



# EMPLOYMENT TRIBUNALS

**Claimant** Mr A W Barnett

**Respondent** Dartmouth Partners Limited

**Heard at:** London Central (by CVP)

**On:** 4 October 2023

**Before:** Tribunal Judge McGrade

## Representation

Claimant: In person

Respondent: K Selves (General counsel)

# RESERVED JUDGMENT

1. The claimant's claim for unauthorised deduction of wages is not well founded and is dismissed.
2. The claimant's claim for unpaid holiday pay is not well founded and is dismissed.

# REASONS

1. This is the reserved judgement of the tribunal with written reasons. The claim relates to the alleged failure of the respondent to pay the claimant wages due while he was employed by them and accrued holiday pay following termination of his employment.
2. Early conciliation began on 30 June 2023 and ended on 25 July 2023. The claim was presented on 25 July 2023.

3. Both parties agreed at the outset that the sum due to the claimant, should I uphold his claim for unlawful deduction from wages, was £3,105.77, representing 8.5 days pay. In addition, the sum payable to the claimant by way of accrued but untaken holiday pay, should I uphold this claim was £6,576.84, being 18 days holiday pay.
4. I heard oral evidence from the claimant and Katie Selves on behalf of the respondent. I had before me a joint bundle extending to 120 pages. I was unable to conclude the evidence within the time allocated to this case, and therefore ordered both parties to lodge written submissions, which they duly did.

### **The issues**

5. The issues to be determined were as follows:-
  - a. Did the respondent make unauthorised deductions from the claimant's wages in respect of the failure to pay him £3,105.77 for the period between 9 and 21 June 2023?
  - b. Did the respondent fail to pay the claimant £6,576.84, being 18 days annual leave the claimant had accrued but not taken when his employment ended?

### **Unlawful Deduction From Wages**

6. The right not to suffer an unlawful deduction of wages is set out in Section 13 (1) of the Employment Rights Act 1996 (ERA):

“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.”
7. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.
8. I have considered the comments made by Lord Bridge in **Miles v Wakefield Metropolitan District Council [1987] IRLR 193**, at page 195, where he stated:-

“If an employee refuses to perform the full duties which can be required of him under his contract of service the employer is entitled to refuse to accept any partial performance. The position then resulting, during any relevant period while these conditions obtain, is exactly as if the employee were refusing to work at all”.

### **Holiday pay claim**

9. Regulation 15 of the WTR provides as follows:-

...

- (2) A worker's employer may require the worker—
  - (a) to take leave to which the worker is entitled under [regulation 13] [or regulation 13A]; or
  - (b) not to take such leave [subject, where it applies, to the requirement in regulation 13(12)],  
on particular days, by giving notice to the worker in accordance with paragraph (3).
- (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) shall be given to the employer or, as the case may be, the worker before the relevant date.
- (4) The relevant date, for the purposes of paragraph (3), is the date—
  - (a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and
  - (b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.
- (5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

### **Findings of fact**

10. The claimant was employed by the respondent as the Group Head of Financial Planning and Analysis from 16 May 2022 until 3 August 2023. He signed a contract of employment dated 16 May 2022 on 20 May 2022. His place of work was stated on the

contract to be 125 London Wall, London. However, he was also permitted to work from home.

11. Clause 10.6 of the claimant's contract of employment provides as follows:-

"We may require you to take holidays on specific days, as notified to you including during garden leave or your notice period."

12. Clause 18 of the claimant's contract of employment provides as follows:-

18.1 Following service of notice to terminate your employment by either party, or if you purport to terminate your employment in breach of contract, the company may by written notice place you on garden leave for the whole or part of the remainder of your employment ('Garden Leave').

18.2 During any period of Garden Leave:

...

18.2.7 you shall be deemed to take any accrued but unused holiday entitlement;

13. Clause 5.2 of the respondent's sickness policy provides as follows: –

"Absence that has not been notified according to the sickness absence reporting procedure will be treated as unauthorised absence. Unauthorised absence will be unpaid although we may, at our discretion, allow you to utilise any outstanding holiday entitlement to cover all or part of the unauthorised absence."

14. Around lunchtime on 8 June 2023, Darren Sookramanien, the Respondent's Chief Financial Officer, asked to meet with the claimant. The meeting took place very shortly thereafter, and the claimant was advised that he was to be made redundant. He was also advised that he would be paid eight weeks' notice, and any outstanding holiday pay. When he was informed of this decision, he asked whether he would receive a redundancy payment, which he was told he would not receive.

15. Following this meeting, the claimant spoke with Katie Selves, the Respondent's General Counsel. He asked her whether he was entitled to a redundancy payment and whether any notice pay could be paid on a tax-free basis. Katie Selves advised him that, as an employee with less than two years' service, he had no entitlement to a

statutory redundancy payment. She also advised him that they could not pay him notice on a tax-free basis. Finally, she advised him that, based on his contract, if he were placed on garden leave, any holiday would be offset against garden leave pay.

16. Following this discussion, Katie Selves forwarded an email to Tim Webster requesting that he prepare a leavers letter for the claimant. She also advised that he would be working for part of his notice, and would then be on garden leave, and that his holiday would be offset during his garden leave.
17. The claimant arranged a consultation with Slater Gordon solicitors, which took place on 19 June 2023. This was the earliest appointment they could offer him.
18. The claimant continued to carry out some work in relation to producing a forecast model, which attempted to forecast earnings for the rest of the year, based on the current month's figures. He took part in two short calls with colleagues on 13 and 21 June 2023.
19. The claimant failed to undertake work in relation to the handover process between 9 and 21 June 2023. He also failed to take part in a schedule call with Darren Sookramanien on 15 June 2023. Darren Sookramanien emailed the claimant on 15 June 2023 raising his concerns regarding the handover and the claimant's failure to communicate with him and other members of staff. He also requested the claimant begin to come in to the office from 16 June 2023 in order to complete the handover process. The claimant did not attend the office. He also failed to take part in a schedule call with Darren Sookramanien on 19 June 2023. Katie Selves contacted the claimant's wife by telephone on 19 June 2023 to check whether the claimant was okay.
20. On 19 June 2023, the claimant emailed Darren Sookramanien, advising him that he had taken legal advice, and raising a number of concerns regarding the decision to terminate his employment. He also asked that he be permitted to leave after this week and also raised the issue of redundancy payment being made to him. Darren Sookramanien responded to this email by email on 20 June 2023. He repeated his concerns regarding the claimant's failure to co-operate in the handover process and indicated the claimant had been on unauthorised absence since 9 June 2023. He suggested that the handover process would take between 10 days and two weeks to complete. He therefore proposed that the claimant work until the end of the month. He

also indicated that the claimant would be deemed to take his annual leave during the period of garden leave, in accordance with clause 18 of his contract of employment.

21. A letter was issued to the claimant on 20 June 2023 by Trish Davis, the respondent's operations manager, which confirmed the claimant would be placed on garden leave from 1 July 2023 and would be deemed to take his accrued but unused holidays during the garden leave period, in accordance with clause 18.2.7 of his contract of employment.
22. On 1 July 2023, the claimant began a period of garden leave. He remained on garden leave until 3 August 2023, when his employment terminated.
23. The respondent made a payment of half a day's wages for the period between 9 and 21 June 2023, as it considered the claimant had taken unauthorised absence during this period. It chose to pay half a day's wages, as the claimant had participated in two short calls on 13 and 21 June 2023. It made no payment in respect of accrued but untaken holiday pay upon termination.

## **Conclusions**

24. It is the claimant's position that he is entitled to be paid for the period between 9 and 21 June 2023 as he performed the amended duties given to him. It is the respondent's position that it was under no obligation to pay the claimant during this period, as he had taken unauthorised absence during this period. The claimant accepts that he did not participate in certain work activities during this period. However, he has sought to provide an explanation for his failure.
25. It is the claimant's position that he did not respond to the email from Darren Sookramanien until 19 June 2023, as he wished to raise a grievance, but did not wish to say anything while other members of staff were on the call, as he was unclear as to how much they knew of his situation. In addition, he did not wish to suggest that everything was okay, when it was not. He therefore did not join various calls that the respondent wished him to participate in.
26. It is clear the claimant deliberately refused to undertake certain key aspects of his duties between 9 and 21 June 2023, after he was advised that he was to be made redundant, in particular progressing a handover, taking part in schedule calls with

Darren Sookramanien and dealing with enquiries by his employer. He has sought to provide an explanation for his failure by suggesting that he wished to raise a grievance, but did not wish to do so while other members of staff were on the calls. He also suggested that he did not wish to give the impression that there were no difficulties and was awaiting legal advice. I do not accept either of these explanations. I consider the claimant failed to engage with his employer as he was unhappy both that his employment was to terminate and the financial terms on offer to him. He no doubt hoped that by failing to cooperate, he could bring some pressure to bear on the respondent to improve the financial terms on offer. However, he was clearly not at liberty to decide which duties he would perform and which duties he would not perform, as per **Miles v Wakefield Metropolitan District Council**. I consider the respondent was entitled to treat the claimant as having taken unauthorised absences. In these circumstances, I am not satisfied wages were properly payable to the claimant between 9 and 21 June 2023. Therefore there has been no unlawful deduction from wages.

27. It is the claimant's position that he is entitled to be paid in lieu of accrued but untaken holidays, as the respondent failed to provide him with the necessary notice in accordance with Regulation 15(4), of double the number of leave days that are to be taken. The contract of employment issued to the claimant make clear that he could be placed on garden leave and be deemed to take holidays during the period. It is the respondent's position that this constitutes a relevant agreement for the purposes of regulation 15(5) of the WTR. I am satisfied that this constitutes a relevant agreement in accordance with regulation 15(5) and that this varied what would otherwise have been the respondent's obligation to provide the requisite notice to the claimant to take holidays. The claimant was therefore not entitled to be paid for accrued holidays upon termination, as he had taken those 18 days holidays during the garden leave period.

**Tribunal Judge McGrade**

**Date 28 December 2023**

**JUDGMENT SENT TO THE PARTIES ON: 29 December 2023**

FOR THE TRIBUNAL OFFICE

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