



EMPLOYMENT TRIBUNALS

Claimant: Sandra Rivera Uzuriaga

Respondent: Bayleaf Facilities Management Ltd

Heard at: London Central (via CVP)

On: 22 March 2022

Before: Employment Judge Bunting

Appearances

For the Claimant: Ms Maya Thomas-Davies, union representative

For the Respondent: Mr Graham Underwood , consultant

RESERVED JUDGMENT

The Judgment of the Tribunal is that :

1. The respondent made unauthorised deductions from wages by failing to pay the Claimant the full amount of wages due from 01 September 2020 to 22 March 2022 (the date of the hearing), and is ordered to pay to the Claimant the sum of £6,646.50 being the total gross sum deducted.

REASONS

INTRODUCTION

1. By a claim form received by the Employment Tribunal on 03 November 2021, the Claimant brings claims for unlawful deductions from wages and holiday against the Respondent.
2. She says that since 1 September 2020 the Respondent has been paying her for only 3 days a week, rather than the 5 days a weeks that she was contracted to do.
3. In a response that was attached to the ET3, the Respondent gave detailed grounds of opposition. In brief, it was said that the Claimant's contract was lawfully varied from 10 hours to 6 hours a week in light of the Covid-19 pandemic.
4. In any event, the Claimant had been offered alternative employment (which she had declined).
5. Alternatively, the Claimant continued to work for a number of months afterwards, and so affirmed the contract.
6. In relation to the holiday pay claim, the Respondent denied that any pay was owed for the same reason.

EVIDENCE

7. In coming to my decision, I had the following evidence :
 - a) The oral evidence of Daniel Apunte and Charlotte van Fowler on behalf of the Respondent
 - b) The oral evidence of the Claimant
 - c) Witness statements from the Claimant, Mr Apunte and Ms van Fowler
 - d) An agreed bundle of documents of 53 pages
 - e) A 7 page document entitled 'Skeleton argument for the Claimant' prepared by Ms Thomas-Davies

8. Ms Thomas-Davies and Mr Underwood provided oral submissions after the evidence.
9. Following the hearing I issued further directions seeking representations on a discrete point relating to holiday pay. I received written submission from both parties. I shall address these when they arise below.

THE CLAIM

10. The claim, as it was presented at the hearing, is as follows.
11. The claim was put solely in relation to unlawful deduction of wages as the Claimant remains employed by the Respondent.
12. It was said that the Claimant was employed for five days a week, but only paid for three days.
13. It was agreed between the parties that the Claimant's daily rate of pay would be £21.10, based on an hourly rate of £10.55.
14. It was further agreed that if the Claimant were to succeed on the unlawful deduction of wages claims that it would follow that she was entitled to 11 days holiday, on a *pro rata* basis. This would also be a claim under s13 as she would have been paid for fewer holidays than she was contractually entitled to.

FINDINGS OF FACT

15. The Claimant has been employed as a cleaner at the Chanel Store in Covent Garden since 2011. At that time her contract was with a different company, but it was transferred to the Respondent on 21 February 2017.
16. A copy of the contract was provided. The relevant parts are as follows :

PLACE OF WORK

You will normally be required to work at Chanel at Covent Garden and / or possibly other designated sites. You will not be required to work outside the United Kingdom.

HOURS OF WORK

Your normal hours of work are a minimum of 10 per week, to be variable in accordance with the needs of the business. You may be required to work additional hours when authorised and as necessitated by the needs of the business.

17. For a number of years, the Claimant has worked 2 hours in the morning every day from 8am to 10am, Monday to Friday.
18. When the Covid-19 pandemic hit, this had an impact on the Respondent's business. The Chanel shop was shut for some months in line with the Government's mandate at the time. The Claimant was furloughed at that point.
19. The Chanel store reopened on 15 June 2020. Initially, this was for the same hours as prior to the pandemic. However, Chanel reassessed their business needs and decided that, instead of a daily clean, from 29 June 2020 they would only clear four days a week (Monday, Wednesday, Friday and Sunday).
20. It was agreed that the Claimant spoke to Daniel Apunte, a Contract Manager for the Respondent, on 22 June 2020. During that conversation, he told the Claimant that she would only need to work on Monday, Wednesday and Fridays.
21. There is a dispute as to whether on that call Mr Apunte offered the Claimant another job for 2 hours a day on Tuesdays and Thursdays (so as to take her back up to the 10 hours that she usually worked) or not.
22. I was provided with a text message exchange between the two from the day after the conversation.
23. A text from the Claimant at 17.31 on 23 June 2020 confirms that she was aware of the proposal to reduce her hours from 10 to 6, and that she was not agreeable with this.
24. Mr Apunte was clear that he had given the Claimant full details of the proposed alternative jobs (with Kiko and Mango). I find that whilst at the hearing Mr Apunte genuinely believed that he had done so, he was mistaken.

25. Firstly, this was now some time ago, and was a very busy and stressful time for him. He had a number of different clients and employees that he had to deal with in a very short space of time. In those circumstances it would be surprising if he had total recall of the conversation (in fact, he was unable to recollect whether it was in person or on the telephone), and unsurprising if he had missed out part of what he had meant to say to the Claimant.
26. Further the Claimant sent a text message at 19.56 on 23 June 2020 that included the following : *“You told me about another job but did not specify details without which I could not accept it”*.
27. There is another message to Mr Apunte at 07.11 on 25 June 2020 where the Claimant says *“Good morning Mr Daniel will I be working at the other Covent Garden location today?”*
28. The clear inference is that the Claimant was not made aware of the specific offer.
29. Further, it is clear that she was seeking to work 10 hours, and the location of Kiko was very convenient for her, at a time that was suitable. Had there been an offer, I am sure that she would have accepted it.
30. Those were the only offers that the Respondent relied upon.
31. In addition, it was agreed that the Claimant worked a small number of Saturdays (for two hours) when a break in her other commitments allowed it, but this stopped in July 2020.
32. For completeness I record that the Claimant was offered further work on 16 July and 29 July by Jorge Hernandez (another manager employed by the Respondent) at a time and location that the Claimant would not be able to manage. She replied to that effect.
33. The Claimant still wished to work her contracted 10 hours and spoke to her union in June 2020 (who represented her at the appeal hearing).
34. Celia Donda, a Trade Union Representative, wrote to the Respondent on 14 September 2020 on the Claimant’s behalf. In this, Ms Donda stated that the Claimant

‘was not paid properly in the months from June to August 2020’, stating that she had only been paid for 6 out of the 10 hours she had been contracted to do.

35. There was some discussion as to the calculations, but on 21 September 2020 Ms van Fowler stated that she would add a payment to reflect the short hours.

36. Her letter to Ms Donda includes the following :

I wanted to let you know that Daniel made her several offers of alternative work, which she refused every time.

There will be no more further payments, can I assume that this issue is now resolved? Please could you confirm.

Of course, should the boutique return to the normal hours, we will contract Sandra and update her, however, in the meantime, her hours will be for Mondays, Wednesdays and Fridays only and she will only be paid for 6 hours per week

If you could confirm the above and agree, please let me know so that I can process the payment.

37. The next item of correspondence is a letter from Ms van Fowler on 26 November 2020. After setting out the above history, the letter reads as follows :

The matter was then settled on the 21st of September 2020 with your union representative Celina Donda, and monies owed to you were paid accordingly in October 2020. We believed the matter settled and notice paid for the hours no longer available ...

We have made you several other job offers, which you all refused ...

Our commitment to you is still in place that should Chanel ask us to return to the original hours we use to deliver prior to the outbreak of Covid-19, we will offer these hours back to you. You can then decide if you choose to accept these hours or decline.

I trust that the above is clarified now. Should you have any questions, please do not hesitate to get in contact with your Manager, Jorge Hernandez”

38. On 03 December 2020 Ms Donda wrote in response and refers back to the conversation prior to the letter of 24 November 2020 and sought clarification of the alternative jobs that it was said that the Claimant had been offered.
39. She states that on 25 November 2022 the Claimant spoke to Mr Hernandez who *“has informed [the Claimant] that he would look for suitable alternative work as per her original contracted 10 hours”*.
40. Ms van Fowler wrote back the same day setting out the job offers (which are those set out above). Further, Mr Hernandez spoke to the Claimant on 25 November 2020 *“and told her that there are no vacancies at the moment, but that he is continuing keeping an eye on it and will revert should a vacancy become available”*.
41. The next written exchange is from Ms Montero (who had taken over from Ms Donda as the Claimant’s union rep) to Ms van Fowler on 16 July 2021.
42. This makes it clear that the Claimant’s position is that she never agreed to a variation of her contract from 10 hours to 6 hours. It ends *“Please note that she is now working under protest. At no point should you interpret the fact that he is working under the new terms and conditions imposed as a tacit acceptance of your Breach of Contract”*.
43. Having heard the oral evidence of the Claimant, I find that she was always of the view that she was entitled to work 10 hours and never intended to act in a way contrary to that.
44. After the email of 21 September 2020, she regularly spoke to the Respondent (through Mr Hernandez) to seek further work to take her back up to the ten hours which she considered to be her contracted hours.
45. The evidence of the Claimant in her witness statement as to this was clear, and not shaken in cross-examination. There was no evidence from Mr Hernandez to contradict this.
46. Shortly after the exchanges in December 2020, the country entered a further lockdown. I find that the Claimant continued to ask for her full ten hours, albeit that

this was less frequent given the disruption to working patterns caused by the pandemic.

47. After the end of the Covid-19 lockdown in mid-April 2021 the Claimant contacted her Union about the unpaid hours and they made the approach set out above in July 2021.

THE LAW

Unlawful deduction from wages

48. The relevant law is that contained at s13 and 14 of the Employment Rights Act 1996 which provides the right not to suffer unauthorised deductions from wages. Wages in this case includes holiday pay.

49. This reads, as far as is relevant, as follows :

13 Right not to suffer unauthorised deductions.

(1) *“An employer shall not make a deduction from wages of a worker employed by him unless—*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

(2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) *“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the*

deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

14 Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

- (a) an overpayment of wages, or
- (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

Breach of Contract

50. It was not disputed that the law in relation to whether an employee should be taken to have affirmed her contract by continuing to work following a fundamental breach, was summarised in the EAT judgment of **Malik v Cencos Securities [2018] UKEAT 0100/17/1701**.

51. This was in the context of a constructive dismissal claim, but the principles are the same.

52. At para 125, Choudhury J said :

125. The law in relation to affirmation is well established:

- (a) In the face of a repudiatory breach of contract an employee can resign and claim constructive dismissal, but is not bound to do so. S/he may elect to affirm the contract of employment;
- (b) Generally, continuing to work in the face of a breach of the contract of employment (certainly for any length of time) will be regarded as affirming the contract. In **Western Excavating v Sharp [1978] IRLR 27** (at page 29) Lord Denning MR stated:

"15. ... he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

Similarly, in **Bashir v Brillo Manufacturing Co Ltd** [1979] IRLR 295, Slynn J stated (at paragraph 16) referring to the passage above:

"16. ... It seems to us that when the Master of the Rolls is talking about the employee continuing for any length of time without leaving he is referring to a situation where the employee actually does the job for a period of time without leaving, or if he does some other act which can be said to affirm the contract as varied. ..."

(c) In **W E Cox Toner (International) Ltd v Crook** [1981] IRLR 443 itself, the EAT considered the case of a senior employee who had been subjected to censure by his employer in July 1979 on the basis of certain allegations. He refuted the allegations and required them to be withdrawn. In February 1980 the employer made it plain that the allegations would not be withdrawn. A month later the employee resigned. The EAT considered that:

- i. as a matter of law, affirmation may be express or implied (paragraph 13);
- ii. an innocent party who calls upon the other party to perform the contract of employment will be taken to have affirmed it (paragraph 13);
- iii. an innocent party who does acts which are only consistent with the continued operation of the contract will be taken to have affirmed it (paragraph 13);
- iv. however:

"13. ... if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right

subsequently to accept the repudiation."

(d) In **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**, the employer had suggested before the employment Tribunal and the EAT that it had 'cured' any breach of the implied term of mutual trust and confidence which had occurred prior to the resignation of the employee. The Court of Appeal did not accept that a breach of contract could be 'cured' so as to deprive an employee of the opportunity to repudiate the contract in response. However, at paragraph 44 of the judgment, Sedley LJ observed:

"44. Albeit with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that were capable of extension to other contracts, and for reasons I have given I do not consider that we would be justified in doing this. That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends. ..."

126. It is clear from the authorities above that an employee who seeks to accept a repudiatory breach must not delay, particularly where the repudiating party has offered to make suitable amends; or do any act which can only be consistent with the continued operation of the contract (unless it is made clear that this is done under protest or by reserving his rights).

Conclusion

Does the contract allow the Respondent to vary the Claimant's hours 'down'?

53. I have set out the relevant terms of the contract above.

54. Whilst it appears to allow a change in the hours of work, the tenor of it is that this would only be an increase in hours where there was a business need.

55. The natural reading of the clause is that the second sentence under the heading 'Hours of Work' qualifies the first, and that the hours would only be changed when there was a need to call on the employee to work more.

56. If there was a power to reduce the hours in response to a business need, then I would expect that to be made explicit in the contract.

57. For those reasons, I consider that there was no power for the Respondent to unilaterally vary down the Claimant's hours.

Was that Claimant offered alternative work?

58. In light of my findings of fact as set out above, the Claimant was not offered alternative work which she could have reasonably undertaken.

59. In any event, given that the only work relied on by the Respondent was from June and July 2020, and the Respondent accepted the shortfall for this period and paid the Claimant in recompense on 01 September 2020, this would not be determinative of the case.

Has the Claimant consented to a reduction in hours?

60. In considering this I take the whole period from 01 September 2020 to 16 July 2021, when it was accepted that the Claimant unambiguously stated that she was working under protest.

61. The two particular events relied on by the Respondent are the letters of 21 September 2020 and of 26 November 2020.

62. In the email of 21 September 2020, the Respondent asks, through Ms van Fowler, whether it can be assumed that the matter is resolved and seeks confirmation. It was not suggested that there was any such confirmation received from the Claimant.

63. Instead, whilst the Claimant continued to work, she continued to press for her contractual hours, and for confirmation of the position.

64. This led to the letter of 26 November 2020. There was no invitation to the Claimant to confirm the change in hours. The Claimant, through her union, responded a week later.

65. This reply centres around the question of alternative employment, but it is clear from that that the Claimant did not accept the unilateral statement of the Respondent.
66. From then onwards, she continued to ask for her full hours. It would have been clear to the Respondent that the Claimant had not acquiesced in the reduced hours.
67. Whilst there is a lengthy period of time, there is no fixed time after which the Claimant would lose the right to enforce her contract. It is a question of fact and degree.
68. In this case, I consider that the email from September 2020 left the matter 'up in the air' until 26 November 2020.
69. From that point on the Respondent would have been aware that although the Claimant did not use the words until July 2021 (when her union got involved), she was 'working under protest'.
70. In assessing this, the fact that the United Kingdom was in a national lockdown for more than half of it is a point of significance.
71. A further relevant factor is that the Claimant was told in June 2020 that her hours would be reduced to 6 per week. However, after disputing this and getting her union involved, the Respondent accepted this and rectified the situation.
72. It is important to take the period of time as a whole. But stepping back, there was no point at which the Claimant indicated that she was content to proceed with only 6 hours a week.
73. On the contrary, she was pressing the Respondent for the hours to take her to her contractual period of 10 hours.
74. In those circumstances, I find that the Claimant never affirmed the unilateral variation from 10 hours to 6 hours.
75. Therefore she succeeds in her claim for unpaid wages.

Holiday Pay

76. The claim for holiday pay appeared to be for accrued, but untaken, holiday pay. However, as the claimant remains employed by the respondent, there could be no claim for breach of contract, or under the Working Time Regulations.
77. I raised with the parties whether, following **Smith v Pimlico Plumbers [2022] EWCA Civ 70**, there is a right (subject to exceptions that do not appear to apply here) to carry over the leave accrued but not taken.
78. The respondent agreed in writing that that was the case, and made some further submissions as to the calculation of the figures.
79. The claimant submitted representations that also agreed that that was the case.
80. However, she has also submitted a letter dated 20 October 2021 (so after these proceedings were started) in which the claimant writes to the respondent (with the heading being 'Subject : Annual Leave, Unpaid Leave) and states that in the calendar year of 2021 she has only taken one day of leave and was requesting that she take the 'remaining days from my Annual Leave' from 26 November 2021 in order to return to her home country for personal reasons.
81. This is framed as a request, although it is not suggested that it was not granted, or that the claimant did take that period of time. Nor is it suggested that she was paid for any of that period of time (bar one day).
82. In those circumstances, the claimant submits that in light of **Smith v Pimlico Plumbers [2022] EWCA Civ 70**, she is entitled to be paid for the 31 days (11 days in 2021 and 20 days in 2022) leave taken but not paid.
83. I shall set out, in particular, the following passages from the judgment of Simler LJ in **Smith v Pimlico Plumbers [2022] EWCA Civ 70** :

72. It followed from all of these considerations (see [36]) that, "*when taking his annual leave, the worker must be able to benefit from the remuneration to which he is entitled under article 7(1) ...*" (emphasis added), because as the CJEU had observed at [35], "*the very purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure ...*". In other words, there is a right to be paid when the leave is taken as this enables the worker to have the

necessary rest and relaxation which paid leave is intended to provide. A worker faced with uncertainty about whether he will be paid for leave when taking it was not regarded as being able fully to benefit from that leave as a period of relaxation and leisure in accordance with article 7 WTD. Similarly, such uncertainty was liable to dissuade the worker from taking annual leave. No evidence of actual deterrence was required. The CJEU noted that any practice or omission of an employer that might *potentially deter* a worker from taking his annual leave was equally incompatible with the purpose of the right to paid annual leave: see [38] and [39]. The CJEU held that against that background, "*observance of the right to paid annual leave cannot depend on a factual assessment of the worker's financial situation when he takes leave*": see [40].

81. In any event, viewed through the prism of a fundamentally important social (health and safety) right, a claim based on a failure to remunerate annual leave taken is not simply a claim for non-payment. Nor is the right only infringed when no payment is made, as Mr Jeans sought to argue. The failure to remunerate leave when the leave is taken (a fact that will inevitably be known in a case where the right is disputed by the employer who refuses to remunerate leave), means that there is a failure by the employer to ensure the necessary rest and relaxation that goes with paid annual leave. As the CJEU made clear in *Shimizu* (and held to similar effect in *Kreuziger*):

"45. ... the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of art.7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period.

46. In addition, the burden of proof in that respect is on the employer... Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively to art.7(1) and art.7(2) of Directive 2003/88."

82. Thus, the employer is required to set up and maintain a facility to enable paid leave to be taken (which may include recognition and acceptance of worker status and worker rights in appropriate cases). The right to paid annual leave is infringed by an employer who disputes the worker's right

to paid annual leave, refuses to remunerate the leave and so fails to set up and maintain such a facility.

83. In conclusion, in my judgment the appeal should succeed. The language of article 7(1), article 31 of the Charter, and *King*, establishes that the single composite right which is protected is the right to "paid annual leave", for the reasons given above. If a worker takes unpaid leave when the employer disputes the right and refuses to pay for the leave, the worker is not exercising the right. Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.

84. A claim to payment for all the leave which Mr Smith took but for which he was not paid in breach of his right to paid annual leave was inherent in Mr Smith's pleaded case. It follows that the tribunals below erred in law in deciding otherwise. Moreover, this claim was in time because he was denied the opportunity to exercise the right to paid annual leave throughout his engagement with the respondent. The respondent could not discharge the relevant burden. The right did not therefore lapse but carried over and accumulated until termination of the contract, at which point Mr Smith was and remains entitled to a payment in respect of the unpaid leave.

84. Although the Court of Appeal cannot re-write legislation, the Annex to the judgment sets out a revised version of how the Working Time Regulations should properly be read.

85. By virtue of s27(1) Employment Rights Act 1996, 'wages' includes "any ... holiday pay ... referable to his employment, whether payable under his contract or otherwise".

86. As the claimant has taken the annual leave, but not been paid for it, I find that she is entitled to payment for those days. This is 11 days in 2021 and 20 days in 2022, making a total of 31 days. Based on a daily rate of £21.10, this is a total of £654.10.

Remedy

87. There are 568 days between 1 September 2020 and 22 March 2022 (the date of the hearing). The total amount of wages deducted is £5,992.40. [£3,424.23 based on 568 / 7 x the weekly rate].

88. The total amount of unpaid holiday pay is 31 days, for which the Claimant is entitled to £654.10 over the relevant period of time.

89. The total amount of unpaid wages is therefore £6,646.50

Conclusion

90. For that reason, the Claimant succeeds in her claim for unpaid wages to the extent above.

DATE: 16 June 2022

Employment Judge Bunting

Sent to the parties on:

17/06/2022.

For the Tribunal:

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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