



EMPLOYMENT TRIBUNALS

Claimant: Anthony Nicholls

Respondent: Blas ar Fwyd Cyf

Heard at: Llandudno Courts and Tribunal

On: 10 November 2023

Before: Employment Judge Othen

Representation

Claimant: In person

Respondent: Mrs Singh (solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for pay in lieu of untaken holidays owed on termination of employment (made under Regulation 14 Working Time Regulations 1998) fails and is dismissed.
2. The claimant's claim for breach of contract fails and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a delivery driver from 28 June 2021 to 17 September 2022. He brings claims for untaken holidays on termination of his employment and breach of contract.
2. The respondent contends that all holiday pay owing on termination of employment has been paid and that there has been no breach by it of any relevant contractual terms.

Procedure, documents and evidence heard

3. I did not have access to the bundle for this hearing as an incorrect copy had been sent to the Cardiff Employment Tribunal by email by the respondent's solicitor, and to Llandudno hearing Centre by post. There was considerable delay to the start of the hearing therefore as copies of the correct bundle were accessed. It was finally agreed that a copy of the bundle from a previous, postponed hearing would be used instead, so that the witnesses could have access to a hard copy when giving evidence. This Bundle was 321 pages in length. The claimant gave evidence in person and had submitted a short witness statement beforehand. Mr. Osian Deiniol gave evidence on behalf of the respondent as its Operations Manager and had submitted a written witness statement.

Preliminary matters

4. The case had been listed for a full merits hearing on 14 March 2023. It could not proceed on that occasion as the claimant has a hearing impairment and his aid was not working. Instead, the hearing was converted to a case management hearing with Employment Judge Jenkins where the relevant issues were discussed and directions given.
5. Time was taken during this hearing to make sure that the claimant could fully hear and understand matters. He had the benefit of a hearing loop which worked sufficiently but it was important for him to be able to see all parties as well, so that he could lip read. The hearing proceeded at a suitable speed for his needs and regular breaks were taken. The claimant was expressly asked to alert me at any stage if he did not understand the proceedings.

Issues for the Tribunal to decide

6. The issues set out in the Case Management Order of Employment Judge Jenkins dated 14 March 2023 were as follows:

Holiday Pay (Working Time Regulations 1998)

- a. What was the claimant's leave year?
- b. How much of the leave year had passed when the claimant's employment ended?
- c. How much leave had accrued for the year by that date?
- d. How much paid leave had the claimant taken in the year?
- e. Were any days carried over from previous holiday years?
- f. How many days remain unpaid?
- g. What is the relevant daily rate of pay?

Breach of Contract

- h. Did this claim arise or was it outstanding when the claimant's employment ended?
- i. Did the restrictive covenant in the claimant's contract of employment prevent or limit the claimant's ability to take work with other employers?

- j. Was that a breach of contract?
 - k. If so, how much should the claimant be awarded as damages?
7. Once the case management order was made available to me, significant preliminary discussion took place with the claimant to understand his claim and allegations and the relevant evidence from the bundle which related to this. This was an attempt to narrow the issues and agree the relevant evidence with the respondent, given the large number of apparently irrelevant documents which were available in the bundle.

Findings of fact

8. At the commencement of the claimant's employment, he signed various documents within an induction pack. One of these included a "Restrictive Covenant Agreement". Clause 5 of this agreement stated as follows:
- a. *"the Employee shall not during the period of six months after the date of termination of their employment with the Company directly or indirectly be engaged or employed by any Restricted Customer with whom the Employee shall have had material dealings in the course of their duties during the Relevant Period"*.
9. Clause 6 was a non-competition clause, lasting for a period of three months after the date of termination of employment. As it has less relevance to this case, I will not quote it in entirety.
10. There were three statements of main terms of employment for the claimant throughout his employment with the respondent. They were largely identical in terms, apart from those relating to hours of work. The most recent of these was dated 15 January 2022 ("Terms"). It contains the following relevant terms:
- a. with regard to the claimant's normal hours of work, these were stated to be 25 per week on Monday, Tuesday and Thursday. It did however state that these hours would be variable and that he would be required to work additional hours when authorised and required.
 - b. . With regard to annual leave, it stated as follows:
 - i. *"Your holiday year begins on 1 April and ends on 31st March each year, during which you will receive a paid holiday entitlement of 28 days inclusive of any public/bank holidays you may choose to request. Entitlements are pro rata for part-time employees..... Your holiday pay will be based on your average earnings over the previous 52 weeks in which wages were payable.....In the event of termination of employment your entitlement to annual leave will be calculated as 1/12th of the annual entitlement for each completed month of service during that holiday year and any annual leave accrued but not taken will be paid for"*.
11. The claimant's hourly rate of pay was £10.50.
12. The claimant was off sick from 1 August 2022. His effective date of termination was 19 September 2022. A letter dated 15 August 2022 from Osian Denial (page 260) gave the Claimant a month's notice of termination. Although the parties disagree about the reason for termination, that is not relevant to the claims before the employment tribunal.

13. It was agreed by both parties when giving evidence that the contractual hours of work stated in the Terms were not accurate and that the claimant worked a lot of weekly, additional hours during his employment. The claimant stated verbally that he thought that he worked about 34 hours a week. He said that amounted to approximately four days per week. The respondent's evidence was that his average weekly working hours, based on the 52 weeks prior to termination, were 35.37.
14. At page 286 in the bundle was a spreadsheet of the hours worked by the claimant from 1 April 2022 until termination of his employment. When questioned by me during his evidence, the claimant agreed that they were an accurate record of the hours worked by him during this timeframe. This spreadsheet shows that the claimant's working hours were extremely variable, with no consistent pattern. They were across any, and sometimes all days of the week.
15. During his evidence, Osian Deiniol confirmed that the average, weekly hours of 35.37 detailed in paragraph 13 above had been calculated according to the spreadsheet records at page 286 but also to previous records which were not in the bundle. In addition, he referred specifically to the claimant's payslip at page 277 in the bundle. This showed the payment of holiday pay made to the claimant on termination of his employment, which was paid on 30 September 2022. The calculation on which that pay slip was based is detailed further in paragraph 17 below. The respondent confirmed that this calculation did not include the period of 1 August 2022 to the claimant's effective date of termination during which he was off sick and did not work.
16. I accept the respondent's evidence that the claimant's average weekly working hours in the 52 weeks before termination of his employment were 35.37. This is consistent with the evidence before me in the bundle as set out above and was not challenged by the claimant. Indeed, it was consistent with the claimant's assertion that his weekly working hours at the time were approximately 34 by his estimation. I found the oral evidence of Osian Deiniol to be credible. He explained that the hours were calculated on an accurate basis by the company accountant and his written witness statement contained systematic and logical calculations.
17. On termination of employment, the claimant was paid a total of 23.58 hours' pay in lieu of untaken holidays on termination of employment. This was calculated at a rate of £10.50 per hour, resulting in a total of £247.59 gross pay. This was not disputed by the claimant. The evidence of Osian Deiniol was that at the time of termination of employment, 23.58 hours amounted to 2 days pay based on an average from the previous 52 weeks.
18. At paragraph 16 of the witness statement of Osian Deiniol was a table which showed the total amount of holidays taken by the claimant in the holiday year of his dismissal (1 April 2022 onwards). This amounted to a total of 78.96 hours. The breakdown within the table was shown in terms of days and hours but the length of the days which were taken varied according to the average daily hours worked by the claimant at the time that the holidays were taken (based on the three-day working week in the Terms and a previous 52 weekly working hours' calculation). Therefore, the table showed that the claimant had taken a total of five days holiday during that year but one of these days amounted to 9 hours, one amounted to 11.02 hours and three of them amounted to 11.79 hours. On questioning by me during the claimant's evidence, he confirmed that this table was accurate and he did not claim that was not paid in full for those hours.
19. The claimant's evidence was that he was owed a further two days holiday pay on termination. He says that this was based on the fact that his average weekly working days were four per week. He was therefore entitled to 4/5 (pro rata entitlement) of 28 days per year and he had worked five full months that holiday year (so 5/12 of this

entitlement amounted to approximately 9.3 days). He had taken five days' holiday, leaving a total of 4.3 days but had only received payments in lieu of two days on termination, therefore leaving approximately 2.3 days owing.

20. The respondent calculated entitlement differently. The calculation contained at paragraph 15 onwards of Osian Deiniol's witness statement explained that the claimant was entitled to a total of 16.8 days holiday per year based on the three-day working week set out in the Terms (in contrast to the four days used by the claimant for his calculations). As the claimant worked for five months that holiday year, 5/12 of his 16.8 day entitlement amounted to seven days' full entitlement on termination of employment. As he had taken five days holiday that year, he had two days remaining, hence the two days which were paid to him on his payslip in September 2022. The two days were calculated according to an average hourly day work at that time (based on the preceding 52 weeks) of 11.79 hours.
21. I find that much confusion has been caused by the fact that the Terms did not reflect the claimant's working hours and that the descriptions of working "days", and the hours that those days reflect, have been understood differently by the claimant and respondent. Despite this however, the holiday entitlement of the claimant, the annual leave taken by the claimant in the holiday year of his termination, and the amount for which he was paid in lieu on termination, in terms of hours, is as set out in paragraphs 16 to 18 above.
22. Following his termination of his employment, the claimant's evidence was that he was prevented from obtaining further employment by the respondent because of the effect of the Restrictive Covenant Agreement which he had signed at the commencement of his employment with it. His witness statement stated that:
 - a. *"Following the termination of contract, I have noticed various vacancies..... For either shop work or driving vacancies. I spoke with some and the [sic] didn't want to progress with any application due to the covenants. I have not been able to apply for other vacancies due to the same restrictive covenants in the T&Cs. However, as Blas ar Fwyd Cyf breached the contract of employment in a repudiatory fashion I have not continued with the applications for fear of retribution".*
23. When the claimant was asked about this aspect of his claim by me during his evidence, he explained that he had spoken to one other employer over the phone during his employment with the respondent, in approximately May 2022, about the possibility of working for it (this was at a time when he was unhappy working for the respondent). He had told that employer about the Restrictive Covenant Agreement. He couldn't remember exactly what he was told in response but it could have been words to the effect that *"we could try and get round this"*. After termination of his employment, he had sent an email to this employer to apply for a potential vacancy but received no response.
24. In addition, following termination of his employment, he went into a retail shop in Caernarfon to ask about potential vacancies. He had told that member of shop staff about the Restrictive Covenant Agreement and had been told that they *"didn't want to get involved"* and to come back to them after the covenants had expired.
25. The evidence from both parties was that the respondent was unaware of the claimant's alleged difficulties in finding further employment after the termination of his employment as he did not bring this to their attention.

Relevant Law

26. Article 7 of the Working Time Directive (WTD) provides that each member state must ensure that every worker is entitled to paid annual leave of at least four weeks.
27. In England and Wales, workers have a right to a minimum of 5.6 weeks' paid annual leave under regulations 13 and 13A of the Working Time Regulations 1998 (SI 1998/1833) (WTR). Any contractual rights can be no less favourable than the WTR entitlement.
28. WTR 1998 do not set out how to convert a weekly entitlement into days or hours for those working on a casual basis or with irregular hours. Current government guidance on "Calculating Holiday Entitlement for Workers" suggests that: "*in practice, if needed, employers may wish to calculate average days or hours worked each week based on a representative reference period, although the Regulations do not expressly provide for this*"¹. The important thing, it says, is to ensure that each worker receives at least 5.6 weeks' annual leave per year.
29. WTR 1998 also give a worker the right to bring a claim that the employer has failed to pay them in lieu of untaken leave following termination of employment in accordance with regulation 14(2) (regulation 30(1)(b)). The payment due under reg 14(2) WTR shall be "*such sum as may be provided for the purposes of this regulation in a relevant agreement*" (Reg 14(3)(a)) or, if no provisions of a relevant agreement apply, a sum calculated by way of the formula set out in Reg 14(3)(b).
30. The EAT's decision in Connor v Chief Constable of the South Yorkshire Police 2023 EAT 42 confirms that termination payments in lieu of untaken leave under a relevant agreement must be at least equivalent to holiday pay for annual leave taken during employment under Regs 13 and 13A WTR. In that case, the claimant's contract of employment included a term stating that payments in lieu of untaken holidays would be based on 1/365th of annual salary for each day's leave. The claimant worked a regular 37.5-hour week and, had he been working, he would have received the same sum for a week of holiday as for a week of work. However, under the payment in lieu calculation set out in his contract, he was paid less than if he had taken the holiday because his annual salary was divided by calendar days as opposed to working days.
31. The EAT pointed out that the right to annual leave under Regs 13 and 13A is expressed in terms of weeks and any payment for time off that falls below the usual level of pay will not be in accordance with the legislative purpose, which is to fulfil its health and safety intentions. In the EAT's view, it was important to note that Reg 14 simply provides a method of calculation, supporting Regs 13 and 13A where the leave year is incomplete. The rights to annual leave and payment are not, therefore, modified by Reg 14. The reference in Reg 14 to '*such sum as may be provided... in a relevant agreement*' must refer to any agreement that provides a formula which is in keeping with the rights provided for in the Regulations. Accordingly, a relevant agreement cannot provide for a calculation which would mean that the worker is paid less than the usual amount that he or she would have been paid for working.
32. Holiday pay is calculated based only on remunerated weeks.
33. Under Section 3(2), Employment Tribunal Act 1996 and Article 3, Extension of Jurisdiction Order 1994, an employee can bring a claim for damages for breach of any contract connected with employment if it arises or is outstanding on the termination of employment.

Law applied to facts of the case

¹ <https://www.gov.uk/government/publications/calculating-holiday-entitlement-for-workers>

Holiday pay

34. The claimant had an irregular pattern of work. He had no regular daily or weekly working hours. It is therefore difficult to calculate a week's leave for the claimant in accordance with WTR or WTD, as neither set out any method of calculating how many days or hours this should amount to in the circumstances.
35. The claimant had a "relevant agreement" under regulation 14(2) for calculating pay in lieu of untaken holidays on termination (the Terms). However, the calculation derived from that agreement cannot result in less pay than he would have received for working for the equivalent time².
36. The Terms confirm that his holiday entitlement was 28 days per year and his holiday pay: "... will be based on [your] average earnings over the previous 52 weeks in which wages were payable".
37. At the time of termination of employment, the claimant's average weekly working hours were 35.37. It is not helpful to calculate the claimant's daily working hours because it is not possible to determine what proportion of a week this is.
38. The claimant's contractual holiday entitlement is consistent with WTR, as 28 days' holiday is consistent with 5.6 weeks. Therefore, the claimant's annual leave entitlement, based on his average weekly working hours at the time of termination of employment was $(5.6 \times 35.37) = 198.07$ hours.
39. The claimant's hourly pay was £10.50. Therefore, his average weekly gross pay was $(35.37 \times £10.50) = £371.39$.
40. The Terms (as the "relevant agreement" under regulation 14(2)) stated that: "*In the event of termination of employment your entitlement to annual leave will be calculated as 1/12th of the annual entitlement for each completed month of service during that holiday year and any annual leave accrued but not taken will be paid for*".
41. The claimant had worked five complete months at the time of his dismissal (April to end of August 2022). Therefore, $(5/12 \times 198.07 \text{ hours}) = 82.53$ hours. However, this entitlement must be at least equivalent to the usual amount that the claimant would have been paid in accordance with his entitlement for annual leave under regulations 13 and 13A WTR³. At the time of termination, the claimant had in fact worked longer than 5/12 of the holiday year as he was employed until 19 September 2022. This was an approximate total of 24.5 weeks. Therefore $(24.5 / 52) \times 198.07 = 93.32$ hours.
42. The claimant had already taken a total of 78.96 hours annual leave that holiday year. He was paid an additional 23.58 hours in lieu on termination. He was entitled to 93.32 hours on termination, less the 78.96 hours he had taken and the 23.58 hours he was paid in lieu. As such, the claimant actually received an over overpayment of 9.22 hours of holiday pay and no holiday pay is owed to him.

Breach of contract

² Connor v Chief Constable of the South Yorkshire Police 2023 EAT 42

³ Connor v Chief Constable of the South Yorkshire Police 2023 EAT 42

43. The Restrictive Covenant Agreement was a contract "connected with" the claimant's employment, as defined by Section 3(2), Employment Tribunal Act 1996 and Article 3, Extension of Jurisdiction Order 1994. However, there was no breach of any of its contractual terms by the respondent.
44. The claimant's own evidence was that there were two prospective employers which may have chosen not to offer the claimant employment with them because of the restrictive covenants within this agreement. The respondent played no part in these decisions. It was unaware of those decisions. Whether those restrictive covenants were enforceable or not is irrelevant to the question of whether the respondent breached any term of the Restrictive Covenant Agreement by which it was bound.
45. As such, the claimant's claim for breach of contract fails.

Employment Judge Othen

V.Othen

29 November 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 1 December 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche