



EMPLOYMENT TRIBUNALS

Claimant: Mr E Kersey

Respondent: DYDRM Limited trading as The Printers Apprentice

Heard at: Leeds by Cloud Video Platform

On: 22 March 2022

Before: Employment Judge Evans (sitting alone)

Representation

Claimant: in person

Respondent: Mr Molloy, consultant, Peninsula

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

JUDGMENT

- 1) The claimant's complaint that he was entitled to a statutory redundancy payment on the termination of his employment fails and is dismissed because he had not completed two years' continuous employment.
- 2) The claimant's complaint that he was dismissed in breach of contract (notice pay) fails and is dismissed because he was paid the notice pay to which he was entitled.
- 3) The claimant's claim for arrears of pay fails and is dismissed because he accepts that no such arrears were due to him.
- 4) The respondent is ordered to pay the claimant £242.31 (two hundred and forty-two pounds and thirty-one pence) in respect of accrued but untaken holiday pay.

REASONS

Preamble

1. The claimant was employed by the respondent from 19 February 2020 until 15 October 2021. Following his dismissal, he presented a claim on 29 October 2021 in which he brought complaints that the respondent had failed to pay him a

statutory redundancy payment, notice pay, or the holiday pay due to him and owed him arrears of pay.

2. The claim was heard on 22 March 2022. The respondent had prepared a bundle of 173 pages and all page references are to the pages in that bundle unless otherwise stated. The claimant confirmed that the bundle included all the documents he believed relevant to his claim except documents relating to the dismissal of another employee, the general manager, and all of his payslips for the whole of his employment. In light of the issues as agreed below, these documents were not in fact relevant and the hearing proceeded without them being available to me. The claimant made no objection to this.
3. The claimant participated in the hearing first on his iPad whilst sitting in his car and then on his mobile phone and iPad whilst sitting in his new place of work. Such arrangements were not ideal, but I was satisfied that the claimant was able to participate fully in the hearing and, in any event, he made no application for an adjournment and did not otherwise suggest that he did not wish to proceed.
4. After a very lengthy discussion of the issues the claimant gave oral evidence. He had not produced a written witness statement other than an email dated 21 March 2022 ("the claimant's email statement"). For the respondent, Ms Alison McGuinness gave oral evidence. She had produced a written witness statement running to 46 paragraphs.
5. The hearing had been listed for three hours and I had another hearing after it. When the parties had given their evidence and made submissions insufficient time remained for me to reach and deliver an oral decision, so I reserved judgment. This is that reserved judgment.

The discussion at the beginning of the hearing and the issues

6. During the discussion at the beginning of the hearing the claimant (1) accepted that he could not pursue a claim for a statutory redundancy payment because he had not completed two years' employment when he was dismissed (2) accepted that he had been paid the notice to which he was entitled on or around 15 October 2021 (the payslip is at page 48). Those claims are therefore dismissed.
7. The parties agreed that the claimant was employed under the terms of the contract at page 38 ("the contract") (except that the claimant's job title was incorrectly recorded). Consequently, it was agreed that:
 - 7.1. He was contractually entitled to an annual salary of £21,000 (clause 9);
 - 7.2. His holiday year was 1 April to 31 March (clause 15);
 - 7.3. He was contractually entitled to 28 days' holiday per year plus the usual public holidays (of which there are of course 8 annually) (clause 15);
 - 7.4. If he had outstanding holiday on the termination of his employment this was to be paid at the rate of 1/260th of his salary per day (i.e. £80.77) (clause 17).
8. The claimant explained that what his claim was about was the respondent requiring him to take holiday between 15 July and 8 October 2021. It was agreed that this had resulted in him being required to take holiday on 51 days before he had taken two weeks' paternity leave ending just before he was given notice of dismissal. The claimant contended that the respondent had acted unlawfully in

this respect because (1) on three days he had been given incorrect notice of the holiday (the notices given on 14, 19 and 22 July 2021); (2) he was a salaried employee and so was entitled to be paid whether or not the respondent's business was open and consequently the respondent was not entitled to give him notice to take holiday on the basis that the business was closed.

9. The claimant explained that he had reached an agreement with Mr Wood in March 2021 that he would be allowed to carry over the whole of his holiday from the holiday year 2020 to 2021 (36 days) because the respondent had been unable to pay him to take that holiday as a result of the coronavirus pandemic. The claimant explained that he had taken no holiday during his employment at all (prior to what he described as the "forced" holiday beginning on 15 July 2021). Consequently, given that he did not accept that the 51 days he had taken off between 15 July and 8 October 2021 were holiday, he was entitled on the termination of his employment to a payment in respect of accrued but untaken holiday of 36 days (from the holiday year 2020 to 2021) and 18 days (from the holiday year 2021 to 2022 – such payment being 3 days per completed month from 1 April to 30 September 2021 in accordance with clause 15 of his contract). He was therefore entitled to 54 days' pay in respect of accrued but untaken holiday pay.
10. The respondent did not accept that the claimant had reached an agreement with Mr Wood to carry over his holiday pay and said that carry over was not permitted by clause 18 of the contract. The respondent also did not accept that the claimant had not been given proper notice of holidays between 15 July and 8 October 2021. Consequently, the respondent did not accept that the claimant was owed any amount in respect of accrued but untaken holiday. However Mr Molloy for the respondent agreed that if I concluded that there was an agreement for the claimant to carry over all his holiday for 2020-2021, then the respondent would owe him 3 days' holiday pay (the 54-day entitlement less the 51 days taken).
11. The issues for me to consider were, therefore:
 - 11.1. Did the claimant reach an agreement with Mr Wood that he was permitted to carry over 36 days holiday from the 2020-2021 holiday year (such an agreement in principle being permitted by clause 18 of the contract – "unless agreed otherwise...")? Alternatively, was he entitled to carry over all or part of his accrued but untaken holiday from 2020-2021 under regulation 13(10) of the Working Time Regulations 1998 ("the WTR 1998")? If so, how much?
 - 11.2. Was the respondent entitled to require the claimant to take holidays by giving him appropriate notice between 15 July and 8 October 2021?
 - 11.3. If so, did the respondent give the claimant the required notice of the holidays he was required to take between 15 July and 8 October 2021?
 - 11.4. In light of the answers to the questions at 11.1 to 11.3 was the claimant due an amount in respect of accrued but untaken holiday pay (to be calculated at the rate of 1/260th of annual salary per day)?
12. The claimant confirmed that he pursued no other argument in relation to "arrears of pay" (the box ticked on the claim form).

The Law and the relevant provision of the contract

13. The issues of the carrying over of holiday pay from one holiday pay year to the next, the notice required to be given by an employee to take holiday, and the amount (if any) due to an employee in respect of accrued but untaken holiday pay on the termination of their employment are to be considered both by reference to the WTR 1998 and the employment contract of an employee.
14. Turning first to the WTR 1998, and the question of carry over, regulation 13 provides that the four weeks' leave to which a worker is entitled "may only be taken in the leave year in respect of which it is due" (regulation 13(9)(a)) but this is subject to paragraphs 10 and 11 which provide that where "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)". Paragraph 11 says that the leave must be taken in the two leave years following the leave year in which it was due.
15. Regulation 13A deals with entitlement to additional annual leave (the 8 bank holidays in this claim). It states that a "relevant agreement" may provide for such leave to be carried over from one leave year to the next. It does not, however, contain any provision permitting the worker to carry over leave if prevented from taking it by the effect of coronavirus. A "relevant agreement" includes a contract of employment (regulation 2). The contract is therefore a "relevant agreement".
16. Regulation 15 of the WTR 1998 deals with dates on which leave is to be taken. Regulation 15(2) permits a worker's employer to require him to take leave to which the worker is entitled under regulations 13 and 13A on particular days by giving notice as required by regulation 15(3). This requires that the notice must be given before the "relevant date". This is the date "twice as many days in advance of the earliest day specified in the notice as the number of days... to which the notice relates". So, if an employer wants an employee to take one day's holiday on Friday, they must give them notice of this before Wednesday: two clear days' notice is required. However, regulation 15(5) allows the rights and obligations in relation to notice to be varied or excluded by a "relevant agreement".
17. Regulation 14 of the WTR 1998 deals with the calculation of the payment due to workers in respect of accrued but untaken holiday pay on the termination of employment. It provides that the amount shall be "such sum as may be provided for the purposes of this regulation in a relevant agreement". If there are no relevant provisions in a relevant agreement, regulation 14 provides a formula for the calculation of the payment.
18. Turning to the relevant provisions of the contract, clauses 15 to 18 provide as follows:
 15. *Our holiday year runs from 1 April to 31 March. You are entitled to 28 days' holiday per holiday year at your normal basic pay. You are also entitled to the usual public holidays in addition to this entitlement. In the holiday year(s) in which your employment starts and ends, one-twelfth of your annual holiday entitlement will accrue for each full month of employment.*

16. *You must take your holidays on dates that are convenient to us and that we agree in writing in advance. You should give us as much notice as you can of your wish to take holiday on a particular date giving notice of at least double the length of time you wish to take on holiday in one go. We may require you to take holiday on specific days as notified to you.*

17. *When your employment ends, we will pay you in lieu of any accrued but untaken holiday entitlement. You must take your outstanding holiday entitlement during any notice period, if we ask you to. If you have taken more holiday than you have accrued, then you must repay us for the days you have not accrued. Payment by you or us under this clause will be at the rate of 1/260th of your annual salary (or, if you are part-time, at 1/260th of your full-time equivalent salary) for each day of holiday.*

18. *Unless agreed otherwise, if you do not take all of your holiday entitlement in any holiday year, we will not normally make any payment in lieu or increase your holiday entitlement in any subsequent year. However, carry forward may be permitted if a period of extended sickness absence, statutory maternity, paternity, shared parental or adoption leave has prevented you from taking leave in the relevant year and in this case you should contact your line manager or HR representative.*

Findings of fact

19. In making these finding of fact I have taken account of all the evidence before me although I do not of necessity refer to it all.
20. The claimant was employed by the respondent from 19 February 2020 until 15 October 2021. The claimant was placed on furlough from a date in November 2020 until 15 July 2021.
21. It is agreed that from 15 July 2021 until two weeks before 8 October 2021 (i.e. for a total of 51 days) the respondent gave the claimant notice to take holiday. Such notices were, it was agreed, given more or less daily. The claimant agreed that two clear days' notice was given of each day's leave except for the three days in respect of which notice was given on 14, 19 and 22 July 2021.
22. Ms McGuinness' written evidence on this issue ([17] and [18] of her statement) was to the effect that "48 hours" or "two days" notice was given. However, I find that that was not the case in respect of the three days in respect of which notice was given on 14, 19 and 22 July 2021. This is because that was the conclusion of the respondent's own HR consultant when it investigated a grievance by the claimant (page 116, paragraph 148 of the consultant's report) and Ms McGuinness did not explain in her evidence why that conclusion was incorrect. .
23. The only other factual dispute in relation to which findings of fact are necessary in light of the issues as agreed above is whether the claimant reached an agreement to carry over 36 days' leave with Mr Wood. The evidence of Ms McGuinness in this regard was that she had been unable to find any evidence (email, letter, text message) in relation to this issue ([8] of her witness statement). When asked in her oral evidence whether she had tried to contact Mr Wood to discuss with him whether he had reached an agreement in relation to carry over with the claimant she said that she had not. She explained this by saying that by the time the issue came up she had already dismissed Mr Wood for gross

misconduct. She also said that she believed it would have been possible for holiday pay to be paid because the business had received a grant of £22,000 and also a rent holiday worth £14,000. She accepted, however, that the respondent's accounts for the period had not been included in the bundle and provided no further detailed information in relation to its finances.

24. The evidence of the claimant was that Mr Wood had agreed with him in March 2021 that he could carry over all 36 days of holiday from the holiday year 2020 to 2021 and that this was because the respondent had as a result of the coronavirus pandemic been unable to pay holiday for that holiday year. He had referred to such an agreement having been reached in correspondence prior to the termination of his employment (for example, the email of 20 September 2021 to Ms McGuinness at page 129, from which the word "no" was omitted before the words "holiday payments" in the penultimate paragraph).
25. I find that the claimant had not taken any holiday in the 2020-2021 leave year and that he reached an agreement with Mr Wood that all of his holiday from 2020-2021 (36 days) could be carried forward to the next holiday year, which agreement was recorded in writing but has since been lost by the respondent, quite possibly as a result of the circumstances in which Mr Wood left the business, which quite clearly resulted in Ms McGuinness struggling to locate a variety of paperwork. I find that this agreement was reached because the respondent was in Mr Wood's view unable to finance holiday of workers in the year 2020 to 2021. To the extent that this finding requires me to prefer the evidence of the claimant to that of Ms McGuinness – and strictly speaking it does not because Ms McGuinness was able only to give evidence in relation to an absence of evidence, she was not involved in the relevant conversations – I do so because I found the claimant to be a credible witness (his evidence was consistent and plausible) and accepted his account to be true.

Conclusions

26. Returning to the issues agreed at the beginning of the hearing, I consider first whether the claimant reached an agreement with Mr Wood that he was permitted to carry over 36 days' holiday from the 2020-2021 holiday year (such an agreement in principle being permitted by clause 18 of the contract – "unless agreed otherwise...")? I conclude that he did in light of my factual findings as set out above.
27. Further and alternatively, I conclude that the claimant was entitled to carry over 4 weeks of his accrued but untaken holiday from 2020-2021 under regulation 13(10) of the WTR 1998 because it was not reasonably practicable for him to take that leave as a result of the effect of coronavirus on the respondent.
28. The consequence of the conclusion at paragraph 26 is that the claimant was entitled under clause 17 of his contract to a payment on termination in respect of 54 days' annual leave less any annual leave taken from 15 July 2021 onwards.
29. The next issue for me is whether the respondent was entitled to require the claimant to take holiday by giving him appropriate notice between 15 July and 8 October 2021 and, if so, whether such notice was given.

30. The claimant raises two arguments in relation to the leave that he was required to take. The first is that incorrect notice was given of such leave on 14, 19 and 22 July 2021 and so the three days to which such notices related should not be counted as leave. I reject that argument: the respondent was not required to give notice as required by regulation 15(2) of the WTR 1998 because this obligation was varied or excluded as permitted by regulation 15(5) of the WTR 1998 by clause 16 of the contract. This provided:

You should give us as much notice as you can of your wish to take holiday on a particular date giving notice of at least double the length of time you wish to take on holiday in one go. We may require you to take holiday on specific days as notified to you.

31. Whilst clause 16 requires notice of a particular length to be given by the claimant, it does not require notice of a particular length to be given by the respondent.

32. The claimant's second argument was that the respondent was not permitted to give him notice to take annual leave on particular dates because he was a salaried employee and so was entitled to be paid even if the business was closed. Further, in the email witness statement he contends that the respondent's contention that it was unable to trade because Mr Joel Geere had resigned was false and that consequently "the reasoning behind making me take my holidays [was] void".

33. There was no dispute that correct notice was given in relation to the other 48 days of leave. Against this background, there is nothing in the WTR 1998 that requires an employer to give or to hold a particular reason for requiring an employee to take holiday on particular dates. All that is required is that the correct notice is given. There is no distinction between salaried employees and those who are hourly paid. Consequently, the respondent did not act in breach of the WTR 1998 by requiring the claimant to take holiday on the 51 days in question. So far as his contract of employment is concerned, there is again nothing in it which prevented the respondent from giving the claimant notice to take holiday on particular days. Nor is there anything in it which required the respondent to give or have any particular reason for the claimant being required to take holiday on particular days. Clause 16 as set out above simply permitted the respondent to "take holiday on specific days as notified to you".

34. I observe at this point that there is nothing surprising about a salaried employee being required to take holiday on particular days. A salaried employee is entitled to their annual salary and to a certain amount of holiday. The pay for the holiday they are entitled to take is included in the salary. No additional payment is made.

35. In light of these conclusions and the issues agreed at the beginning of the hearing the respondent should have paid the claimant an amount in respect of 3 days accrued but untaken holiday on the termination of his employment. That is to say he carried forward 36 days' holiday from the 2020-2021 holiday year and then accrued 18 days in the 2021 to 2022 holiday year giving a total of 54 days' annual leave. However, he was lawfully required to take 51 days' annual leave between July and October 2021 leaving a balance of three days' leave due and unpaid.

36. Such leave is to be paid at 1/260th of annual salary per day. Therefore, the respondent is ordered to pay the claimant $3/260^{\text{th}} \times \text{£}21,000 = \text{£}242.31$ in respect of accrued but untaken holiday pay.

Employment Judge Evans
Date: 23 March 2022

JUDGMENT SENT TO THE PARTIES ON
23 March 2022

Olivia Vaughan
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.