



EMPLOYMENT TRIBUNALS

Claimant: Mr R Drakeley

Respondent: Wrates Scholastic Photographs Limited

Heard at: Midlands East Employment Tribunal via Cloud Video Platform

On: 21 January 2022

Before: Employment Judge Brewer

Representation

Claimant: Ms C Evans, Counsel

Respondent: Ms S Firth, Counsel

JUDGMENT

The Tribunal's judgment is:

1. The claimant's claim for unauthorized deductions from wages from 2020 fails and is dismissed.
2. The claimant's claim for holiday pay under the Working Time Regulations 1998 in respect of holiday from 2020 fails and is dismissed.
3. In respect of holiday for 2021 the claimant's claim succeeds and the respondent shall pay to the claimant the sum of £612.96 subject to any deductions for tax and National Insurance contributions.

REASONS

Introduction

1. This case was listed for a two-hour hearing. The claimant claims that he was owed holiday pay expressed as a claim for unauthorized deductions from wages or in the alternative a claim under the Working Time Regulations 1998.

2. The claimant gave evidence and I heard evidence from two witnesses for the respondent, Mr Glyn Bagley, Owner and Managing Director, and Mr Kitz Bagley, Manager. I had written witness statements, an agreed bundle running to 71 pages and I had a written skeleton argument from Ms Firth. I heard and considered the oral submissions of both Counsel.
3. In the event the hearing lasted for longer than the allotted time and given the matters raised and the conflicting oral evidence I reserved my decision which I set out below.

Issues

4. The issues were as follows.

Unauthorised deductions from wages

5. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

Holiday Pay (Working Time Regulations 1998)

6. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Law

7. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

'An employer shall not make a deduction from wages of a worker employed by him.'

8. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).
9. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

- a. a contract of employment (defined as a 'contract of service or apprenticeship'), or
- b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

10. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'

11. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.
12. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.
13. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.
14. Regulation 16(1) WTR provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which he or she is entitled under Regulation 13 (basic leave) or Regulation 13A (additional leave). A 'week's pay' is calculated in accordance with Ss.221-224 ERA.
15. The general rule is that statutory annual leave cannot be replaced by a payment in lieu — Regulations 13(9)(b) and 13A(6) WTR. The main exception to this rule arises where the worker is owed outstanding holiday on the termination of his or her contract. In these circumstances, a payment in lieu is permitted.
16. WTR were amended in 2020 by **The Working Time (Coronavirus) (Amendment) Regulations 2020** which provide as follows:

3. In regulation 13—

(a) at the beginning of paragraph (9)(a) insert “subject to the exception in paragraphs (10) and (11),”;

(b) after paragraph (9) insert—

“(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

4. In regulation 14—

(b) after paragraph (4) insert—

“(5) Where a worker’s employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.”.

17. In short, the Regulations provide an exception relating to the effects of coronavirus to the bar on carrying forward untaken leave under Regulation 13 WTR. They came into force on 26th March 2020.

18. Regulation 3 of these Regulations inserts an exception to the bar on carrying forward untaken leave. which applies where, at the end of a leave year, it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under regulation 13 WTR as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society). In this case the untaken leave may be carried forward and taken in the following two leave years.

19. Regulation 14 WTR provides for a payment in lieu of any untaken annual leave where a worker’s employment terminates. This regulation is amended by regulation 4 of these Regulations to provide for a payment in lieu of any leave that carried forward under the exception inserted by regulation 3 and remains untaken on the date of termination.

Findings of fact

20. The claimant was employed by the respondent from August 2018 until 31 March 2021 when he resigned without giving notice.

21. The respondent is a business involved solely with photographing in schools and therefore it has no, or very limited work during non-term time. As a result, the contracts of employment of the photography staff contain a clause which limits them to taking holiday during the same periods as schools are closed for school holidays.
22. The claimant confirmed in his evidence that the holiday system was explained to him during his interview. He confirmed that he would be entitled to take 4 weeks in August, two weeks in December and all bank holidays. Given that holiday days are defined as working days, six weeks holiday accounts for 30 days holiday which means that even if staff “went on holiday” at other times, for example Easter, nothing turns on that because, as I have found, whether staff are technically on holiday or simply not working because the schools are closed their position is exactly the same, they are not working.
23. The claimant was put on furlough on 22 March 2020 and this was to last until at least 31 July 2020. In the event it would seem that the claimant was on furlough for the entire period during which he would normally have taken holidays.
24. During furlough the employees were paid from funds Received by the respondent from the government under its job retention programme, that is to say employees received 80% of their normal pay. It was left to each employer to determine whether to uplift that to 100% and in this case the respondent decided not to provide an uplift.
25. The respondent maintains a list of school holidays so that staff know when they are able to be on holiday however there is no booking system for holidays because it is not necessary for the respondent to know when photography staff are in fact on holiday because given that schools are on holiday, the staff would not be working in any event.
26. The key issue in this case is limited. The claimant says that during December 2020 he was given the choice whether to take holiday to be paid at 80% of normal pay with the 20% balance to be paid later, or whether to roll over holiday to be taken over the following two years as provided for in the Coronavirus regulations. The claimant says he decided to roll over his holiday.

Conclusions

27. My starting point is the essential finding that the respondent did not operate his system of staff being required to book time off for holidays. In effect the claimant's time was divided between work time, that is to say the periods of school term time, and non-work time that is to say the periods when schools were on holiday. Given that scenario, it makes perfect sense that it was not necessary to require staff to book holidays because it did not matter to the respondent whether, for example the claimant, was “on holiday”, as opposed to merely not working during any particular period of non-work time.

28. if that is correct and I find that it is, then the claimant's case is problematic. By the time he says he was given the choice whether to take paid holiday during 2020 or roll it over into the following two years, he would have already taken most of his holiday. Indeed, in his cross examination the claimant confirmed that at the time he was put on furlough he understood that he would be taking his holidays in the fixed periods. Given that there was no discussion or conversation to the contrary, the logical conclusion is that by 4 December 2020 the claimant had already had 20 days holiday which he must have taken during August as required by his contract.
29. The claimant relies on the text message at page 51 of the bundle. This states, in a message to Glyn Bagley "I'll take my holidays next year sometime when it's quiet thanks. Regards". There is no reference to any discussion, offer or even conversation about when or if anyone can take holidays or rollover holidays and indeed nothing in the bundle about holidays in 2020 save for this text message. The claimant relies on a number of WhatsApp messages in early January 2021 and these are pages 52, 53 and 54 of the bundle. But these messages cannot be about 2020 holiday for the same reasoning set out above, at this point in time all 2020 holidays must have been taken for those staff with the same contractual provisions as the claimant. No evidence was provided about the contractual position as regards holiday for those in this WhatsApp group save for the claimant. It is clear that in early January There was a conversation with some stuff about when they will be taking their holidays but the chain of WhatsApp messages is consistent with the discussion about holidays in 2021 given that at this stage no holidays would have been taken for those who had the same contractual clause as the claimant as regards fixed holidays.
30. We also looked at the documents at pages 46 and 47 of the bundle. Page 46 is an electronic calendar showing school holidays during 2019. Page 47 is the same electronic calendar for 2020 but it is not populated with any dates for school holidays. In my judgement this simply reflects the fact that the respondent's business was closed and therefore it was not necessary for them to populate this calendar because they were not working in schools, so they did not need to know when schools were on holiday.
31. We also looked at pages 49 and 50. These are two letters sent by the respondent 2 the staff there, the first dated 23 March 2020 and the 2nd dated 18 May 2020. Neither of these refers to any change to the holiday position. I would have thought that if the respondent was going to offer staff the chance to take or rollover their holiday the respondent would have said that out in writing but, as I say, there is no mention of that in either of these formal communications.

32. For those reasons I accept the evidence of the respondent that there was no change to the claimant's position in respect of his holiday, he was not given the option in respect of his 2020 holiday whether to take it or roll it over and he in fact took all of his holiday.
33. In relation to the claim for unauthorised deductions from wages I find that by the time the claimant resigned from his employment he had been paid his 2020 holiday pay and so even if there was a technical unauthorised deduction at the precise time the claimant took the holiday, because he was paid at 80% instead of 100% at the relevant time, they responded remedied that.
34. In relation to the claim under the Working Time Regulations 1998, As amended by the Working Time (Coronavirus) (Amendment) Regulations 2020, I agree with the respondent that there was no evidence that it was not reasonably practicable for the claimant to take all of his leave during 2020 and indeed as I have found he did so. It follows therefore that in accordance with the amended regulations he was not entitled to carry over untaken leave in any event.
35. I note that the respondent accepts that it owes the claimant the gross sum of £612.96 in respect of unpaid holiday pay from 2021.
36. For all of those reasons the claimant's claims in respect of 2020 fail and are dismissed.

Employment Judge Brewer

Date: 27 January 2022

JUDGMENT SENT TO THE PARTIES ON

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