



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr J Plumridge

Centurion Construction (London) Limited

Heard at: London Central

On: 8 January 2020

Before: Employment Judge Stout

Representations

For the claimant: In person

For the respondent: No appearance or representation

JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent breached the Claimant's contract by failing to pay him for three of the four weeks' notice period he was due under his contract;
2. The Respondent failed to pay the Claimant the amount due to him under reg 14(2) of the Working Time Regulations 1998 in that the Respondent paid him nothing in lieu of holiday pay on termination when the Claimant was entitled to 1.26 weeks' pay;
3. The Respondent must pay the Claimant, **within 14 days of the date on which this judgment is sent to the parties**, a total of £3,267.42 comprising £2,301 in respect of his notice period and £966.42 in respect of accrued but untaken holiday.

REASONS

The issues

1. The issues to be determined are:
 - a. Whether the Respondent failed to pay the Claimant in lieu of the notice period to which he was entitled under his contract;
 - b. Whether the Respondent failed to pay the Claimant in lieu of holiday pay to which he was entitled under reg 14(2) of the Working Time Regulations 1998 (WTR 1998).

The Evidence and Hearing

2. The Claimant attended the hearing in person. He gave oral evidence on oath. He provided the Tribunal with the following documents:
 - a. A copy of his contract of employment;
 - b. Emails between him and Mr Spencer/Mr Bingham between 26 March 2019 and 1 May 2019;
 - c. Some of his payslips.
3. The Respondent had not entered a response to the claim and did not attend the hearing. Today's hearing was therefore in substance a hearing under Rule 21(2), which permits the Tribunal to enter judgment in the absence of a response from the Respondent. In this case, I would not have been able to give judgment solely on the material provided in the claim form and I have accordingly received oral and written evidence from the Claimant as set out herein.

The facts

4. The Claimant was employed by the Respondent from 19 November 2018 to 5 April 2019 as a General Manager - Construction.
5. Clauses 11 and 12 of the Claimant's contract provide so far as relevant as follows:

11. Termination of Employment

Your employment is subject to a probationary period of 3 months, (this may be extended in writing at the discretion of management) during which time your contract of employment may be terminated by 1 week's notice by either party. The Company's Capability and Disciplinary procedure does not apply during your Probationary Period.

12. Notice Periods

From the Employer:

<u>Period of Continuous Employment</u>	<u>Period of Notice</u>
During probationary period	1 week
Over probationary period	4 weeks with an additional week's notice for each <u>complete</u> year of service between 4 and 12 years

6. The Claimant says that during employment he was provided with no written information about probationary period other than this. His probationary period was not extended in writing at any point during his employment and therefore expired on 19 February 2019.
7. On 7 March 2019 the Claimant was given notice by Jonathan Spencer and Simon Bingham (both of whom are statutory directors of the Respondent company). The Claimant offered to work his notice period and it is apparent from the emails the Claimant has provided that some work was done by the Claimant for the Respondent after 7 March 2019.
8. On 29 March 2019 the Respondent paid the Claimant 1 week's notice pay.
9. On 9 April 2019 the Claimant emailed Mr Spencer querying that final payment and pointing out that he had been paid insufficient notice pay and had not been paid in lieu of his outstanding holiday entitlement.
10. Mr Bingham replied on the same day indicating that he considered the Claimant was not due any further monies because *"You will recall you were still on your probationary period. If you refer back to clauses 11 and 12 this states 1 week. I hope this clarifies the situation."*
11. The Claimant responded immediately pointing out that he had exceeded his probationary period and querying again the holiday entitlement.
12. Mr Bingham replied later that day stating *"The probationary period is indicative and we would ordinarily confirm full time status had been achieved. We are, I believe, allowed some flexibility in this regard."*
13. Although there has been further correspondence between the parties, the Claimant never received any further payments.
14. So far as holiday pay is concerned, his contract provides at clause 8 that he is entitled to 21 days Annual Holiday and that the Company's Holiday year is 1 January to 31 December. Holiday entitlement must be taken during the appropriate holiday year and cannot be carried over into subsequent years.

15. The Claimant showed me his payslips for 7 December 2018 to 4 January 2019 showing that his normal take-home pay was £767 per week (net). The gross pay was £1,057.69 per week. PAYE was £198.90 per week and NI was £90.90 per week.
16. There was a period of ACAS Early Conciliation between 19 May and 19 June 2019.
17. The Claimant's claim was received by the Tribunal on 18 July 2019.
18. The Respondent did not submit a response to the claim.

Conclusions

Notice pay

19. I find that the Claimant had completed his probationary period which was under his contract of employment three months unless extended by the Respondent in writing. This was not, as the Respondent appears from its emails to consider, a matter in which it was entitled to "*some flexibility*".
20. The meaning of a contract is to be determined objectively from the point of view of a reasonable person having all the background knowledge that would be available to the parties. The subjective intentions of the parties are not relevant: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14.
21. As a matter of the construction of the Claimant's contract, I find that unless the probationary period was extended by the Respondent giving written notice of the same prior to its expiry, then the probationary period ceased after three months and the Claimant was thereafter entitled under the contract of employment to 4 weeks' notice (and to the benefit of the Respondent's Capability and Disciplinary Procedures). I do not accept that the period could be extended by written notice given after the expiry of the probationary period. This interpretation is not one that would be adopted by a reasonable person as it would mean that an employee could under the contract complete the three-month period and then become entitled to the benefit of the Company's Capability and Disciplinary policy and 4 weeks' notice, but then, at the whim of the Respondent on unilateral written notice, have those rights taken away again perhaps months or even years after the probationary period had expired.
22. In any event, I find that in this case the Respondent at no point extended the Claimant's probationary period by written notice. The emails from Mr Bingham to which I have been referred do not themselves constitute any such notice but merely reflect Mr Bingham's apparent misunderstanding of the contract to the effect that the probationary period would continue indefinitely unless the Respondent confirmed in writing that it was complete. This is simply not what the contract says.

23. The Claimant was accordingly entitled under his contract to 4 weeks' notice. He was paid for only 1 week of that notice period. 3 weeks' net pay is therefore owing to him, i.e. a total of £2,301.

Holiday pay

24. By regs 13 and 13A of the WTR 1998 the Claimant was entitled to 5.6 weeks (28 days) leave per year. By reg 14(2) he was entitled on termination to be paid in lieu of any outstanding leave, that amount to be calculated in accordance with reg 14(3) in the absence of a relevant agreement to a different amount, i.e. as $(A \times B) - C$, where A is the period of leave to which the worker is entitled under regs 13 and 13A, 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.
25. For the purposes of reg 14(3) the Claimant's leave year is whatever is provided in his contract: see reg 13(3)(a). The termination date is "*the date on which the termination takes effect*": reg 14(1)(b). This provision is not further defined in the WTR 1998, but in my judgment should be interpreted in accordance with usual contractual principles and the similar wording in s 97 of the Employment Rights Act 1996 as being the date on which the notice period expires. In this case, that was 4 weeks from 7 March, i.e. 5 April 2019 (since notice given orally takes effect the day after it is given: *West v Kneels* [1987] ICR 146).
26. The proportion of the leave year that had expired at the time the Claimant's employment terminated was therefore 13.6 weeks (1 January to 5 April). He had by that time accrued holiday entitlement of $13.6/52 \times 5.6 = 1.46$ weeks. He had only taken 1 day (0.2 weeks') holiday by that point so his accrued but outstanding holiday entitlement was 1.26 weeks, which equates to £966.42.

Overall conclusion

27. In my judgment, therefore, the Respondent:
- a. Breached the Claimant's contract by failing to pay him for three of the four weeks' notice period he was due under his contract (£2,301); and
 - b. Failed to pay the Claimant the amount due to him under reg 14(2) of the WTR 1998 in that the Respondent paid him nothing in lieu of holiday pay on termination when the Claimant was entitled to 1.26 weeks (£966.42);
28. I announced my decision orally at the hearing, but reserved the reasons for writing. Accordingly normally under Rule 66 the Respondent would have 14 days from the date of the hearing to pay, but in the light of the Respondent's absence from the hearing I extend the time for payment to 14 days from the

date on which this judgment is sent to the parties. The Respondent must within that period pay the Claimant the total sum of £3,267.42.

Employment Judge Stout

Date 8 January 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

13 January 2020

FOR THE TRIBUNAL OFFICE