



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Maninder Singh

**Respondent:** First Stop (Wombourne Common Road) Limited

**Heard at:** Birmingham      **On:** 19 April 2018

**Before:** Employment Judge Flood (sitting alone)

## JUDGMENT

1. The second limb of the claimant's complaint for accrued holiday pay is also well-founded and succeeds. The respondent is ordered to pay to the claimant the further sum of £2778 in respect of accrued holiday pay. This sum is to be paid gross and the claimant is to be responsible for the payment of any income tax and National Insurance Contributions thereon.
2. The Claimant's application for costs against the Respondent is dismissed.

## REASONS

### Preliminary matters

1. The Claimant brought a complaint of unfair dismissal contrary to **section 94 of the Employment Rights Act 1996 ("ERA")** and unlawful deduction of wages under section 23 of the ERA.
2. Both complaints came for hearing on 13 December 2017 and the claimant was successful in his complaints and was awarded the sum of £6371.38 in respect of his unfair dismissal complaint and £3333 in respect of unpaid wages, which included a payment for accrued but untaken holiday pay in the holiday year from April 2017 until the termination of his employment on 31 March 2017. Oral judgment was given on the day of the hearing, and a decision and written reasons dated 15 January 2018 was subsequently promulgated by the Tribunal.

3. Part of the claimant's complaint for unpaid wages, also included unpaid holiday pay for two previous holiday years from July 2014 until March 2015 and from April 2015 until March 2016. I made findings of fact at the hearing and accordingly concluded at paragraph 24.2 that the claimant was prevented from taking his holiday entitlement for those years. However in the time available at the hearing and in the absence of this claim being particularised, I was not in a position to make a decision on this element of the claim. The claimant was asked to provide further particulars of this complaint within 14 days if receipt of written reasons the matter would be dealt with on the papers and without the need for a further oral hearing.
4. The claimant wrote in to the Tribunal on 25 December 2017 stating:  
  
*“Maninder Singh wants the court to accept his holiday pay request covering the periods 2014-2016. The breakdown is given in the schedule of loss given in the bundle. First Stop failed to provide him with holiday pay by delaying the request by saying it will be given later. Maninder has difficulty in understanding fluent English, therefore his employers thought Maninder will not know who to turn to. The company hid the fact he was entitled to holiday pay”*
5. At the hearing the claimant also made an application for costs under regulation **76(1), Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”)** against the respondent. The claimant appeared in person at the hearing, assisted by Mrs Kumari but was not legally represented. The application for costs appeared to relate to some legal advice obtained by the claimant on the merits of his complaint earlier in the proceedings. At the hearing, I asked the claimant to consider whether he was in fact making an application for costs or whether he alternatively wished to make an application for preparation time under the same provision, given that a costs order and a preparation time order may not both be made in favour of the same party in the same proceedings (rule 75(3) of the ET Rules).
6. The claimant confirmed by e mail received by the Tribunal on 8 January 2017 that he was in fact making an application for costs in the sum of £840. The claimant attached a copy of an invoice dated 19 December 2017 from Davisons Solicitors in Birmingham for this amount with a breakdown as follows:  
  
*“Advice in conference; further telephone advice, perusal of papers and provision of written advice”*
7. This corresponds with a letter disclosed by the claimant at page 89 -91 of the Bundle which sets out the advice provided by Davisons Solicitors.
8. The respondent was given the opportunity on 20 March 2018 to comment on these issues raised by the claimant by no later than 28 March 2018. The respondent did not provide any comment. The matter has now come back for consideration before myself on the papers.

## **The Issues**

9. The issues which needed to be determined were:

- 9.1. was the Claimant was entitled to any further outstanding holiday pay
- 9.2. does the information provided by the claimant regarding legal costs fall within any of the circumstances set out in **rule 76 of the ET Rules** ? and, if so;
- 9.3. should, in the Tribunal's discretion, a costs order be made?

## **The Law**

### **Holiday Pay Issue**

10. **Regulation 13 (1) of the Working Time Regulations 1998 ("WTR")** provides that:

*'... a worker is entitled to [four weeks'] annual leave in each leave year.'*

11. **Regulation 13(9) of the WTR** provides:

*'Leave to which a worker is entitled under this regulation may be taken in instalments, but —*

*(a) it may only be taken in the leave year in respect of which it is due, and*

*(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.'*

11. **Regulation 16 of the WTR** provides:

*'A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.'*

12. **Regulation 30 of the WTR** provides:

*(1) A worker may present a complaint to an employment tribunal that his employer—*

*(a) has refused to permit him to exercise any right he has under—*  
*(i) regulation ..... 13(1);.....*

*.....(b) has failed to pay him the whole or any part of any amount due to him under regulation ..... 16(1).*

13. **Section 23 (4A) of the Employment Rights Act 1996** provides:

*An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*

14. In the case of **King v Sash Windows C-214/16** the CJEU held that European law does not allow Member States to exclude the right to paid annual leave or for national measures to provide for the right to paid annual leave of a worker, who was prevented from taking that leave, to be forfeited at the end of a period fixed by those national measures (paragraph 51):

*“Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave”*

### **Costs Application**

15. **Regulation 76, Schedule 1 of the ET Rules** states:

*(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

- (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
- (b) any claim or response had no reasonable prospect of success.*

*(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*

16. This is a two stage test: a Tribunal has a duty to consider making an order where any of the grounds are made out but a discretion as to whether to actually award costs.

### **Conclusion**

#### **Holiday Pay Issue**

17. In relation to the claimant’s claim for holiday pay, then I have already made a finding of fact that the claimant was prevented from taking any paid holiday from when he commenced employment in July 2014 until the end of March 2016.
18. **Regulation 13 (9) of the WTR** (above) would suggest that the claimant is not entitled to carry forward the entitlement to paid annual leave for those two leave years into the final leave year of his employment. Further **Section 23 (4A) of ERA** (above) would appear to prevent me from making any award

to the claimant in relation to holiday accrued prior to 21 May 2015 (which is date immediately prior to the two year period ending on the date of presentation of the complaint).

19. However, applying the conclusions of the CJEU in **King v Sash Windows** (above) I am satisfied that this is a case where the claimant has been prevented from taking paid holiday due to the denial of that right by his employer. Accordingly I find that these limiting provisions need to be disapplied and that the Claimant is entitled to the outstanding holiday pay that has accrued but remains untaken for the duration of his employment. As this case relates to rights of the claimant under the **Working Time Directive 1998 (“the Directive”)** and not additional rights to paid annual leave conferred under the **WTR**, this only applies in respect of the 20 days so called EU leave and not the 5.6 weeks leave to which he would otherwise be entitled to under the **WTR**.
20. The Schedule of Loss contained in the Bundle states that during the period from July 2014 to March 2015 the claimant worked on average 60 hours per week and was paid at the rate of £6.50 an hour, making his weekly pay £390. It further states that from 1 April 2015 until 31 March 2016, the claimant worked again on average 60 hours per week and was paid at the rate of £6.70 an hour, making his weekly pay £402 during this period. I was unable to accept in entirety the figures provided by the claimant for holiday pay claimed as these were based on the 5.6 weeks holiday provided for under the **WTR** whereas this decision is made in relation to the 4 weeks holiday entitlement under the **Directive**.
21. However using the figures for weekly pay set out above, I have calculated his outstanding holiday pay entitlement as follows:
- (1) For the period from 1 July 2014 until 31 March 2015 (40 weeks):
- 15 days holiday (3 weeks) at £6.50 per hour with an average weekly working time of 60 hours entitles him to £1170 in outstanding holiday pay for that holiday year.
- (2) For the period 1 April 2015 until 31 March 2017 (52 weeks)
- 20 days holiday (4 weeks) at £6.70 per hour with an average weekly working time of 60 hours entitles him to £1608 in outstanding holiday pay for that holiday year
- The total additional holiday pay entitlement is therefore £2778.

### **Costs Application**

22. In my decision with written reasons dated 15 January 2018, I had already concluded that the legal advice provided to the claimant on the merits of his claim generally and does not fall under any of the grounds for awarding costs against the respondent set out in the **ET Rules**.

23. Having considered the additional information provided by the claimant following the hearing, there is nothing which suggests that this conclusion needs to be adjusted. The respondent played no part in the hearing having failed to attend both an initial hearing (which was postponed) and the rescheduled hearing. It is also correct to say that the initial hearing in this case was postponed on the application of the respondent. I have considered whether either of these circumstances would fall within the matters set out at either **rule 76 (1) (a)** “(acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted)” or **76 (2)** “(where a hearing has been postponed or adjourned on the application of a party )” of the ET Rules.
24. However the fact remains that the legal advice obtained by the claimant from Davisons solicitor was not in relation to these matters at all but was general advice on the claim, its merits and how to proceed to hearing. Following receipt of this advice, the claimant went on to represent himself at both hearings, very ably assisted by Mrs Kumari. Therefore no legal costs were actually incurred by the claimant as a result of the postponement of the hearing or the failure of the respondent to participate in the hearing itself.
25. It is unnecessary for me to go on to consider the second issue, namely whether it is appropriate to make an order for costs. In light of my conclusions above, it would clearly not be appropriate for me to exercise my discretion in this way.

**Employment Judge Flood**

19 April 2018

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