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THE EMPLOYMENT TRIBUNALS

Claimant: Ben Philcox
Respondent: Railscape Ltd
Heard at: East London Hearing Centre
On: 18 February 2019
Before: Employment Judge Burgher

Representation

Claimant: Mr M Curtis (Counsel)
First Respondent: Mr S Rahman (Counsel)

REMEDY JUDGMENT

1. The Respondent is ordered to pay the Claimant the sum of £8,145.00 in respect his claims for annual leave under the Working Time Regulations 1998.

REASONS

Issues

- 1 At the outset the following issues were identified for determination of remedy:
 - 1.1 What was the Claimant's normal rate of pay. The Claimant asserted it was £100. Following evidence, the Respondent contended that the rate was £90.
 - 1.2 The amount of days holiday to be accrued per year. The Claimant contended that he was entitled to 5.6 weeks pay based on 5 days per week. The Respondent contended that the Claimant did not work on bank holidays and as such the holiday entitlement should be reduced to reflect this.

- 1.3 Whether the award should be gross or net.
- 1.4 Whether the holiday pay claim extends back to the commencement of his work in 2013 or whether it should be limited to two years pursuant to the Deduction from Wages (Limitation) Regulations 2014.

Evidence

2 The Claimant gave evidence on his own behalf. The Respondent called Mr Michael Hayes, Managing Director.

3 I was also referred to the documents in an 8 page remedy bundle provided by the Respondent. The documents show the comprehensive work records of the Claimant to the Respondent from 2016 to 2018. I expressed concerned that these documents were not before me at the liability hearing as they could have been relevant to my determination in my liability judgment that the Claimant was not an employee. However, having considered the documents further, I decided against reconsidering the liability judgment pursuant to rule 73 of the ET rules 2013 as the documents show that there were periods, albeit limited, that the Claimant was not working for the Respondent.

Facts

4 The Respondent paid £100 to Mr Sonntag each shift the Claimant worked. The Claimant stated that he was then paid £90 for each day by Mr Sonntag. Had the Claimant been paid holiday I find a similar arrangement would have taken place and the Claimant would have received £90. The Claimant is therefore entitled to holiday pay at the rate of £90 per day.

5 For the remedy hearing, the Respondent provides comprehensive records of the Claimant's work for them or on their behalf from 2016. The records show that the Claimant.

- 5.1 Did not work on the 15 bank holidays during that period;
- 5.2 Was noted as off for 7 days during that period; and
- 5.3 Was noted as sick for 2 days during that period.

6 The Claimant did not usually work for the Respondent on Saturdays or Sundays but over the 2 year period he worked for the Respondent on 9 of those days.

7 Whilst the Claimant stated that he worked on bank holidays at least half of the time his evidence was uncertain and was unsupported by any documentation to undermine the Respondent's records. I therefore find that the Respondent's records reflect the days the Claimant worked.

8 There was therefore a period of 15 days over the 2 years where the Claimant was not working for the Respondent and as such the accrual of holiday is on the basis of 50.5 weeks a year. In the absence of other evidence I use this period as the calculation period for accrued holiday entitlement. This results in the following holiday calculations for the period.

8.1	1 November 2013 to April 2015	14 days
8.2	April 2014 to April 2015	27.5 days
8.3	April 2015 to April 2016	27.5 days
8.4	April 2016 to April 2017	27.5 days
8.5	April 2017 to January 2018	20.5 days
		117 days total.

9 However, the calculation of 117 days above is not the same as the Claimant's actual holiday entitlement under the Working Time Regulations 1998 which is addressed below.

Law

10 Regulation 13 of the Working Time Regulations 1998 state:

Entitlement to annual leave

1) *Subject to paragraphs (5), a worker is entitled in to four weeks annual leave in each leave year.*

(2) ...

(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.

(4) *Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture in Wales or Scotland) except where, in the case of a worker partly employed in agriculture in Wales or Scotland, a relevant agreement so provides.*

(5) *Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.*

(6) – (8)....

(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.

11 Regulation 13A of the Working Time Regulations provides for additional annual leave. It states:

Entitlement to additional annual leave

13A.—(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2). (2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(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) This regulation does not apply to workers to whom the Agricultural Wages (Scotland) Act 1949(a) applies (as that Act had effect on 1 July 1999).

12 Regulation 16 of the Working Time Regulations states:

Payment in respect of periods of leave

16.—(1) *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.*

(2) *Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).*

(3) *The provisions referred to in paragraph (2) shall apply—*

(a) *as if references to the employee were references to the worker;*

(b) *as if references to the employee's contract of employment were references to the worker's contract;*

(c) *as if the calculation date were the first day of the period of leave in question; and*

(d) *as if the references to sections 227 and 228 did not apply.*

(4) *A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") and paragraph 1 does not confer a right under that contract.*

(5) *Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.*

13 Regulation 30 of the Working Time Regulations states:

Remedies

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

(a) *N/A*

(b) *has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).*

14 Given the above legislative provisions, this claim is for annual leave pursuant to regulations 16 and 30 of the Working Time Regulations. Contrary to the Respondent's submissions, I conclude that the limitation of two years under section 23(4A) of the Employment Rights Act 1996 does not apply to this claim as this is not an unlawful deduction of wages claim.

15 When considering how far the Claimant can claim back, regulation 13(9) provides that the annual leave may only be taken in the leave year in respect of which it is due and regulation 13A(7) requires a relevant agreement to carry forward leave

entitlement into the leave year immediately following the leave year in which it is due. There was no relevant agreement in this case.

16 However, a distinction must be drawn between the period of annual leave (section 13 Working Time Regulations) and additional annual leave (section 13A Working Time Regulations). Regulation 13 arises from the Working Time Directive, and EU law, Regulation 13A does not. I was referred to the CJEU case of The Sash Windows Workshop Ltd v King [2018] IRLR 142 which addressed the limitation of claim under regulation 13. The CEJU addressed the following question in paragraph 48 of the Judgment:

48 By its second to fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether 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.

17 The CJEU answered this question at paragraph 65 of the Judgment:

65 It follows from all the foregoing considerations that the answer to the second to fifth questions is that 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.

18 The effect of this judgment therefore is to disapply regulation 13 (9) and entitle the Claimant to a maximum of 4 weeks pay untaken annual leave for each year that he was prevented from being able to exercise his rights to paid annual leave. However, the Judgment does not apply to additional annual leave entitlement which is restricted by Regulation 13A(7).

19 In view of the above the Claimant's annual leave entitlement is:

19.1	1 November 2013 to April 2015	10 days
19.2	April 2014 to April 2015	20 days
19.3	April 2015 to April 2016	20 days
19.4	April 2016 to April 2017	20 days
19.5	April 2017 to January 2018	20.5 days
		90.5 days total

20 When deciding whether the payment should be made gross or net I considered the case of Rosewood v Bank UK/EAT/0053/16 which indicated that the tax position of any payment of an award extending back many years was one in which a Respondent should make enquiries with the Revenue. I understand that the Respondent has made enquiries with the Revenue in this case and as such I award the Claimant the gross sum on the basis that the Respondent will make the appropriate payments to the Revenue.

21 The Respondent is therefore ordered to pay the Claimant the sum of £8,145.00 (90.5 x £90) in respect of his Working Time Regulations complaint for annual leave.

Employment Judge Burgher

19 February 2019