



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Hesketh

**Respondent:** Southern Commercial Truck & Trailer Repairs Limited

**Heard at:** Huntingdon Employment Tribunal      **On:** 10 August 2018

**Before:** Employment Judge Tynan

**Appearances:**

**For the Claimant:** In Person

**For the Respondent:** Mr Munro, Solicitor.

## JUDGMENT

1. The Respondent failed to pay the Claimant his holiday pay in accordance with Regulation 13A of the Working Time Regulations 1998 and the Tribunal orders the Respondent to pay to the Claimant the sum of £202.50.
2. All other claims by the Claimant against the Respondent are dismissed.

## REASONS

1. By a claim presented to the Employment Tribunal on 29 January 2018 the Claimant claims that he is owed holiday pay, arrears of pay and other payments. He completed section 9.1 of Form ET1 on the basis that he was seeking a recommendation, but there is nothing further in Form ET1 to indicate that the Claimant intended to bring a complaint of discrimination. The Claimant was very clear at Tribunal that he was simply pursuing a claim in respect of sums which he believed were owed to him by the Respondent. There is some suggestion at section 9.2 of Form ET1 that the Claimant was expecting to be employed for at least a year. However, he did not suggest at Tribunal that the Respondent had offered him guaranteed employment for a year. On the contrary it was the Claimant's case that his employment had ended by mutual agreement.

2. The claims are refuted by the Respondent. It asserts that any final monies owing to the Claimant were paid to him on 29 December 2017.
3. This is a case in which there is almost no documentary evidence regarding the issues in dispute between the parties. Instead, I must largely decide the issues on the strength of the parties' oral testimony. I heard evidence from the Claimant (who arrived nearly two hours late at the Tribunal) and from Mr Goodwin on behalf of the Respondent. Mr Goodwin had made a short written statement to which had been attached copies of the Claim and Response Forms and various correspondence from the Tribunal. Otherwise, the only other document referred to was a single page form headed "Employment Information". I was told that this form had been provided to the Claimant (possibly by Mr Goodwin's wife) for him to fill in and that the form was intended for the Respondent's accountant who would be preparing an employment contract or written statement of particulars of employment to be prepared. For the reasons set out below, I am satisfied that the Claimant was employed by the Respondent. Section 1(2) of the Employment Rights Act 1996 requires an employer to provide a written statement of particulars of employment to an employee within two months of the employee commencing employment. In this case the Claimant did not work for the Respondent for two months and accordingly it did not breach section 1 by failing to provide the Claimant with a written statement during his employment. However, the fact remains that the Respondent did not issue the Claimant with a written contract of employment or written statement of particulars of employment. As such his terms of employment largely fall to be implied.
4. The parties do not agree the Claimant's start date. The Claimant states that he commenced work on Sunday 12 November 2017, whereas the Respondent asserts that it was Monday 20 November 2017. However, on the basis I was given to understand that the Claimant worked weekdays, it seems to me unlikely that he commenced with the Respondent on a Sunday as he claims. In the circumstances I conclude that the Claimant's start date was Monday 20 November 2017.
5. Form ET3 was completed by the Respondent on the basis that the working relationship ended on 22 December 2017. However, in his evidence at Tribunal, Mr Goodwin claimed that the Claimant had failed to turn up to work on 27, 28 and 29 December 2017. If the working relationship had in fact ended on 22 December 2017 as the Respondent claims, I do not understand on what basis Mr Goodwin might have been expecting the Claimant to have come to work on those subsequent days. I prefer the Claimant's evidence that his employment was treated as having ended by mutual agreement on 1 January 2018. He and Mr Goodwin spoke by telephone on the morning of 2 January 2018 and agreed that things were not working out between them. That was then the end of the working relationship.

6. As to whether or not the Claimant was an employee, Section 4.1 of Form ET3 was completed by the Respondent on the basis that the Claimant was not in fact an employee but instead a commercial contractor. However, Mr Goodwin was more equivocal in his evidence at Tribunal. He could not explain why the Claimant had been given an employee information form to complete. Indeed, I note that he describes that form in paragraph 2 of his witness statement as the Claimant's "terms and conditions of employment" (even though it is evidently not a statement that complies with section 1 of the Employment Rights Act 1996). Further, in paragraph 7 of his witness statement, he states that the Claimant was paid his contractual and statutory notice. The concept of statutory notice is peculiar to employment. The Claimant had worked a 45 hour week under the direction of the Respondent. I have no hesitation in finding that the Claimant was employed by the Respondent.
7. The Respondent's rate of pay is recorded on the employee information form, namely £675 per week (£15 per hour x 45 hours per week). There is no evidence to substantiate the Claimant's claim in Form ET1 and in his evidence at Tribunal that he was paid £750 per week. On the contrary, as noted already, the employee information form was completed by him. As neither party has suggested otherwise, I proceed on the basis that £675 was the Claimant's net weekly pay.
8. It is common ground between the parties that the Claimant worked a week in hand, namely having commenced employment on 20 November 2017, he was first paid on 1 December 2017 and thereafter weekly. On the face of it the Claimant would therefore have been due a minimum of one week's pay when his employment terminated.
9. The Claimant confirmed in his evidence at Tribunal that he was entitled to 28 days' holiday, namely in accordance with the Working Time Regulations 1998. What is less clear is whether those 28 days accrued pro-rata or instead whether 20 days accrued pro-rata with the remaining 8 days to be taken at the same time as the English public holidays. In the absence of any written contract of employment or written particulars of employment I construe the contract in favour of the Claimant. In other words that between 20 November 2017 and 1 January 2018 the Claimant accrued 2.5 days' annual leave (rounded up from 2.3 days pro-rata) in addition to Christmas Day, Boxing Day and New Year's Day ("the Christmas holidays").
10. At this point it is worth summarising the parties' respective positions because, as I shall explain, it seems to me that they each secure a more favourable outcome on the other's case.

### **The Claimant's Case**

11. The Claimant's evidence is that he was on leave on 18, 19, 21, 22, and 25 to 29 December 2017 and on 1 January 2018. He claims that he was called in to work on Wednesday 20 December 2017, much to his wife's annoyance. It is not in dispute that the Claimant was paid on 29 December 2017. On the basis that he remained in the Respondent's employment through to close of

business on 1 January 2018, albeit on leave that day, all things being equal the Claimant might have expected to have been paid his week in hand and for 1 January 2018 i.e, 6 days' pay in total, on Friday 5 January 2018. However, disregarding the Christmas holidays, that means on his case that he had taken 7 days' leave by the time his employment terminated as against a pro-rata entitlement of 2.5 days. On the basis that he had thereby taken 4.5 days in excess of his pro-rata entitlement, it follows that these days are to be off-set against the 6 days' pay claimed to be owing to him, meaning that 1.5 days' pay would be due to him on the termination of his employment.

### **The Respondent's Case**

12. Mr Goodwin denies that the Claimant was on holiday the week commencing 18 December 2017 or that the Claimant was called in to work that week. Instead, his evidence was that the Claimant had failed to turn up to work one day that week, though he could not recall precisely which day it was. He further claimed that the Claimant had failed to attend work on 27 to 29 December 2017. It is, of course, a fundamental obligation of employment that an employee will make themselves available for work. In which case, on the Respondent's case, the Claimant is not entitled to be paid for 27 to 29 December or for the day in the preceding week that he failed to attend work. On the Respondent's case, the payment to the Claimant on 29 December 2017 would have covered all his work up to and including 22 December 2017, albeit the Claimant would have been overpaid by one day given he was absent from work without cause that week. Whilst the Respondent contends that all sums were therefore paid to the Claimant, this overlooks that the Claimant was entitled to be paid for his holidays, namely his 2.5 days pro-rata (none of which, on Mr Goodwin's evidence, the Claimant had taken) and for the Christmas holidays. On the Respondent's case the Claimant is owed 5.5 days' leave. However, allowing for the overpayment of one day's pay in the week commencing 18 December 2017, the Respondent would owe the Claimant 4.5 days' pay.
13. Faced with a direct conflict in their evidence, and with both the Claimant and Mr Goodwin uncertain as to the precise sequence of events over the Christmas period, I have decided on the balance of probabilities that the Claimant's recollection of events is correct. In particular, it was common ground between them that the Claimant did not work on 27, 28 and 29 December 2017. When giving evidence the Claimant provided a spontaneous and persuasive description of his wife having been annoyed that he had to work on one of his scheduled days' leave over the festive period. I accept his evidence in this regard. On the basis that both parties agree that the Claimant did not work after Christmas, the day in question must have been before Christmas, yet Mr Goodwin's evidence is that the Claimant was not on leave that week. In the circumstances I conclude that the Claimant was on leave on 18, 19, 21 and 22 December 2017, but that he interrupted his leave on Wednesday 20 December 2017 at Mr Goodwin's request. In preferring the Claimant's evidence in this regard, paradoxically the result is that he is due less money than would have been the case had I preferred Mr Goodwin's evidence.

14. I shall order the Respondent to pay the Claimant the sum of £202.50 being 1.5 days' pay in respect of holiday owing to him at the termination of his employment.
15. There are no other sums due to the Claimant. It was suggested at section 9.2 of Form ET1 that the Claimant was at risk of losing his car due to daily storage charges which he could not pay. However, the repair bill was said to be £2,500. I am not satisfied that the Respondent's failure to pay the Claimant the sum of £202.50 due to him has caused the Claimant any loss that this Tribunal can or should compensate him for. In the circumstances I shall dismiss the Claimant's other claims.

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Employment Judge Tynan

Date: 14 August 2018.....

JUDGMENT SENT TO THE PARTIES ON

28 August 2018.....

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FOR THE TRIBUNAL OFFICE