



EMPLOYMENT TRIBUNALS

Claimant: Ms. Urszula Hajdas

Respondent: Took Us a Long Time Limited

Heard at: London Central

On: 30 July 2021

Before: Employment Judge M Joyce

Representation

Claimant: In-person

Respondent: Ms. Julie Jones, Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Respondent:

1. Failed to pay the Claimant statutory redundancy pay;
2. Failed to pay the Claimant outstanding leave entitlement on termination;
3. Failed to pay the claimant notice pay, in breach of contract;
4. Failed to pay the claimant a proportion of her pension entitlement;
5. The Respondent is ordered to pay the Claimant the sum of £119.01 in respect of unpaid statutory redundancy pay, the net sum of £5.97 in respect of outstanding leave entitlement on termination, the net sum of £59.99 in respect of unpaid notice pay, and the net sum of £45.39 in respect of unpaid proportion of pension entitlement.

REASONS

Claims and issues

1. The Claimant has brought a claim for unpaid redundancy pay, unpaid notice pay, unpaid holiday pay and unpaid proportion of her pension entitlement. The issues agreed at the start of the hearing were as follows: (i) Was the

Respondent's calculation of a week's pay correct? (ii) was the payment of £3,817.12 to the Claimant an *ex-gratia* payment or a statutory redundancy payment (iii) If it was a statutory redundancy payment was the payment of £3, 817.12 in the correct amount? (iv) was the Claimant paid the correct amount of notice pay? (v) is the Claimant entitled to accrued holiday pay during the period she was on furlough or was the Respondent legally entitled to require her to take any accrued leave during her period of furlough? (vi) was the Claimant paid all due amounts for holiday pay?

2. It is worth emphasizing that the Claimant did not dispute that she was redundant, and the issues focused solely on the financial calculation of her entitlements resulting from that redundancy. Much of the dispute surrounded the calculation of a week's pay, which formed the basis for subsequent calculations. At the hearing, the Respondent conceded that the Claimant was due a pension payment in the net sum of £45.39.

Hearing, Procedure, documents and evidence heard

3. The Tribunal heard evidence from the Claimant and, on behalf of the Respondent, from Ms. Mayuri Vachhani (Finance Director). There was a bundle of 149 pages. Both parties made oral closing submissions at the conclusion of the hearing.

Facts

4. The Respondent is a company which operates a number of restaurants. The Claimant commenced employment with the Respondent on 21 June 2010 as a waitress. She operated mainly from one restaurant but from time-to-time operated shifts from other branches.
5. The Claimant had a contract of employment which provided that she had basic hours of work of 30 hours per week " (...) plus further hours as agreed between [her] and the management". On occasion the Claimant worked fewer than 30 hours. However, I found that the period of 30 hours per week of work was a minimum requirement under the contract of employment. The contract further provided that the Claimant was entitled to 28 days of leave including public holidays.
6. The leave year ran from 1 February 2020. In terms of holiday pay, the evidence was that while the figure appearing on the HR portal was 27 days, this was an error and that all calculations were made with reference to 28 days. As set out below in the conclusions, I found that the period of 28 days or 5.6 weeks of leave was correctly used in determining the claimant's leave entitlement. During her period of employment, including while on furlough, the Claimant received updates regarding her annual leave balance through an online portal.
7. On 23 March 2020, the Respondent placed the Claimant on furlough. In the furlough agreement dated 30 March 2020, signed by the Claimant, the Respondent specified that leave entitlement accrued during the period of furlough would be assumed to have been taken. The agreement further provided that any accrued leave prior to the period of furlough "(...) may also be assumed to be taken during the period".

8. The Claimant maintained that it was unclear to her, by the use of the word “may”, that the period of leave accrued prior to furlough would in fact be assumed to have been taken. For the reasons set out below, I found that the wording was sufficiently clear that it meant that any period of leave, whether accrued before her period on furlough or during furlough would be assumed to have been taken.
9. On 19 June 2020, the Respondent sent an email to the Claimant advising that redundancies would be necessary but that she had not been selected for redundancy at that time. By email of 23 September 2020, the Respondent emailed the Claimant advising her that she had been selected as being at risk of redundancy. By email of 24 September 2020, the Claimant emailed the Respondent requesting that she be placed on sabbatical rather than be made redundant. By email of 25 September, Mr. Joshua Field, ‘Head of People’ on behalf of the Respondent, emailed the Claimant denying her request for a sabbatical.
10. By further email of the same date, Mr. Field informed the Claimant that she had been made redundant. The email set out the Claimant’s notice entitlement as being 10 weeks and stated as follows “you receive at least the amount of notice pay you are entitled to, your notice will either be extended and your employment will be terminated by reason of redundancy on the 14 December 2020, or if your notice period extends beyond the 31st October 2020 we will either continue to pay you as normal until termination or we will terminate your employment by reason of redundancy on the 1st November 2020 and pay you in lieu of notice, we will confirm this before the 31st October.”
11. The email further specified that she was entitled to redundancy pay of £3,643.61. The email of 25 September 2020 further informed the Claimant that although her accrued annual leave had been considered to have been taken during her furlough period, she was entitled to a further 20% top up due to furlough holiday entitlement having been calculated at 80%.
12. By email of 29 September 2020, the Claimant responded to Mr. Field in which she stated “(...) thank you very much for laying out my redundancy pay (...)”. The Claimant asked for further clarification of the position regarding her notice payment.
13. In the same email, the Claimant stated that she understood that 5 weeks of her notice period (that is until 31 October 2020) would be paid via the furlough scheme. I found that the Claimant’s termination date was 31 October with the balance of her notice period being paid in lieu of notice until 14 December 2020.
14. By email of the same date, Mr. Field clarified the position regarding the Claimant’s notice period. He provided estimates of the figures that would be due to the claimant as notice pay. He emphasized that they were only estimates as furlough calculations were only completed by the finance department nearer to the day of salary payments.
15. By email of 4 October 2020, the figure of £3,643.61 for redundancy payment was subsequently accepted by Mr. Field to have been erroneous and the figure was increased to £3,817.12.

16. By email of 4 October 2020, the Claimant emailed the respondent stating “Thank you very much for the redundancy pay in my favour. I appreciate your effort to investigate complex details of redundancy process (...)”. The claimant further raised the issue of calculation of a week’s pay, expressing the view that the week of 6 March¹ should not be included in such calculation because she worked fewer than 30 hours during that week.
17. By email of 6 October 2020, Mr. Field in essence denied the Claimant’s request to have the week of 6 March excluded from the calculation of a week’s pay. By email of 11 October 2020, the Claimant again protested the inclusion of the week of 6 March 2020, and requested that the week processed on 27 December² be included in the calculation of a week’s salary.
18. By email of 9 November 2020, the Claimant issued a formal grievance in which, among other claims, she protested the inclusion of the week of 6 March in the calculation of a week’s pay, and protested non-payment of her redundancy and what she characterized as under-payment of her notice pay.
19. The Claimant further thanked the Respondent for “an act of kindness” in the form of an *ex-gratia* payment to her on 6 November 2020. By email of 11 November 2020, Mr. Field informed the Claimant that the *ex-gratia* payment was her statutory redundancy payment and that it had been processed as such to “ensure that [she was] not disadvantaged by deductions being applied”. He further informed the Claimant that as she was no longer a staff member of the Respondent, she was not entitled to use the grievance procedure but that nonetheless, he would hold a meeting with her in order to discuss her concerns
20. Following further email exchanges between the Claimant and Mr. Field regarding the status of the proposed meeting, the Claimant declined to take part in the meeting. The meeting never took place.
21. From 25 September 2020 to 31 October 2020 the Claimant worked on furlough. From 1 November 2020 to 14 December 2020, the Claimant was paid in lieu of notice.

Legal Framework

22. *GAP Personnel Franchises Ltd v Robinson EAT 0342/07* provides that an employee can impliedly agree to a unilateral variation of contract through their conduct in affirming the revised term of the contract.
23. The Working Time Regulations 1998 provide at Regulation 14: Compensation related to entitlement to leave
14.—(1) This regulation applies where—

¹ During the hearing the week which the Claimant disputed being included in the 12 week period used to calculate a week’s pay was referred to as ‘the week of 6 March’. However, it is in fact the week of 24 February 2019 to 1 March 2019, with payment for that week’s wages being made on 6 March 2019.

² This is the working week from 16 to 22 December 2019, with pay being processed for that week on 27 December 2019.

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula $(A \times B) - C$

where

A is the period of leave to which the worker is entitled under regulation 13(1); B is the proportion of the worker's leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date.

24. For the calculation of a week's pay, sections 222 and 224 of the Employment Rights Act 1996 were referenced at the hearing. S. 222 of the Employment Rights Act 1996 provides:

Remuneration varying according to time of work.

(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

(3) For the purposes of subsection (2)—

(a) the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and

(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.

25. S. 223 of the Employment Rights Act 1996 provides:

Supplementary.

(1) For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours, shall be brought in.

(2) If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.

(3) Where—

(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime), account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

26. S. 224 of the Employment Rights Act 1996 provides:

Employments with no normal working hours.

(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.

27. S. 225 of the Employment Rights Act 1996 in relevant part provides:

Rights during employment.

(1) Where the calculation is for the purposes of section 30, the calculation date is—

(a) where the employee's contract has been varied, or a new contract entered into, in connection with a period of short-time working, the last day on which the original contract was in force, and

(b) otherwise, the day in respect of which the guarantee payment is payable.

Conclusions

A week's pay

28. As to the 12 week period for calculation of a week's pay, the Respondent had chosen the 12 week period prior to the Claimant going on furlough as the appropriate period. The Claimant did not dispute that this was the correct period, but disputed the inclusion of the week of 6 March 2019 in the calculation because on that week she worked 15.25 hours, which was below her contractual minimum of 30 hours. The Claimant submitted that the next

working week, that of 27 December 2019 be included in the calculation instead.

29. It was submitted on behalf of the Respondent that although the Claimant had a written contract for a minimum of 30 hours of work per week, that the contract of employment had been varied by custom or practice due to the Claimant working fewer than 30 hours on a number of occasions.
30. It was submitted on behalf of the Respondent that in light of this, the correct provision for calculation of a week's pay was s.224 Employment Rights Act 1996 for employees with no normal working hours, and not s. 222 of the same act. According to the Respondent, the use of s. 224 would permit weeks where the Claimant worked fewer than 30 hours to be included in the 12 week period used to calculate a week's pay. As such, the Respondent submitted that this permitted it to take account of the week of 6 March in its calculation of a week's pay.
31. S. 222 refers to 'normal working hours' as the same working hours whether on a daily, weekly or longer period. Although the Claimant had a contract providing for a minimum of 30 hours per week, she did not work 30 hours per week every week. A review of her working hours at page 148 of the bundle demonstrates that she often worked in excess of 30 hours. As such, she did not have "normal working hours". For this reason, s. 224 and not section 222 of the Employment Rights Act 1996 applies.
32. S. 223 (2) and S. and s. 224(3) only allow for the inclusion of an earlier week of remuneration in the 12 week period for the calculation of a week's pay in circumstances where on a particular week no remuneration was payable. But this was not the case on the week of 6 March 2020 as the Claimant was remunerated for 15.25 hours of work. As such, I could not include the week of 27 December 2019 in the calculation.
33. s. 224 (2) provides for "the amount of the employee's average weekly remuneration", to be included in the 12 week calculation. It does not permit, in my view, for the employer to 'contract out' of an employee's contractual minimum hours. In these circumstances, the minimum contractual amount of 30 hours remuneration ought to be included in the calculation.
34. In light of the above, the week of 6 March 2020 ought not to have been included as one of the 12 weeks used to calculate a week's salary as the Claimant only worked 15.25 hours during that week. Instead, a 30-hour work week at the rate of £264 ought to have been included. Adding in the total for this week gives a total over the 12 week period of £4,293.93, which when divided by 12 gives a week's salary of £357.83. It is this figure which forms the basis of the remainder of the calculations below.

Redundancy Pay

35. I found no merit in the Claimant's assertion that the statutory redundancy payment of £3,817.12 was an *ex-gratia* payment as an "act of kindness" for her years of service to the Respondent. It was apparent from the prior discussions over email with Mr. Field that what was being calculated was a statutory redundancy payment. The Claimant's own email of 4 October 2020 in which she expressed her thanks to Mr. Field for further investigating

the figures relating to the statutory redundancy payment makes this abundantly clear. Regardless of the reasons for naming the payment as a “*ex-gratia*” payment, I found that this was indeed the Claimant’s statutory redundancy payment.

36. However, had the statutory redundancy payment been calculated using the correct figure of £357.83 for a week’s pay, the payment would have been £3,936.13. The difference between this figure and the sum paid of £3,817.12 is £119.01, which is due to the Claimant.

Notice Pay

37. At the hearing, the claimant sought to make the argument that, as the Respondent had stated that the Claimant had in effect been given 11 weeks of notice, that she was then due 11 weeks of notice pay. But the Respondent’s position was based on the Claimant having been given 5 weeks of notice while on furlough pay from 25 September to 31 October and a further 6 weeks in lieu of notice from 31 October to 14 December, making a total of 11 weeks.
38. It was clarified at the hearing that the Respondent did not mean that the Claimant was entitled to the monetary equivalent of 11 weeks of notice, nor was this ever communicated to her. I found that the Claimant was entitled to 10 weeks of notice, per her statutory entitlement and as communicated to her in the redundancy notice of 25 September 2020.
39. The sole remaining issue to be determined in relation to notice pay related to the calculation of a week’s pay. 10 weeks of notice at £357.83 is 3,578.30. But the Claimant was already paid the sums of £1,305.66 as furlough pay and £2212.65 as notice pay. When these sums are subtracted from £3578.30, this leaves a sum due of £59.99.

Holiday Pay

40. I found that the Respondent was, per the terms of the furlough agreement, entitled to treat accrued annual leave, both before and during the period of furlough, as deemed to have been taken by the Claimant. The wording of the furlough agreement was:

All holiday accrued in accordance with your employment contract during the furlough period will be assumed to be taken during this time. Any holiday that accrued prior to the furlough period may also be assumed to be taken during the period.

41. I considered that the wording of the furlough agreement was sufficiently clear that any leave accrued before placement on furlough, and accrued during furlough was deemed to have been taken while on furlough. Further, this was communicated to the Claimant in the furlough agreement. I considered that the use of the word “may” in the second sentence read as emphasizing that leave accrued prior to the furlough period would also be considered to have been taken. Otherwise the use of the word “assumed” would not have been included in the sentence.

42. I did not find that the fact that the Claimant was receiving updates as to her outstanding leave balance meant that she was entitled to take that leave balance. Rather, an account of leave balance had to be maintained in any event for the purposes of calculating the 'top up' of her leave referenced below.
43. However, the matter does not end there as the claimant was entitled to a top up of 20% per the terms of her furlough agreement and notice of redundancy. In terms of holiday pay, applying section 14 of the Working Time Regulations gave the following result:
44. $5.6 \text{ weeks of leave} \times 38 \text{ weeks} / 52 \text{ weeks}$ (being the proportion of the worker's leave year which expired before the termination date of 31 October 2020), which gives 4.092 weeks of leave (incidentally, when multiplied by 5 days this gives a figure of 20.5 leave days, which coincides with the number of leave days apportioned to the Claimant by the Respondent).
45. Multiplying $4.092 \times £357.83$ gives a total accrued annual leave entitlement value of £1,464.24. But the Claimant was only entitled, for the reasons set out above, to 20% of her leave entitlement as a top up. 20% of £1,464.24 is £292.85. The Claimant had already been paid the sum of £286.88 which leaves an outstanding balance of £5.97 (i.e. the difference between £292.85 and £286.88).

Pension entitlement

46. As noted at the beginning of this Judgment, the Respondent conceded at the hearing that £45.39 net was due to the Claimant as unpaid pension entitlement.

Employment Judge **Joyce**

____08.09.2020_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

09/09/2021

FOR EMPLOYMENT TRIBUNALS