



EMPLOYMENT TRIBUNALS

Claimant: Mr R Acanfora

Respondent: Med Fish Distribution Limited (in voluntary liquidation)

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (by video)

On: 6 June 2021

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: In person

For the respondent: Did not appear and was not represented

JUDGMENT

The Respondent is ordered to pay the claimant the sum of £5,729.07 in total, being:

A £2,483.91 as compensation for the respondent's failure to pay him his untaken holiday entitlement following the termination of his employment; and

B £3,245.16 as compensation for the respondent's unlawful deductions from the claimant's wages.

REASONS

Conduct of this hearing

- (1) This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

- (2) The claimant logged in to the hearing at the allotted time from the back of a taxi. The tribunal adjourned for 10 minutes to allow the claimant to be in a quiet space appropriate for his participation in the claim. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
- (3) The parties present were able to contribute to the discussion and to hear and see all comments made. From a technical perspective, there were minor difficulties regarding connectivity of the claimant while he was speaking, but these were overcome by asking him to repeat what he had said.
- (4) No requests were made by any members of the public to inspect any written materials before the tribunal.
- (5) The claimant gave evidence on oath.
- (6) Those present were told that it is an offence to record the proceedings.
- (7) The tribunal was satisfied that the claimant was not being coached or assisted by any unseen third party while giving his evidence.

The claim

- (8) The Claimant was employed by the respondent shop and restaurant as a shop worker and driver, from 6 September 2018 until he resigned with effect from 6 July 2020. By a claim form presented on 2 December 2020, following a period of early conciliation from 7 October 2020 to 5 November 2020, the claimant brought complaints of unpaid wages and holiday pay. The respondent did not file any response. It has gone into creditors' voluntary liquidation, and its winding up commenced on 12 January 2021. The liquidators are Mr LG Bednash and Mr A Price, Craftwork Studios, 1-3 Dufferin Street, London EC1Y 8NA. That liquidation does not stop these proceedings from continuing. I therefore determined to continue with the hearing, pursuant to Rule 21 of the Employment Tribunal Rules of Procedure 2013.

The issues

The issues which potentially fall to be determined by the Tribunal are as follows:

- (9) *Time limits / limitation issues*
 - (i) Were all of the claimant's complaints presented within the time limits set out in sections 23(2) to (4) of the Employment Rights Act 1996 ("ERA") and regulations 30(2) and 30B Working Time Regulations 1998?
 - a. When did the conduct complained of take place?
 - b. Where the acts or failures to act part of a series of similar acts or failures?
 - c. Have the claims been brought within time
 - d. If not, was it not reasonably practicable for the claims to have been brought within time?
 - e. If so, were the claims brought within a reasonable time thereafter?

- (ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 8 July 2020 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.
- (10) *Unpaid annual leave – Working Time Regulations*
- (i) When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?
 - (ii) how much leave had accrued for the leave year?
 - (iii) How much paid leave had the claimant taken in the year?
 - (i) How many days remain unpaid?
 - (ii) What is the relevant net daily rate of pay?
 - (iii) How much pay is outstanding to be paid to the claimant?
- (11) *Unauthorised deductions*
- (i) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by reducing his pay without his agreement, and by not paying him for additional hours worked, and if so how much was deducted?

Facts

- (12) The claimant was employed by the respondent, which owned a fishmongers and ran an adjoining restaurant, as a fishmonger from 6 September 2018 until his employment ended on 6 July 2020. The claimant worked long hours. He was generally the only fishmonger in the shop. After hours, he delivered meals to customers from the respondent's restaurant.
- (13) The claimant worked full time. His agreed pay was £2,300 per month. For each of the months of February, March, April and June 2020 the respondent paid the claimant £700 less than he was entitled to. The respondent did not pay the claimant at all for the month of July. Pay was generally made to the claimant at the beginning of the month following the month for which pay was due. Therefore, the claimant should have received his final pay together with money for untaken holiday entitlement in early August 2020.
- (14) The claimant was never given any information about the period during which leave in any year should be taken.

Law

- (15) In general, claims in relation to unpaid wages and non-payment of holiday pay must be made within 3 months of the date the relevant payments should have been made. That time can be extended by the period during which ACAS was tasked with conducting early conciliation.
- (16) S13 Employment Rights Act 1996 (ERA) gives employees the right to recover from their employers unauthorised deductions from wages. The

definition of deduction encompasses reduced pay, as well as complete non-payment of pay.

- (17) S 23 ERA states that an employment tribunal shall not consider a one off claim for unlawful deductions from wages “*unless it is presented before the end of the period of three months beginning with ...in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made*” Where a claim relates to a series of deductions or payments it must be presented before the end of the period of three months beginning with the last deduction in the series. S23 (3A) allows that time limit to be extended by time taken for ACAS early conciliation to facilitate conciliation before institution of proceedings. S23(4) gives the tribunal the power to extend the time during which the claim should have been brought as follows:

“Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

- (18) Regulations 13 and 13A of the Working Time Regulations 1998 entitle workers to 5.6 weeks’ leave per holiday year. If there are no provisions in any relevant agreement defining a holiday year, the workers’ leave year is deemed to start on the anniversary of the date he started work with his employer (Reg 13.3 WTR). There were at the material time no statutory provisions allowing workers to carry the 4 weeks’ annual leave over from one leave year to the next. The 1.6 weeks additional leave can be carried over but only if a relevant agreement so provides.
- (19) Regulation 14 of the Working Time Regulations 1998 allows workers to claim money in lieu of untaken holiday entitlement not used by the time their employment is terminated. It states:

14.—(1) This regulation applies where—

(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...(b)... 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.

- (20) WTR contains similar provisions relating to the time when claims for untaken holiday should be brought, as follows:

30.(1) A worker may present a complaint to an employment tribunal that his employer... (b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) ...

(2) ... an employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months ... beginning with the date on which ... the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three ... months."

The regulations contain similar provisions regarding the extension of time for bringing claims as a result of the ACAS early conciliation process to claims for unlawful deductions from wages.

Conclusion

Holiday pay

- (21) There was no relevant agreement which set out the respondent's holiday leave year. The claimant began his employment with the respondent on 6 September 2018. Therefore his leave year for the period 2019-2020 was deemed to have begun on 6 September 2019. No provisions in any relevant agreement regarding the possibility of carrying forward any periods of additional leave were brought to my attention. The claimant was therefore entitled to 28 days' holiday per leave year.
- (22) The claimant worked for the respondent for 305 of the 365 days in the relevant holiday leave year. He took no holiday. He had therefore been entitled to take 23.4 days' holiday during the relevant leave year by the time his employment ended. His daily pay was £106.15 ((£2,300 x 12/260). By virtue of Reg 14 WTR, he should have been paid £2,483.91 to compensate him for his untaken holiday. That payment should have been made with his final pay, in early August 2020. The respondent is ordered to pay the claimant £2,483.91 compensation for its failure to have paid the claimant for his period of untaken holiday entitlement.

Unauthorised deductions from wages

- (23) The claimant was paid £700 less than the agreed sum for 4 months during 2020, culminating in the month of June 2020. The total underpayment was therefore £2,800. In addition, he received no pay for July. He should have been paid £445.16 for the days he worked in July (£2,300 x 6/31). This payment should have been made in early August 2020. The claimant is therefore ordered to pay the claimant the sum of £3,245.16 to compensate him for the unlawful deductions made from his wages.

Jurisdiction issues

- (24) The tribunal held that the failure to pay the claimant any pay for July 2020 was the last in a series of deductions, and that this sum should have been paid in early August 2020 – the respondent paying the claimant at the beginning of the month following that for which the payment was due. Compensation for untaken holiday entitlement should have been paid at the same time. The tribunal therefore held that this claim has been brought within time, and the tribunal has jurisdiction to hear it.

Employment Judge Palca

06/07/2021

Sent to the parties on:

06/07/21

For the Tribunal: