



EMPLOYMENT TRIBUNALS

Claimant

Mr Simone Guadagno

v

Respondent

Butch Annie's Limited

Heard at: Cambridge

On: 10 January 2022

Before: Employment Judge Tynan (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Nigel Howell, Director

RESERVED JUDGMENT

1. The Claimant's complaint that the Respondent made unlawful deductions from his wages is well founded.
2. The Tribunal Orders the Respondent to pay to the Claimant the sum of **£770.40** in respect of the unlawful deductions from his wages.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 21 February 2021, following Acas Early Conciliation from 11 December 2020 to 22 January 2021, the Claimant complains that he is owed holiday pay and arrears of pay. The Respondent operates a restaurant in central Cambridge and employed the Claimant as a Commis Chef. He claims to be owed the sum of £1,512.00 in respect of 21 days' holiday, accrued but untaken as at 30 November 2020 when his employment with the Respondent terminated. He claims the further sum of £28.80 in respect of 16 hours that he worked in July 2020 and which he alleges was paid at his furlough rate of pay rather than his actual rate of pay.
2. The Claims are denied by the Respondent. In its Response Form the Respondent additionally pursues an employer's contract claim against the Claimant in respect of losses allegedly incurred by reason of the

Claimant's alleged failure to give notice of termination of his employment in accordance with the terms of his Contract of Employment. I explained to the parties that the Tribunal has no jurisdiction to consider an employer's contract claim where, as here, there is no contract claim by the Claimant (Article 4(d) of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994).

3. As regards the claimed underpayment of wages, Mr Howell acknowledged that the Claimant was entitled to be paid his normal rate of pay for any hours actually worked by him. He said that the Respondent was not in a position to dispute the Claimant's claim that he had worked 16 hours for the Respondent in early July 2020 in getting the Respondent's restaurant ready ahead of its re-opening following the first national lockdown as a result of the Coronavirus pandemic. Mr Howell did not seek to dispute the Claimant's calculation that in being paid his furlough rate of pay for those 16 hours, he had been underpaid the sum of £28.80.
4. I find that the Claimant did work a total of 16 hours as he alleges in July 2020 in order to ensure the restaurant was ready to re-open, but that he was only paid his furlough rate of pay in respect of those hours worked by him. Accordingly, his complaint that he was underpaid by £28.80 is well founded.
5. As regards the Claimant's holiday pay complaint, Mr Howell contends that the Claimant effectively took his annual leave during between March and July 2020 when he was furloughed. He said the Claimant had travelled to Italy on or around 8 May 2020, returning to the UK in late June ahead of the restaurant re-opening.
6. On the date the Claimant travelled to Italy in May 2020, there were legal restrictions on non-essential travel outside the UK. Travel for the purposes of taking a holiday was not permitted. In a WhatsApp exchange with Stef, the Restaurant Manager (also the Claimant's cousin), the Claimant wrote on 7 May 2020,

"Hi Stef, so lets make clear my reasons, I am going to Italy not for a holiday but because here I am just spending money for food and other primary stuff that I can avoid in Italy because I will be with my family there, second thing is that in Italy I will have more restrictions then here because the quarantine is forced there so for sure recreations is not a reason for go there."
7. It must be highly unlikely that travel to Italy for the purposes of reducing his outgoings would have qualified as essential travel. However, it is not necessary or even desirable that I should make any specific finding in that regard. The Claimant does not forfeit his employment rights because it is alleged he may have breached travel restrictions in place during the pandemic. I find that his trip to Italy was not a holiday or otherwise for the purposes of leisure and relaxation. I accept his evidence that the restrictions in place in Italy at this time were at least as onerous as those

in the UK and that his trip to Italy did not offer him opportunities for leisure or relaxation.

8. All employers have the right to require that their workers take holiday at times elected by the employer, including whilst furloughed. The mechanics are set out in Regulation 15 of the Working Time Regulations 1998, which provides,

“(3) A notice under paragraph (1) or (2) –

- (a) may relate to all or part of the leave to which a worker is entitled in a leave year;
- (b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and
- (c) should be given to the employer or, as the case may be, the worker before the relevant date.”

9. There is no requirement that any notice under Regulation 15 must be given in writing. Having reviewed the documents in the Hearing Bundle, there is no evidence of any notice in writing having been given to the Claimant requiring him to take annual leave whilst in Italy or indeed otherwise whilst furloughed. I am equally satisfied, and find, that he was not issued with any verbal instruction to take any part of his annual leave, whether by Stef or anyone else at the Respondent. I note in particular Stef's WhatsApp message to the Claimant on 7 May 2020, in which he suggested, erroneously, that the Claimant,

“must be resident in Cambridge in order to be eligible for furlough pay, unless a holiday has been agreed in advance with the company.”

10. It is implicit from those comments that Stef was of the view on 7 May 2020 that a holiday had not been agreed ie, either at the Claimant's request or as directed by the Respondent.
11. Having received a response from the Claimant on 7 May 2020, Stef sent a further WhatsApp message to the Claimant on 8 May 2020. Whilst he reiterated the Respondent's erroneous position above as to the application of the Coronavirus Job Retention Scheme, he still did not state that the Claimant was required to take a period of paid leave.
12. Whilst I conclude therefore that the Claimant did not take holiday and was not issued with notice by the Respondent to take any holiday, that is not an end to the matter. Under clause 12(1) of his Contract of Employment, the Claimant was required to give the Respondent one month's notice of termination of employment. I find that he left the Respondent's employment without notice and without securing the Respondent's agreement that he need not work his notice.

13. On 15 July 2020, the Claimant gave notice resigning his employment citing his rate of pay. I find that he withdrew that notice following a discussion with the Respondent and having secured an increase in his pay, albeit he remained ambivalent as to whether he would remain with the Respondent in the longer term. The Claimant suggests that it was agreed he would continue working for the Respondent until it was able to source a replacement Commis Chef. I am not persuaded there was any such agreement. In any event, I find that it certainly was not agreed that the Claimant was at liberty to leave the Respondent's employment on no notice.
14. The Claimant commenced a second period of furlough leave on or around 3 November 2020 as a result of the second national lockdown. At the end of that second short lockdown and just as the Respondent's restaurant was about to re-open, the Claimant emailed the Respondent on 30 November 2020 stating that he would be leaving its employment with immediate effect. He purported to rely upon the notice given on 15 July 2020. His letter of resignation concluded,

"I regret any inconvenience this will cause; I wish you the best and the company the best".
15. Clause 12(4) of the Claimant's Contract of Employment provides,

"The Company reserves the right to require you to use any remaining holiday entitlement during your notice period."
16. Clause 12(5) of the Claimant's Contract of Employment provides,

"If you terminate your employment without complying with the above notice provisions and without our consent to vary them, may deduct from your final salary and amount to compensate us fully for any loss suffered by us as a result."
17. In resigning without giving the Respondent one month's contractual notice, the Claimant was in breach of contract. By his actions he deprived the Respondent of the opportunity to require him to take some of his accrued holiday entitlement during his notice period. I am satisfied, on the balance of probabilities, that the Respondent would have exercised the right available to it under Clause 12(4) above, had it been permitted the opportunity to do so. Clause 12(4) is subject to the overriding obligation in Regulation 15(4) of the Working Time Regulations 1998, namely, that in order for notice under Regulation 15 to be effective, twice as many days' notice must be given by the employer of the leave required to be taken.
18. Given the provisions of Regulation 15(4), the Claimant could, at most, have been required by the Respondent to take 10 days' leave during his notice period. The Respondent was entitled to deduct an appropriate sum from the Claimant's final salary to compensate it for its liability to make

payment in lieu of 10 days' holiday pay. However, the Claimant was not paid his full rate of pay during November 2020, he was on furlough and accordingly only being paid at 80% of his normal pay. The Respondent's loss is therefore 10 days' furlough wages, namely £576.00.

19. It is not in dispute between the parties that the Claimant was entitled to 28 days' annual leave, inclusive of bank holidays. Clause 8(3) of his Contract of Employment provides that if required to work on a bank holiday, the Claimant would be given a day off in lieu. The Claimant was not required to work on 1 January 2020, Good Friday, Easter Monday, or the two May bank holidays in 2020, as the Restaurant was closed on those dates. Whilst he is not entitled therefore to days off in lieu of them, I find that he was only paid at his furlough rate of pay for the latter four bank holidays. He is entitled to be paid the shortfall between his furlough pay and his normal rate of pay in respect of them. His normal daily rate of pay was £72. I find that he was only paid £57.60 for each day, namely 80% of his normal rate of pay, a shortfall of £14.40 per day. He has therefore been underpaid by £57.60 in this regard.
20. The Claimant took two days' leave prior to the pandemic in order to travel to Spain. Excluding Christmas Day and Boxing Day 2020, which fell after the Claimant had left the Respondent's employment, his total holiday entitlement to 30 November 2020 was to 18.33 days pro rata (or 18.5 days rounded up) together with the six bank holidays that fell during his employment. I find that the only bank holiday he was required to work (and in respect of which he was therefore entitled to a day off in lieu) was the August bank holiday, meaning that his total annual leave up to 30 November 2020 was 19.5 days.
21. Allowing for the two days' leave taken in the early part of 2020 to travel to Spain, the Claimant had 17.5 days accrued untaken leave as at the date of termination of his employment. That equates to £1,260.00 on the basis that his daily rate of pay was £72. For the reasons set out above, the Respondent was entitled to deduct £576.00 from the Claimant's outstanding wages pursuant to Clause 12(5) of the Claimant's Contract of Employment, meaning that he is owed £684.00 net of that deduction.
22. In conclusion, I calculate that the Claimant is owed £770.40, comprising as follows:
 - 21.1 £684.00 in respect of accrued but untaken holiday;
 - 21.2 £57.60 in respect of the shortfall in his pay for the four bank holidays;
 - 21.3 £28.80 in respect of the 16 hours worked by the Claimant in July 2020 when the Claimant was incorrectly paid at 80% of his normal rate of pay.

23. Accordingly I shall order the Respondent to pay the Claimant the sum of £770.40. This sum may be subject to PAYE deductions.

19 January 2022

Employment Judge Tynan

Sent to the parties on:

26 January 2022

For the Tribunal Office