



EMPLOYMENT TRIBUNALS

Claimant Mr V Mittou
Respondent: Dr Dwindar Nar t/a Dental Suite Hounslow

HELD AT: London South (by CVP video) **ON:** 8 March 2022
BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: In person
Respondent: Ms Webber of counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim for notice pay is dismissed.
2. The claim for holiday pay is dismissed.
3. The claim for mileage expenses is dismissed.

REASONS

The hearing

1. The hearing was conducted by CVP and commenced almost an hour late due to technical issues at the Tribunal.

2. Mr Mittoo, the claimant, was representing himself. Dr Nar, the respondent, was represented by Ms Webber of counsel. Both parties are thanked for their assistance and representation during the hearing.
3. It was confirmed at the outset that the respondent's title should be amended to "Dr Dwindar Nar t/a Dental Suite Hounslow".
4. The respondent provided a 115-page hearing bundle. The claimant provided documents attached to an email dated 7 March 2020. The claimant agreed to use the respondent's bundle, since this contained most of his documents, was more extensive and was paginated. The only additional documents relied on by the claimant were 6 pages relating to his search for employment. The respondent queried whether these were relevant but agreed that they could form a supplementary bundle.
5. The claimant gave evidence on his own behalf. He relied on a witness statement contained in the email dated 7 March 2022. Since this statement only addressed his claim for notice pay, evidence in chief was adduced based on the claims as set out in the claim form. Dr Nar, for the respondent, had a witness statement covering all elements of his response to the claims.
6. The parties were informed that there would be a break for lunch and a mid-morning and mid-afternoon break, and to not hesitate to request further breaks should they be required.

Claims and issues

7. Both parties confirmed at the outset that the claims were monetary ones for notice pay, holiday pay and expenses. The claimant confirmed that he was not bringing claims for unfair dismissal or discrimination. This was in accordance with the correspondence dated 16 June 2021 from EJ Andrews stating "your claim will proceed as one for notice pay and other payments only. Unfair dismissal and discrimination are not being claimed".

8. Having confirmed the claims to be determined at this hearing, the issues were agreed to be as follows:

Notice pay

- 8.1. What was the claimant's notice period?
- 8.2. Was this notice period varied?
- 8.3. What notice did the claimant receive?
- 8.4. Did the claimant agree or acquiesce to receive less notice?
- 8.5. Was the claimant paid for part or whole of that notice period?

Expenses

- 8.6. What travel expenses was the claimant entitled to under contract?
- 8.7. Was the contract varied?
- 8.8. Did the respondent breach the contract by failing to pay agreed expenses?
- 8.9. How much should the claimant be awarded as damages?

Holiday pay

- 8.10. What was the claimant's leave year?
- 8.11. What holiday pay has the claimant accrued?
- 8.12. How much paid leave had the claimant taken in the year?
- 8.13. Was the claimant entitled to carried over leave from the previous holiday year?
- 8.14. What pay is owed to the claimant and how is it calculated?

Factual findings

- 9. Dr Nar was a sole trader operating a dental practice in Hounslow and another in Hythe. He employed a total of 15 dentists and support staff across the two practices.
- 10. The claimant was employed as a Practice Manager for both practices between 14 January 2019 and 31 July 2020. His place of work was Hounslow for 3 days per week and Hythe for 2 days per week, a round trip from home of 150 miles and 250 miles respectively.

11. The claimant was provided with a written statement of terms and conditions of employment, of which the relevant terms were as follows (pages 44-53):
 - 11.1 Mileage expenses to be paid as per accountant instruction at £0.35 per mile (handwritten amendment to clause 9.1).
 - 11.2 28 days holiday including bank holiday and public holidays (clause 10.1).
 - 11.3 The holiday year was 1 April to 31 March (clause 10.2).
 - 11.4 Holiday entitlement could not be carried over to the following holiday year (clause 10.4).
 - 11.5 12 weeks' notice to terminate employment (clause 14.2).

12. On 5 March 2019 the claimant submitted a claim for mileage expenses for February 2019. This was considerably more than Dr Nar had anticipated and more than he could afford. As a result, there were discussions throughout 2019 as to alternative arrangements. This culminated in an email from the claimant to Dr Nar on 8 January 2000 proposing:
 1. payment of £3500 to cover past expenses;
 2. payment for an annual train ticket £5112 (by instalments) to cover travel to Hounslow; and
 3. provision of a company car for travel to Hythe. Dr Nar to pay MOT, servicing and a monthly fuel allowance. The claimant to pay for insurance. (page 73)

13. Dr Nar responded by email dated 17 January 2020 with a counter proposal, stating that he was happy to commit to the following:
 4. payment of the £3500 for past expenses "as a gesture of goodwill";
 5. payment of an annual train ticket of £5112 in 12 monthly instalments; and
 6. provision of a company car for travel to Hythe. The claimant to pay for fuel, road tax, insurance and ensure compliance with legal requirements.

Dr Nar further stated: "Please note, you have been included in a bonus scheme which should cover your fuel expenses". It is not disputed that the bonus scheme was never implemented. The email ended "kindly confirm your acceptance of this proposal" (page 72).

14. The claimant did not respond to this email but stated that there was a further conversation with Dr Nar after the 17 January during which the claimant expressed concern about fuel not being paid. Dr Nar denied that this discussion took place. I accept the claimant's evidence that he was not happy with this arrangement but I also accept Dr Nar's evidence that he would not have agreed to pay for fuel because he could not afford it. Dr Nar's position was the basis upon which the proposal of the 17 January 2020 was made. Following the 17 January 2020 email Dr Nar paid the claimant £3500 for past fuel expenses, and paid monthly instalments of the annual train ticket. Further from 4 February 2020 Dr Nar provided the claimant with a company car.

15. It was not disputed that at the end of the 2019/20 holiday year (31 March 2020) the claimant had 8.5 days outstanding holiday leave. The claimant stated in his witness statement that Dr Nar would not allow him to take leave, that he had to continuously ask him and wait for several months before being allowed to take time off. In evidence the claimant claimed that Dr Nar agreed that he could carry over his outstanding leave. He was unable to provide details as to when this discussion occurred or what was said. He stated that Dr Nar had no issue with rolling over holiday and that other staff were also permitted to roll over their holidays. Dr Nar denied that this conversation took place and stated that no member of staff was permitted to carry over holiday. I find that, in the absence of any specific details of any discussion or corroborative evidence, there was no agreement to carry over the outstanding leave.

16. On 2 June 2020 the claimant attended a meeting with Dr Nar who informed him that his employment was to be terminated on 31 July 2020 for financial reasons. There are no notes of this meeting. Dr Nar stated that the claimant was prepared to accept 2 months' notice because he was aware of the financial position of the business and the claimant said that he had only expected to receive 1 month's notice. The claimant denied that he said this or that notice was discussed. He agreed that Dr Nar said that he could not afford to continue to employ the claimant but also stated that Dr Nar threatened a disciplinary action if he did not agree to the termination of his contract. The claimant claimed that the allegations against him were false. I find it more likely than not that during the discussions Dr Nar

referred to the possibility of disciplinary action since there are documents in the bundle suggesting that the claimant's performance was being investigated. I make no findings as to whether or not the investigation was justified. I do however find that in the light of these matters being raised it is more likely than not that the claimant agreed to the termination of his contract on 31 July 2020.

17. On the 6 June 2020 Dr Nar emailed the claimant referring to the discussion on the 2 June 2020, stating that the claimant's last day of employment will be 31 July 2020 "as mutually agreed" (page 84). The email further stated that Dr Nar was happy to accommodate the claimant's request for 2 weeks' annual leave and requested dates.
18. On the 9 June 2020, the claimant responded by email providing dates for annual leave and requesting payment for outstanding expenses including £1066.38 for car travel expenses to Hythe (page 87). There was no mention of the 2-month notice period or the termination date. The claimant accepted in evidence that he did not complain about the reduced notice period in writing. He stated that he attempted to contact Dr Nar by telephone and WhatsApp on a number of occasions and that Dr Nar was increasingly unresponsive. The claimant did not adduce any evidence of these attempts. The WhatsApp messages in the bundle were provided by Dr Nar, did not refer to any discussion regarding the notice period and all but one were post-termination. Conversely there is evidence of continued communication between the claimant and Dr Nar in relation to other matters.
19. On 10 June 2020 Dr Nar responded to the claimant's request for outstanding expenses and stated in relation to car travel expenses "my understanding is that I was not prepared to pay your fuel expenses since I was going to be paying for your train ticket, and provided you with a car for use. We have documented this an agreement between us." (page 86). The issue of expenses was further discussed by Dr Nar and the claimant on the 18 June 2020, after which Dr Nar emailed the claimant stating "as discussed and mutually agreed, I would like to confirm in writing that the myself / business will NOT be paying the expenses that

you have billed us for” (page 86). On 17 July 2020 the claimant responded “as agreed I will not be looking to claim business expenses” (page 86).

20. On the 27 July Dr Nar wrote to the claimant offering to pay £180 towards fuel expenses despite the former agreement that no fuel expenses would be paid (page 90). The claimant responded by email on the 29 July 2020 stating that the amount offered was not reasonable or realistic and sought payment of a sum that amounted to over £1000 (pages 89-90). Dr Nar responded that the claimant’s calculations were completely wrong, stating that “the car does at least 100 miles for £10 worth of diesel. You have done 3176 miles”. Dr Nar made a “final offer” of £317.68 (pages 88-89). By email on the 31 July 2020 the claimant stated “as discussed will accept your calculation of fuel charges” (page 88). The claimant accepted that he was duly paid the sum of £317.68 for outstanding expenses.
21. The claimant’s contact terminated on the 31 July 2020.
22. Following the termination of the claimant’s contract there were discussions on the 10 August 2020 regarding re-employing the claimant on a new contract with reduced pay (pages 92-93). The claimant requested time to consider the offer but ultimately rejected it.
23. It was not disputed that prior to the termination date the claimant took the requested 2 weeks (10 days) annual leave. It was also not disputed that the claimant had received 4 bank holidays in the 2020/21 leave year and that therefore total leave taken at the date of termination was 14 days.

Closing submissions

24. The claimant’s submissions were as follows:
 - 24.1 Notice pay: The claimant relied on the written terms of his contract that provided for 12 week’s notice period. The claimant denied that he agreed to a reduced notice period of 2 months at the 2 June 2020 meeting or at all.

24.2 Expenses: The claimant relied on the written terms of his contract that provided for mileage at £0.35 per mile. He stated that at no point did he deviate from this agreement.

24.3 Accrued holiday pay: The claimant accepted that his leave entitlement was 28 days per year, that the leave year ran from 1 April to 31 March and that he had taken 14 days in the current leave year (2020/21). He accepted that this was in excess of his accrued holiday entitlement for that year of 9.5 days. He therefore confirmed he was claiming 4 days outstanding from the previous year, plus a further 2.5 days if his claim for notice pay succeeds. He stated that Dr Nar had agreed to leave being carried over from one leave year to the next.

25. The respondent's submission were as follows:

25.1 Notice pay: The respondent accepted that the claimant's contract provided for 12 weeks' notice. The respondent contended that this was varied by agreement to 2 months at the meeting on the 2 June 2020 and that this agreement was reflected in the 6 June 2020 email. Alternatively, the claimant acquiesced in the unilateral variation of his contract in that he continued to work without objection.

25.2 Expenses: The respondent accepted that the claimant's contract provided for mileage at £0.35 per mile, but contended that this was varied by agreement, or by conduct, on or around 17 January 2020. Alternatively, on the 17 July 2020 the claimant agreed not to claim further fuel expenses, or alternatively on 31 July 2020 the claimant accepted £317.68 as payment for outstanding expenses.

25.3 Accrued holiday pay: The respondent contended that the claimant had no outstanding leave having exhausted his 2020/21 leave entitlement. The respondent relied on the provision in the written contract that no leave will be carried over from one leave year to the next. The respondent denied that it agreed to any variation to this provision.

The law

26. A term in a written contract may be varied by express agreement, in writing or orally. It may also be varied by implied agreement through conduct. Tribunals should be slow to imply agreement to a variation, unless such agreement is clear from the surrounding facts. Factors can include whether the variation takes immediate effect, whether there was any objection to the variation, whether, and to what extent, there is any benefit to the employee from the variation.
27. An employer can unilaterally change a term of the contract, but if they do so it will be a breach of contract. An employee then has a choice, they can acquiesce in the breach by carrying on working without objection under the revised terms, they can remain at work but make it clear that they object to the breach, or they can refuse to be bound by the contract and resign. In relation to the latter two options, where employment has ended, an employee may be entitled to bring a claim for breach of contract in the employment tribunals in accordance with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
28. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. An employer will also be in breach of contract if they fail to pay contractual holiday pay or contractual expenses. The aim of damages for breach of contract is to put the claimant in the position they would have been in had a contract been performed in accordance with its terms.
29. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision, or a relevant provision of the workers contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction. A worker has a right to complain to an employment tribunal of an unauthorised deduction from wages pursuant to section 23 ERA. The definition

of wages under section 27 would include notice pay and holiday pay, but excludes expenses.

30. Regulation 13 of the Working Time Regulations 1998 (WTR) entitles a worker to 4 weeks' annual leave and regulation 13A entitles a worker to a further 1.6 weeks' annual leave, amounting to a total of 5.6 weeks including bank holidays. Under both regulations employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment. In relation to carrying over the 4 weeks' leave, the general rule under regulation 13(9)(a) is that a worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year. There are caselaw exceptions to this rule which include being unable to take leave due to for example sick leave and parental leave, or being prevented from doing so by the employer. In relation to carrying over the 1.6 weeks' leave, regulation 13A(7) permits this to be carried over if there is a relevant agreement between the parties.

Conclusions

Notice pay

31. It is not disputed that the claimant's contract provided for 12 weeks' notice. Further it is not disputed that the claimant only received 2 months' notice. The issue is whether the claimant either agreed to a reduced notice period at the meeting on the 2 June 2020, or if he did not whether he subsequently acquiesced in a unilateral variation imposed on him by the respondent.
32. In relation to whether there was an express agreement to reduce the notice period, I was concerned as to why an employee faced with dismissal would agree to this. I have concluded that the claimant may have done so in order to avoid disciplinary action against him and / or because he was aware of the financial position of the respondent. I reach this conclusion based on the evidence in the bundle of potential concerns regarding the claimant's performance at work, the undisputed evidence that Dr Nar could not afford to continue to employ the claimant for financial reasons, and the email of the 6 June 2020 that refers to the

termination date being “mutually agreed”. However even if there was no agreement to vary the contract on 2 June 2020, and therefore Dr Nar was potentially breaching the claimant’s contract, I have concluded that the claimant acquiesced in the breach. I have reached this conclusion because there is no evidence that the claimant objected to the shortened notice period at any point. It is particularly notable that he makes no mention of the notice period in his email response of the 9 June 2020, which did raise other outstanding matters such as expenses and holiday. Nor was it raised in any of the subsequent email exchanges or discussions regarding expenses, Therefore I have concluded that there was no breach of contract. Since there was no breach of contract there is also no unlawful deduction of wages and the claimant’s claim for notice pay is dismissed.

Mileage Expenses

33. It was not disputed that the claimant’s contract provided of mileage expenses at £0.35 per mile. I find that the contract was varied on or around 17 January 2020, either expressly by agreement or impliedly by conduct. I take into account the fact that following the 17 January 2020 email, the claimant received payment of £3500, payment towards the annual train ticket and a company car. Further, there are no requests by the claimant after this date for payment of fuel mileage expenses, until he was given notice of termination of employment. I accept that the claimant was not happy about non-payment of fuel expenses for his travel to / from Hythe, but conclude that it was something he was prepared to accept at the time. For the sake of completeness, I do not consider that the failure to implement the bonus scheme undermined the agreement. The reference to the bonus scheme in the 17 January 2020 email was aspirational and I do not consider it to be central to the terms under offer.
34. If I am wrong, then any entitlement to fuel expenses effectively came to an end either on 17 July 2020 when the claimant agreed not to claim further fuel expenses, or on 31 July 2020 when he expressly accepted Dr Nar’s offer of £317.68 as payment for all outstanding expenses.

35. Therefore I have concluded that there was no breach of contract, and the claimant's claim for expenses is dismissed.

Holiday pay

36. It was not disputed that the claimant had taken more than his leave entitlement in the 2020/21 leave year. Therefore the claimant's claim for holiday pay was dependent on his having entitlement to carry over leave from the previous leave year (2019/20). The contract expressly prevented holiday from being carried over therefore the claimant will only have a claim for breach of contract and / or unlawful deduction of wages, if there was agreement to vary the contract. In other words if there is evidence that Dr Nar agreed that the claimant could carry over leave to the next year. The claimant was unable to provide any details as to what was said and when, despite being specifically asked during the hearing to provide this information. On the other hand Dr Nar was clear in his evidence that there was no such discussion or agreement. The burden rests on the claimant and in the absence of specific information I am unable to find that there was an agreement to vary. I also take into account the emails of the 6 and 9 June 2020 in relation to the request for 2 weeks' leave prior to the termination of the contract. The claimant does not mention in this correspondence that there was any further leave owing to him. Therefore I have concluded that there was no breach of contract or unlawful deduction of wages.

37. I have considered whether the claimant was entitled to carry over leave under the statutory provisions in the WTR. In the absence of a relevant agreement the claimant is not entitled to carry over leave under regulation 13A. I have considered whether he could carry over leave under regulation 13. Whilst the general rule is that unused leave cannot be carried over, there are exceptions. The claimant cannot rely on the sick leave / parental leave exceptions but was he prevented from taking his annual leave entitlement? The respondent did not dispute that the claimant had not taken 8.5 days of his leave in 2019/20, however no evidence was provided by the claimant as to why this had occurred. The evidence that the claimant gave related to delays in agreeing leave but not that his requests for leave were refused and there is no other evidence to suggest that the claimant was prevented from taking leave. I have therefore concluded that

there was no entitlement to carry over leave under the WTR. Accordingly, the claim for holiday pay is also dismissed.

Employment Judge Hart

Date: 20 May 2022

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