



EMPLOYMENT TRIBUNALS

Claimant: Shane Johnson

Respondent: Ventrolla Limited

Heard: by CVP in the North East Region

On: 30 August 2024

Before: Employment Judge Ayre

Representation

Claimant: In person

Respondent: Ian Flanagan, Chief Executive

RESERVED JUDGMENT

1. The claim for holiday pay succeeds. The respondent is ordered to pay to the claimant holiday pay of £1,600.35, less tax and national insurance.
2. The claim for unauthorised deduction from wages succeeds. The respondent is also ordered to pay to the claimant the sum of £1,873.72 unpaid wages, less tax and national insurance.
3. The claim for breach of contract (notice pay) is not well founded. It fails and is dismissed.

REASONS

Background

1. The claimant issued this claim in the Employment Tribunal on 6 March 2024 following a period of early conciliation that started on 29 February 2024 and ended on 6 March 2024. He is bringing claims for notice pay holiday pay and arrears of pay. The respondent defends the claim. It says that the claimant is not entitled to notice pay because he was guilty of gross misconduct, and that he is not entitled to holiday pay or arrears of pay because there was a clause in his contract of employment entitling

the respondent to offset against these payments losses incurred by the respondent as a result of the claimant's behaviour.

The hearing

2. Both sides submitted documents to the Tribunal, which I have considered. I heard evidence from the claimant and, on behalf of the respondent, from Wayne Greenwood, Operations Manager, and Jarrod Marchant, General Manager.

The issues

3. At the start of the hearing we discussed the issues that needed to be decided today. The claimant confirmed that his claims are the following:
 1. Holiday pay of £1,873.72 (13.16 days' holiday at a daily rate of £142.38 gross);
 2. Unpaid wages of £1,993.32 (14 days' pay for the period from 16th to 31st January 2023 at a daily rate of £142.38 gross); and
 3. Notice pay of £711.90 (one week's pay at the daily rate (for five days a week) of £142.38 gross.
4. The respondent admits that:
 1. The claimant's daily rate of pay was £142.38 gross;
 2. The claimant's notice period was one week (five working days);
 3. The claimant accrued holiday during the course of his employment (it says the outstanding amount was 12.5 days); and
 4. The claimant worked for 14 days at the end of his employment and was not paid for those days.
5. In light of the admissions by the respondent, the issues that fell to be determined by the Tribunal were the following:
 1. Did the claimant do something so serious that the respondent was entitled to dismiss him without notice?
 2. How much holiday pay was the claimant entitled to on the termination of his employment?
 3. Was the respondent entitled to withhold the claimant's holiday pay and unpaid wages to offset against the losses it incurred as a result of the claimant's behaviour, relying on clause 11.1 of the claimant's contract of employment?

Findings of fact

6. The claimant was employed by the respondent as a Technical Surveyor from 30 August 2022 until 31 January 2024 when he was dismissed with immediate effect. The claimant's work involved going out to visit the respondent's customers and potential customers, and measuring up for joinery work, new doors and windows. He

also did some glazing and fitting of windows.

7. The claimant's role with the respondent was a full time one and he was expected to work 40 hours a week. During the time that he was employed by the respondent he also carried out work on his own account, including for customers of the respondent. He did not tell the respondent that he was doing this, nor seek permission for this work, which was in competition with the work carried out by the respondent.
8. At the start of his employment the claimant was provided with a written contract of employment. He refused to sign the contract because his name was spelt incorrectly. In January 2024 the claimant was provided with another contract, which he signed on 11 January 2024. That contract contained the following clauses:

"6 HOURS OF EMPLOYMENT

6.1 Your normal hours of employment shall be 0800 to 1700 Monday to Friday (or in demand with client visits) during which an hour may be taken for lunch....

10 DEDUCTIONS FROM WAGES

11.1 The following provision is an express term of your contract of employment: -

a. any damage to vehicles, stock, or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement.

b. any loss to us that is the result of your failure to observe rules, procedures, or instruction, or is because of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss; and

c. in the event of an at fault accident whilst driving one of our vehicles you may be required to pay the cost of the insurance excess up to a maximum of £250.00

11.2 In the event of failure to pay, we have the contractual right to deduct such costs from your pay....

13 HOLIDAYS

13.1 You are entitled in addition to the normal public holidays to take 20 working days as holidays in each holiday year which runs from 1 April to 31 March, and you will be paid your normal basic remuneration during such holidays....

13.3 If your employment commences or terminates part way through the holiday year your entitlement to holidays during that year will be assessed on a pro rata basis and deductions from final salary due to you on termination of employment will be made in respect of holidays taken more than entitlement....

13.6 You will be entitled to payment in lieu of holidays accrued due but untaken as at the date of termination of employment....

21 TERMINATION OF EMPLOYMENT

21.1 Your employment may be terminated, subject to the probationary clause:

(a) By you on giving the Company not less than four-week written notice of resignation from employment.

(b) by the Company on giving to you written notice as follows:

(i) during the first year of continuous employment not less than one week's notice.

(ii) during the second to twelfth years of continuous employment not less than one week's notice for each year of continuous employment....

(c) by the Company without notice or payment in lieu of notice in the event of serious or persistent misconduct by you.

21.2 The Company reserves the right, at our sole and absolute discretion, to pay salary based on basic salary in lieu of any required period of notice whether given by you or the Company, less any deductions the Company is required to make by law and any other appropriate deductions."

9. Whilst employed by the respondent and in the course of carrying out his duties for the respondent, the claimant visited the home of a customer, CK. The customer asked the claimant if he could make some templates for glazing on her windows. The claimant agreed to do so. He did not tell the respondent that he was doing work in his personal capacity for one of its customers.
10. Over the course of several months CK paid the claimant almost £5,500 for work that he was supposed to be doing for her between April and November. The claimant also took money from other customers of the respondent in his personal capacity and did not inform the respondent that he was doing this.
11. The respondent suggested in his evidence that the work he was doing for the respondent's customers was not work that the respondent could or would have done. The respondent's witnesses both contradicted this. On balance I prefer the evidence of the respondent's witnesses who I found to be credible and consistent with each other. Moreover, the work that the claimant did for CK is now being remedied by the respondent, which further supports the respondent's witnesses version of events.
12. On 30 January 2023 CK contacted the respondent and made a serious complaint about the claimant. She said that he had carried out work to a very unsatisfactory standard and that she had not had any contact with him for several months and was unable to contact him, despite paying him a substantial amount of money.
13. Wayne Greenwood, the respondent's Operations Manager, went out to visit CK. He found that work had been done to CK's house which included fitting double glazing, renovating sashes and replacing window sills. The work that had been carried out was work that the respondent could have done. It had not been done to a satisfactory standard and the claimant had not left the house in a safe condition.

Mr Greenwood found power tools that had been left by the claimant in the bedrooms of CK's young children.

14. CK and her husband were both very upset when Mr Greenwood visited the site. Mr Greenwood arranged for two other employees of the respondent to come to the house to make it safe. The respondent subsequently carried out a significant amount of work to put right damage that had been caused by the claimant due to poor workmanship and due to the fact that he had not completed the work. The estimated cost of doing this work is almost £37,000, although the respondent did not know this at the time it dismissed the claimant. The respondent is carrying out this work without making any charge to the customer, with a view to protecting its brand and business.
15. Mr Greenwood was the claimant's line manager and met with him regularly. At no point during the course of his employment with the respondent did the claimant tell Mr Greenwood that he was carrying out work 'on the side' or on his own account or seek permission to do so.
16. Having received the complaint from CK and visited her house, Mr Greenwood discussed the situation with Jarrod Marchant, the respondent's General Manager, and with the respondent's Managing Director. They decided to dismiss the claimant because of the CK incident. This incident gave them serious concerns that the claimant was carrying out work for their customers on his own and bringing the respondent into disrepute. It caused them to lose all trust and confidence in the claimant.
17. On the afternoon of 31 January 2024 the claimant was asked to attend a meeting with Mr Greenwood and Mr Marchant. During the meeting Mr Greenwood told the claimant that a customer had complained about the claimant and that they were terminating his contract with immediate effect due to gross misconduct. The claimant was taken to his company vehicle to collect his bag and escorted out of the building. His employment ended on 31 January. Although the letter that was subsequently sent to the claimant referred to a meeting on 2 February, I accept the claimant's evidence that the meeting, and therefore the termination of his employment, occurred on 31 January. He was clear that the meeting took place that day, whereas the respondent's witnesses were not sure of the exact date.
18. On 7 February 2024 Jarrod Marchant wrote to the claimant in the following terms:

"I am writing to formally notify you of the termination of your employment with Ventrolla due to gross misconduct.

Following our meeting on Friday, February 2nd, 2024, attended by Wayne Greenwood and myself, it was confirmed that your employment is terminated effective immediately. This decision is based on clause 21.C of your employment contract which states "By the company without notice or payment in lieu of notice in the event of serious or persistent misconduct".

The serious misconduct in question pertains to the evidence that you were accepting payments totalling up to £5,500 from an existing Ventrolla client, despite the fact that the contracted works were not being undertaken. Such actions not only violate the

trust placed in you as an employee of our company but also demonstrate a breach of our company's ethical standards and values.

We take such breaches very seriously, as they not only undermine the integrity of our company but also damage our reputation and relationship with our clients. Therefore, after thorough investigation and consideration of the facts, it has been determined that termination of your employment is warranted.

We understand that this may be a difficult and challenging time for you, but we must uphold the standards and values of our company.”

19. When the claimant was dismissed, the respondent did not pay him any notice pay, any holiday pay or his pay for the period from 16 January 2024 through to the date his employment ended. The respondent did not tell the claimant at the time why it was not paying holiday pay or salary for the period from 16th to 31st January. It did not refer to clause 11.1 or clause 11.2 of the claimant's contract of employment in its communications with him about his dismissal, and did not ask the claimant to repay the losses that it suffered before withholding his salary and notice pay.
20. The respondent produced to the Tribunal an Order form dated 29 April 2024 in respect of works carried out for client CK. The total value of the work set out in the form was £36,681.89. The respondent's evidence, which I accept, is that the order form contains an estimate of the corrective works that the respondent will have to carry out for customer CK. The Order form was however created after the termination of the claimant's employment and, at the time the claimant was dismissed, the respondent did not know how much it would cost to put right the work that the claimant had done.
21. The claimant was entitled to 20 days holiday a year plus 8 bank holidays. The respondent's holiday year ran from April to March. Between April 2022 and the date of his dismissal on 31 January 2023 the claimant accrued 16.67 days' holiday (10 months of the holiday year at 1.67 days per month). The claimant took four days holiday during that period, including 3 days over the Christmas and New Year period when the respondent's business shut down.
22. I take judicial notice of the fact that the bank holidays between 1 April 2023 and 31 January 2024 fell on the following days: April 7th (Good Friday); April 10th (Easter Monday); May 1st (May Day); May 29th (Spring bank holiday); August 28th (Summer bank holiday); December 25th (Christmas day); December 26th (Boxing day); and January 1st (New Year's day).

The Law

Holiday pay

23. Claims for holiday pay can be brought either as complaints of unlawful deduction from wages, as claims under the Working Time Regulations 1998 (“the WTR”) or, if they arise or are outstanding on the termination of the claimant's employment, as claims for breach of contract.

24. Regulations 13 and 13A of the WTR contain the right for all workers to 28 days' paid holiday a year. Regulation 14 deals with compensation for untaken annual leave on the termination of employment and provides that:

“(1) Paragraphs (1) to (4) of this regulation apply where –

- (a) A worker's employment is terminated during the course of his leave year, and*
- (b) On the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

- (a) Such sum as may be provided for the purposes of this regulation in a relevant agreement, or*
- (b) Where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula*

$$(A \times B) - C$$

Where –

A is the period of leave to which the worker is entitled under regulation 13 and regulation 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.”

Unauthorised deduction from wages

25. Section 13 of the Employment Rights Act 1996 states that:

“(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...*

(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."

26. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal.

Wrongful dismissal / Notice pay

27. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 gives Tribunals the power to hear claims for breach of a contract of employment or other contract connected with employment where the claim arises or is outstanding on the termination of the claimant's employment.
28. In a wrongful dismissal claim, where it is admitted that the claimant was not given or paid for his notice period, the question is whether the claimant was in repudiatory breach of his contract of employment such that the employer was entitled to dismiss him without notice.
29. In a wrongful dismissal case questions of reasonableness do not arise, and the issue is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (***Enable Care and Home Support Ltd v Pearson EAT 0366/09***).

Conclusions

30. Was the respondent entitled to withhold the claimant's holiday pay and unpaid wages to offset against the losses it incurred as a result of the claimant's behaviour, relying on clause 11.1 of the claimant's contract of employment?
31. It is an implied term of every contract of employment that both the employer and the employee will behave in such a manner as to preserved trust and confidence in the relationship (***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606***). This term is fundamental to the employment relationship, and any breach of it will amount to a repudiatory breach of contract, entitling the other party to walk away from its obligations under the contract.
32. Employees are also subject to an implied duty of fidelity towards their employer, which requires them to serve their employer faithfully and not to work against the best interest of their employer.
33. The claimant's actions during the course of his employment amount to a breach of both of these implied terms. He acted against the best interests of the respondent,

and in his own personal interest, by carrying out work in his personal capacity for customers that he had been introduced to in the course of his employment with the respondent. He did work that the respondent could have done and he earned substantial sums of money from that work. He therefore earned income that could and should have gone to the respondent. He did not tell the respondent that he was doing this, nor did he seek permission.

34. Moreover, the work that he did in his personal capacity for CK was of such poor quality, and his behaviour towards the customer CK and her family was so bad that it caused damage to the reputation of the respondent.

35. I have no hesitation in finding that the actions of the claimant amount to a breach of the implied duties of fidelity and of trust and confidence and that they are a fundamental breach of his contract of employment. They were so serious as to amount to gross misconduct for which the respondent was entitled to dismiss the claimant without notice.

36. The claim for notice pay therefore fails and is dismissed.

37. At the time the claimant was dismissed ten months of the holiday year had elapsed. The claimant was entitled to a total of 28 days holiday a year both under his contract of employment and under Regulations 13 and 13A of the Working Time Regulations 1998. He had used 12 days' holiday by the time his employment terminated – eight bank holidays and four additional holiday days, including three days during the Christmas shut down.

38. For the purposes of Regulation 14 of the WTR:

A = 28 days a year (the total holiday including bank holidays to which the claimant was entitled during a holiday year);

B = 0.83 – (10 months/12 months) - the proportion of the holiday year which expired before the claimant was dismissed; and

C = 12 (the period of leave taken by the claimant between the start of the holiday year and the termination date – namely 8 bank holidays and 4 additional leave days).

39. The calculation of holiday pay under Regulation 14 is $(A \times B) - C$. In the claimant's case the calculation is $(28 \times 0.83) - 12$ which comes to 11.24. The claimant is therefore entitled to 11.24 days' holiday pay on the termination of his employment, at the daily rate of £142.38. This gives a total holiday pay entitlement on termination of £1,600.35, from which the respondent must deduct tax and national insurance contributions as required by law.

40. I have considered whether the respondent was entitled to withhold the claimant's holiday pay of £1,600.35 and his unpaid wages of £1,873.72 by virtue of clause 11.1 and/or clause 11.2 of his contract of employment. Clause 11.1(b) provides that it is an express term of the claimant's contract of employment that any loss to the

respondent that is the result of the claimant's "*failure to observe rules, procedures, or instruction*", or which is "*because of your negligent behaviour or your unsatisfactory standards of work*" will render the claimant liable to reimburse to the respondent "*the full or part of the costs of the loss*". I am satisfied that the respondent has suffered loss as a result of the claimant's negligent behaviour and unsatisfactory standards of work for client CK.

41. Clause 11.2 of the claimant's contract however states that "*In the event of failure to pay, we have the contractual right to deduct such costs from your pay*". The obvious interpretation of this clause is that the right to make deductions from pay only arises if the claimant fails to pay the respondent's costs or losses. The respondent's evidence to the Tribunal was that, prior to making the deductions from the claimant's wages in respect of holiday pay and unpaid wages, it had not asked the claimant to repay it the costs and losses it incurred. It cannot therefore be said that the claimant had failed to pay the respondent. As such the respondent cannot rely upon clause 11.2 of the claimant's contract of employment to withhold holiday pay and wages. The position would have been different had the respondent first asked the claimant to repay the money.
42. The right to holiday pay and wages arise as a matter of statute, not just as a matter of contract. As such the fact that the claimant committed a repudiatory breach of contract through his behaviour does not relieve the respondent from the duty to pay holiday pay and wages due. The respondent admits that the claimant had accrued holiday pay and wages and that it did not pay the claimant any holiday pay on termination of his employment or his wages for the period between 16th and 31st January 2024.
43. The deduction from the claimant's pay for holiday pay and wages was not made by virtue of a statutory provision or a provision in the claimant's contract, nor had the claimant previously signified in writing his agreement or consent to the making of the deduction.
44. I am bound to apply the provisions of section 13 of the Employment Rights Act 1996 and to find that the respondent did make unauthorised deductions from the claimant's wages in respect of both holiday pay and unpaid wages. It gives me no pleasure to make this finding, in light of the claimant's egregious conduct towards the respondent and its clients, and I have every sympathy for the respondent's position. I note however that there is no employer's counter claim for breach of contract before this Tribunal.
45. The claims for holiday pay and unauthorised deduction from wages are well founded. The respondent is ordered to pay the following sums to the claimant, subject to the deduction of tax and national insurance:
 1. Holiday pay of £1,600.35; and
 2. Unpaid wages for the period from 16th to 31st January 2024 of £1,873.72.

Employment Judge Ayre

Date: 15 September 2024

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