



EMPLOYMENT TRIBUNALS

Claimant: Dianne Davies

Respondent: Rachel Hawken

Heard at: Mold **On:** Friday 14 June 2019

Before: Employment Judge RL Brace (sitting alone)

Representation:
Claimant: In person
Respondent: Did not attend

JUDGMENT

1. The claimant was dismissed by reason of redundancy in January 2019. She is therefore entitled to a statutory redundancy payment, calculated at 19 years x 1½ x £101.79 i.e. £2,901.02. Since the issue of proceedings this amount has been paid in full by the Respondent;
2. In breach of Regulation 14(2) of the Working Time Regulations 1998, the respondent failed to pay the claimant a sum in lieu of holiday that she had accrued but not taken by the date on which her employment terminated with the claim being in respect of previous years limited by section 23(4A) Employment Rights Act 1998 to two years' accrued leave.
3. The respondent is ordered to pay her the sum of £1,099.33 in this regard in respect of 5.2 weeks for the leave year to termination date (5.6 x ¹¹/₁₂) and 5.6 weeks for leave year 1 March 2017 – 26 February 2018 at the weekly pay of £110 per week

As the claimant has received the full amount of the redundancy payment from the respondent since the issue of these proceedings, the total amount the respondent must pay to the claimant is therefore **£1,099.33**. The claimant is responsible for any income tax or employee national insurance contributions that may be due on the sums awarded at paragraph 2 above.

REASONS

1. Proceedings were issued by the claimant claiming a redundancy payment and an unquantified amount in respect of holiday pay and a hearing date was given of 14 June 2019.
2. On 16 May 2019 the claimant wrote into the tribunal confirming that she had been paid the full amount of her redundancy payment claim but that no amounts had been paid by the respondent in respect of her holiday pay. The claimant confirmed that she was seeking a payment in respect of 5.6 weeks' holiday pay per year based on a weekly wage of £101 per week.
3. The respondent failed to submit an ET3 until 5 June 2019. The ET3 was accompanied with an email from the respondent stating that she had assumed that the hearing listed for 14 June had been cancelled as she had paid the claimant £3,108.75 in respect of the redundancy payment claim on 11 April 2019.
4. Employment Judge Moore wrote to the parties on 5 June 2019 and confirmed that the claimant's outstanding claim for holiday pay would be determined on 14 June 2019.
5. On 7 June 2019 the respondent wrote to the Tribunal explaining that she had not realized that the claimant was pursuing a separate claim for holiday pay. In that letter she indicated that she would accept liability for payment in the sum 5.6 days' paid holiday per year (based on an 8 hour' day at £7.83 per hour) amounting to £702.56 for 2 years' holiday pay. She did however indicate that she was again requesting an adjournment of the 14 June hearing, due to prior arrangements, and that if the hearing was still to proceed on 14 June, she would not be attending.
6. On 7 June 2019, Employment Judge Davies wrote to the respondent refusing her application to postpone and advising that the submission of the ET3 response would be treated as an application for an extension of time for presenting the response and would be dealt with at the outset of the hearing.
7. The claimant appeared before me today but the respondent did not attend. At the outset of the hearing I considered the preliminary issue of whether I would allow the ET3 response out of time.
8. I have a discretion whether to allow the ET3 out of time which must be exercised in accordance with the overriding objective to deal with cases

fairly and justly. In that regard I weighed up and balanced all the factors including:

- a. the respondent's explanation for the failure to submit the ET3, which was that she had not realized that there was any claim outstanding for holiday pay;
 - b. the merits of the defence; and
 - c. balance of prejudice.
9. As the respondent herself was a litigant in person, I had some acceptance that she may have lacked realization that the claim included a claim for holiday pay. I noted that she had paid the redundancy claim after issue of proceedings and was unable to attend the hearing. On balance I considered that it would be in accordance with the overriding objective to allow the ET3 to be accepted out of time.
10. I took evidence on oath from the claimant and made the following findings:
- a. the claimant's employment commenced on or around 1 March 1999;
 - b. the claimant's weekly pay was £101.79 based on weekly hours of 13 hours per week and a rate of pay of £7.83 per hour (which had also been accepted by the respondent in her correspondence with the tribunal);
 - c. She had taken no paid annual leave from 1 March 2018 to the date of termination of employment at the end of January 2019
 - d. she had taken no paid annual leave for the leave year 1 March 2017 – 27 February 2018
11. I also found that the claimant was told by the respondent, when she asked for paid annual leave, that the claimant '*did not start having it and [the respondent] was not paying it now*' or words to that effect. I therefore found that the claimant had been, or felt unable to, take paid annual leave during her employment with the respondent and had not in fact been paid annual leave since the commencement of her employment with the respondent. Any leave that the claimant had taken had been unpaid.
12. The respondent had accepted that the claimant was entitled to payment in respect of accrued untaken annual leave at the rate of 5.6 days per year for the last two years. This was based on a misunderstanding that the claimant was claiming for payment in lieu of holiday of 5.6 *days* per year based on the Working Time Regulations 1998, as opposed to 5.6 *weeks* per year.

13. I therefore considered that the claim for holiday pay was well founded and I considered it appropriate to make an award in respect of accrued annual leave over a 2 year period, based on annual leave entitlement of 5.6 weeks per year at the rate of £110 per week and a holiday year from 1 March – 27 February each year. Regulation 13 Working Time Regulations 1998 provide that where the worker's employment began after 1 October 1998 his or her leave year begins on the date on which his or her employment began.

14. Whilst I accepted that the respondent had overpaid an amount in respect of the statutory redundancy payment, I did not consider that I had any ability to off-set the excess redundancy payment made against the entitlement to accrued holiday pay and therefore considered an award of £1,099.33 at a salary of £101.79 per week to be appropriate as follows:

- a. 11 months' accrued untaken leave for 2018-2019 at 5.6 weeks per year; and
- b. 12 months' accrued untaken annual leave for 2017-2018 at 5.6 weeks per year

4. The respondent is therefore ordered to pay the claimant the sum of £1,099.33 in this regard in respect of 5.2 weeks for the leave year to termination date ($5.6 \times \frac{11}{12}$) and 5.6 weeks for leave year March 2017 – March 2018 at £101.79 per week

15. As the claimant has received the full amount of the redundancy payment from the respondent since the issue of these proceedings, the total amount the respondent must pay to the claimant is therefore **£1,099.33**

Employment Judge R L Brace
Dated: 14 June 2019

JUDGMENT SENT TO THE PARTIES ON

.....16 June 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNAL