



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Shahzad

**Respondent:** Sanskruti Restaurant Manchester Limited

**HELD AT:** Manchester

**ON:** 3 November 2017

**BEFORE:** Employment Judge Ross

## REPRESENTATION:

**Claimant:** In person

**Interpreter:** Mr M Ahmed

**Respondent:** Mr R Anderson, Consultant

**JUDGMENT** having been sent to the parties on 3 November 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. At the last hearing I found the claimant was employed by the respondent from 1 February 2016 until either 28 May or 2 June 2017.
2. This hearing was to determine whether the claimant is entitled to holiday pay and whether he is entitled to notice pay.
3. There was a substantial factual dispute between the parties. The claimant said he was not paid any holiday pay at all between February 2016 and when his employment ended. He also said that his payslips were incorrect and that he did not work 16 hours a week, he worked 52 hours per week and was paid £300 per week. He alleged he was dismissed.
4. For the respondent Mr Shukla stated that the claimant had received his full holiday pay entitlement and that he worked 16 hours per week and that his payslips, P60 and P45 were accurate and reflect this. He alleges the claimant resigned.

5. The claimant relied on some documents from Google Maps which he says showed he was at the respondent's premises at particular dates and times.

6. Both parties agreed the claimant went to Pakistan on 27 February 2016 to 2 April 2016. The claimant's passport showed that he was in Pakistan on 9 March 2016 to 23 March 2016, page 9. It is the respondent's case he was paid for this period (two weeks). Both parties agree the claimant was in Pakistan 27/2/17-02/4/2017. It is the respondent's case the claimant was also paid for this period.

7. I turned to consider the claimant's claim for payment for accrued but untaken holiday on the termination of employment. The relevant law is Regulation 14, Working Time Regulations 1998

8. I must identify the holiday year, the period of leave to which the claimant is entitled, the proportion of the leave year which has expired and the leave taken by the claimant from the start of the leave year to the termination of employment. I also need to calculate a week's gross pay as set out in Regulation 13.

9. I find the holiday year based on the evidence of Mr Shukla commenced 1 January and ended 31 December. Under the Working Time Regulations an employee is entitled accrued but untaken holidays on the termination of employment.

10. I find the termination date is 2 June 2017. I prefer the evidence of Mr Shukla as to why the claimant's employment ended. (See below). I therefore find the date the employment ended was the date he gave in evidence.

11. The start date of the holiday year is 1 January 2017. I find the claimant worked 16 hours a week. I find he was paid 120 per week. (£7.50 per hour). The claimant's annual statutory entitlement under the Working Time Regulations is 5.6 weeks. He left half way through the leave year. Accordingly, he is entitled to 5.6 weeks holiday s divided by 2 ie 2.8 weeks. I find a week was 16 hours because I find the claimant worked 16hours a week at £7.50 = £120.

12. Therefore at the point of termination the claimant was entitled to half of his annual paid entitlement namely 2.8 weeks of £120 x 2.8 weeks which is = £336.

13. However from this must be deducted holiday which was taken and paid for during this period. I must also deduct the payment made for holiday pay at the termination of employment.

14. The claimant said categorically he was not paid any holiday pay at all. I find this is incorrect. I rely on his final wage slip which shows the claimant was paid £217.50 holiday pay (29 hours @ £7.50) see page 138 of the respondent's bundle.

15. I also find the claimant was paid whilst he visited Pakistan during the period 27 February to 2 April 2017. He received £576. (£115.20 x 5 ) Both parties agree the claimant visited Pakistan in this period. I accept the evidence of Mr Shukla that the payslips show the claimant being paid £115.20 per week during this period. I accept his evidence that at that time, if an employee was employed by the respondent and was on holiday it was simply shown on his wage slip as a payment whereas if an

employee left employment any accrued holiday pay was shown on the final statement as holiday pay.

16. The claimant also received a £217.50 holiday pay when his employment ended. That is a total of £793.50

17. The claimant received in excess of his statutory entitlement and his claim for payment for accrued but untaken holiday for the holiday year 1 Jan 2017 to termination of employment fails.

18. I turned to consider the holiday year during the period February 2016 to 31 December 2016, the previous year I found the claimant was employed.

19. Mr Shukla said he never refused the claimant any holiday request. I rely on his evidence. He certainly granted the claimant holidays because his passport shows he went to Pakistan in the period 9-23 March 2016 and the pay slips show he was paid in that period.

20. Mr Shukla said it was his practice to allow employees to carry over holidays particularly if they wanted to go back to their country of origin although there is no express entitlement to the Working Time Regulations to permit carry over of holidays where employees are fit to work and holidays are granted.

21. There are no clear holiday records of when the claimant took holiday in 2016 save for the period when he was in Pakistan for two weeks. The claimant said he took no paid holidays but that is inconsistent with his passport entry for March 2016 and the pay slips showing he was paid.

22. Mr Shukla agreed that at the relevant time as a small business with few employees he did not keep formal holiday records. The position has now changed.

23. The burden of proof is on the claimant. I am not satisfied by his evidence that he did not take any paid holidays at all in 2016. I am not satisfied he is entitled to carry over holidays under the Working Time Regulations in circumstances where the employer granted holiday requests. (This is not a situation where he was unable to take holiday).

24. Even if I am wrong about that and he is entitled to payment for accrued but untaken holidays carried over from 2016 he has failed to discharge the burden of proof in showing how many days he was owed and how many he had taken. Therefore, his claim for accrued but untaken holidays for the holiday year February 2016 to 31 December 2017 fails.

25. There was a very substantial conflict of evidence in this case in this case which is concerning. Often a conflict of evidence means one party has simply a different recollection of events. However, the conflict about how many hours the claimant worked is so substantial, that it is not possible both parties are being completely truthful.

26. The claimant was adamant that he worked 52 hours a week. He relied on some information in his bundle (both parties presented bundles) to show that he was at the restaurant for lengthy periods of time. He says he worked every day except Monday. For the respondent Mr Shukla was said that the claimant worked Tuesday, Friday and Saturday. There was no written contract of employment.

27. The parties agreed that the claimant was paid weekly in cash on a Sunday. Mr Shukla said that was because the claimant at the relevant time did not have a bank account. Both parties agreed that the claimant was not regularly provided with wage slips. Mr Shukla said he provided them as and when requested.

28. It is possible that the wage slips were accurate in relation to part of the claimant's wages but that he worked greater hours i.e. the 52 hours he suggests. If that was right then that would have been a very serious matter because the respondent would have been responsible for producing inaccurate documents namely wage slips and payroll information and the claimant in the absence of any objection would have been complicit in such an arrangement which could amount to a fraud on the revenue and/or illegality.

29. I do not find this is what occurred. I prefer the evidence of the respondent and find the documents produced by them are accurate.(I did not have sufficient information about the Google Maps document produced by the claimant to know how accurate it is).

30. I turned to the second issue which is whether or not the claimant is entitled to one week's notice pay. The claimant says the respondent dismissed him on 28 May 2017, the respondent says the claimant resigned and agreed to work his notice to 2 June 2016. I prefer the evidence of the respondent. It is more consistent with the contemporaneous documentation. The claimant relied on a text message at page 139 of the respondent's bundle (page 84 of the claimant's bundle). When asked about the conversation or message which prompted this text the claimant did not give a clear reply. The message was sent on 29 May 2017 and I find it is consistent with the claimant asking questions during his agreed notice period.

31. I find in the email from the respondent dated 9 June 2017 at page 142 of the respondent's bundle Mr Shukla specifically said, "you are more than welcome to join us again as we discussed when you gave the notice to leave".

32. I find the offer to re-engage the claimant in a contemporaneous document inconsistent with the suggestion that he was dismissed by the respondent. Accordingly, having found the claimant resigned, his claim for notice pay does not succeed.

Employment Judge Ross

Date 13 December 2017

REASONS SENT TO THE PARTIES ON

18 December 2017  
FOR THE TRIBUNAL OFFICE