



EMPLOYMENT TRIBUNALS

Claimant: (1) Mr J Simpson (2) Mr T Barker

Respondent: Aim Recruit Ltd

Heard at: Leeds

On: 19 July 2018

Reserved 12 September 2018

Before: Employment Judge Keevash

Representation

Claimant: Mr S Bartrupe, friend

Respondent: Mrs C Hodgson, Consultant

RESERVED JUDGMENT

The complaints that the Respondent failed to pay the Claimant an amount to which they were entitled in respect of accrued annual leave fail.

REASONS

Background

1 By their Claim forms the Claimants brought holiday pay complaints. By its Response the Respondent resisted the complaints.

Issues

2 The Employment Judge identified that the following issues had to be determined:- had the Respondent failed to pay to the Claimants the whole or any part of any amount to them to which they were entitled in respect of accrued annual leave on termination of their employment under the Working Time Regulations 1998 ("the 1998 Regulations")?

Hearing

3 At the outset of the Hearing Mrs Hodgson applied to adduce the witness statements of Adrian Irving, Director, and Jayne King, Director. She confirmed that, as explained in a rejected postponement application, they were in Spain. The Employment Judge adjourned to give Mr Bartrupe time to read the

statements. On resumption Mr Bartrupe confirmed that he did not object to the statements being read by the Employment. However, they were not agreed. The Employment Judge read the statements. The Claimants gave evidence on their own behalf. The Employment Judge also considered a bundle of documents.

Facts

4 The Employment Judge found the following facts proved on the balance of probabilities:-

4.1 The Respondent is an agency that employ HGV drivers and provides drivers' services to haulage companies.

4.2 Before November 2016 the Claimants worked under umbrella companies. The First Claimant was paid £130 each shift. The Second Claimant was paid £10.50 an hour (Monday to Friday) and £13.50 an hour (Saturday). Their pay included a payment in respect of their accrued holiday pay. However, they decided that they did not wish to continue working in that way.

4.3 On or about 31 October 2016 the First Claimant agreed that he would be employed by the Respondent with it making deductions for tax and national insurance. It was agreed that he would be paid £115 each shift.

4.4 By an email dated 24 November 2016 Mr Irving informed the First Claimant:- "Been speaking with Tony and he's happy for his holiday pay to be paid weekly and in his wage... Your daily rate is £102.62 and with Holiday Pay it will make it £115.00 ...".

4.5 During his employment the First Claimant took 2 weeks' annual leave for which he was not paid.

4.6 On 24 November 2017 the First Claimant left the Respondent's employment. He asked for his accrued holiday pay. He had intended asking for it to be paid over the Christmas 2017 period.

4.7 By an email dated 27 November 2017 Mr Irving sent the First Claimant his P45.

4.8 By emails dated that day the First Claimant asked Mr Irving to send a "proper P45" through the post. He added:- "Plus I still need wage slips and holiday since 31st Oct 2016".

4.9 By an email dated that day Mr Irving informed the First Claimant;-
"...
Thirdly, you state you want all holiday pay since October 2016 ...?"

When you joined AIM, you were originally paid through various umbrella companies. Your pay had holiday pay within it. You weren't employed directly by us, it was them. You also knew this. They also sent you copies of payslips too.

When you joined AIM on PAYE, it was agreed that we paid you your holiday pay in your weekly wage and Daily rate. This was completed at your own request not mine. I still have a copy of the email we sent confirming this with you.

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It was only up to around 4 weeks ago, we learnt we had to renegotiate this with you as we were no longer allowed to do this, regardless that you wanted his system. To which I stated I would be willing as a one off I'd keep your daily rate on the same rate of pay and pay holiday on top of this.

Any holiday pay in the last four weeks you've accrued I will be more than willing to pay. But this is the first request we've had from you ...".

4.10 By an email dated that day the First Claimant informed Mr Irving:-
"The holiday pay was before P45 was issued by you and I was still on your books so holiday pay should not be emergency taxed ...".

On or about 31 October 2016 the Second Claimant agreed that he would be employed by the Respondent with it making deductions for tax and national insurance.

4.11 By an email dated 24 November 2016 Mr Irving informed the Second Claimant:-

"...

Only way I can pay holiday pay in your weekly wage is on your hourly rate. So your hourly rate will go from £8.25 to £9.25. Let me know if this is OK ...".

4.12 By an email dated 29 November 2016 Mr Irving informed the Second Claimant:-

"Just to confirm our discussions about moving from Umbrella Payment/Company to PAYE with us at AIM.

- ...
- Rate is £9.25 FLAT RATE this includes Holiday Pay
- ...".

4.13 During his employment the Second Claimant did not ask for holiday pay. He intended taking a long break over Christmas 2017 and he planned to take all his accrued holiday pay at that time.

4.14 In or about November 2017 the Second Claimant informed the Respondent that he would be leaving the job.

Law

5 Regulation 13 of the 1998 Regulations provides:-

"(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins –

- (a) on such date during the calendar year as may be provided for in a relevant agreement; or
- (b) where there are no provisions of a relevant agreement which apply –
 - (i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or
 - (ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date...

(9) 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.”

Regulation 13A of the 1998 Regulations provides:-

“(1) ... a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) ...

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

(8) ...”.

Submissions

6 After Mr Bartrupe and Mrs Hodgson had made oral submissions, the Employment Judge Ordered that the parties make further written submissions addressing the issue whether the Claimants were entitled to carry forward any untaken annual leave. In her written submission Mrs Hodgson referred to **Robinson-Steele v R D Retail Services Ltd** [2006] ICR 932 CJEU; **Stringer v Revenue and Customs** (Case C-520/06) and **Schultz-Hoff v Deutsche Rentenversicherung Bund** (Case C-350/06 CJEU; **NHS Leeds v Larner** [2012] EWCA Civ 1034 CA. Mr Bartrupe made written submissions commenting on Mrs Hodgson’s submission and Mrs Hodgson made a written submission commenting on that. Although the Order provided for further comments from Mr Bartrupe, he made no further written submissions.

Discussion

7 The Employment Judge found that there was no relevant agreement as to when the Claimants’ leave year began. Accordingly, by virtue of Regulation 13(3)(b)(ii) of the 1998 Regulations it began on the anniversary of the start of their employment, namely 31 October 2016.

8 The Employment Judge understood that the 1998 Regulations did not permit a worker to carry forward any untaken leave (out of the four weeks standard entitlement) into the next leave year. However, Regulation 13A(7) of the 1998 Regulations did so permit (in respect of the 1.6 weeks’ additional leave) where there was a relevant agreement. However, he found that there was no relevant agreement that the Claimants could carry forward any untaken leave into the next leave year.

9 The Employment Judge found that during the leave year 31 October 2016 to 30 October 2017 the First Claimant requested and took two weeks’ annual leave. He was entitled to have a further two weeks’ ‘ordinary’ annual leave and 1.6 weeks’ additional annual leave. He did not request any leave during that year or indeed between 31 October 2017 and the date of termination of his employment. He had intended taking leave over Christmas 2016 and to ask for a payment in respect of his accrued leave (including the leave year 2016/17). The Second Claimant’s situation was similar to that of the First Claimant – the only difference was that he took no annual leave during the leave year 2016/17.

10 In **Larner** the Court of Appeal held that the Claimant did not lose her entitlement to paid annual leave for the leave year 2009/10 even though she had not requested any leave during that year. There was unchallenged evidence that she could not and did not take annual leave because of sickness. She was entitled to carry forward her untaken leave to 2010/11 without making a prior request to do so. As her employment terminated in that year, she was entitled to a payment in lieu on

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termination. Also there were CJEU authorities (see **Schulz-Hoff**) which held that national legislation may provide for the loss of the right to paid annual leave at the end of a leave year at the end of a leave year or carry-over period, provided that the worker has actually had the opportunity to exercise the right.

11 The Employment Judge decided that the Claimants' cases were very different from that of the Claimant in **Larner**. There was nothing to prevent them from requesting annual leave during 2016/17. They had the opportunity to exercise their right and did not do so. In fact it was their own choice not to make any request. In those circumstances the Employment Judge decided that the 1998 Regulations and the CJEU authorities did not assist the Claimants. They had lost their entitlement to any paid annual leave for the leave year 2016/17. They were entitled to be paid for annual leave which accrued between 31 October 2017 and 24 November 2018. The Employment Judge found that on termination of their employment the Respondent paid the First and Second Claimants £166.56 and £178.60 respectively in respect of accrued holiday pay. Since those amounts exceeded their entitlement for that period, the Employment Judge decided that their complaints failed.

12 Although it was not strictly necessary to decide the issue, the Employment Judge also considered whether the Claimants' pay during their employment included holiday pay. The Claimants contended that their pay did not include any payment for holiday pay. This was disputed by the Respondent.

13 By its Response the Respondent contended that the First Claimant was employed on a casual basis from 27 November 2016 to 24 November 2017. It was agreed that his holiday pay would be included in his pay. His normal daily pay rate was agreed at £102.62. His holiday pay was calculated at 12.07% of his daily rate and he was paid the additional amount of £12.38 a day. The Respondent also contended that the Second Claimant was employed from 27 November 2016 to 17 November 2017. It was agreed that his holiday pay would be included in his pay. His holiday pay was calculated at 12.07% of his rate of pay. He was absent on leave in June 2017. Before then at his request the Respondent began to withhold £50 a week from his pay. The money withheld was paid to him when he took his holiday

14 In his witness statement Mr Irving stated that the First Claimant was employed on a casual basis. He was offered shifts that were available and he had the choice of accepting or rejecting those shifts. It was agreed that the daily rate would be £102.62 and that an additional amount of £12.38 in respect of holiday pay would be paid each shift. That evidence was corroborated by the email dated 24 November 2016 sent by Mr Irving to him (which also referred to an agreement with the Second Respondent). In cross examination the First Claimant denied that he received that email.

15 The Employment Judge found that the daily rate of £115.00 did include a payment in respect of holiday as agreed by the First Claimant and Mr Irving. The First Claimant confirmed that the email address shown in the email was his; it was likely that it had been sent to him and that it was the best evidence of the terms of the contract between the parties.

16 In his witness statement Mr Irving stated that the Second Claimant agreed with the Respondent that he would be paid at an hourly rate of £8.25 with additional payments being made for weekend working and overnight stays. He also stated

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that subsequently the Second Claimant agreed that his hourly rate should be increased to £9.25 so as to include holiday pay. That evidence was corroborated by the emails dated 24 and 29 November 2016 sent by Mr Irving to him. In cross examination the Second Claimant denied that he agreed to work for a basic hourly rate of £8.25. He denied any knowledge of Mr Irving's emails to him.

17 The Employment Judge found that the hourly rate of £9.25 did include a payment in respect of holiday as agreed by the Second Claimant and Mr Irving. The Second Claimant confirmed that the email address shown in the emails was his; it was likely that they had been sent to him and that they were the best evidence of the terms of the contract between the parties.

18 Accordingly the complaints failed.

Employment Judge **Keevash**

Date: 4 October 2018