EMPLOYMENT TRIBUNALS

Claimant: **Mr K Klimek**

Respondent: **Why Not Bar and Lounge Ltd**

Heard at: **By video** **On:** **18 April 2024**

Before: **Employment Judge R Harfield**

Representation
Claimant: Mr Klimek represented himself as a litigant in person
Respondent: Mr Phillips (A director of the Respondent company)

RESERVED JUDGMENT

1. The Claimant's complaint of unauthorised deduction from wages is well founded. By agreement, as at 18 April 2024 the Respondent must pay the Claimant the sum of **£686.36** being the agreed amount outstanding at that time (and subject to reduction in respect of any further part payments made by the Respondent to the Claimant since that date);

2. The Claimant's complaint of unpaid holiday pay is well founded. The Respondent must pay to the Claimant the gross sum of **£983.08**. The Claimant is responsible for any tax and employee national insurance due;

3. The Claimant's complaint of unfair dismissal is dismissed as the Claimant did not have the 2 years' service required to bring such a complaint.

REASONS

Introduction

1. The Claimant was employed as a bar supervisor. He presented his ET1 Claim Form on 26 September 2023 complaining of unfair dismissal, unpaid/late payment of wages, that he was owed 9 days holiday from August 2023 and also accrued and untaken holiday owed to him on the termination of employment.

2. On 21 January 2024 the Claimant was sent a strike out warning for his unfair dismissal complaint on the basis he did not have 2 years service. The Claimant was given until 29 January 2024 to give reasons why his unfair dismissal complaint should not be struck out; which he did not do. I have therefore dismissed that complaint and there is no suggestion the Claimant did have 2 years' qualifying service.

3. The Respondent filed their ET3 late and an extension of time was granted. The parties had in the meantime been involved in negotiations with the assistance of Acas. The ET3 asserted the Claimant had walked out of work on 1 August 2023 and they had had to close the business. In the ET3 the Respondent accepted a final wage payment was owed to the Claimant and they said they had paid, and were continuing to pay, £50 a month towards that until the debt is cleared because Respondent's only means to pay it (as they were not trading), was out of Mrs Phillips' personal pension.

4. The ET3 says the Respondent disputes the holiday pay claim. The ET3 states that the holiday year runs from 1 April to 31 March each year and that the Claimant had walked out of work on 1 August 2023. The ET3 says: "*The days where he has not clocked in for work were taken as his leave days, this is how holidays are recorded in our system."* The ET3 says the Claimant had made an allegation, via Acas, that the payroll and clocking in machines had been tampered with and the Respondent disputes that allegation.

5. In the meantime, the case had been listed for a final hearing by way of video on 18 April. The parties had sent in documents in a piecemeal fashion and so on 17 April I directed each party to re-send in one email the documents they wished to rely upon. Both parties did so and I confirmed with them I had everything they wished to rely upon. There had been no provision for written witness statements and so the Claimant gave evidence under oath and was cross examined by Mr Phillips. Mr Phillips then gave evidenced under oath being cross examined by the Claimant. The parties had the opportunity to make closing comments. Due to lack of time and a need to carefully review some documents, Judgment was reserved to be delivered in writing.

The Issues to be Decided

6. Mr Phillips accepted there had been an unauthorised deduction from wages in not paying the Claimant his final month's wages and there was no objection to Judgment being entered for the Claimant in that respect, albeit that part payments made since have reduced the sum down, as agreed.

7. The dispute for me to decide relates to the Claimant's holiday pay claim. The Claimant told me that he was no longer seeking 9 days holiday he said he had booked for August 2023, because he accepted that in fact his employment came to an end at the start of August. His employment therefore ended before he had the opportunity to take that leave. The Claimant said, however, that he was seeking payment for accrued and untaken holiday in the holiday year running to the date his employment terminated. The Respondent said the Claimant had taken all his holiday and there were no sums owing.

The relevant law

Unauthorised deduction from wages

8. Section 13 of the Employment Rights Act 1996 ("ERA") provides the right not to suffer unauthorised deductions. The relevant parts state:

   "13(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…

(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…

9. Section 14 disapplies section 13 in certain circumstances. In particular, where the purpose of a deduction is reimbursement of an overpayment of wages or overpayment in respect of expenses incurred by the worker in carrying out his employment.

10. Section 23 ERA provides the right for a worker to complain to the employment tribunal that his employer has made a deduction from his wages in contravention of section 13. Under section 24 where an employment tribunal finds a complaint is well founded it must make a declaration to that effect and order the employer to pay to the worker the amount of any deduction made in contravention of section 13.

11. Section 27 sets out the meaning of "wages" for that part of ERA and includes holiday pay.

Holiday pay under the Working Time Regulations

12. Regulation 13 of the Working Time Regulations 1998 gives a worker an entitlement to 4 weeks' annual leave in each leave year. Unless set out in a relevant agreement the leave year runs from the date their employment commenced. Regulation 13A provides an entitlement to a further 1.6 weeks annual leave in each leave year with an aggregate maximum of 28 days.

13. Under Regulations 14 and 15A, where the proportion of leave taken by a worker is less than the proportion of the leave year which has expired, the employer must make a payment in lieu of leave in accordance with the calculation method set out at Regulation 14(3) unless there is a relevant agreement that provides for an alternative sum. A relevant agreement is a workforce or collective agreement or any other legally enforceable written agreement between the parties.

14. Under the Working Time Regulations the amount of any payment is also set by reference to a week's pay for each week's leave under sections 221 to 224 of ERA 1996, excluding sections 227 and 228 and with some adjustments. If pay does not vary with the amount of work done, a week's pay is the amount payable under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week (section 221(2)). In *Connor v Chief Constable of the South Yorkshire Police [2023] EAT 42*, the Employment Appeal Tribunal noted that the Working Time Regulations refer to calculation of holiday based on weeks. It suggested that, when applying the statutory formula where a worker receives an annual salary with no extras, a week's wages will be calculated by dividing the annual figure by 52 which provides the multiplicand. The multiplier is the proportion of the leave year that has elapsed (and any leave taken is deducted). To calculate pay for unused holiday correctly, the starting point is the working week, or proportion thereof, that would be paid if someone was working. That is then multiplied by the figure reached by application of the formula within the statute. It is only the interpretation of regulation 14(3)(b) of the WTR 1998 and any "relevant agreement" that can impact on this. he question then arises whether a relevant agreement can provide for a payment in lieu of unused holiday that would be less than that provided for by the statutory formula. The Employment Appeal Tribunal also held that a relevant agreement cannot not provide a formula which would result in a worker being paid less than the usual amount they would

have been paid when taking annual leave while working.

15. How a week's pay should be calculated has been subject to litigation in the European Court and domestic tribunals and courts. I do not need to go into the detail here save to say that it imports a notion of entitlement to normal remuneration for the leave period in question, at least in respect of the 4 week entitlement protected by the European Working Time Directive. The Employment Rights (Amendment, Regulation and Transitional Provisions) Regulations 2023 which came into effect on 1 January 2024 made some amendments to the definition of a week's pay with the aim of codifying previously retained EU law and domestic law, required because of EU retained law otherwise ceasing to have effect.

16. Regulation 15 makes provision for how a worker and an employee can notify the other of dates on which leave is to be taken. The employer can require the worker to take leave by giving twice as much notice as the length of the leave and must be given before the relevant date. These rights and obligations can be varied or excluded by a relevant agreement.

17. Regulation 30 provides a method of enforcement for claims under the Working Time Regulations 1998, this includes a complaint that an employer has failed to pay the worker the whole or any part of any amount due to him under regulation 14(2) or 16(1). Where a complaint is held to be well founded the tribunal must make a declaration to that effect and under regulation 30(5) must order the employer to pay the worker the amount which it finds to be due. It is also possible to bring a complaint of non payment of Working Time Regulation holiday pay as an unauthorised deduction from wages claim.

18. Employees often also have separate contractual entitlements to holiday pay which are governed by contractual principles and can also be brought as unauthorised deduction from wages claims. Where a worker has a contractual right to holiday as well as a right under the Working Time Regulations the worker may take advantage of whichever is more favourable (Regulation 17, Working Time Regulations).

The contractual provisions

19. The contract of employment says about holiday and holiday pay:

"Hours of Work and Overtime

4.1 You are required to work 2,100 hours a year which does not include paid holidays or public holidays. This is an average of 45 hours a week over 46.54 weeks ("your average weekly hours"). These hours will be worked from Wednesday to Saturday and Sunday on a rota basis depending on the needs of the business.

4.2 You may be required to work such additional hours in excess of your average weekly hours as are reasonably necessary for the proper performance of your duties and to meet the needs of the Company's business. Wherever possible, your line manager will give you reasonable notice of any additional hours and they will be given back as time-in-lieu…

4.5 The Company reserves the right to require you to work different hours of work according to the needs of the business, whether on a temporary or a permanent basis. This may involve shorter or longer hours of work, or working on different days of the week or at different times of the day in accordance with operational requirements. It is a condition of your employment that you agree to work different hours if requested to do so by the Company.

Salary

5.1 Your pay will be £22,000.00 per annum in arrears on or before the first working week of the month for the previous month…

Deductions from Wages

6.2 The Company reserves the right and you irrevocably authorise the Company at any time during or upon termination of your employment, to deduct from your pay and/or other monies due to you an amount equivalent to the following:

(i) Any overpayment of wages, salary, remuneration or other payment made to you during the course of your employment
(ii) The amount of any expenses claimed by you and paid but subsequently disallowed by the Company;
(iii) The cost of repairing any damage or loss of property of Company property, any fines or charges imposed upon or any other loss sustained by the Company or any third party, caused by your breach of contract or breach of the Company's rules or as a result of your negligence or dishonesty; and
(iv) Any other sums you may owe the Company at any time…

Holiday

8.1 The Company's holiday year is from 1st April to 31st March.

8.2 You will be entitled to 28 days holiday during each holiday year regardless of the number of hours that you actually work. This includes bank and public holidays.

8.3 You will accrue holiday at the rate of 2.4 days per calendar month. If your employment starts or finishes part way through the holiday year, your holiday entitlement during that year shall be calculated on a pro-rata basis. Holiday entitlement for part-time employees is pro rata, based on the number of hours worked compared with those worked by a full-time employee.

8.4 Your holiday entitlement will be taken at the dates set by your line manager to serve the purposes of the business. You may request holiday dates other than other than those set by the management by submitting dates to your line manager. You must give at least one month's notice of any proposed holiday dates outside of those set by the Company and these must be agreed by your line manager in advance. Whilst every effort will be made to facilitate such holiday dates, agreement will be at the discretion of the Company.

8.5 The company requires you to take holiday on the specific dates notified to you, including during any period in which the company shuts down during the summer or at Christmas/ New Year. You must retain a sufficient number of holidays from your annual entitlement to cover any such dates…

8.7 You shall not be entitled to payment in lieu of untaken holiday except on termination of employment. Unless required by law, you will have no right to be paid in lieu for holiday accrued but not taken in previous holiday years. The amount of any payment in lieu on termination of employment shall be equal to your normal pay for the number of hours holiday that has accrued but has not been taken by you…

8.9 If you have taken more holiday than your accrued entitlement at the date your employment terminates, the Company shall be entitled to deduct from any payments due to you an amount equivalent to the hours holiday you have taken in excess of your entitlement at the rate of your normal pay. If the amount of excess holiday pay exceeds the amount of any payments due to you, you will be required

to reimburse the Company such excess holiday pay at the same rate…

Holiday pay

9.1 You will be paid your normal basic pay during holidays, at the rate of 10 hours a day."

Findings of fact

20. This case is primarily a dispute about whether the Claimant took any holiday in the period 1 April 2023 (the agreed start date of the holiday year) until his employment terminated at the start of August 2023. At the hearing the Claimant accepted his employment did terminate at the start of August 2023. During the hearing the parties referred to correspondence that had passed between them via Acas and both parties consented to my seeing and taking into account that Acas correspondence. It is relevant as it sets out the background to the arguments and evidence put before me at the hearing.

21. After receiving his P45 and August payslip the Claimant sent emails to say he had worked a week in August which had not been paid, that he had taken 9 days holiday in August that he should be paid for, and that any outstanding holidays should be included in the payslip too. He said his July wages were also outstanding. (By the time of the hearing before me the Claimant accepted he had not worked a week in August and that he had not taken 9 days holiday in August, because his employment had terminated at the start of August).

22. On 13 February 2024 the Claimant sent an email to the Respondent saying he was still owed £986.36 for July wages and £1250.40 in holiday pay. The Claimant said he had accrued holiday at 2.4 days a month which was 12 days and he was entitled to be paid 10 hours a day which totalled 120 hours. He said at a base rate of £10.42 he was owed £1250.40.

23. On 15 February 2024 the Respondent sent an email to the Claimant and to Acas saying there were instances in the clocking in records where the Claimant had not worked 5 days a week and had not fulfilled his contractual hours. They said the Respondent had a responsibility to ensure the accuracy of the records and they did not agree that any holiday entitlement was owed. On 19 February the Respondent emailed the Claimant with extracts from the employment contract saying that the Claimant's last day of work was 1 August. The email said:

> *"We have also scrutinised your official clocking-in records/diary and contractual hours worked. These are collated by line managers and our administrative assistant who in turn forward them onto the payroll department to process. This highlights that on many occasions your contractual hours were not met.*
>
> *Summary as follows:*
>
> *From 1st April to August 1st 2023 totals 17 weeks and 3 days, totalling 710 anticipated contractual hours to be worked for the company. Your actual hours worked for the same period total (rounded up) to 605 hours which is an obvious and significant shortfall of over 115 hours. This did not meet the needs of the company and/or meet the requirements of your contract. Actual records can be forwarded upon request.*
>
> *As previously mentioned in our emails, we do not feel any holiday entitlement is due when considering the shortfall in hours worked…"*

24. The Claimant responded to point out that the contract said he was entitled to 28 days holiday a year regardless of the number of hours worked. On 21 February 2024 the Respondent sent a further email to Acas saying they disputed 9 days of holiday were owed and that the Claimant: "*has not worked the full weekly hours (5 day week) as stipulated in his contract and there are many days where he has not clocked in at all; these are considered as "days off" and deducted from his termination of holiday entitlement. This is how our system tracks holidays/leave taken by employees.*

Furthermore, there are four days where he has come into work, and clocked in for a short amount of hours to open the premises and accept a delivery on Tuesday morning (4th July - 1.10 mins. 11th July – 57 mins and 1st August – 39 mins). These were intended to address and make up for any shortfall in previous week's hours worked and were not considered as a days' work. These Tuesdays were also allocated to him as "leave days."

We understand that the clocking in machine was new in May however, to have a break of 9 days of not registering his attendance in work as bar supervisor is questionable, especially as he clocked in for 2 days prior to the non registration as can be seen from his records attached. This issue was constantly addressed and showed significant improvement and accuracy towards the end of the month. Prior to the machine being installed a diary was used to sign in/out. These records are available on request. It shows very much a similar picture where Mr Kliemek has underworked his contractual hours.

From his clocking-in records, he has already taken 12 days. However, taking into consideration the newness of the machine etc, we are prepared to offer 4 days holiday entitlement…"

25. On 22 February the Claimant said, via Acas, that he wanted 9 days holiday that had been granted to him by the company. He said he was not informed that Tuesdays had been allocated as leave days and it was possible to change hours on the clocking in machine and so he would not respect any proof based on that system. He said the diary also went missing several times and that the hours in it were not accurate either as it had been used as an excuse to make late payment.

26. On 25 March the Claimant sent a further calculation saying that he was employed until the end of August and so he was entitled to 4 months holiday at 2.4 days a month which was 9.6 days. He said that as he did not work for the full length of August he would only claim 8 days. He said he worked fixed hours and received the same wages every month.

27. I have an email from Francine Richards, former manager, dated 4 March 2024 stating that she disputes an accusation that the signing in books or clocking in machines have ever been altered and she says that all records and timekeeping systems were maintained with the utmost accuracy and compliance. Her email says that staff were responsible for their own signing/clocking in. Her email says that any holiday requests were granted based on holiday pay prediction not accrued time off. I also have an email from Donna Smith-Jones administration assistant dated 25 March 2024 with screenshots of clocking in records. In the email Ms Smith-Jones said that the software did not allow information to be deleted and if changes of timings were made the system shows them. Neither Ms Richards or Ms Smith-Jones attended the hearing to give evidence.

28. The Respondent's bundle of documents includes an excel spreadsheet which as I understand it identifies the dates where it is said the Claimant did not work/took annual leave identified by yellow highlight. Based on that, the disputed dates are:

- Friday 19 May;
- Saturday 20 May;
- Sunday 21 May;
- Tuesday 23 May;
- Wednesday 24 May;
- Thursday 25 May;
- Friday 26 May;
- Saturday 27 May;
- Thursday 15 June;
- Tuesday 27 June;
- Tuesday 4 July;
- Tuesday 11 July;
- Thursday 20 July;
- Wednesday 26 July;
- Sunday 30 July;
- Tuesday 1 August.

29. I also have the clocking in/out records. These on the face of them show the Claimant on 18 May 2023 starting a shift at 22:20 and then clocking out in the early morning of Friday 19 May at 00:41. They show the Claimant then clocking straight back in and out again at 02:52.

30. The records then show the Claimant clocking in on the evening of 19 May at 19:55 but not clocking out until 08:37 on Tuesday 23 May in the morning. The records then show the Claimant clocking in again at 09:55 on 23 May and clocking out again immediately thereafter. There is nothing for the 24 or 25 May with the next entry being the Claimant clocking in at 04:05 on Friday 26 May and clocking out again immediately thereafter. There is nothing for the 27 May with the Claimant next clocking on at 22:12 on 30 May.

31. The Claimant said in evidence he had not booked holiday for May 2023. He said that he had also never, for example, after the event booked a day when he had been off work as being holiday. It was put to the Claimant in cross examination that he had clocked in and out on 17 and 18 May and that according to Ms Richards the Claimant had then had the next 8 days off work as there was no clocking in or clocking out and the Claimant had not clocked in on 28 or 29 May but then did so on 30 May. The Claimant said that he might have forgotten to clock in and out and he was not aware of the records and no one had spoken to him about out. He said it would have been a genuine mistake and not done on purpose. The Claimant said that he could not think of any reason why he would have taken holiday in May and even if he did it would be 2 or 3 days at the most (which he could not remember taking) as he did not take long holidays other than going to Poland for 2 or more weeks. The Claimant said there was no reason to take such a long holiday in May. Certainly, the Claimant's bank records do not show him leaving the country at this time.

32. I have to making findings of fact applying the balance of probabilities. I cannot on the balance of probabilities conclude that the Claimant was on annual leave on Friday 19 May 2023 because I can see that the Claimant clocked in at 19:55; on the face of it, the start of an evening shift. I appreciate there is no clocking out until 23 May 2023 but it appears to me on the balance of probabilities on the evidence before me that the absence of a clocking out in the early morning of 20 May 2023 would be user error on the Claimant's part. That also accords with the Respondent's email of 21 February 2023 where it was said: "*This issue was constantly addressed and showed significant improvement and accuracy towards the end of the month."* On the balance of probabilities I cannot be satisfied that the Claimant did not work an evening shift on Friday 19 May 2023. I do not find he took annual leave that day.

33. Turning to Saturday 20 and Sunday 21 May there are, as stated, no clocking in or out records. My understanding is that Monday 22 May was a rest day and so no clocking or out would be expected. There is then a clocking out at 8:37 on Tuesday 23 May. The Claimant accepted in evidence that he would work some hours on some Tuesday mornings to deal with deliveries. Otherwise, under the terms of the written contract that I have Tuesday were not generally working days (unless the requirements were changed). Taking that into account, on the balance of probabilities, I consider it likely that the Claimant was seeking to clock in at 8:37 on Tuesday 23 May to deal with a delivery but mistakenly clocked out and then did a further clocking in and out. Of itself that latter action lends support to the conclusion the Claimant was at that time making some mistakes with his clocking in and out when dealing with a relatively new system.

34. The Respondent says this Tuesday morning working was there to address shortfalls in previous week's hours, were not considered as a day's work, and that Tuesdays were allocated to the Claimant as "leave days." My understanding is it is being said that at least some Tuesdays became working days not rest days, and that the Claimant worked a couple of hours of those Tuesday working days, and then took the rest of those Tuesday working days as annual leave. The Claimant's evidence was that there was no understanding or agreement that the Tuesdays were being taken as holiday days or holiday hours.

35. From the Respondent's perspective, I do not have direct witness evidence as to the Tuesday arrangements. Mr Phillips (or indeed Mrs Phillips) were not the managers on the ground, and I did not hear witness evidence from Ms Richards or Ms Smith-Jones. All I have are the emails sent to Acas/the Tribunal, as summarised, as against the Claimant's evidence. On the balance of probabilities, I prefer the evidence of the Claimant. He gave his evidence under oath. Moreover, I have some difficulty with understanding, if agreement was reached that some Tuesdays would become working days not rest days, and then be a mixed day of some annual leave and some working hours, why that would not be recorded in documentary form somewhere.

36. The Respondent's position seems to be that if full hours are not worked in a week they are considered to be days off or time off and it is said that is how their systems track holidays/ leave taken by employees. The contract of employment says: "*Your holiday entitlement will be taken at the dates set by your line manager to serve the purposes of the business."* Whilst I accept that this gives the Respondent the unilateral contractual right to set dates for annual leave that serve the purpose of the business, I do not consider that it, by itself, gives a contractual right after the event to unilaterally deem short hours worked in a week as being holiday. That is not what the express contractual provision says, and the Claimant says he was unaware of such an arrangement. I also do not consider that it would be sufficient to vary or disapply the provisions of the Working Time Regulations with regard to the giving of notice as it is not sufficiently precise in what it says the system is and how it works. I do accept, and in my industrial experience, sometimes employers and employees will agree after the event that days or hours not worked (for whatever reason) will be taken as paid annual leave as opposed to the time having to be made up, for example. But here on the balance of probabilities I do not have sufficient evidence of such an agreement having been reached as the Claimant denies that it did. I therefore do not find that Tuesday 23 May was a holiday day or included holiday hours.

37. I then turn back to Saturday 20 and Sunday 21 May. I do factor in here that there is no clocking in or out. But again, applying the balance of probabilities I do not find that these were annual leave days. I consider it more likely, considering my other findings, that it came down to user error on the part of the Claimant in not having clocked in and out. But that does mean that he was not working on those days. If they were days of annual leave, I consider it likely that the Respondent would have been able to produce evidence as to the booking of these. For example, through documents or evidence

from a manager including if there was some arrangement after the event that they be considered to be holiday days or holiday hours.

38. I next turn to Wednesday the 24 May, Thursday 25 May, Friday 26 May and Saturday 27 May. Here, as already identified, the Claimant did clock in at 04:05 on 26 May and then immediately clocked out again. That tends to suggest he was actually trying to clock out at the end of the shift that spanned the evening of 25 May into the early morning of 26 May, but that as he had not clocked in at the start of the shift the entries went awry. Again, this adds credence to my general findings that the Claimant may have in general been making user errors with the system at this time, rather than it being the case he was not in work. So on the balance of probabilities, I consider it likely that he did work an evening shift on Thursday the 25 May rather than taking annual leave. Again, applying the balance of probabilities on the evidence before me I cannot be satisfied that the Claimant did not work on 24 May, 26 May and 27 May (where there are no clocking in records for the evening bar shifts and no clocking in until the evening of 30 May), rather than again making user errors with the clocking in system. I have taken into account the number of days involved here across May 2023. But on the evidence before me, I cannot be satisfied that these were holiday days or days the Claimant did not work when otherwise rostered to work, as opposed to the Claimant having worked but not having properly clocked in and out. I do not find that these were holiday days or hours.

39. Turning to the 15 June the records show the Claimant clocking in at 19:52 but then not clocking out. The Respondent's email of 25 March 2024 confirms that the Claimant had failed to clock out and that the administrator had not been able to amend the entries to include the clocking out time as she did not have the clock out time to enter. On the balance of probabilities again I do not find that it was a holiday day or a day not worked. The Claimant had clocked in. On the balance of probabilities it is more likely the Claimant did work but failed to clock out on the system.

40. Tuesday 27 June has the Claimant clocking in at 17:15 and immediately out again. The Claimant was clearly in work for some purpose so as to enable him to undertake that clocking in and out activity. I do not have any detail from either party as to the work the Claimant was supposed to or did that day or any evidence about arrangements, for example, to work some hours and take some annual leave hours. On the balance of probabilities, I cannot be satisfied that it was a day or hours of holiday as I do not have sufficient evidence to support that, and the Claimant clearly was in work for some time that day. I cannot be satisfied that there was an arrangement to work a full shift that day that the Claimant did not fulfill as opposed to the Claimant instead working but making errors with his clocking in and out. In any event, for the reasons already given above, I also do not find that the contractual terms allow the Respondent after the event to unilaterally deem short hours as being holiday hours.

41. The entry for Tuesday 4 July shows the Claimant clocking in at 08:10 and out at 09:20. The entry for Tuesday 11 July show the Claimant clocking in at 08:52 and out at 09:49. My analysis is same as already undertaken above. On the balance of probabilities, I prefer the Claimant's evidence that there was no understanding or agreement in place that Tuesdays were going to become working days with then a split between working hours and holiday hours. I have no direct evidence of such an arrangement from the Respondent, particularly direct witness evidence. I have also found that the contractual provision (nor the Working Time Regulations) allowed the Respondent, absent agreement from the Claimant to after the event unilaterally deem short hours worked in a period to become annual leave.

42. Thursday 20 July shows the Claimant clocking in at 11:31 and clocking out at 14:59. Based on the records the Claimant was therefore in work that day and undertook some work. I therefore cannot find on the evidence before me that it was a day's annual leave. I also do not have sufficient evidence before me to establish on the balance of

probabilities that there was an arrangement or agreement in place that some hours that day would be treated as annual leave hours.

43. Wednesday 26 July does not have any clocking in or out records. The Claimant clocked out previously at 00:12 in the very early morning of Sunday 23 July (and to my understanding then would then have been non-working rest days). The Claimant then clocked in again at 16:58 on Thursday 27 July for an evening shift. Given my other findings as to the propensity for the Claimant to make mistakes with clocking in and clocking out, on the balance of probabilities and in view of the lack of direct evidence from the Respondent that there was some agreement or arrangement that the Claimant was taking annual leave on 26 July, I cannot be satisfied that this was a day of annual leave. I consider it more likely that the Claimant worked but failed to clock in and out.

44. The Claimant clocked out from a night shift that had started on the evening of Saturday 29 July at 05:13 in the morning on Sunday 30 July. It does not show the Claimant clocking in again for a night shift on the evening of 30 July. The Claimant clocked in again at 09:10 on Tuesday 1 August (my understanding being the Monday was a non working rest day). I do not have any evidence before me that the Claimant was rostered to work that Sunday night. But in any event if he was, given my other findings as to the propensity for the Claimant to make mistakes with clocking in and clocking out, on the balance of probabilities, I do not find it sufficiently established that there was an arrangement that this was a day of annual leave as opposed to the Claimant making errors with clocking in and out but having actually worked.

45. That leaves Tuesday 1 August where the Claimant clocked in at 09:10 and clocked out at 09:49. My analysis in this regard is the same as the other Tuesdays dealt with above and I do not find it established on the balance of probabilities that the Claimant took annual leave that day.

Conclusions

46. For the reasons given above, in the holiday year 1 April 2023 to the termination of employment on 1 August 2023 I do not find it established on the balance of probabilities that the Claimant took annual leave days or annual leave hours. I also do not find that the Respondent had the contractual right to deem any shortfall of hours worked as being annual leave without the Claimant's agreement. I have not found the Claimant gave any such agreement. Alternatively, there was no effective notice given by the Respondent of a requirement to take annual leave under the Working Time Regulations.

47. Given my findings about the accuracy of the clocking in records I would also, in any event, not be able to make a finding about a shortfall of worked hours. I do not have sufficient evidence to find on the balance of probabilities that there was a shortfall in actual hours worked because I do not consider the clocking in records are accurate and I do not have any other evidence about the hours the Claimant was working or not working. The contractual obligation is to work 2100 hours over a year excluding paid holidays and public holidays, rather than being expressed in other periods. Those hours are expressed as an average of 45 hours a week (but that would not necessarily have to be the actual figure worked in any one week) are to be set by the rota. But I do not have a copy of the Claimant's rotas.

48. The Claimant worked 4 months in the holiday year. Under his contract (if it is taken to be a relevant agreement), he accrued 9.6 days annual leave. In fairness to Mr Phillips he confirmed that 9.6 days would be the Claimant's entitlement if the Claimant's claim was well founded (a figure higher than that actually put forward by the Claimant).

49. Under the Working Time Regulations calculation the Claimant is entitled to be paid a week's pay for each week's leave, which is the amount due under his contract if he worked normal working hours in a week. The Claimant's contract says that the amount paid on termination shall be equal to the normal pay for the number of hours' holiday that has accrued but has not been taken. The difficulty this presents is that holiday entitlement has been calculated in days rather than hours. There is also no definition of "normal pay" other than clause 9.1 which says normal basic pay is at the rate of 10 hours a day, but that is by specific reference to when a holiday is taken rather than accrued holiday payable on termination.

50. The Claimant was paid a monthly salary which at the time of termination/the calculation date was £2000 gross a month which is £24,000 a year and £461.54 a week. I take the Claimant's normal working hours to be 45 a week. I take the normal working week to be 4.5 days. I use this figure because the contract (albeit in relation to taking holidays) refers to 10 hours a day and if there is an average of 45 hours a week that would equate to working 4.5 days a week on average. It also correlates with the contractual obligation to work hours over Wednesday to "Saturday and Sunday" (i.e. it could be over 4 or 5 days a week – so 4.5 on average). The Claimant was therefore entitled to 2.13 weeks holiday pay on termination (9.6 days holiday entitlement against an average working week of 4.5 days). £461.54 x 2.13 = £983.08. The Claimant is therefore owed the gross sum of £983.08 by way of holiday pay due on termination.

51. I do not find that the Respondent is contractually entitled to offset against that their claim that the Claimant owed them hours back. For the reasons given I cannot find on the evidence before me that there were any such hours as I have found the clocking in records to be inaccurate. Moreover, the Claimant is entitled to bring his claim under the Working Time Regulations, and whilst it is possible to have a relevant agreement in place, such a relevant agreement cannot provide a formula for the Claimant to be paid less than the usual amount he would be paid when taking annual leave when working. As I discussed with the Respondent at the hearing, the Working Time Regulations are generally seen as protective health and safety measures and the approach taken in case law has been to guard against contractual measures being able to dilute those statutory rights by, for example, off setting other sums.

Employment Judge R Harfield

Date 17 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 18 July 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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