



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Dulewicz

**Respondent:** RTS Textile Recyclers Ltd

**Heard at:** Bristol                      **On:** 5 July 2017

**Before:** Employment Judge Mulvaney

**Representation**

**Claimant:** Ms E Dulewicz, the claimant's sister

**Respondent:** Did not appear and was not represented

**JUDGMENT** having been sent to the parties on 4 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant brought claims for notice pay, holiday pay and arrears of pay following the termination of his employment on the 13 July 2016. A claim for arrears of pay for overtime hours was withdrawn by the claimant on the 6 June 2017.
2. The respondent is a textile recycling company. The claimant was employed as a driver from 23 November 2016. The claimant's supervisor was Mr Pawel and his manager and the director of the respondent was Mr Voralia.

### **Respondent's application to postpone and case history**

3. A default judgment was issued on this claim on the 25 November 2016, no response having been submitted to the claim by the respondent. On the 10 January 2017 the respondent submitted an application for reconsideration of the default judgment and for a response to be submitted out of time. That application was heard at a reconsideration hearing on the 3 March 2017. The outcome was that the default judgment was revoked and an extension of time permitted for entering a response. The case was then listed to be heard on

the 4 May 2017 and directions were given for disclosure, bundle preparation and exchange of witness statements. The respondent did not comply with the directions but the 4 May hearing was postponed in any event on the 3 May 2017 due to lack of judicial resources.

4. The hearing was relisted for the 5 July 2017. On the 12 June 2017 the claimant applied for a postponement on medical grounds. The respondent objected to the claimant's postponement application. The claimant was directed to provide medical evidence in support of the application and, having rearranged a medical appointment, did not pursue the application.
5. On the 4 July 2017 the respondent's representative applied for a postponement of the hearing on the 5 July on the grounds that Mr Pawel, one of the respondent's witnesses, had had to return to Poland urgently because of an emergency. No further detail or evidence was provided to support the respondent's application. At 8.25 am on the 5 July 2017 a further letter was received by the Tribunal from the respondent's representative 'refreshing' the postponement application on the basis that the respondent's representative had been and was still at a hospital with an ill relative and unable to attend the hearing. In the light of the fact that the applications had been made so close to the start of the hearing without any supporting documentation, the Judge directed that the application should be made in person at the start of the hearing, if not by the representative, then by the respondent itself.
6. There was no attendance by the respondent at the hearing and the Judge considered the application to postpone in its absence. The application was opposed by the claimant who had travelled up from Devon to attend the hearing. The claimant's sister, who was representing him, had taken a day off work to attend with him. In the absence of any supporting evidence from the respondent as to the necessity for Mr Pawel to leave urgently for Poland or as to the medical emergency which prevented the respondent's representative from attending or instructing an alternative representative; and in the absence of any attendance by Mr Voralia for the respondent who was due to attend the hearing to give evidence on behalf of the respondent and who could have provided an explanation for the late application, the Judge refused the application.
7. In addition, the directions given by the Tribunal in relation to bundle preparation and witness statement exchange had not been complied with by the respondent. The respondent had not provided a copy of the bundle to the claimant as had been directed and no effort had been made to ensure that the Tribunal was provided with a bundle or copies of the respondent's witness statements. In the circumstances it appeared that no real effort had been made by the respondent to prepare for or attend the hearing.
8. In determining the issues at the hearing I took account of the respondent's particulars of response contained in the ET3, the comments of the respondent's representative in her email to the Tribunal dated 5 July 2017, and the contents of the respondent's witness statements to which the claimant was able to provide access for me to read. The weight that I attached to the respondent's evidence was affected by the fact that there was no attendance by the respondent at the hearing.

### Claim for holiday pay

9. The claimant's evidence was that he had not been able to take any holiday in 2015. His employment had commenced on 23 November 2015 and the respondent's holiday year ran from 1<sup>st</sup> January to the 31 December as shown in the contract of employment included in the bundle and provided by the respondent. The claimant's evidence was that December was a busy time of year for the respondent and he was told by his supervisor, Mr Pawel that he would be able to carry over untaken holiday from 2015 into 2016. I found as a fact that that was the case, there being no evidence to contradict it. The claimant's evidence was that he had taken no holiday was produced he following year either, between the 1 January 2016 and the 13 July 2016. He claimed that he was owed 18 days holiday in total based on an entitlement of 28 leave days per year or 1.66 days per month. His entitlement for 2015 was therefore 3 days and for 2016, 15 days.
10. The respondent stated in its ET3 that it owed the claimant three days' holiday pay. In the respondent's representative's letter of the 5 July it was stated that the respondent owed the claimant 8 days' holiday. It was stated that the claimant had accepted that he took and was paid for bank holidays and that he had taken a single day's leave for his mother's funeral.
11. The claimant's evidence at the hearing was that he did not accept that he took and was paid for bank holidays. Although he had had bank holidays off he always had to work on the following Saturday to make up for the time off. This would have been apparent from his time sheets had the respondent provided them. I found that there would have been 5 Bank Holidays between 1 January 2016 and the 13 July 2016 and even if the respondent's contention was accepted, the claimant would have been owed 10 days holiday in 2016, not the eight calculated by the respondent. I found as a fact that the claimant did not have the benefit of Bank Holidays as paid leave during his employment. I accepted his evidence that he had to work on Saturdays to make up for time off on Bank Holidays, there being no evidence from the respondent to the contrary. As regards the day of absence to attend his mother's funeral, a document in the bundle provided by the respondent dated 11 February 2016 showed the claimant had taken a day off for his mother's funeral. The form showed the type of absence as both 'leave' and 'bereavement'. In the light of the respondent's lack of clarity as to the type of absence, I concluded that the day's absence was in respect of bereavement and that it should not have counted against the claimant's leave entitlement.
12. I had to consider the amount of pay to which the claimant was entitled for his outstanding holiday. It was the claimant's evidence that he worked an average of 55 hours per week and that his holiday pay should be based on this weekly average.
13. There was a lack of documentary evidence in relation to the claimant's hours of work and pay. It was the claimant's evidence that during the period that he worked for the respondent he had only received 2 pay-slips. The additional pay-slips included in the bundle had only been provided in the course of these proceedings and he had not seen them before. I accepted the claimant's evidence on that. The pay-slips had been disclosed by the respondent

accompanied by a spreadsheet setting out the weeks worked, the hours worked in that week and the amount paid. Although the claimant had asked the respondent to provide copies of his time sheets, the respondent had failed to comply and the hours worked shown on the respondent's spreadsheet were disputed by the claimant.

14. The claimant referred to a copy of one of his time sheets, which was the only one that he had. It was for the week 13 – 16 June 2016 and it showed that the claimant had worked a total of 54.5 hours in that week. The respondent's spreadsheet recorded that the claimant had only worked 45 hours in that week. In the light of that discrepancy, and in the absence of any oral evidence from the respondent, I concluded that the spreadsheet could not be relied upon as an accurate record of the hours worked by the claimant. On the basis of the copy time sheet that the claimant had produced, I concluded that he worked an average of 54.5 hours per week.
15. The contract provided by the respondent stated that the claimant might '*be required to work additional hours when authorized and as necessitated by the needs of the business*'. It also provided that '*Any payments for additional hours worked will be paid at basic rate or Time Off in Lieu will be given at the discretion of the Managing Director*'. Based on this contractual provision, I concluded that the claimant was entitled to be paid for additional hours worked at his basic rate of pay, the equivalent of the national minimum wage. The calculation of his holiday pay should be based on the earnings that he should have received for the average hours that he worked each week.
16. I concluded that the claimant's holiday pay should be based on a total of 18 days and on an average of 54.5 hours worked per week. I calculated leave outstanding at 32 hours for 2015. The minimum wage in 2015 was £7.40 and I awarded the sum of £236.80 (32 x £7.40) for that holiday year. The minimum wage in 2016 was £7.76 and the leave outstanding for that year was calculated as 162 hours and amounted to £1,257.12 (162 x £7.76). The total award for holiday pay was £1,493.92.

### **Notice Pay**

17. The claimant was dismissed by letter dated 5 July 2016 sent by post giving one week's notice and providing that the claimant's termination date was the 13 July 2016. The respondent's case was that the claimant did not work his notice and so was not paid for it.
18. The claimant's evidence was that he informed his supervisor Mr Pawel on the 4 July 2016 that he would not be attending work the following day due to back pain. He sent in a fit note to the respondent, included in the bundle, on the 12 July 2016. In the absence of any evidence from the respondent to the contrary, I accepted the claimant's evidence as to the reason for his non-attendance during that week and concluded that he was entitled to be paid for that part of his notice period.
19. The claimant's contract of employment stated that he was entitled to four weeks' notice of termination after successful completion of a probationary period (3 months) but having accumulated less than five years' service. I

therefore awarded the claimant four weeks' contractual notice at £293.47 per week amounting to £1,173.88 in total.

**Unpaid wages**

20. The claimant's evidence was unclear as to the weeks for which he claimed to have received no pay. In the circumstances I made no award to the claimant for unpaid wages

**Costs**

21. The claimant had applied for costs to be awarded to him in respect of the attendance of his sister at the reconsideration hearing on the 3 March 2017. The claimant's sister had had to take a full day's leave from her employment in order to attend the hearing to represent the claimant. A letter from her employer, Aylward Engineering & Pneumatics Ltd dated 27 March 2017 was produced confirming that fact.

22. I found that the claimant was entitled to be awarded costs due to the respondent's unreasonable conduct in failing to submit a response to the Tribunal within the time allocated which led to the issuing of a default judgment and thereafter, a reconsideration hearing.

23. The claimant's sister lost a days' holiday, the value of which I calculated to be £88.46 based on her salary of £23,000pa. I therefore awarded the sum of £88.46 to the claimant in respect of his costs.

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Employment Judge Mulvaney  
9 August 2017

JUDGMENT SENT TO THE PARTIES ON  
23<sup>rd</sup> August 2017  
.....  
AND ENTERED IN THE REGISTER  
.....  
FOR THE TRIBUNAL OFFICE