EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss M Zuniga Arboleda **v** **Otium Services & Facilities Ltd**

Heard at: Reading Employment Tribunal **On**: 14 June 2023
Before: Employment Judge George

Appearances
For the Claimant: In person
For the Respondent: Did not attend, having been given notice of the hearing.

JUDGMENT

1. The respondent's application for postponement is refused.

2. The respondent is to pay to the claimant £798.00 gross of tax and national insurance contributions (NICs) as compensation for breach of contract/unauthorised deduction from wages.

3. The respondent is to pay to the claimant £114 gross of tax and NICs in respect of annual leave accrued but not taken on termination of employment.

4. The total award is £912 gross which is to be paid after deductions for tax and NIC. The respondent may give credit for £423.25 which they have already paid to the claimant.

REASONS

1. At the outset of the hearing I considered the respondent's application for a postponement. On 13 June 2023, the day before the hearing, the respondent's emailed the tribunal to ask, in effect, for a postponement although it was worded as an application for an extension.

2. The procedural history of the case is that following a period of conciliation that lasted between 18 August and 29 Septemebr 2022, the claimant

presented a claim form on 14 October. When that was served on the respondent they were told that their response had to be received by 21 November 2022. By the claim form the claimant complained that she was owed arrears of pay and holiday pay in respect of her holiday entitlement that she had accrued and not taken at the end of her employment.

3. She had worked as a part-time cleaner for the respondent in employment that began on 7 June 2021 and ended on 29 July 2022 with her resignation. The response was in fact received on 22 November 2022 therefore one day out of time and it was not accompanied by an application for an extension of time. In that response, the respondents indicated that they accepted that they owed the claimant some money but, in effect, disputed the amount.

4. On 28 January 2023, the response form was rejected. That communication was sent by the Tribunal to the email address of Baljit Ruffley whose email address had been given on the draft ET3 as the method by which the Tribunal should correspond with the respondent. They were also sent a standard letter warning them that because the response had been rejected a judgment might now be entered against them and they were sent the usual information about what to do if they disagreed with the rejection of the response. Nothing was received by the Tribunal in response to that. So, a remedy hearing was listed by notice of hearing sent to the same email address on 13 March 2023.

5. As I say, on 13 June, the day before the hearing, the respondent emailed stating that the email address that the tribunal had used was no longer in use because the Manager, Baljit Ruffley, had left the company in January 2023. They asked for an extension to look into the claim and organise a reply and in evidence they wished to present to the tribunal, This was taken as an application for a postponement of the hearing which was referred to Employment Judge Quill and he directed that the application needed to be made at a hearing which remained listed to take place today.

6. At 09.25 this morning, the respondents emailed the Tribunal and apologised but said that at the short notice they did not have anyone that could attend the hearing today. They repeated the information that the emails had been sent to an email address of a manager who had left the company in January 2023. They said they did not understand why the email did not bounce back as the email account was closed. I caused the administration to make enquiries and was informed that when the notice of hearing date of 13 March was sent by the tribunal, there is no evidence that an automatic response, was received by the Tribunal either to say that individual with whom they had tried to communicate was no longer in employment, nor directing the Tribunal to any other person at the respondent organisation. The email was not returned undelivered.

7. When parties are involved in litigation the responsibility is on them to ensure that the communication addresses that the Tribunal administration has for them are up to date and, therefore, even if this is the reason why the respondent did not receive notice of today's hearing, that is not a complete and acceptable explanation.

8. I rejected the application for a postponement because I was satisfied that the respondent had been given notice of the hearing in the manner that we had been told was the appropriate manner for communicating with them. There was nothing to alert the tribunal to the circumstances that it was no longer in use and, indeed, it is somewhat perplexing that the respondent appears to have been aware of the hearing today even though the only method by which the Tribunal was communicating with them was through the email address that they claim was closed.

9. I considered the provisions of rule 34 of the Employment Tribunal Rules of Procedure 2013 and considered that it was in accordance with the overriding objective to avoid delay that the hearing should proceed in the respondent's absence.

10. The claimant gave evidence and she provided four payslips in evidence as well as a number of emails and a contract dated 6 July and a starter form.

11. Her continuous employment started on 6 July, initially at Lightwater as I have said , and then she increased her hours and was working at Lightwater and Camberley for a period of time. At the time of her resignation, she was working solely at Camberley doing four hours a week.

12. The contract of employment states that her normal hours of work were as stated on the starter form and in accordance with the rota. At that time the starter form indicated that her hours were 12.5 hours a week but I am satisfied that that was varied up by agreement and then slightly down so that at the time of her resignation her contracted hours were 20 hours a week. This was not a zero hour contract and there is nothing written in the contract of employment to give the employer the right unilaterally to vary the hours.

13. There are also contractual terms about annual leave which are relevant. It states there that the holiday year begins on the first of the month in which the start date fell. It states that the claimant had the statutory entitlement to holiday, which is found in the Working Time Regulations 1998. Otherwise, where there are gaps, the statutory provisions would apply. So, I find that in the case of the claimant because she started work on 7 June, at the time of her resignation the then current annual leave year started on 1 June 2022. Her annual leave entitlement was 28 days inclusive of bank holidays. Annual leave could not be carried over from one year to the next.

14. In circumstances which I do not need to set out in detail, the claimant decided to resign her employment and on 10 July gave notice. She said that she gave notice by email. It is not one of the emails that has been provided to me but I accept her evidence that the notice she had given was due to expire on 29 July 2022. This is more than the contractual minimum that she was required to give which was one week.

15. The reason I accept that evidence is in part that there is no apparent basis for rejecting or doubting the claimant's evidence about this. Also, in the draft ET3 the respondent said that the dates given by the claimant for her

employment were correct and those dates included an effective date of termination of 29 July. I accept her evidence that prior to her resignation, in round terms, there had been attempts to reduce her hours unilaterally which she had resisted. Having given notice on Saturday 10 July she worked on 11 July and then on 12 July there was an incident which led to her ending her employment sooner than expected.

16. The details that she provided to me in evidence were that, during her notice period, she had arranged to meet the new manager by the name of Vivienne at her place of work so that she could show the replacement cleaner the site and the area. They were due to meet at 6.30pm. At about 6.15 pm she was telephoned by Vivienne who asked where she was. There had apparently been some confusion about the claimant's start time. In that phone conversation Vivienne informed the claimant that, during her notice period, since the replacement was also going to be working, the claimant's hours would be reduced to two hours a day, presumably working alongside the replacement. The claimant challenged Vivienne about that saying that she was not able to do that lawfully during the notice period and Vivienne replied that she could. This reached an impasse and the claimant then resigned. She did not attend for work on 12 July.

17. The claimant has informed me that she retained the keys to the site temporarily because she was waiting for her wages to be paid; that is something that is referred to in the draft grounds of response but it is not a matter that I need to make any findings about within the issues that I have to decide.

18. On reflection, and hearing the evidence that I have heard from the claimant, which in general terms is the factual account that she sets out in box 8.2 of her claim form, it seemed to me that the correct legal construction of this is as follows. The claimant, having given longer notice than she was contractually required to, was due to end her employment on 29 July 2022. Her account is that the respondent employer then behaved in a way that she could not be expected to tolerate, namely by unilaterally reducing her hours during that period. By doing so, they committed a repudiatory breach of contract by halving the hours available to her in the notice period. She accepted that repudiatory breach by resigning.

19. I agreed to the claimant, who has been acting in person throughout, making an amendment to her claim to put a different legal label on the claim she is bringing. By that she argues that the unpaid wages are owed as compensation for constructive wrongful dismissal following that repudiatory breach of contract rather than unauthorised deduction from wages. She brought forward the end date of employment by resigning with immediate effect on 12 July. The facts that support that are clear on the claim form and I am satisfied that it is simply changing the legal head of claim.

20. Therefore, there are two different types of complaint; one which is in part an unauthorised deduction from wages and, in part, a breach of contract is the complaint that the claimant should have been paid for the hours she actually worked, or should have worked, between 1 July and 29 July. She actually

worked between 1 and 11 July. She worked 6 days, 4 hours a day, and then on 12 July gave notice but would have worked up until 29 July. That is a total within July of 21 days. Technically this is an unauthorised deduction from wages claim of 7 days at 4 hours a day, namely 1 July, 4 to 8 and 11 July and then compensation for breach of contract in respect of the remaining 14 days. The 21 days in July need to be compensated at 4 hours a day at £9.50 an hours gross, which is a total gross sum of £798.

21. The claimant, at the time of presenting her claim, had not been paid the annual leave that had been accrued and not taken. She accepts that she had taken 8 hours of annual leave during June. Between 1 June 2022 and 31 July 2022 she had worked 80 hours in June and had, or should have worked, 84 hours in July up to the end of her notice period. By the end of the employment she would have worked 164 hours since the start of the holiday year.

22. Applying the percentage that the respondent's have applied to calculating the number of hours annual leave, that means that she had accrued 19.77 hours' leave. I round that up to 20 hours of annual leave between the start of the annual leave year and the end of her employment. Of that she had taken 8 and, therefore, she should have been paid 12 hours annual leave at £9.50 an hours which is £114. Those are gross figures.

23. Since commencement of proceedings, the respondents have paid the claimant the sum of £423.25 but they did not provide the claimant with a payslip so it is not possible to see how that has been calculated. This must have been paid net of tax and NIC. It therefore is not simply a matter of me taking £423.25 from the gross figure that I have found the claimant is owed. The respondents must account for tax and national insurance and then may give credit for £423.25 before paying the balance to the claimant.

_____

Employment Judge George

Date: …22 August 2023……..

Sent to the parties on: ...23 August 2023

.....
For the Tribunal Office