EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Kerrigan	**v**	Mr N Clifton and Mr P Phillips T/A Spar Six Mile Bottom

Heard at: Bury St Edmunds **On:** 5 July 2019

Before: Employment Judge S Moore

Appearances
For the Claimant: Did not attend and was not represented.
For the Respondent: Mr Luke Hutchings, Solicitor.

JUDGMENT

The claim for compensation for untaken leave under regulations 14 and 30 of the Working Time Regulations 1998 is dismissed.

REASONS

1. This is a claim for compensation for untaken leave under regulations 14 and 30 of the Working Time Regulations 1998 following the claimant's resignation with effect from 31 August 2018.

2. The claimant did not attend the hearing. The day before the hearing he sent an email to tribunal stating that he could not attend because of unforeseen circumstances but was happy for the tribunal to rule on the evidence supplied. In the event I heard evidence from Mr Nicholas Clifton, Mr Paul Phillips and Ms Michelle Faber and was referred to a bundle of documents. On the basis of that evidence I make the following findings of fact.

Findings of Fact

3. The claimant was employed between 14 August 2017 and 31 August 2018 as store manager of a Spar store at Six Mile Bottom, Newmarket. It was agreed that the claimant's normal hours of work would be 42 hours per week. He was given a template contract of employment but neither this nor any other contract was ever signed.

4. The payroll for the business was administered by an external agency and the claimant forwarded the relevant hours worked by each employee, including himself, each week to the agency for payment. The emails the claimant forwarded described his own hours worked as follows: "42 hours contracted", and any additional hours were described and claimed as overtime. I therefore find that the claimant's normal working hours for the purposes of s.221 and s.234 of the Employment Rights Act 1996 were 42 hours per week.

5. The claimant had the practice of copying Mr Clifton into emails he sent to the agency for the payroll. However, he stopped this practice in or about the end of April 2018. Also on 23 April 2018 the claimant's son, Liam, began to be employed by the respondent.

6. In early May 2018 the claimant asked Mr Clifton if he could be paid his holiday entitlement rather than taking it as holiday. Mr Clifton spoke to Mr Phillips about this and they agreed that he could. It was agreed the claimant would be paid two weeks annual leave split over two consecutive weeks of the weeks 19 and 26 May 2018. The claimant contacted payroll to arrange these payments himself. The claimant made a similar request for the week ending 14 July 2018 and again Mr Clifton and Mr Phillips agreed.

7. On 2 August 2018 the claimant tendered his resignation with effect from 31 August 2018. When the respondent investigated what balancing payments needed to be made to the claimant as regards his holiday they found that the emails the claimant had sent to the agency regarding the payroll for the weeks of 19 May 2018, 26 May 2018 and 14 July 2018 described him as working his contracted hours of 42 hours plus, respectively, working *overtime* hours of 45 hours, 43.5 hours and 51 hours "the contested hours". In fact, the claimant later claimed in email correspondence dated 8 December 2018 that the payments were bonus payments.

Conclusions

8. The factual issue is whether the contested hours were paid to the claimant as cashed in holidays or were in fact payments for overtime worked or a bonus payment. In this respect I accept the evidence of Mr Clifton and Mr Phillips that these hours were paid as cashed in holidays to the claimant and paid at the claimant's request. As well as accepting the credibility of their evidence, I also accept the points that they make that it

is not credible that the claimant would have worked such excessive overtime, making working weeks in excess of 85 hours. If there was a particular problem in any of those weeks the claimant could have allocated some of the extra hours among more junior staff. Further it is notable that the claimant always took his son to and from work and Liam did not claim such excessive hours himself. I further accept it is not credible that Liam would have waited hours and hours for his father to finish work.

9. Further and in any event, the claimant later said in email correspondence that the hours were not necessarily worked but paid as a bonus payment. However, there is no evidence of any bonus scheme being in operation or as to how it was operated.

10. I therefore find that these contested hours were paid as cashed in holidays and that there was a total of 139.5 of them.

11. The next question is what holiday entitlement did the claimant have at the termination of his contract? The template contract provided that the annual leave year ran from 1 April to 31 March, however this contract was never signed.

12. Where there is no contractual provision, according to regulation 13(3)(b)(ii) a workers' leave year runs according to the anniversary of their employment. On this basis the claimant's first leave year ended on 14 August 2018 and he had been employed for only approximately 2 weeks of current leave year at the date of the termination of his contract.

13. However, an email dated 17 September 2018 to the claimant records that it had been agreed with the claimant that, because the respondent was in the process of changing its normal leave year, the current holiday year would run from August 2017 to March 2019. On this basis it was calculated that at the date of his dismissal the claimant had worked 54 weeks of his leave year. His holiday entitlement per year was 42 his number of hours times 5.6 weeks, i.e. a total of 235.2 hours or 4.52 hours per week. Considering then a leave year of 54 weeks, this meant that the claimant was entitled to a total of 244.24 hours at the date of his termination. He had in fact taken 41 hours of actual holiday leaving 203.24 hours.

14. So, the next question is whether the respondent could set off against this entitlement the 139.5 hours of cashed in holiday given that that arrangement contravenes regulation 13(9)(b) of the Working Time Regulations 1998. On the basis of the authorities of Robinson Steele v RD Retail Services Ltd [2006] ICR 932, the judgment of the ECJ, and Lyddon v Englefield Brickwork Ltd [2007] WL3001935 an employer may do so *if* the sums are paid in a transparent and comprehensible manner. In this case although the hours were marked as overtime on the emails to the payroll agency it was the claimant himself who had marked them as such although knowing full well that they were payment for his cashed in holiday. Indeed, both parties knew that these hours were payment in

respect of annual leave. Accordingly, I find that the respondent is entitled to set these hours off against the claimant's entitlement.

15. It follows that at the date of his dismissal the claimant was entitled to 104.75 hours (which is 244.24 minus 139.5). In fact, due to an administrative error the respondent paid the claimant a further 118.24 hours, which means that there is nothing further due to him.

16. Furthermore, if on an alternative scenario the claimant's leave year ran with the commencement of his employment contract clearly no holiday pay was due to him when his contract was terminated as he had only worked approximately 2 weeks of that current leave year. It follows from all of the above that even taking the most generous interpretation of events for the purposes of the calculation there is no merit in the claimant's claim for compensation in lieu of leave and his claim is dismissed.

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Employment Judge S Moore

Date: 24 July 2019

Sent to the parties on: .....06.08.19.....

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For the Tribunal Office