



# EMPLOYMENT TRIBUNALS

## Claimant

Mr S Leigh

## Respondent

Cera Vision Limited

v

**Heard at:** Bury St Edmunds (by CVP)

**On:** 14 January 2022

**Before:** Employment Judge Laidler

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr R Myers, Counsel

## RESERVED JUDGMENT

1. The claim for unauthorised deductions from wages was submitted outside the requisite time period set out in s23 Employment Rights Act 1996, the tribunal has no jurisdiction to determine it and it is dismissed.
2. The claim for holiday pay fails and is dismissed.

## RESERVED REASONS

1. The claim form in this matter was received on 13 January 2021, following a period of Acas Early Conciliation between 12 and 13 January 2021. In his particulars on the claim form, the claimant stated he did not receive any payroll or pension benefits in October 2018 and March, May, August, September, October, and November 2019. He asserted he was asked to “defer” those salary payments as the company could not service its outstanding payroll to HMRC and that it was also being pursued by several other creditors. The agreement, he asserted, was always a deferral with a promise of payment when company finances permitted. Although there is reference in the claim form to a TUPE transfer and the claimant not being consulted with, he confirmed at this Hearing that he was not bringing a claim of a failure to inform and consult.

2. In the ET1 the claimant assessed the total for the seven months' salary he was claiming as £42,925.33 (gross) and the relevant employer pension benefits due. He also claimed £8,490.00 for his outstanding holiday entitlement (6 weeks at £1,415.00 per week).
3. The respondent defended the proceedings. It set out how a "*pre-pack deal*" was agreed between the Administrator and certain directors of the respondent and that subsequently staff transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. It stated the Claimant's employment transferred in February 2020 to Arab Asian UK Limited which later changed its name to Cera Vision Limited. On 12 May 2020, the claimant was put at risk of redundancy. In mid December 2020, it alleged that the claimant was informed his role was in fact to be made redundant with effect from 31 December 2020 providing him with 12 weeks' statutory notice which he was required to serve on garden leave. It denied any agreement that the claimant would defer salary, rather admitted that prior to the transfer the claimant had not been paid his wages in certain months of 2018 and 2019, either fully or in part. It asserted the claimant was fully aware of the respondent's financial position and disputes any promise to pay the wages on the claimant's transfer. It also asserted that the claim was out of time.
4. By letter of the 17 June 2021 the respondent applied for leave to amend its Response. It stated that in its preparation it had discovered a loan made to the claimant in 2013 which was to be repaid by him but had not been. It sought leave to bring a counter claim against the claimant the loan not having been repaid during employment or at the date of termination.
5. By letter of the 30 August 2021 the respondent was advised that its application had been refused by E J Ord on the grounds that the claimant brought the statutory complaints of unauthorised deductions from wages and for holiday pay. As no breach of contract claim was brought there was no jurisdiction to entertain a respondent's counter claim.
6. The Tribunal heard from the claimant and Timothy Reynolds on his behalf and from Sean Rogers on behalf of the respondent. From the evidence heard, the Tribunal finds the following facts.

### **Findings of Facts**

7. The claimant commenced employment on 1 March 1997 and his employment ended on 31 March 2021. In 2018 / 19 the respondent was experiencing financial difficulties and in 2019 formally filed to be voluntarily wound up. A "*pre-pack deal*" was entered into with some of the directors and the respondent traded initially as Arab Asian UK Limited, before being able to obtain the former name of Cera Vision Limited. Part of the pre-pack sale was that the remaining staff would transfer. The claimant transferred but his role was subsequently ended by reason of redundancy. As the claimant is not advancing an unfair dismissal claim, it is not necessary to go into the redundancy situation in any further detail.

## Holiday pay

8. The claimant was placed on furlough in May 2020. Prior to that, the claimant had taken three days holiday from his 30 days allocated to him for the year 2020. The respondent's holiday period ran from January to December.
9. The Tribunal accepts the respondent's evidence that at no stage from May 2020 until 31 December 2020, did the Claimant submit a holiday request which was rejected by the respondent.
10. Clause 10.2 of the claimant's contract of employment provides:-

“The holiday year is the calendar year from 1 January to 31 December and you should take your holidays during this period. You will not be permitted to carry over unused holiday entitlement into a following holiday year. You will not be entitled to payment for any unused holiday entitlement, save as provided under 10.3.

10.3 If you leave the company's employment with an outstanding holiday entitlement, you will, in addition to any other sums to which you may be entitled, be paid a sum representing salary for the number of days holiday entitlement outstanding. If you leave the company's employment having taken more than the accumulated holiday entitlement for the current holiday year then a sum equivalent to wages for the additional holiday taken will be deducted from any final payment to you and the balance will be paid to you. A day's holiday pay for these purposes will be 1/365 of your annual basic pay.”
11. The claimant was given notice of redundancy by letter 22 December 2020. He was advised that his employment would terminate three months from the date of that letter on 31 March 2021. The claimant was to be placed on garden leave and be paid during that period but not required to work. He was however to remain available for work. With regard to holidays the letter specifically stated:

‘...During your notice period you will be required to take your accrued holiday and therefore at the completion of your notice period all holiday will be deemed to have been taken on the dates to be notified to you whereby you will not be required to be available to the business during working hours’.
12. In an email of 24 December 2020, the claimant indicated to Peter Crook that he had found information online that there were to be changes to the holiday entitlement because of the Coronavirus pandemic. He therefore believed that he should be paid 30 days holiday for 2019 and an additional 7 days for his 12 week notice period.
13. In a reply of the 29 December 2020, Mr Crook stated:-

“The company’s employment contract with you precludes the carry over of annual holidays from one holiday year to the following holiday year.

In respect of the 2021 holidays that will be accrued during the three months of your notice period, the company requires that you take this holiday during the notice period.”

14. Following further correspondence between the claimant and Mr Crook, Mr Crook wrote on 19 January 2021:-

“Further to our recent communications, I would like to make it clear that we have already agreed that you are able to carry forward your accrued but untaken holiday from 2020. Our records show that you took three days holiday between January 2020 and March 2020 leaving you 27 days holiday to carry forward. Please confirm that this is also your understanding.

In addition to the 27 days above, you will accrue holiday during your notice period of 7.5 days leaving you with 34.5 days holiday to take.

As we have previously notified to you, as we are entitled to do, you must take these holidays during your notice period and therefore we have notified you that we will record you as being on holiday from 25 January 2021 until 11 March 2021 inclusive. You will not be required to remain available to the company during these dates whilst you are on annual leave.

...”

### **Unpaid wages**

15. The figure in the ET1 form has already been set out above. This was again set out in a schedule of loss dated 11 June 2021, where the total unpaid salary was calculated at £42,925.33. In addition, the claimant claimed employer pension contributions totalling £682.65.
16. He calculated the total annual leave claim to amount to £10,611.40.
17. In the claimant’s witness statement, he stated he was asked to ‘defer’ his salary payments over a period of seven months by Tim Reynolds as the company could not meet its outstanding salary and creditor commitments. He alleges there was a promise of payment to be made when the company was able. He produced a letter from Tim Reynolds at page 88 of the hearing bundle.
18. The claimant in paragraph 8 of his witness statement acknowledged that upon receipt of the bundle, he saw a spreadsheet (page 96) that references outstanding salary payments and includes what he describes as “*hardship loans*” made in lieu of salary. He stated that he did not have access to that information prior to receiving the bundle and upon receipt he subsequently submitted a new schedule of loss in respect of unpaid wages for a net payment of £13,933.35.

19. The Claimant acknowledged in cross examination that he had no evidence that these were loans. He had not paid back these loans as they were to be paid back upon receipt of salary. He acknowledged that he and Mr Reynolds had known each other since their early 20s. He disputed that the cash payments were made to employees as part payment. He denied that it was ever explained to him that if they did not accept these reduced payments the company would fold. He then acknowledged that the alternative was that the company being in financial difficulties there was a risk of loss of jobs or the company would fold.

20. In cross examination, the claimant did not dispute the cash payments that were set out in a document he believed that Mr Peter Crook had prepared, at page 98 of the Hearing Bundle. This showed the following cash payments:-

“30 May 2019	£4,000
29 August 2019	£1,000
6 September 2019	£3,000
7 November 2019	£2,500
28 November 2019	£3,000
Total paid	£13,500”

21. The claimant gave various reasons why he had not acknowledged these cash payments in his ET1 form. The first was that he did not have access to his computer. He had not, however, forgotten about them. He then asserted again they were a loan. He then said that the company would have looked at what they had paid to the employees by way of these cash payments and then deducted them when the salary was paid. As it would have been illegal to make cash payments, they were treated as loans. He specifically stated they were not being processed by payroll. The tribunal did not find his evidence credible and it is not accepted.

22. It was then put to the claimant that these payments were made by way of the BACS system directly into his account and not actual cash. The claimant then accepted that and stated that he could have done some ‘homework’ by checking his bank account as to the amount that had been paid.

23. The tribunal did, however, see in the bundle dated 26 July 2021, a letter from the claimant to Fosters Solicitors acting for the respondent in which this £13,500 was described as “*hardship loans*”. The claimant subsequently accepted in cross examination that although not technically paid through the payroll, they were paid in respect of salary.

24. The claimant accepted that his employment with the respondent came to an end in March 2021. The last month for which payment is sought is November 2019. It is the respondent’s case that the claim has been submitted out of time. The claimant was asked in cross examination what

he had done after the end of his employment. He had been looking for work and had done some work but he had mainly been at home. His health had been 'up and down' and he had been to the doctors but he had not been in hospital. He was on prescription medication from the doctor. In answer to the question of why he could not have put the claim in sooner, he believed there was a gentleman's agreement he would be paid when the finances improved. He did take some legal advice.

25. The tribunal also heard from Sean Rogers who was one of the employees of the respondent who also did not receive their full pay in 2019. He gave evidence which the tribunal accepts that no such deferral or promise to pay the balance was ever made to him or, to his knowledge, to other employees. His recollection is the cash sums paid to employees at the time, including himself, were in consideration of the full pay to which they were entitled but which the company could not afford to pay. These amounts were accepted at the time as being their wages for the month which if not accepted would have meant jobs were lost or the company having to fold. At no stage has any employee prior to the claimant made a claim for wages owed because the cash payments made were paid to the staff as wages due to the company being in financial difficulty. At no stage prior to the claimant's redundancy did he ever raise with the respondent that he was owed wages and he has not provided any evidence within the hearing bundle prior to the redundancy situation arising that that was an issue. Mr Rogers also confirmed that these were not technically cash payments, they were paid through the BACS system. The spreadsheet at page 98 of the hearing bundle showed Mr Rogers have received £5,500 in cash payments. This spreadsheet showed other cash payments paid to other staff whose names have been redacted. Mr Rogers was adamant that he was never told that the cash payments were loans.

## **Relevant Law**

### **26. Employment Rights Act 1996**

#### **Deductions by employer**

##### **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.

...

### **Section 23 Complaints to employment tribunals**

...

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
  - (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
- (3) Where a complaint is brought under this section in respect of—
- (a) a series of deductions or payments, or
  - (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

## **27. Working Time Regulations 1998**

### **Dates on which leave is taken**

15.— (1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

- (2) A worker's employer may require the worker—
  - (a) to take leave to which the worker is entitled under regulation 13(1); or
  - (b) not to take such leave,  
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.

**28. Working Time (Coronavirus) (Amendment) Regulations 2020 (came into force 26 March 2020)**

**Amendment to the Working Time Regulations 1998**

2. The Working Time Regulations 1998 are amended as follows.

3. In regulation 13—

(a) at the beginning of paragraph (9)(a) insert “subject to the exception in paragraphs (10) and (11),”;

(b) after paragraph (9) insert—

“(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be **entitled to** carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(13) For the purpose of this regulation “coronavirus” means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).”.

4. In regulation 14—

(a) in paragraph (1) for the introductory text substitute “Paragraphs (1) to (4) of this regulation apply where—”;

(b) after paragraph (4) insert—

“(5) Where a worker’s employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward



under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.”.

5. In regulation 15(2)(b) after “leave” insert “(subject, where it applies, to the requirement in regulation 13(12))”.

## **Conclusions**

### **Unpaid wages**

29. The claim is significantly out of time and the tribunal has no jurisdiction to determine it. The claim should have been brought within 3 months of the last payment allegedly due in November **2019**. It was not, the claim not being presented until 13 January **2021**. The claimant has not produced any evidence that it was not reasonably practicable for him to bring the claim in time. The tribunal has no jurisdiction to determine the claim which is dismissed.
30. In the alternative if the tribunal had found the claim in time it gives its decision on the merits. The claimant’s evidence was inconsistent and lacked all credibility. It cannot be accepted. He commenced these proceedings claiming £42,925.33 (gross) making no reference whatsoever to the £13,500 that had been paid to him. It is difficult to accept that he had not remembered that amount. It was paid through the BACS system and could have been traced in the claimant’s own bank statements. The tribunal has had to conclude that he only acknowledged it when faced with documents in the bundle produced by the respondent showing the payments made.
31. The tribunal accepts the respondent’s position that these payments were made and accepted by the claimant in respect of the wages he was due for the months in question. There was no ‘hardship’ or other loan being made. There is no evidence that the claimant queried payment of further allegedly outstanding sums until his redundancy. The claimant accepted these amounts in respect of his wages.
32. However, as was discussed at this hearing this claim has been brought as unauthorised deduction from wages. E J Ord directed it was not a breach of contract claim. In submissions on behalf of the respondent counsel made no mention of the provisions of s13 Employment Rights Act 1996 under which the deduction is unauthorised unless ‘the worker has previously signified in writing his agreement or consent to the making of the deduction.’ There is no such evidence that the claimant did so signify his consent. Had therefore the claim been presented in time the tribunal would have had to have found that he was entitled to the balance of the monies claimed.

**Holiday pay**

33. There is documentation to evidence the position regarding holiday pay. initially the respondent's position was that the claimant could not carry over the 27 days not taken in 2020. That was the contractual position. The Working Time Amendment Regulations do not assist the claimant as he has not demonstrated it was not reasonably practicable to take the leave.
34. On the facts however the Amendment Regulations became irrelevant as during negotiations the respondent agreed that the claimant could carry over the leave. It required him however to take it and the 7.5 days accrued during his notice period during the garden leave period. That it was entitled to do.
35. The 27 days carried forward were by agreement with the respondent. The question of notice to take the leave does not therefore arise. The notice provisions with regard to the other 7.5 days were complied with by the respondent informing the claimant in its letter of the 19 January 2021.
36. The claim for holiday pay therefore fails and is dismissed.

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Employment Judge Laidler

Date: 23 February 2022

Sent to the parties on:

4 March 2022

For the Tribunal Office