



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Da Silva
Respondent: Haus Maids Bishops Stortford Ltd
Heard at: East London Hearing Centre
On: 7 July 2023
Before: Employment Judge D Reid

Representation

Claimant: In person
Respondent: Not represented (Mr T Davies and Ms L Davies attended)
Interpreter: Ms M Mendes

JUDGMENT (Reserved)

- 1** The Claimant is entitled to unpaid wages for the work she did on 7 and 17 January 2022 (which is subject to any deduction of tax and National Insurance the Respondent is obliged to make). This is subject to her giving credit for the amounts she was instead paid as holiday pay for those dates.
- 2** The Claimant is entitled to 2 days accrued but untaken holiday in the holiday year January – December 2022 (which is subject to any deduction of tax and National Insurance the Respondent is obliged to make). The contract sets out how holiday pay is to be calculated.
- 3** The Claimant was paid holiday pay for 7 and 17 January 2022 and not wages based on her work on those dates. She is therefore in practice entitled to (a) any further pay due for 7 and 17 January 2022 on the basis that these were working days and not holiday (if the holiday pay was less than the wages payable for those days) and (b) 2 days accrued but untaken holiday pay calculated in accordance with the contract.
- 4** The Claimant is not entitled to any more notice pay and that claim is dismissed.

The parties should be able to agree the above figures and it is hoped that no further hearing is required to do the calculations. If, however they are unable to agree the figures they should tell the Tribunal that they need a further hearing. The Respondent should provide the Claimant with a calculation of the amount set out above so that she can see how it has been calculated.

REASONS

Background and issues

1 The Claimant presented her claim form on 19th March 2022. She claimed unfair dismissal, race discrimination, wages, holiday pay and notice pay. By the time of this hearing, she had withdrawn her claim for race discrimination, and she did not have two years' service to be able to bring an unfair dismissal claim. There had been two previous preliminary hearings on 12 September 2022 and 8 March 2023.

2 The Claimant's claims were not struck out at the previous hearing on 8 March 2023 despite non-compliance with Tribunal orders. Further orders were made at that hearing which the Claimant complied with in part by way of an e-mail to the Tribunal dated 4th April 2023; this attached the job advertisement she had responded to, some messages and a one-page summary of what she said she was owed. On the basis that the orders had not been fully complied with the Respondent repeated its strike out application on 8 June 2023.

3 Some aspects of the Claimant's claim was still unclear, and she had not produced a witness statement for this hearing in breach of the Tribunal order. However I identified that she could provide oral evidence at this hearing without the need for a witness statement and that this would not disadvantage the Respondent because from the little she said in her e-mail dated to 4th April 2023, it seemed that her case had not changed as to why she said she was entitled to a higher rate of pay than the Respondent paid her, from what she had said at the previous preliminary hearing on 22 March 2023. The Respondent was not therefore disadvantaged by a lack of witness statement from the Claimant because they were not taken by surprise.

4 I clarified the claims with the parties as follows.

5 In relation to her claim for unpaid wages the Claimant's claim was that she was entitled to be paid £1500 per month. She said she was entitled to this because that is the rate that was in the Indeed advertisement which she responded to. She confirmed she did not claim that anyone at the Respondent had in writing or verbally agreed this amount with her - she based it entirely on the advertisement. Her claim for wages was therefore on the basis that there was a shortfall in the amount she was actually paid. This had a knock-on effect on her claim for holiday pay and notice pay because she was claiming those other amounts at this higher rate.

6 The Respondent's case was that the £1500 per month had never been agreed. The Respondents said her pay had been agreed as a fixed percentage of the fee paid by the client to the Respondent for house cleaning services (fixed percentage pay). That fixed

percentage was initially 23% which later increased to 25%. The Respondent's case was that this was clear in the information given to the Claimant when she joined, consistent with the contract and offer letter issued to her on her first day at work and evident from the app she was given access to which showed the price the client paid and the amount she would get from that job. The Respondent said that she had never complained about her rate of pay during her employment.

7 In her one-page summary of what she now claimed the Claimant now also included underpayments of wages in October 2021, November 2021 and February 2022. These were not amounts claimed in her original claim form which only claimed unpaid wages for December 2021 and January 2022. I explained to the Claimant that she would need to make an amendment application to add in a claim for these three extra months. She said she wanted to do that, and I heard submissions on each side on that application. I refused her application and gave oral reasons at the hearing.

8 In relation to the Claimant's claim for notice pay she said that she had not been paid any notice pay at all. The Respondent's case was that it had been paid in full in the final payslip, namely one week's pay, the amount calculated as an average of her pay during the employment.

9 In relation to the Claimant's claim for holiday pay she said she had not been paid any accrued holiday pay on termination. The Respondent's case was that the Claimant had already taken all her accrued holiday in the 2022 holiday year. The Claimant claimed 7.5 days, but she was apparently also including holiday untaken in the 2021 holiday year; she did not say that she had been prevented taking holiday in 2021 or that she had taken it but it had been unpaid. It also appeared that she was disputing that she 'took' paid holiday on bank holidays. The Respondent's case was that even though she did not work on bank holidays, bank holidays were included as part of the overall 28-day holiday entitlement and that is why she was paid on bank holidays. The Claimant also said she had taken an extra two weeks holiday to go to Portugal in early 2022 which was not reflected in the summary produced by the Respondent of the holiday taken. She also said she was entitled to 22.5 days during the whole of her employment which was impossible as she was only employed for around 3-4 months. The basis on which the Claimant calculated what she said had accrued and when was never made clear.

10 Having clarified the issues I discussed the Respondent's application for a strike out and explained that there had at least been partial compliance with the previous Tribunal orders. I identified that the issues on the strike out overlapped with the issues on the merits/strengths of the claims. The Respondent decided not to proceed with the strike out application in order to avoid wasting time.

11 The Respondent provided a bundle of documents for this hearing including documents 1-27. Mr Davies provided a second witness statement dated 5th April 2023 in addition to his first witness statement dated 16 January 2023. I checked with the Claimant that she had been through these documents with someone who spoke English and she said she had with her husband whose English was better. The interpreter translated some extracts, when necessary, when the Claimant was asked to comment on parts of documents. Both the Claimant and Mr Davies gave oral evidence. At the very end of the hearing the Claimant produced her 2022 work logbook/diary and relied on the pages for 7 and 17 January 2022 to show that she had not taken these as holiday but had worked these days.

Relevant law

12 s13 Employment Rights Act 1996 says that an employer must not make a deduction from wages (including an underpayment) except where the deduction is authorised by the contract or under the law or where the employee has agreed to the deduction. In this case it was for the Claimant to show that it had been contractually agreed that she be paid £1500 per month.

13 An employee is entitled to a notice period. This can be set out in the contract but in the Claimant's case that had to be at least a week under s86 Employment Rights Act 1996. Her contract said that her notice period was one week, so the contract complied with what the law says is the minimum. The employer can either let the employee stay at work during the notice period or can make a payment in lieu of notice i.e., a payment to represent the pay for the notice period. If they do either of those things, they have complied with the law and the contract.

14 Regulation 14(1) Working Time Regulations 1998 says that an employee is entitled to be paid for holiday which has accrued in the holiday year in which they leave but which they have not taken. The way that is calculated can be set out in the contract. In the Claimant's contract the holiday pay was calculated by averaging her pay over the period she had worked. Under Regulation 13(9) unless the employer agrees, the employee cannot carry forward holiday from one holiday year to the next if they haven't taken it. The Claimant's contract did not say that untaken holiday could be carried forward into the next holiday year and she did not claim that any manager had agreed she could carry forward any unused holiday from 2021.

Findings of fact

The contractual rate of pay

15 The job advertisement relied on by the Claimant (document 21) did not say that the rate of pay would be £1500 per month. It said there was 'a clearly set out progression salary structure, once you have shown us your skills your salary will increase, then further progression £1300 -£1800 month is easily within reach to capable candidates'. All the job had said was that someone could earn £1300 - £1800 if they did well. The advertisement does not say the pay would be £1500 per month.

16 I find that the percentage pay structure was explained to the Claimant when she was interviewed by Mr Davies. However due to not being proficient in English it is likely that the detail of his explanation was harder for her to follow. However, I also find that the Claimant was given a written contract of employment and offer letter on her first day at work (documents 4 and 5). Document 5 makes it clear that payment is on the percentage basis - as a driver the Claimant would be entitled to 23%. The Claimant said she never received these documents, but I find that if she had not received anything in writing she would have asked the Respondent for something in writing. The one-page offer letter was clear about her rate of pay. It does not matter that she did not sign these documents.

17 The percentage amount was the amount/rate the Claimant was then paid until she left the Respondent's employment around 4 months later. The Claimant was not being paid £1500 per month for 4 months and did not raise any query about her pay or make any complaint. She said at this hearing that she had queried 3 days missing pay with Mr Davies in December 2021 but even if that was the case she on her own case was not

questioning the rate of her pay but was questioning whether all the right days had been included. Not raising a problem with her pay over several months is inconsistent with thinking that she was being paid at the wrong rate given she knew what she was being paid was lower by around £300-£400 per month.

18 Throughout her employment the Claimant had access to the Respondent's app which showed for each job how much the client was paying and how much of that she would be paid. This made it additionally obvious to her that she was being paid the fixed percentage.

19 In a WhatsApp message dated 2 February 2022 Mr Davies informed her that the driver percentage was being increased to 25%, part of an overall increase across the company. The Claimant's reply did not respond on that issue but neither did she say the percentage pay method was wrong. Her diary entries for 7 and 17 January 2022 produced at this hearing show she notes the client price down and some of the entries show that she was doing at least a rough calculation of what she would get from that fee as her percentage. She was clearly aware of it.

20 Taking the above findings of fact into account there was no contractual term that the Claimant would be paid £1500 per month. Firstly, the Claimant relied solely on the job advertisement which does not offer that. Secondly the fixed percentage rate was set out in her contract/offer letter (and was the basis on which she was paid and about which she did not complain until she was dismissed). She may not have taken in all the detail of the documents issued to her on her first day of employment, but she was aware of the method being used to calculate her pay and not complaining is inconsistent with her case that she was being paid wrongly throughout the employment.

21 She is not therefore owed any outstanding wages for December 2021 and January 2022 because she was paid at the contractual rate, the fixed percentage rate. She may have wanted more or expected to earn more as she progressed, but the Respondent did not breach her contract or underpay her because there was no term in the contract that she be paid £1500 per month as claimed. The way in which she says the right to £1500 per month was created is not a way the law recognises as a way to create a contractual right to that pay rate.

Notice pay

22 The Claimant was entitled to one week's notice under her contract (document 4). The Respondent said it included that payment in her final payment (doc 15) ie of the £661 said to be salary, £200 of that was her notice pay (see also doc 18, £441 final salary payment). It is unfortunate that the final payslip did not break down the payment into wages and notice pay or this might have been clearer to the Claimant at the time. That notice pay was calculated as an average week's pay for the Claimant over her employment. I have already found that the correct rate of pay was the fixed percentage basis and therefore the Claimant is not owed a higher amount for that weeks' notice. The Claimant was therefore paid her notice correctly.

Holiday pay

23 The claimant claimed 7.5 days holiday which she said at this hearing was partly holiday carried forward from the previous 2021 holiday year. It was not clear how the 7.5 figure had been reached when she also said she had taken two weeks off to go to

Portugal in early 2022 which was not recorded in the Respondent's summary at document 18; if that was right and she had taken this extra holiday then it is likely that she would have ended up owing the Respondent and not the other way round.

24 The Claimant did not understand why she was paid on bank holidays when she did not work bank holidays. This is because her contract (document 4) says that her holiday entitlement includes the eight bank holidays. This is why she was paid on those days.

25 The contract provides that holiday accrues in the first year at 1/12th per month worked. Throughout her employment the Claimant was in the first year of her employment.

26 In the 2021 holiday year (Jan -December 2021) the Claimant had 2 paid bank holidays (summary document 18). Her contract did not say holiday not taken could be carried forward. It was not the Claimant's case that she had been prevented from taking holiday or had taken holiday but not been paid when she took it. Therefore, in the absence of any agreement that she could carry forward unused 2021 holiday entitlement she lost it.

27 As regards the 2022 holiday year (Jan-December 2022) she only accrued holiday on the 1/12th basis up to the date she left (10 February 2022). The Respondent's records were that she had taken 3 days in that period (document 18) including 7 and 17 January and was not owed any more. However, at the very end of the hearing the Claimant produced her 2022 original work logbook/diary showing the full address of the houses where she said she had worked on those two dates. Mr Davies was asked to comment on this but said it did not match with the Excel spreadsheet he maintained which recorded holiday and he was unable to access that spreadsheet from the Tribunal. Given the time spent on this case and the fact that this was the third hearing it was not proportionate to adjourn the hearing for the Respondent to have a further opportunity to provide any documents supporting the summary. There was no written system of booking holiday e.g., using a form or online it was done by direct request to Mr Davies and accordingly the Excel spreadsheet was the only potentially relevant other document. Mr Davies said the spreadsheet contents were reflected in the summary in any event so the spreadsheet itself would not have shed any further light on the issue.

28 On the evidence before me I therefore find that the Claimant worked on 7 and 17 January 2022 and that those dates were wrongly recorded as holiday. On that basis the Claimant is owed 2 days holiday pay by the Respondent and is also entitled to be paid her fixed percentage for those two dates, if that is more than the amount already paid as holiday pay for those dates.

Employment Judge D Reid
Date: 11 July 2023