2021 which was rejected by Mr. Khan. It was at this point, on 09/12/2021 that Ms. Grant sent a signed letter to the claimant confirming her "last day of service will be 31/12/2021" and she had 21 days outstanding holiday which would be paid in her final pay. I find that this was an unequivocal acceptance of the short notice which had been tendered by the claimant on 04/10/2021. I find that nothing material turns on the incorrect resignation date being cited in the first line as this would amount to even shorter notice than that actually given by the claimant.
32. It follows that the short notice having been accepted by the respondent the purported unilateral withdrawal of that acceptance by letter dated 16/12/2021, was of no effect. The change to effectively extend notice to expire on 03/01/2022 would have required mutual agreement.
33. On 16/12/2021, Finance Team were instructed to take mandatory holidays in the period between 24/12/2021 and 03/01/2022. There were three days of mandatory leave applicable to the claimant. I find that this was within the notice required by the Working Time Regulations.
34. Having found that the claimant's contract terminated on 31/12/2021, I find that the claimant's 21 days was reduced by the mandatory holidays the Finance Team were instructed to take (and which were not public holidays) on 29/12/2021, 30/12/2021 and 31/12/2021 (3 days). The 18 days holiday entitlement accrued and untaken falls to be reduced by a further day which was overpaid on the mistaken view that the claimant's employment terminated on 03/01/2022. Credit is also to be given for the 5 days of accrued holidays paid on 28/01/2022. The sum owed to the claimant is therefore £2,307.72 (gross) being 12 days at the daily rate of £192.31.

Tribunal Judge **Jane Callan** sitting
In the Employment Tribunal as an Employment
Judge

Date: 01 February 2023

JUDGMENT SENT TO THE PARTIES ON

7 February 2023

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