



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 2/7/2021

Claimant: Mr D Newell

Respondent: Riba 1834 Ltd

Before: Employment Judge Mr J S Burns

Representation

Claimant: Mr S Yahaya (case worker)

Respondent: Mr C Khan (Counsel)

JUDGMENT

The claims are dismissed

REASONS

1. I heard evidence from the Claimant and from Mr Straw, from the Respondent. There was a bundle of documents and a skeleton argument from Mr Yahaya. I received oral submissions. The hearing was by CVP. There were no technical problems.
2. The Claimant was employed by the Respondent from 2012, initially on a part-time casual basis. The Claimant was employed on a permanent full-time basis from 16 March 2020 but was made redundant on 11 December 2020. His claim is for what he says is unpaid holiday pay from 2012 onwards and some pension contributions. The Respondent defends the claims and also says they have been presented out of time.

Relevant law

3. Holiday pay is “wages” for the purposes of Part II ERA 1996 so any failure to pay in the ordinary course of a worker’s contract is not only a breach of regulations 16 and 30 Working Time Regulations 1998 (WTR) but is also an unauthorised deduction.
4. Like Part II ERA, the WTRs apply to workers as well as employees.
5. A worker or employee can present a complaint about a breach of regulations 16 or 14 to the ET under regulation 30 WTR. The time limit is the same as under the ERA (3 months) and is subject to extension under the “reasonably practicable” test.

6. There is no series of deductions provision in the WTR unlike the ERA so a claim for payment has to be made within the relevant time limit for each individual failure to pay.
7. The two-year limit on backpay in s.23(4A) ERA does not apply to WTR claims .
8. Under regulation 13(9) WTR, it is possible to get pay in lieu of untaken holidays when employment is terminated, but only in respect of the leave year in which the employment is terminated. The basic rule is thus “use it or lose it”.
9. It has been held that exceptionally, an employee who has been unable to take holidays because he has been on long-term sick leave or for some other reason beyond his control must be allowed to carry forward those holidays to a later leave year and must be paid in lieu if his employment is terminated before it has been taken.
10. The EAT in Smith v Pimlico Plumbers Ltd UKEAT/0211/19 held in March 2021 clarified the ECJ ruling in King v Sash Window Workshop Ltd regarding the right to carry over. The worker can carry over leave which has not been taken because they have been deterred from doing so by the employer not allowing paid leave. Paragraph (16) in the Appendix to the judgment reads: *“Where in any leave year a worker was unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because of the employer’s refusal to remunerate the worker in respect of such leave, the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (17).”*
11. Where a failure to pay is a breach of contract, that can be claimed on termination.

Findings of Fact and conclusion re holiday pay

12. The Claimant’s casual contract which he received in 2012 and which covered his work until March 2020 provided inter alia as follows: *“should you wish to take a paid holiday you should give your supervisor two weeks’ notice and payment will be arranged accordingly”*. The Claimant never invoked this provision. He could have asked for taken and be paid for paid holidays during this period but never did so. This remained the situation until March 2020 when he was placed on a permanent contract.
13. Between March 2020 and his dismissal in December 2020 he was paid for 16 days annual leave while on furlough and at the end of his employment paid in full for the balance of his accrued but untaken 2020 holidays and in addition paid for 5 extra days for 2019.
14. The addition of the 5 days was a gratuity given in the light of the Respondent’s policy in 2020 to allow employees to carry over a maximum of 5 untaken holidays from one holiday year to the next.
15. The Claimant was not entitled to be paid for any holidays during his employment up to March 2020 because he failed to take those holidays despite having been informed (in writing) of his right to do so..
16. He was entitled on termination of his employment in December 2020 to receive pay in lieu of holidays accrued but not taken during 2020, and on his own evidence he was paid that in full before he issued his claim.
17. The claim before the Tribunal is for pay in lieu of holidays in the years 2012 to 2019 inclusive, less the 5 “2019 days” paid as a gratuity on dismissal. That claim is not a valid unauthorised deductions claim because until the Claimant had taken holidays he was not entitled to be paid for them, and hence no deduction was made. For the same reason there was no breach of contract.

18. In any event, even if there had been deductions, the latest deduction would have been in 2019, and as 2020 has been paid in full there is no series of deductions which would bring these claims within the three month time limit under the ERA. It is not shown that it would not have been reasonably practicable to claim in time, had this been a valid claim.
19. Viewed as a WTR claim, there is no entitlement to bring forward 2019 or earlier untaken holidays or receive a payment in lieu on termination because of the provisions of Regulation 13(9). No King v Sash windows type exception applies because the employer did not refuse to remunerate the Claimant if he took holidays – on the contrary it had told him in writing that he would be paid if he took them.

Findings of fact and conclusion re pension contributions

20. The claim is limited to employer pension contributions which the Claimant contends were unpaid to the extent of £228.03 in “2014/2015”.
21. I accept Mr Shaw’s evidence that the Claimant was automatically enrolled into the Respondent’s pension scheme as and when he was eligible, following the Respondent’s staging date on 1/4/2014, in accordance with the Respondent’s obligations under the Pensions Act 2008.
22. The Claimant made no reference to this in his various communications with the Respondent leading up to dismissal and the claim in this regard appears to be the result of some afterthought prompted by a discussion he had with an ACAS consultant.
23. The Claimant has not produced any document or other evidence to support this bare assertion and I do not find he has proved any shortfall in any event.
24. In any event this claim even if it was valid, would be about 5 years out of time and the tribunal has no jurisdiction to consider it.

J S Burns Employment Judge
London Central
2/7/2021
For Secretary of the Tribunals
Date sent to parties : 02/07/2021
