



EMPLOYMENT TRIBUNALS

Claimant: Ebonee Walton

Respondent: Creed Recruitment Ltd

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

Judgment

1. The Respondent breached the Claimant's contract in that it failed to pay the Claimant the correct salary due under her contract of employment.
2. The Respondent is ordered to pay the Claimant the net amount of £635.77.

Rule 21

1. The Claimant presented a claim form on 16 March 2022. The Respondent has not responded to this claim, or in fact communicated with the Tribunal at all.
2. I have therefore considered whether to issue a judgment under Rule 21. I considered whether, on the available material, a determination could properly be made of the Claimant's claims.
3. Further information was required in order to properly determine the Claimant's claims. A hearing was therefore held at the Midlands West Employment Tribunal (by CVP) on 10 October 2022. The Respondent was notified of the hearing but did not attend.
4. The Claimant provided witness evidence under oath. Additionally, the Claimant provided nine documents, which included two payslips and the Claimant's contract of employment. This provided sufficient information to determine the Claimant's claim.

Findings of fact

1. The Claimant was employed by the Respondent from 13 December 2021 until 27 January 2022.
2. The Claimant did not take any sick leave or annual leave during this period.

3. The Claimant's salary was £22,000 per annum. The Claimant's daily rate of pay was therefore £84.62.
4. The Claimant was employed on the basis that she would work 37.5 hours per week, from 9.00am to 5.30pm, Monday to Friday. The Claimant's contract of employment states that her hours of work were "not variable" and that if the Claimant worked additional hours then she would be entitled to overtime.
5. The Claimant did not work any overtime during the course of her employment with the Respondent.
6. The Claimant's contract of employment states that she is to be paid at her normal rate of pay whilst on annual leave. The Claimant's annual leave entitlement is stated to include public/bank holidays.
7. In January 2022, the Claimant gave two weeks' notice of the termination of her employment. The Claimant understood this to be the notice period required. The notice period stated in the Claimant's offer letter differs from the notice period stated in the Claimant's contract of employment. However, the Respondent accepted the Claimant's notice and did not dispute the notice period due. The Respondent therefore agreed to a notice period of two weeks.
8. The Claimant was asked to return her equipment on 17 January 2022. However, the Respondent gave no indication that her employment would terminate with effect from this date.

The relevant law

Breach of contract

1. In order to determine whether the Respondent was in breach of contract, I have to establish the payments to which the Claimant was entitled under her contract of employment.
2. The Claimant's salary is clearly stated in her employment contract as £22,000 per annum, to be paid in equal monthly installments.
3. However, the Claimant's employment amounted to two partial months only. It is therefore necessary to determine how the Claimant's salary accrued.
4. Under section 2 of the Apportionment Act 1870, salary payments shall "be considered as accruing from day to day, and shall be apportionable in respect of time accordingly".
5. Under this section, the Claimant's salary would therefore accrue at the rate of 1/365th per day.
6. However, section 7 of the Apportionment Act 1870 allows the parties to contract out of section 2 of the Apportionment Act. This issue was considered in detail by the Supreme Court in *Hartley v King Edward VI College [2017] UK SC*.

Conclusions

1. The Claimant's salary accrued at the rate of 1/260th per working day. This case is distinguishable from *Hartley v King Edward VI College [2017] UK SC* on the following grounds:

- a. The claimants in *Hartley* performed services on notionally non-working days. The Claimant had fixed working days and working hours, and was entitled to overtime for hours worked outside of these times.
 - b. The Supreme Court in *Hartley* indicated that section 2 of the Apportionment Act could be disapplied by way of an “express statement”. The Claimant’s contract of employment states that her working hours are “not variable”. The Claimant’s working hours are therefore fixed and unmovable, and expressly distributed over 260 working days of the year. I find that this statement is clearly inconsistent with an accrual rate of 1/365th per calendar day, and is therefore sufficient to disapply section 2 of the Apportionment Act 1870.
2. The Claimant was therefore entitled to be paid at a daily rate of £84.62, which is 1/260th of £22,000.
 3. The Claimant was entitled to be paid for 15 days in December 2021, giving a total of £1269.30 (gross). The Claimant was in fact paid £1195.65 (gross). This is a gross underpayment of £73.65.
 4. The Claimant was entitled to be paid for 19 days in January 2022, giving a total of £1607.78 (gross). The Claimant was in fact paid £785.71 (gross). This is a gross underpayment of £822.07.
 5. The total gross underpayment to the Claimant was therefore £895.72.
 6. Had the Claimant been paid correctly in December, the net sum which the Claimant would have received would have been £1195.55. The net sum received by the Claimant was £1147.81. This is a net underpayment of £47.74.
 7. Had the Claimant been paid correctly in January, the net sum which the Claimant would have received would have been £1421.48. The net sum received by the Claimant was £785.71. This is a net underpayment of £635.77.
 8. The Respondent is therefore ordered to pay the Claimant the sum of £683.51. This represents the difference in the net amounts paid by the Respondent and the net amounts properly due to the Claimant under her contract of employment.

Employment Judge Routley

Date: 10 October 2022