EMPLOYMENT TRIBUNALS

Claimant: Mr E Myers

Respondent: Auxeris Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: LONDON CENTRAL (BY CVP)
On: 3 DECEMBER 2024

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances
For the claimant: In person
For the respondent: Ms E Mayhew-Hills (Litigation Consultant- Croner)

JUDGMENT

The claimant's claims for unpaid notice pay and for unlawful deduction of wages are not successful and are dismissed.

The claimant is entitled to the sum of £634.62 (gross) being the amount of 6 day's accrued by untaken holiday pay. The respondent must account to HMRC for income tax and National Insurance contributions due on this sum.

REASONS

Background and Introduction

1. This was a Final Hearing (listed for 1 day) in which the claimant made claims for: a) notice pay; b) outstanding holiday pay and c) unlawful deduction of wages.

2. The claimant commenced employment with the respondent on 11 September 2023, which terminated on 19 March 2024.The claimant notified ACAS of the dispute with the respondent on 19th March 2024 and obtained an Early Conciliation certificate on 3rd April 2024. He presented his Claim Form on the 21st May 2024. The respondent denied all the claims.

3. The final hearing had been listed for 2 hours on 11 September 2024 before EJ Gidney. However, it was clear that the case was not ready to be heard and that hearing was converted to a Case Management Preliminary Hearing. The final hearing was rescheduled for 3 December (1 day).

4. On 11 September, the parties discussed the Issues with the Judge, and these were set out at Annex 1 of the Case Management Order (CMO) at pages 31-40 of the Hearing Bundle. The outstanding issue of whether the claimant was owed payment in lieu of his 1 month notice period depended on whether (as alleged by the respondent) he had agreed to waive this notice period during a Teams meeting on 19 March 2024.

5. The claimant had recorded the meeting without the respondent's knowledge at the time. The claimant was ordered by EJ Gidney to provide the respondent with every recording in his possession of the 19 March meeting and a transcript of those recordings. The claimant was also required to confirm that the recordings were complete and that no recording had been withheld. The CMO also ordered the claimant to send the respondent every recording.

6. At the commencement of the hearing, I clarified the position with regard to the recordings and transcripts with the claimant. He accepted that only excerpts from the meeting were provided at pages 185-191 of the Agreed Hearing Bundle. The claimant said that he no longer had the full recordings in his possession as they could not be retrieved. He said that he had edited the recordings before the hearing on 11 September and had retained the sections which he believed were relevant. He accepted that his interpretation of relevance may not be the same as the legal interpretation of relevance for the purposes of his claims.

7. I asked the claimant why he had not told EJ Gidney that he did not have the full recordings at the hearing on 11 September. The claimant said that although he had already edited the recordings, he had not realised at that stage that he could not retrieve the deletions. He accepted, however, that he had not explained the situation to the respondent earlier.

Conduct of the Hearing

8. The hearing was conducted remotely using CVP. There was an Agreed Bundle of 274 pages. Page references are to that Bundle unless otherwise specified.

9. The Tribunal heard evidence from the claimant and on behalf of the respondent from: Nicola Webster-Hart (Account and Recruitment Director); Louise Plint (CEO) and Jean-Pierre Jordaan (CFO and COO). The witnesses adopted their

written witness statements on oath and there was an opportunity for cross-examination and re-examination for each witness.

10. Each party made oral submissions; neither party cited any legal authorities. The hearing concluded at 3.55 and judgment was reserved.

The Issues

11. The outstanding issues for determination were essentially the same as those contained in Annex 1 but were narrowed and amended during the course of this hearing.

Arrears of Pay

12. The claimant accepted that he had received outstanding sums owed for January and February 2024 as part of his final payment made in April 2024.

Notice Pay

13. The parties accepted that the claimant was entitled to 1 months' notice (clause 16.1 of his contract of employment (at pages 48-62), but that he had not been paid his notice, which was £2291.67 (gross). The respondent said that the claimant had waived his notice period during the meeting on 19 March 2024, the claimant denied this: he said he was willing to work his notice period and should have been paid. He relied on the excerpts from the recording as proof.

Holiday Pay

14. The parties accepted that the claimant was entitled to 25 days' holiday (excluding bank holidays) per calendar year. The claimant says he is owed 6 days' holiday pay (at £105.77 (gross) per day). Ms Plint accepted in her evidence that the claimant was owed 5 days' holiday pay.

Unlawful Deduction of Wages

15. The parties accepted that the respondent had deducted £350 from the final balancing payment made to the claimant in April 2024. The claimant accepted that he had been provided with a work laptop, which he had not returned following the termination of his employment. The claimant maintained that the respondent was contractually obliged to cover his reasonable expenses in returning the laptop and that they had not done so. The respondent said that the claimant was obliged to return the laptop and that his failure to do so had resulted in the deduction from his wages. This was allowed by virtue of clause 3.4 of the claimant's employment contract.

Burden of Proof

16. It is for the claimant to prove his case; the standard of proof is the balance of probabilities.

Findings of Fact

17. I shall only make such findings of fact as are necessary to determine the outstanding issues set out above.

Notice Pay

18. Following an email to Ms Webster-Hart sent on 19 March 2024 (at 14.53) in which the claimant set out the outstanding payments owed to him for the period January to March 2024, the claimant accepted that he had formally resigned by another email (sent at 16.52) on 19 March 2024 (at page 177).

19. The claimant said that his resignation was due to "*the inconsistencies with salary payments*". The claimant said his resignation was "*effective immediately*" but also said that he was "*happy to work my 1 month notice period*".

20. There was a pre-arranged meeting held at 17.00 on 19 March 2024 (with Ms Plint and Mr Jordaan) which the claimant said he wished to retain in order to discuss outstanding wages and to which he wished to bring a representative, Ms Nadine Myers. The claimant's case is that he never agreed to waive his notice period during the meeting as alleged by the respondent.

The excerpts of the 19 March meeting

21. The excerpts produced by the claimant do not appear to follow any logical or chronological sequence and are often cut off mid-sentence. I also note that the claimant has inserted his own "interpretative" headings to the excerpts, ie indicating the point he wishes to make. I do not regard these headings as factual evidence in themselves.

22. The claimant was referred in cross-examination to page 187. Mr Jordaan has an exchange with the claimant's representative: he says that the claimant can leave today (ie 19 March) but he will not get paid for the month he has not worked. Ms Myers says this makes sense. The claimant accepted that this was said. At page 189 the claimant confirmed, in response to a question from his own representative, that he was "*happy to continue working*" during the notice period.

23. The claimant said he had never agreed to forego his notice period. There is no specific reference in the excerpts selected as relevant by the claimant, to him insisting that he should be allowed to work the notice period or to be paid in lieu.

24. I find that the excerpts selected and edited by the claimant are inconclusive on their own, to support his case that he did not agree to waive the notice period at the meeting of 19 March. I must, therefore, consider the surrounding documentation and evidence.

25. Ms Plint's evidence was that she asked the claimant if he wished to remain working during the notice period or whether he would prefer a clean break. She said the claimant replied that he wanted to do what was best for the business and so was open minded either way. It was after this comment that the claimant's representative made the comment about the claimant being paid for work done (page 187). The claimant denied making the comment about doing what was best for the business.

26. Ms Plint said that in order to assess whether the respondent needed the claimant to work out his notice, he was asked to provide a list of his outstanding tasks and they would get back to him to confirm whether he should leave with immediate effect or work out his notice.

27. The claimant was referred in cross examination to page 179 which was an email from him to Ms Plint and Mr Jordaan sent at 20.40 on 19 March 2024 attaching a copy of his calendar for the next two weeks. It was put to him that this supported the respondent's argument that it had been agreed that the respondent would let the claimant know if they wished him to work during the notice period. The claimant merely repeated his assertion that he had not agreed to forego his notice period.

28. The claimant was also referred to page 182 which showed that all the entries on his calendar had been inserted on 19 March. The claimant said that it was not uncommon for him to do this all at once for each week on a Monday. It was noted that 19 March was in fact a Tuesday.

29. At page 194 the claimant emailed Ms Plint and Mr Jordaan on 20 March to say that he was now within his notice period and was "*awaiting further instruction*". This appears to support the respondent's assertion that they were deciding on whether he should work his notice period.

30. At page 195, Ms Plint emailed the claimant on 20 March to confirm the position. Ms Plint accepted in her oral evidence that she could have expressed herself more clearly but the email confirmed two options for the claimant: to leave immediately with no further payment or to work out his notice period with pay. The respondent chose the first option. The remainder of the email clarified final payments and administrative details such as the return of the company's laptop.

31. Given the inconclusive nature of the transcripts provided by the claimant and given the surrounding documentation, I prefer on a balance of probabilities, the respondent's evidence that the claimant did agree to let the respondent decide whether they wished him to work his notice – his own email of 20 March says he is "*awaiting further instructions*".

32. It may be that the claimant believed that he would be paid in lieu of notice, but the excerpts provided by him show his representative (acting on his behalf) with the claimant present, accepting that he would only be paid for work actually done.

33. I raised with Ms Plint the terms of the claimant's employment contract. She accepted that clause 16.1 said that if the employee gave notice there was no express right for the employer to pay in lieu of notice. However, she said that the respondent believed that the claimant had waived his right to notice during the 19 March meeting.

34. I referred her to clause 21.6 in the employment contract which said that any variation to the agreement must be in writing and signed by each party, which had not been the case. Ms Plint in turn referred to clause 21.3 which allowed

the respondent to make reasonable changes and to notify the claimant in writing as soon as possible. Ms Plint said that this was done in her email of 20 March 2024. Although she accepted that again, this could have been more clearly expressed by her in that email.

35. In the light of the evidence presented, I find that the claimant has not shown on a balance of probabilities that he is entitled to his notice pay.

Holiday Pay

36. The claimant had been entitled to carry over 3 days holiday from the year 2023. He accepted that he had agreed to adopt the flexible holiday arrangement available within the respondent's organisation but said he had not been aware that this meant that he lost his right to carry over holiday. The flexible arrangement meant that an employee recorded his/her own holiday and did not need to ask permission to take holiday. This was clearly an expression of trust by the respondent.

37. The claimant explained in his oral evidence that he had in fact been abroad visiting family in Trinidad and then Brazil from end January/early February 2024 until he returned to the UK in early April 2024. However, he said that he had been working during that period and had only taken 5 days holiday. I did not find the claimant's evidence on the number of days' holiday taken to be plausible.

38. However, the respondent did not produce any evidence to contradict the claimant's claim as regards his holiday entitlement. Accordingly, I find that **the claimant is entitled to 6 days' holiday pay at £105.77 per day, making a total of £634.62 (gross).**

Unlawful Deduction of Wages

39. There was no dispute that the claimant had been given the use of a company laptop, which he took with him on his extended trip abroad in January – April 2024. There was no dispute that the employment ended with effect from 19 March 2024. Clause 14 of the employment agreement provided for return of company property to the CEO upon request and in any event prior to the termination of employment.

40. In her email of 20 March, Ms Plint referred to the laptop. The respondent offered to sell the laptop to the claimant for £350. If he wished to return the laptop the respondent would withhold £350 until it was returned in comparable condition to when it was provided.

41. The claimant continually referred in his evidence to clause 3.3 of the employment agreement, which said that employees would be reimbursed for "*all reasonable expenses properly incurred in the performance of their duties"* for the company. The claimant understood this as meaning that the company was obliged to pay him the costs incurred by him in returning the laptop. I find that this was not a reasonable reading of this clause and is the claimant's own interpretation. He gave no explanation or authority for this interpretation.

42. The claimant was in Brazil in March 2024 and so could easily not return the laptop. However, he did not give any satisfactory explanation as to why he did not return the laptop when he returned to the UK in April 2024, other than to say he could not afford the train fare to return it to Ms Plint's address. I did not find this to be a plausible explanation. The claimant's responses were disingenuous and somewhat petulant.

43. The claimant accepted that he had seen and signed his employment agreement. He had been aware of clause 3.4, which allowed the respondent to make deductions of any sums owed to the company, and which provided the claimant's consent to such deductions. The claimant said he did not fully understand that clause. However, the agreement was signed by the claimant and the clause must stand.

44. The respondent was entitled to deduct £350 as the claimant acknowledged that he had never returned the laptop.

Conclusions

45. The claimant's claims for notice pay and unlawful deductions of wages do not succeed. The claimant's claim for unpaid holiday pay does succeed.

46. The claimant is entitled to the sum of £634.62 (gross) being 6 days' holiday pay. The respondent must account to HMRC for income tax and NIC on this sum.

Employment Judge Henderson

JUDGMENT SIGNED ON: 17 December 2024

JUDGMENT SENT TO THE PARTIES ON

30 December 2024

.....

AND ENTERED IN THE REGISTER

.....

FOR THE SECRETARY OF THE TRIBUNALS