



EMPLOYMENT TRIBUNALS

Claimant: Ms I Bonkowska

Respondent: Mercor Fire Protection UK Ltd

Heard at: Liverpool (by CVP)

On: 10 November 2023

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: In person (accompanied by a Ukrainian interpreter)

Respondent: Mr Marshall

Interpreter: Ms Leici

JUDGMENT

1. The judgment of the Tribunal is that the claimant's claim for outstanding holiday pay fails and is dismissed.
2. The claimant's claim for unpaid wages fails and is dismissed.

REASONS

Introduction

1. By a claim form dated 23 January 2023, having achieved an early conciliation certificate between 12 November 2022 and 24 December 2024, the claimant brought a complaint for outstanding wages due to her. The claim was brought as an unauthorised deduction complaint under section 13 of the Employment Rights Act 1996. She claimed outstanding wages for September 2022 and sick pay for October 2022. She also claimed outstanding holiday pay under the Working Time Regulations 1998. She was not able to specify how many days or how much holiday pay was due to her on termination of employment. The claimant said the respondent had failed to provide payslips.

2. The respondent defended the complaints and during the process of putting its defence together clarified the figures and accepted that some money was due to the claimant for wages for September 2022 and statutory sick pay for October 2022. It made a payment of £862.17 to the claimant and both sides accept that that amount can be offset against any amount due to the claimant in this case. Further, the respondent said that in fact it had overpaid the claimant because she had taken more annual leave than that to which she was entitled.

Evidence

3. I heard oral evidence from the claimant today and oral evidence from Mr Marshall for the respondent. Mr Marshall had not been intending to give evidence but the claimant alleged for the first time today that he had falsified the formal leave record. He was happy to be called so that this could be put to him. The claimant wished him to be called.

4. There were no witness statements from the claimant though there was a 16 page narrative at the front of her bundle of documents.

5. I did not hear oral evidence from Mr Jacob Solich who attended in support of the claimant. He had not prepared a statement.

6. At the outset of the hearing we had agreed that the claimant would give evidence and Mr Marshall would give evidence. There would then be closing submissions and I would adjourn to reach a decision. I typed this agreed procedure with numbered stages into the Chat function of our video hearing. It was translated for the claimant who agreed it and took it down in her own writing on paper. Everyone agreed this was the procedure we would follow. We agreed time allocations.

7. After the claimant had finished giving evidence and whilst Mr Marshall was giving his evidence for the respondent the claimant protested that what Mr Marshall was saying was wrong, about her leave entitlement, and that Mr Solich would say that the formal leave record was not correct. I explained this was not the time to introduce evidence from Mr Solich who had not been called as a witness by the claimant and that we would finish Mr Marshall's evidence and then discuss the matter.

8. In discussion it was clear that the claimant wished to call Mr Solich. I asked what evidence he had to give that would be relevant to the case and necessary for me to decide the issues about her holiday pay and wages. The claimant said that Mr Solich would say that there were emails that the claimant had sent when she was in work on days that the record shows she was not working (they are not in her disclosed documents or the bundle) and that he could say therefore that the leave record was wrong. He could say how hard he and she had worked for the business, that they were the only two people present most of the time as the third person worked from home. She said she had referred to him as a witness throughout her bundle of documents. She said that her relationship with him is irrelevant to the evidence he had to give.

9. Ms Baylis objected to the introduction of evidence on the following grounds:

- a. The procedure and timetable had been agreed and set out in the Chat.

- b. This was a late attempt to introduce new evidence from a new witness after closure of the claimant's evidence and during the respondent's.
- c. It would prejudice the respondent who has not seen a statement from the witness and does not know what the witness will say or to which documents in the bundle, or otherwise, he will refer.
- d. If the witness is to attest to emails having been sent on leave days then the emails themselves were sent by the claimant so she can give that evidence.
- e. The witness is the claimant's partner and former boss so not an independent witness and nowhere has it been suggested that he can attest to her presence at work on days when she had recorded herself as absent.
- f. The hearing is close to its ending with only closing submissions left and has already, for understandable reasons relating to interpretation and the time it takes, overrun.
- g. It is not proportionate to go part heard in this case as that would cause unacceptable cost and delay to the respondent who has already overpaid this claimant.

10. I adjourned to consider whether or not to hear from Mr Solich and decided not to for the following reasons:

- a. Rule 41 and Rule 29 give me discretion to regulate procedure. Rule 2 requires me in the exercise of any discretion to take account of a proportionate response and to avoid delay so far as is compatible with fairness.
- b. It seems to me that the claimant wants Mr Solich to say that she was at work, or at least sending work emails, on dates on which she recorded herself as absent. I already have that evidence from the claimant and her alternate record of leave.
- c. I accept the respondent's submissions that to include Mr Solich now would cause delay and cost and prejudice to the respondent that outweighs any prejudice to the claimant. It would be disproportionate. The claimant has not included any statement for him, nor copies of the emails to which she says he will refer and she agreed the procedure this morning. I accept her submission that just because he is her partner it does not mean he could not give independent evidence. The points she says he would make, she has already made and will be taken into account.

11. I had a bundle of documents of 100 pages provided by the claimant, and I had the respondent's counter Schedule of Loss which set out its written submissions in the case.

Findings of Fact

12. The claimant was employed by the respondent from 2 August 2021 until her resignation on 24 October 2022. Her salary was £ 14 400 per annum for working 20 hours per week.

13. Her job included keeping records of absence from work. She entered onto that formal record her own annual leave. The formal record collated data about categories of absence. The claimant provided the information from the formal record to the accountant who managed the payroll.

14. Her contract of employment provided that she was entitled to 28 days' annual leave per year pro rata to her working time. She worked 20 hours per week. It was agreed that the pro rata base entitlement to holiday was 14 days per full year. Her contract of employment provided at clause 3.7 a right to make deductions from wages for any overpayments.

15. The claimant took 36 days of holiday absence in her final holiday year between 1 January 2022 and 24 October 2022. She was only entitled to have taken the 12 days that had accrued when her employment ended on 24 October 2022. She received payment for 28 days work that she had taken as leave in excess of her entitlement.

16. In September 2022 the claimant was paid normally up to 23 September 2022. She then had three days' sickness absence which counted as waiting days and then was due statutory sick pay from 28 September 2022 until her resignation date on 24 October 2022.

17. The claimant received payslips for her employment which she provided in the bundle.

Application of the Relevant Law

19. Section 13 and Section 14 Employment Rights Act 1996 provides

(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 worker's 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 worker's contract, means a provision of the contract comprised—

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

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

[(8) In relation to deductions from amounts of qualifying tips, gratuities and service charges allocated to workers under Part 2B, subsection (1) applies as if—

(a) in paragraph (a), the words "or a relevant provision of the worker's contract" were omitted, and

(b) paragraph (b) were omitted.]

Section 14

14 Excepted deductions

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

(2) Section 13 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

18. In law, the claimant must show that there were "wages properly payable" to her that were not paid.

19. The Working Time Regulations 1998 provide that a worker is entitled to four weeks' annual leave in each leave year. Where the date on which a worker's

employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the leave due for that leave year remaining on the date on which his employment begins.

20. Leave may not be replaced by a payment in lieu except where the worker's employment is terminated. Regulation 14 provides for a period of additional leave to which a worker is entitled. The aggregate entitlement is subject to a maximum of 28 days. That will be calculated pro rata for workers who work part time.

22. The claimant's pro rata entitlement to paid annual leave in her last year to termination date was 12 days. I have found as a fact, based on the oral evidence of the respondent in reliance on a written record created as part of her role by the claimant, she took 36 days.

21. The claimant has not therefore been able to establish any days she says were untaken annual leave to which she was entitled. She produced a document in her bundle which she says was a table she kept at home, separate from the record at work, showing her accurate holiday. It was not clear when or why this table had been created. I found it unreliable.

22. Her case at its highest rested on an allegation, made at the hearing, that the formal record that she kept at work must have been tampered with. I reject the claimant's submission that there has been any falsification or manipulation of leave records by Mr Marshall. I found him to be an entirely credible witness. He only joined the company in August 2022 and much of the leave record related to the earlier months in that year. For the claimant's allegation of falsification to stand I would have to accept that Mr Marshall having recently joined as MD, entered the record and changed it to record absence for the claimant (which she had not taken) during periods when he did not work there. He would not know, when doing that, if the claimant could show that she was at work on the dates on which he falsified her as absent. I find it highly implausible that he would have done that. The claimant produced no evidence whatsoever to support that allegation. She cross examined Mr Marshall who answered robustly that he had not and would not falsify a document. She was not able to establish any motivation on his part to falsify her holiday records.

23. During his evidence Mr Marshall informed me that Mr Solich was the claimant's partner and had been the MD of the respondent until removed by the respondent and replaced with Mr Marshall. For most of the period in respect of which there is a dispute between the claimant's account as to holiday she took and the record she created at the time, her partner Mr Solich was her boss. It seems more plausible to me that the claimant took more leave than that to which she was entitled during 2022 than that Mr Marshall falsified a record after the event.

24. I have looked in detail at her 16 page statement and the oral evidence she gave today and can find no basis upon which she argues that she was due annual leave that she had not taken when her employment ended. In the absence of any evidence to contradict it, I find that the formal record that the claimant kept for the respondent is a reliable record of the annual leave she took.

25. Turning to her wages complaint the claimant was due sick pay for 29 September to 24 October. The rate at that time was £ 99.35 per week being £ 14.19 per day. The

claimant was due 24 days at £ 14.19 per day being £ 340.62 This was not paid to the claimant on termination of employment. However, on termination of employment the claimant had taken 36 days holiday but was only due 12. The respondent is entitled to off-set the amounts paid for 28 days work when the claimant was absent, at termination of employment, by virtue of section 13 and clause 3.7 of her contract in which she consented to the deduction of amounts owing on termination. 28 days pay at the claimant's rate, using her figure for daily rate of pay of £110.80 amounts to £ 3102.40 for leave taken in excess of entitlement.

26. Further, the respondent paid £ 862.17 to the claimant during early conciliation but without any binding agreement having been reached.

27. Accordingly, I find that there were no wages properly payable to the claimant which were unlawfully deducted on termination of her employment. There are no monies due to the claimant and the claimant's claims are dismissed.

28. I want to thank everybody for what has been a difficult process today with interpretation in both Polish and Ukrainian during a video hearing. I am grateful to our interpreter who was unwell with a head cold and yet persisted with interpretation well beyond the time which had been agreed. We were listed for three hours and in fact took most of the day.

29. The communication was strained at times because of delay necessary for interpretation. Time pressure meant that my oral judgment was shorter than would usually be the case and that less explanation of reasoning was given for ease of interpretation. For those reasons I have of my own volition provided full reasons for my decision here in writing.

Employment Judge Aspinall
Date: 17 November 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 November 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.