



EMPLOYMENT TRIBUNALS

Claimant

H McKenzie

v

Respondent

Escape Kent Limited (1)
Timescape Adventures Limited (2)

Heard at: London South by CVP
Before: Employment Judge Anderson

On: 18 February 2025

Appearances

For the claimant: S Puleston (lay representative)

For the respondent: M Knell (director of both respondents)

RESERVED JUDGMENT

1. The second respondent has made an unlawful deduction from the claimant's wages and is ordered to pay the claimant the sum of £480.59 (less any necessary deductions for tax and national insurance) within 28 days from the date this judgment is sent to the parties.
2. The respondent's counterclaim is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as an Art Team Leader from 4 June 2021 until 29 September 2023. She brings a claim of unauthorised deductions from wages against the respondents, in the sum of £821.44. The respondents deny that wages are unpaid and on 29 October 2024 the second respondent counterclaimed against the claimant in the sum of £317.05.
2. The case was issued originally against Escape Makers Limited. At a preliminary hearing on 30 September 2024 Mr Knell said that the proper name of that company was Escape Kent Limited but the company was dissolved and the employer became Timescape Adventures Limited. As this is a wages claim and can only be enforced against the employer, all subsequent references within this judgment to 'the respondent' are to the second respondent unless indicated.

The Hearing

3. The parties filed a joint bundle of 87 pages. This included witness statements from the claimant and Mr Knell. Both witnesses attended the hearing and gave evidence on oath. The hearing was listed for three hours. Witness evidence and submissions took up almost the whole three hours and judgment was reserved.
4. When being cross examined the claimant said that the respondent had a practice of only allowing as much holiday to be taken as had been accrued at any point in the holiday year. The respondent said this was incorrect and that employees could take their annual leave entitlement at any time throughout the holiday year. The claimant said she had evidence. The point was relevant to the claimant's calculations but had not been set out explicitly in pleadings or the witness statement. I considered whether to allow further evidence to be adduced on this point and decided not to. The respondent would not only have had to consider and respond to that evidence within this brief and time pressured hearing, on a point that had not been raised previously, but in those circumstances is likely to have wanted to carry out a search for its own evidence to support any denial of the point. This is a relatively small wages claim and to have adjourned to a further hearing for that purpose would have been, in my view, a disproportionate use of the tribunal's resources.

The law

5. 13.— Right not to suffer unauthorised deductions (Employment Rights Act 1996)
 - (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.

...

6. 27.— Meaning of “wages” etc (Employment Rights Act 1996)
(1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, ...

Findings of Fact

7. The claimant was employed by Escape Kent Limited from 4 June 2021. By the time relevant to this claim (March 2023 to September 2023) the claimant's employment had transferred to Timescape Adventures Limited. Her employment ended on 29 September 2023.
8. The following terms were contained in the claimant's contract:
8.1. The claimant was contracted to work 169 hours per month.
8.2. She was entitled to 218.4 hours annual leave per annum.
8.3. The leave year was from 1 April until 31 March.
8.4. The claimant was entitled to carry over annual leave accrued and unused up to a value of 40 hours.
9. In the year commencing 1 April 2023 the claimant's wage was £17 per hour.
10. The claimant's wife became pregnant in 2022 and was due to give birth on 4 May 2023.
11. When the holiday year ended on 31 March 2023 the claimant had accrued but untaken holiday leave of 66.97 hours.
12. The claimant was entitled to two weeks statutory paternity leave on the birth of her child. Statutory paternity pay was significantly lower than the claimant's contractual wage.
13. It is the claimant's case that she had a meeting with Mr Knell in March 2023 at which she raised that she had substantial accrued leave and wanted to carry it over to when the baby was born, rather than taking it in the next month directly before the birth. The claimant claims that Mr Knell agreed to this carry over, which was in excess of the contractually allowed carry over of 40 hours, and said that he believed that the claimant was entitled to two weeks paternity pay and he thought this was at full pay. The claimant said that after that discussion he told her he had made a mistake and statutory paternity pay was only £172 per week, but because this was his mistake he would grant her an extra week of paternity leave at full pay.
14. The claimant said that these verbal discussions are evidenced in a WhatsApp exchange that took place on 7 June 2023.
15. Mr Knell said that no such conversations about carrying over more than 40 hours or the claimant being granted an extra week of leave took place. He said

that the exchange on 7 June 2023 does not evidence what the claimant says it does, and proves his case.

16. I need to make a finding on whether the conversations that the claimant claims took place, did in fact take place, as both the carrying over of extra leave and the provision of an extra week of paid leave, if offered by Mr Knell, would amount to variations of the claimant's contract.
17. I did not find the WhatsApp exchange of 7 June to be helpful in drawing conclusions. Mr Knell refers to 'looking to see if I can give you more than 2 weeks maternity to increase your pay a bit too', which seems an unlikely comment if he had already offered a further week at full pay. However the claimant refers to 'the 40 hrs you said you'd add for my paternity leave'. Mr Knell explained that he understood that to be a reference to 40 hours carry over of holiday from the previous holiday year which the claimant had used in May 2023 when she took most of the month off as leave after her daughter was born on the 4th. The usefulness of this document in terms of fact finding was further reduced by the matter that came up in evidence, briefly referred to above at paragraph 4, which was that the claimant's figures were, she said, based strictly on holiday accrued basis and she was not asking to use holiday not yet accrued. Mr Knell's position was that that was exactly what he thought she was doing, i.e. booking holiday based on her annual entitlement for the year rather than on what she had accrued to that point.
18. I have therefore looked at the other evidence before me. There is documentary evidence that the claimant raised a number of times with Mr Knell, after her resignation took effect, that she had been underpaid. She set out why she believed that to be the case and Mr Knell either did not respond, or when he did, it was not with an alternative calculation of the amount payable but a criticism of the claimant for raising the issue.
19. In cross examination the claimant set out clearly her recollection of the discussions she had with Mr Knell about her impending parental leave and statutory paternity leave. She said that had a full carry over of leave not been agreed then she would have used up the leave in excess of 40 hours before the end of the holiday year. Mr Knell said that this discussion had not taken place and if he had agreed such changes, he would have recorded them. When I asked Mr Knell what discussions had taken place about the claimant's parental leave, he said he could not remember any specific discussion although it was talked about that the client's wife was going to have a baby. He said that he and his brother carried out the HR duties for their companies with the help of the accountant, he said that he saw the claimant two or three times a week and that the company had approximately 15 employees. He also said that this scenario of paternity leave had not arisen before.
20. I find it unconvincing that in a relatively small company where the claimant and Mr Knell saw each other multiple times each week, and where he was responsible for HR matters, that he would have no recollection of discussion with claimant about statutory leave in the weeks immediately preceding that leave, and the amount of leave she would require in total after the birth, particularly where he said this was the first and only time he had dealt with a

statutory paternity leave matter. The claimant contacted Mr Knell by WhatsApp on numerous occasions about her final salary figure after her resignation without receiving any answer on that subject and the only response came when she raised the possibility of contacting ACAS.

21. I find, from a consideration of the evidence set out in paragraphs 18 and 19 above, that the conversations and agreements the claimant described as having taken place in March 2023 did take place and that Mr Knell varied her contract to allow her to carry over the full extent of her accrued and untaken leave for the year 1 April 2022 to 31 March 2023, and granted her an extra 40 hours leave for the year commencing 1 April 2023.
22. When the claimant's resignation took effect on 29 September 2023, she had accrued 108.89 hours of leave for the period 1 April 2023 to 29 September 2023 under her standard contractual annual leave allowance.
23. While I find that the respondent did amend the claimant's contract for the year commencing 1 April 2023 to allow an extra 40 hours of leave, this was not and could not be statutory leave (in this case statutory paternity leave) and although referred to by the claimant as paternity leave it was extra annual leave. There was no evidence before me that the parties had agreed the extra leave should be treated differently to the claimant's usual contractual leave allowance of 218.4 hours per annum and I find that where she left employment with the respondent part way through the year, the extra annual leave entitlement should be pro-rated. Pro-rating the 40 hours for the period 1 April to 29 September 2023 gives an accrual of 19.95 hours.
24. The annual leave entitlement of the claimant at the point of her resignation on 29 September 2024 was 108.89 hours accrued under her standard contract for that period, 19.95 hours accrued under the variation by which she was given an extra 40 hours leave for that year, and 66.97 hours carried over from the previous year. This amounts to 195.81 hours.
25. The claimant had taken 167.54 hours of leave, leaving a balance of 28.27 hours untaken.

Decision

26. The respondent varied the claimant's contract for the year commencing 1 April 2023 by allowing her to carry over 66.97 hours of leave and giving her an additional 40 hours of leave.
27. There was no agreement that the extra leave should be treated differently to the standard contractual annual leave allowance in that on resignation it should not be pro-rated.
28. I find that under s13 Employment Rights Act 1996 the respondent has made an unauthorised deduction from the claimant's final salary payment on 15 October 2023 in the sum of £480.59 (28.27 hours @£17 per hour). This figure is gross.

- 29. That deduction was not authorised by the claimant's contract or a statutory provision. The claimant had not signified her agreement to the decision in writing.
- 30. The claimant's claim of an unauthorised deduction from wages is upheld in part.
- 31. The respondent's counterclaim is dismissed as it is based on the premiss that the claimant's claim of being entitled to extra leave and full carry over of untaken leave from the previous year is unfounded. I have found that her claim is well founded.

Approved by:
Employment Judge Anderson
Date: 21 February 2025

Sent to the parties on
Date: 15 April 2025