EMPLOYMENT TRIBUNALS

Claimant: **Mr L Viner**

Respondent: **Mark Holbrook T/A Bristol Joinery**

Heard at: **Bristol** **On:** **23 August 2019**

Before: **Employment Judge Midgley**

Representation
Claimant: Mr L Viner, in person
Respondent: Mr M Holbrook, in person

JUDGMENT

1. The Claimant's claim for redundancy pay is not well founded and is dismissed. There was no redundancy situation within the meaning of s.139 ERA 1996.

2. The Claimant's claim for unlawful deduction of wages was dismissed on withdrawal; the Respondent having paid the wages agreed to be owed to the Claimant.

3. The Claimant's claim for unlawful deduction of wages in respect of accrued but untaken annual leave is not well founded and is dismissed.

4. The Respondent failed to provide the claimant with a written statement of employment particulars, but no award can be made pursuant to s.38 of the Employment Act 2002 as the Claimant's substantive claims failed.

REASONS

1. On 23 August 2019 the claimant's claims above were heard at the Bristol Employment Tribunal. The parties provided written statements, gave oral evidence and referred to documentary evidence which they had produced for the purposes of the hearing.

2. The Employment Judge considered all those matters, and provided an oral Judgment with reasons identifying his findings of fact and the application of the law

to those facts by which:

2.1. The claim for redundancy pay was dismissed as the Judge found that there was no reduction or diminution in work of the type that the claimant was employed to do, and therefore there was no redundancy situation as defined in section 139 of the ERA 1996.

2.2. The claim for unlawful deduction of wages was dismissed on its withdrawal by the claimant, in circumstances where the respondent had agreed to pay the outstanding balance of £13 in respect of wages.

2.3. The claim for accrued but unpaid annual leave (brought under the Working Time Regulations 1998 and as an unlawful deduction of wages claim under section 13 of the ERA 1996) succeeded. The Employment Judge found that:

2.3.1. There was no written contract which specified the annual leave year or the entitlement to annual leave:

2.3.2. In consequence, as a result of Regulation 13(3)(b)(ii) of the Working Time Regulations 1998 ("WTR") firstly, the annual leave year began on 1 March each year (being the commencement date of the claimant's employment with the respondent); secondly, the claimant's entitlement annual leave was 28 days (pursuant to Regulations 13 (1) and 13A WTR 1998) and eight days bank holiday, as there was no written contract specifying the bank holiday should be included in the 28 days statutory holiday, providing a total of 36 days of annual leave;

2.3.3. The claimant had taken 16 days annual leave in the annual leave year commencing on 1 March in 2018 and ending on the termination of his employment resignation on 7 September 2018, including five days bank holiday;

2.3.4. The claimant's entitlement on a pro rata basis annual leave at the date of his resignation was 28/12 x 6 (months) = 14 days.

2.3.5. There were five bank holidays in the period's 1st March until the 7th September 2018. In consequence the claimant's entitlement to annual leave was 14+5 = 19. The respondent paid 15 days annual leave; there were therefore four days accrued but unpaid annual leave and the termination of the claimant's employment.

2.4. As the claimant's claim for annual leave succeeded the Tribunal was obligated to make an award pursuant to section 38 of the Employment Act 2002 as there were no exceptional circumstances which would make making an award or increase the award in that respect unjust or inequitable.

2.5. The Employment Judge found that the appropriate level of award was the minimum of two weeks.

3. On 27 August 2019 the Employment Judge notified the parties that he was reconsidering his Judgment of his own motion pursuant to Rule 73 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013. The grounds for the Judge's decision to reconsider the Judgment were set out in an email to the parties on that date. In particular, the Employment Judge informed the parties that

3.1. The issue was whether the bank holidays were to be in addition to the

statutory annual leave or included within it.

3.2. The Employment Judge found that as there was no written contract specifying that the bank holidays were to be included within the statutory annual leave, they had to be treated as additional to them.

4. However, the Employment Judge was minded to reconsider that aspect of the Judgment as:-

4.1. Mr Holbrook gave evidence that there was a verbal contract that the annual leave was 28 days, (which was inclusive a bank holidays, given that it did not specify that they were to be in addition to the statutory annual leave);

4.2. There is no principle or authority of law that bank holidays must be added to statutory annual leave in the absence of an agreement to the contrary. The Statutory regime obliges an employer to pay a minimum of 28 days annual leave.

5. The Employment Judge directed that the parties should provide representations in writing in relation to the proposed reconsideration, indicating whether they were content for the Judge to make the decision without a hearing or whether they required a further hearing, by 4pm on 29th of August 2019.

6. The parties complied with that direction. The claimant resisted the reconsideration on the grounds that:-

6.1. the verbal contract specified that the leave year began on 1 January;

6.2. he had only taken 11 days annual leave (being six days in June and five bank holidays); and

6.3. he was therefore owed two days accrued but untaken annual leave.

7. The respondent supported the reconsideration for the reasons given.

8. The Employment Judge therefore reconsidered his Judgment pursuant to rule 73 on the grounds that he had identified to the parties. He concluded that the claimant's claim for accrued but untaken annual leave should fail because, for the reasons given orally on the date of the hearing:-

8.1. As there was no written contract specifying the start date of the leave year, regulation 13(3)(b)(ii) WTR 1998 specified that it should be construed to be the anniversary of the commencement of employment, namely 1 March, irrespective of the fact that the oral contract suggested it should begin on 1 January. That was the effect of the application of the law, which could not be avoided.

8.2. The Employment Judge had preferred the respondent's evidence as to the number of days of annual leave which the claimant had taken in the annual leave year of 2018. In consequence, the finding of fact was that the claimant had taken 16 days annual leave in 2018 in circumstances where he was only entitled to 14.

9. As the claim for accrued but untaken annual leave had failed the Employment Judge had no power, in consequence of section 38(2) and (3) of the Employment Act 2002 to make an award in respect of the respondent's failure to give a statement of employment particulars. Section 38(2) EA 2002 provides:

"if in the case of proceedings to which this section applies –

(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relates, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change)

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

10. S.38 (3) EA 2002 provides:-

if in the case of proceedings to which this section applies –

(a) the employment tribunal finds in favour of the employee, in respect of the claim to which the proceedings relates, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

11. The claimant's claims are therefore dismissed. No sum is due to the claimant, whether for unlawful deduction of wages, unpaid holiday or any breach of the requirement to provide written particulars of employment.

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Employment Judge Midgley

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Date 30 August 2019