



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Swinfield

**Respondent:** Degree-Six Recruitment Limited

**Heard at:** Leicester on 25 October 2019

**Before:** Employment Judge Ayre (sitting alone)

**Appearances:**

**For the claimant:** Mr Swinfield, husband

**For the respondent:** Did not attend and was not represented.

## JUDGMENT

The claim for holiday pay fails and is dismissed.

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## REASONS

### Proceedings

1. By claim form dated 2 August 2019 the claimant complained that she had been underpaid holiday pay in the sum of £1,281.44, calculated on the basis of 12.07% of her earnings.
2. The claim was initially defended by the respondent, and the respondent requested additional information about the claim.
3. On 3<sup>rd</sup> September 2019 the claimant supplied a Schedule of Loss, also calculating the holiday pay that she claims to be entitled to on the basis of 12.07% of earnings, but this time valuing her claim at £1,481.45.
4. On 23<sup>rd</sup> October, in preparation for today's hearing, the claimant sent to the Tribunal an updated Schedule of Loss valuing her holiday pay claim at £1,361.02 and this time calculating holiday pay on the basis of average earnings in the 12 weeks prior to the payment of holiday pay.
5. On 21 September Employment Judge Ahmed ordered the respondent to supply a fully pleaded defence by 30<sup>th</sup> September. The respondent did not do so. At

the same time EJ Ahmed also made case management orders for disclosure of documents, preparation of an agreed bundle by the respondent, and for witness statements.

6. The respondent did not attend the hearing and was not represented. Shortly after 10 am a clerk telephoned the respondent on the telephone number given on the response form. The number did not appear to be working. The hearing therefore started at 10.20am.
7. Mr Swinfield told me that the claimant had sent her documents to the respondent by way of disclosure, but had not prepared witness statements. There was no bundle of documents.
8. I adjourned the hearing to give Mr Swinfield time to copy and paginate the documents that he wanted to refer to, and during the adjournment he prepared a bundle running to 8 pages, and comprising the claimant's Schedule of Loss and some wage slips.
9. I heard oral evidence from the claimant and her husband. Whilst I have no doubt that they were being honest in giving their testimony, their evidence was confused and at times contradictory. For example, the claimant initially said that she had not taken any holiday at all. When prompted by her husband she recalled taking one week's holiday but couldn't remember taking any other holiday. When I asked the claimant how much holiday pay she thought she was owed she replied that she didn't know.

### **The issues**

10. There was some suggestion in the Schedule of Loss prepared by the claimant that she was seeking also to make a claim that the respondent had failed to provide her with written particulars of employment.
11. I explained to Mr Swinfield that such claims can only be brought by employees. Mr Swinfield told me that the claimant is a worker rather than an employee, and this is consistent with the terms of an agency worker contract sent to the Tribunal on 3<sup>rd</sup> September 2019.
12. As the claimant accepts that she is a worker, the Tribunal does not have jurisdiction to consider a complaint for failure to provide a written statement of employment particulars.
13. I asked Mr Swinfield whether the claimant wished to pursue a complaint that the respondent had failed to provide an itemised pay statement contrary to section 8 of the Employment Rights Act 1996 ("the 1996 Act"). Mr Swinfield told me that she did not.
14. Accordingly, the sole issue for determination at the hearing was whether the claimant is entitled to any additional holiday pay.

### **Findings of fact**

15. The claimant is engaged by the respondent as an agency worker on a zero hours' contract. The claimant's hours of work vary from week to week and she does not have normal hours of work.
16. The respondent has latterly paid the claimant the following sums by way of holiday pay :-
  - a. £261.90 gross on the 18<sup>th</sup> May 2018;
  - b. £689.78 gross on the 19<sup>th</sup> October 2018;
  - c. £664.43 gross on the 15<sup>th</sup> March 2019;
  - d. £92.84 gross on the 5<sup>th</sup> April 2019; and
  - e. £353.50 gross on the 19<sup>th</sup> July 2019.
17. Holiday pay was paid to the claimant after emails were sent to the respondent's accounts department by the claimant or her husband.
18. There was no evidence before me of how the holiday pay that had been paid to the claimant had been calculated. There was very limited and contradictory evidence before me of how much holiday the claimant had taken and when she took holiday.
19. The claimant recalled taking a week in August 2018, possibly taking a week in April 2019, and her husband said that she had taken a week in July 2019.
20. Mr Swinfield's evidence was that the Schedule of Loss in the bundle had been prepared using average pay in the 12 weeks before holiday pay was paid to the claimant. The only payment of holiday pay that appeared to correspond to a week's holiday taken by the claimant was the payment in July 2019.
21. Mr Swinfield's evidence was that his wife had taken a week's holiday in July 2019 and the payslip dated 19<sup>th</sup> July 2019 showed that she had been paid £353.50 for that week. The claimant was paid an average of £343.75 a week in the 12 weeks leading up to her holiday in July. On the claimant's evidence she was paid more than the average of the last 12 weeks' pay in July 2019.
22. The claimant could not tell me why she believed she had been paid wrongly. Mr Swinfield's evidence was that the respondent had told him that the claimant's holiday pay had been calculated using specialist software, and that the calculations were correct.

## The Law

23. Regulation 12 of the Working Time Regulations 1998 ("the WTR") provides that:-

*"(1) ...a worker is entitled to four weeks' annual leave in each leave year...*

*(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*

*It may not be replaced by a payment in lieu except where the worker's employment is terminated.*

24. An additional 1.6 weeks' annual leave is granted under Regulation 13A of the WTR.

25. Regulation 16 of the WTR deals with payment for annual leave and provides that:-

*"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A 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...*

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

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

26. Regulation 30 of the WTR gives workers the right to complain to an Employment Tribunal that an employer has failed to pay the whole or any part of any amount due to him under regulation 16(1).

27. Section 224 (2) of the 1996 Act states that where there are no normal working hours, "*...the amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending –*

- (a) Where the calculation date is the last day of a week, with that week, and*
- (b) Otherwise, with the last complete week before the calculation date.."*

28. The burden of proof in relation to claims for holiday pay lies with the claimant. In summary, the claimant has to establish on the balance of probabilities that she has not been paid all of the holiday pay to which she is entitled.

## **Conclusions**

29. There is, unfortunately, insufficient evidence before me to allow me to conclude that there has been a breach of regulations 13, 13A or 16 of the WTR.

30. The evidence of the claimant and her husband as to when the claimant took holiday was vague and, at times, contradictory. The sums claimed by way of holiday pay have changed over time, and the basis upon which the claimant asserts that holiday pay should have been calculated has also changed.

31. The calculation relied upon by the claimant at the hearing is that holiday pay should be calculated by reference to the average earnings in the 12 weeks before the holiday pay was paid to her. On her evidence alone, the only holiday pay payment that corresponds to a week's leave was in July 2019. The

claimant was paid **more** for her week's annual leave in July than she earned on average in the 12 weeks before she took and was paid for a week's leave.

32. I make no criticism of the claimant or her representative in reaching my conclusions, but on the basis of the evidence before me any finding that the claimant has been underpaid would be speculation. The claimant has failed to discharge the burden of proof.
33. It is, therefore, with regret, that I reach the conclusion that the claim must fail and is dismissed.

**Employment Judge Ayre**

25 October 2019

Sent to the parties on:

For the Tribunal: