



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Hossein Sobati

v

Maronsett Limited

Heard at: London Central
On: 31 July 2023

Before: Employment Judge Hodgson

Representation

For the Claimant: in person

For the Respondent: Ms Samantha Dixon, respondent's employee

JUDGMENT

1. **The claim of unfair dismissal is dismissed.**
2. **The respondent shall pay to the claimant by way of unlawful deduction from wages and failure to pay accrued holiday pay the total sum of £1,015.81.**

REASONS

The issues

1. By a claim form dated 3 April 2023 the claimant brought various claims.
2. At the hearing, I considered the issues. The claimant agreed that he had brought claims of ordinary unfair dismissal, failure to pay accrued holiday, and failure to pay wages during the notice period. As he worked his notice this was treated as an unlawful deduction of wages claim.

3. I considered the dates of employment. Following discussion, and after consideration of the notice of termination, it was agreed that the claimant's employment started on 11 March 2022 and terminated on 2 January 2023, by reason of notice. In addition, the claimant confirmed that he had worked initially for three weeks until 3 April 2022. Thereafter, he had taken unpaid leave and started working again on 24 May 2022.
4. It follows that the claimant was employed for a total period of just under 10 months. The claimant accepted he did not have the requisite period of employment of two years, as required by section 108 Employment Rights Act 1996, to bring a claim pursuant to section 94 Employment Rights Act 1996.
5. The claimant accepted that he could not proceed with his claim of unfair dismissal and that it should be dismissed.
6. It was agreed that the claimant received formal notice of termination of employment by letter of 20 December 2022. The letter stated, "The 2 weeks on this termination notice commence on Tuesday 20.12.2022 and run concurrent regardless of annual/public holidays." The notice therefore expired on 2 January 2023.
7. The statement of terms of employment, which was not signed by the claimant, and which he disputed receipt of, provided that the correct period of notice for employee with three months' service but less than two years' service was one week.
8. It was agreed that the holiday year ran from 1 April to 31 March. The claimant had taken no holiday in the first part of employment. There was no provision to carry forward holiday.
9. The claimant accepted that he had been paid for all bank holidays, after he returned from his period of agreed unpaid leave. He was paid for five bank holidays on 2 and 3 June 2022, 29 August, and 26 and 27 December. I note 2 January 2023 was a bank holiday and I will consider this further below. The respondent alleges that the claimant was paid for it, and in any event, I accept he should have been paid for it.
10. The business was closed from 28 to 30 December 2022. The claimant received holiday pay.
11. The respondent alleges the claimant took holiday on 15 November and 18 August 2022. The claimant said he was forced to take holiday on 15 November, and he was uncertain if he took a half day holiday on 18 August 2022.
12. It follows that the respondent alleged the claimant had been paid for six bank holidays and an additional five days' holiday, being 11 days in total. The claimant disputed the two holidays in August and November.

13. It was accepted the claimant's was paid a salary of 31K per annum. It was agreed that one day's holiday was the gross sum of £119.23.
14. It is respondent's position that the claimant was paid all wages due during notice period, and that payment was made at the end of December 2022. In addition, the respondent alleged that it calculated the total accrued holiday pay due was £894.23. Tax was paid on the holiday pay in the sum of £56.40. The respondent retained the rest against sums it says were owed by the claimant.

The law

15. Section 13 Employment Rights Act 1996 states -

Section 13 ERA

(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 workers 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 workers contract, means any provision of the contract comprised -

(a) in one or more written terms of the contract of which the employer has given the work of 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.

16. The amount of accrued holiday pay due at the termination of employment is calculated in accordance with Working Time Regulations 1998 regulation 14 .

14(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

- (a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or
- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula--

(A X B) - C
where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;
B is the proportion of the worker's leave year which expired before the termination date, and
C is the period of leave taken by the worker between the start of the leave year and the termination date.

...

17. Pursuant to regulation 30, an employee may present a complaint to an employment tribunal alleging that it has failed to pay any amount due under regulation 14(2)

30 Remedies

(1) A worker may present a complaint to an employment tribunal that his employer-

...

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

...

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.

18. Under section 27 (1) (a) Employment Rights Act 1996, wages includes "holiday pay or other emolument referable to his employment whether payable under his contract or otherwise."
19. Section 86 Employment Rights Act 1996 provides for minimum periods of notice. For those employers who been employed for more than a month but less than two years, the minimum period is one week.

Findings of fact

20. A number of facts were agreed, as set out above. I deal with those facts that are disputed.
21. I am satisfied that the claimant took holiday in August 2022. At the hearing, it was contended that he took one day's holiday. However, the wage slips make it clear that a half the day was paid for. The claimant

was uncertain as to whether he had taken holiday, but he did accept that he had taken time off to collect his wife from an appointment. On the balance of probability, I find that this a half day holiday.

22. I considered whether the claimant was forced to take holiday in November. I preferred the evidence of Ms Dixon. I accept there was maintenance work being undertaken. The claimant was given an option to either take holiday or to come into work and undertake general duties. I am satisfied he chose to take holiday. I therefore find that he took one and half days' holiday, half a day being on 18 August 2022 and one day on 15 November 2022. It follows that during the holiday year from 2022 to 2023, the claimant was not required to work six bank holidays. He was paid for five. I have found he was not paid for 2 January 2023, and I will consider this further below. The total holiday taken was 10.5 days.

23. The claimant was not asked to sign a contract of employment, or the particulars of terms of employment. He was aware they were said to contain contractual terms.

24. There is a term in the staff handbook which states the following

Damage

Any damage caused to company or customers property through neglect or wilful damage will result in dismissal for gross misconduct, the company will also pursue the cost of any damage so caused.

25. I find the claimant did cause damage to property. On 6 December 2022, he was testing the emissions of a Ford car. The car slipped on the rollers, and it caused damage to the car door, the computer screen, and the diesel smoke tester. It is unclear whether that was caused by neglect or wilful damage. It is the claimant's case it was an accident. There is no proper explanation from the respondent.

26. On 7 December 2022, the claimant was reversing a Saab motorcar, the claimant damaged a mirror. He agreed to pay the sum of £60.47, albeit he refused to accept that payment was a contractual entitlement. I have seen a letter dated 20 December 2022 which states

I, H Sobati, authorise impact car care

To deduct direct from my wages the sum of £60.47 for damages caused to customer vehicles whilst I was in control of them

...

If my employment with Impact should end for any reason during the repayment period I will remain liable for any costs incurred by Impact and acknowledged any outstanding amount will be deducted from my final months salary.

27. The claimant signed it but wrote the following caveat "Not obliged to pay. As I said it on the spur of the moment I will pay this amount unwillingly."

28. On 13 December 2022, the claimant caused damage to a Porsche motorcar, when reversing it.
29. I am not satisfied that the defendant has proven the value of any loss. The defendant has failed to include any estimates for repair or receipts for costs incurred. However, for the reasons I will come to, this is not a matter I need to consider further.
30. I have seen the last three payslips. In November 2022, the claimant received salary of £2,464.10 and one-day's holiday at £119.23.
31. In December 2022, the claimant received salary of £2588.33.
32. In January 2023, the claimant was credited £894.23 salary. That full amount was retained by the respondent save for £56.40 which was paid to the Inland Revenue.

Discussion and conclusions

33. I dismiss the claim for unfair dismissal. As discussed at the hearing, the claimant does not have the requisite qualifying period pursuant to section 108 Employment Rights Act 1996 to bring a claim of unfair dismissal pursuant to section 94 Employment Rights Act 1996.
34. I dismiss the claim for failure to pay notice. The claimant was given two weeks' notice. The claimant was entitled only to one week's notice by statute. It is unclear whether the contract of employment was ever given to him. However, that provided for a period of one week as well. The respondent was only required to give one week's notice, and that week was paid for. However, although the claimant referred to notice pay, the claim was always a claim of failure to pay wages. The claimant received payment for the period 22 - 31 December. The claimant was not paid for 2 January 2023.
35. I must consider whether the respondent is entitled to make a deduction from his wages. For these purposes, I consider the accrued holiday pay to be wages as defined.
36. Pursuant to section 13 Employment Rights Act 1996, an employer may not make a deduction from wages unless it is authorised by statutory provision, provision in the contract, or the worker has previously signified his agreement in writing.
37. Deduction for tax is permitted because it is authorised by statute.
38. I have considered the handbook. I have taken it to contain contractual terms. However, the term relied on falls short of permitting a deduction from wages. Stating that the "company will also pursue the cost of any damage so caused" is neither expressly, nor implicitly, a right to make a

deduction. The term neither provided for the calculation of loss nor permits an authorised deduction. There is no contractual term allowing for any deduction.

39. The claimant agreed in writing to a deduction of £60.97, and that sum may be deducted.

40. It is necessary to calculate the total accrued holiday. It is necessary to apply regulation 14 WTR.

41. The relevant formula is set out above. The exact arrangements during April 2022 are unclear. However, the respondent does not allege the claimant was not employed. It appears to have been unpaid leave. The respondent has not alleged that holiday ceased to accrue. In those circumstances, I consider that there is no basis for saying that holiday did not continue to accrue. It follows the claimant was employed, in the relevant holiday year, for 247 days.

42. The relevant calculation is –

A = 28 days
B = 247/365
C = 10.5 days.

43. It follows the total accrued holiday is $[28 \times (247/365)] - 10.5 = 8.5$ days.

44. At the daily rate of £119.23 this gives an entitlement of £1,013.45.

45. I find that the claimant was entitled to one day's holiday pay on 2 January 2023. He was paid until 31 December 2023. The first day of January 2023 was a Saturday, for which he would not been entitled to pay. He was entitled to pay for 2 January 2023. The pay slips demonstrate he received only holiday pay in January. He did not receive the one day he was entitled to. This was an unlawful deduction.

46. It follows that the final calculation is as follows

Holiday pay £1,013.45
Pay for 2 January £119.23
less authorised deductions £60.47 + £56.40

Total owed £1,015.81

47. The respondent will pay to the claimant the sum of £1,015.81. That is a gross payment and it constitutes wages; it is subject to tax. It may be paid through the PAYE system and tax may be deducted.

48. It is noted the respondent asserts the right to recover sums from the claimant. Any continuing right is limited because there has been an unlawful deduction from wages. The parties' attention is drawn to section

25(4) Employment Rights Act 1996. Where there has been an order to pay or repay wages, any entitlement the respondent may have to recover any sum by whatever means "in respect of the matter in relation to which the deduction of payment was originally made" is reduced by the amount of the order.

Employment Judge Hodgson

Dated: 1 August 2023

Sent to the parties on:

02/08/2023

For the Tribunal Office