



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Oakley  
**Respondent:** Andrew Bostock Limited  
**Heard at:** Hull **On:** 16 December 2019

**Before:** Employment Judge Rostant

## Representation

**Claimant:** In person  
**Respondent:** Mr A Bostock, Managing Director

# RESERVED JUDGMENT

The claimant's claim succeeds and the respondent is ordered to pay the claimant the sum of £1,264.88.

# REASONS

1. By a claim presented to the Employment Tribunal on 26 May 2019 the claimant brought a claim of unauthorised deduction for wages relating to holiday pay owing on termination of employment.
2. The matter came to me at a hearing on 8 November 2019. At that hearing I decided the contested issues of the claimant's employment status, her working week and her hourly rate of pay.
3. For reasons given at the time and not now repeated I concluded that the claimant was an employee of the respondent, that she was employed for 30 hours a week and that her hourly rate was £8.33.
4. I adjourned the question of whether or not the claimant was entitled to any holiday pay to a further two-hour hearing on 16 December 2019.
5. The issue before me at the adjourned hearing was whether or not the claimant was entitled to accrued holiday pay on termination of her employment. The entitlement to holiday pay related to the holiday year commencing 1 April 2018

and terminating with the end of the claimant's employment on 25 February 2019. The claimant's case was that she had taken no holiday at all during that year. The respondent's case was that she had taken more holiday than she had accrued in the relevant period.

6. I heard evidence from the claimant and from Mr Bostock and from a former colleague of the claimant's appearing to give evidence on behalf of the claimant Miss Manders.

### **The Law**

7. Section 13 of the Employment Rights Act 1996 makes it unlawful to make an unauthorised deduction from the wages of an employee.
8. Section 27 of the Employment Rights Act includes in the definition of wages holiday pay or other emolument referable to the claimant's employment.
9. Regulation 14 of the Working Time Regulations 1998 provides that any untaken leave accrued on termination of employment during the course of a holiday year should be compensated for by a payment of the sum equivalent to the amount that would have been earned had that leave been taken.

### **Matters agreed between the parties**

10. It is agreed that the claimant worked at the respondent's newsagent shop in Gilberdyke between 1 April 2018 and 25 February 2019. It is further agreed that between 1 April and at some point over Christmas 2018, the claimant and Mr Bostock were in a relationship. It is further agreed that the claimant's hours of working in the shop totalled 18 spread over 4 days with the remainder of her hours (12) taken up by administration.
11. It is further agreed that the claimant's accrued entitlement to holiday in that relevant year amounted to 151.84 hours.

### **The issue for the Tribunal to determine**

12. The sole issue before me, following my decisions made on the earlier occasion, was whether or not the claimant had taken any annual leave during the relevant year and, if so, how much a decision on that point would allow me to conclude whether on 25 February the claimant had any unpaid accrued leave and to make an order accordingly.

### **The evidence and my conclusions**

13. I would first say that in essence this was an artificial case. I have no doubt that the relationship between the claimant and Mr Bostock during most of the year in question, although for the purposes of an Employment Tribunal claim was one of employee and employer, was for their purposes much more of an equal partnership and I have no doubt that that entailed a fair amount of give and take between the two of them, co-operating both in business and in life to ensure that both things got done. It is in that sense that viewing this case now as a claim for untaken leave is artificial. Nevertheless, I am required by the existence of this claim and the nature of the defence to reach a conclusion on the rival contentions.
14. I have concluded that the claimant's case succeeds and that that the respondent must therefore pay her accrued holiday pay as calculated and set out in my Judgment above.

15. The burden initially rests upon the claimant to show that her employment had terminated and that she had received no pay for untaken leave at the end of the year. In fact that is agreed. I have no doubt that the reason why she was not paid for any accrued untaken leave at the end of the year was not because at the time Mr Bostock thought she was not entitled but because of the state of antagonism that existed between the claimant and Mr Bostock by the time the claimant resigned.
16. By the time the claimant's employment ended her relationship with Mr Bostock had also ended in very acrimonious circumstances and indeed court proceedings in the Magistrate's Court had already taken place.
17. Mr Bostock's defence to this claim is one which is constructed after the event and was not, in my view the true basis of the initial failure to pay the claimant.
18. Nevertheless, if I had been satisfied that the claimant had taken leave I would have dismissed the whole or part of this claim whatever may have been the reason for an initial failure to pay..
19. Mr Bostock's defence to this claim consists essentially of producing evidence which, he says, shows that the claimant was not present in the shop on a variety of occasions and that her absence should be regarded as paid holiday since he had never made any deduction from her wages for failing to attend work. In essence those occasions and the evidence to support them fall into two broad categories.
20. The first of those categories is weekends and some week days when the documentary evidence shows that Mr Bostock cashed up the till. The parties agree that in the normal way of things it was the claimant's job to cash up the till. Mr Bostock has produced evidence of 20 occasions when the claimant would, on her normal rota, be expected to be in work at the shop and would therefore be expected to have cashed up the till but where in fact he did the cashing up. (In fact there were 21 occasions relied on but the claimant was able to show me that on one occasion, although the cash up slip was completed by Mr Bostock it also carries her handwriting, which showed that she was present. Mr Bostock says that I may infer from the fact that he did the cash up and not the claimant that the claimant was not present on a shift when she should be present and that he was there covering her absence.
21. The claimant's evidence is however that I may not make such an inference since it was common, particularly at weekends, for Mr Bostock to attend at the shop when the claimant was working and that he would on occasion cash up a till for her. Needless to say, Mr Bostock disagreed with that evidence and said that although he did sometimes attend the shop when the claimant was there, when that was the case it was invariably the case that the claimant cashed up the till as a way of taking a break from standing up to serve.
22. The remaining evidence deals with the shop diary. The shop diary records the presence of members of staff other than the claimant and Mr Bostock says it establishes that on a number of occasions the claimant did not work her full shift. That he says, can be inferred from the fact that other members of staff were called in to work extra hours, presumably to cover her absence. The claimant's evidence about that is that I cannot make that inference from the presence of other members of staff. Other members of staff were called in occasionally to do extra hours but that does not mean that she was not

working and therefore Mr Bostock's documentary evidence does not carry the weight that he would like it to carry.

23. My first observation is that it simply is not possible for me to make a differentiated or carefully calibrated decision along the lines that claimant may have taken some holiday but not as much as Mr Bostock suggests.
24. What little evidence I have been given and the way the parties have put the forces me to make an all or nothing finding one way or the other. Mr Bostock's documentary evidence which he relies on as the basis for me drawing an inference of the claimant's absence establishes a total number of hours of the claimant's supposed absence in excess of the accrued amount of holiday that she is claiming.
25. The claimant complains that that evidence was sprung on her and that she is not in a position to produce evidence which she would have liked to have produced for example by way of text messages to show that she was working or present for those hours although I would observe that in fact much of the evidence that I saw today was produced on the last occasion and the claimant has had it since that time.
26. The basis for my conclusion finding for the claimant is however as follows. The documentary evidence does not firmly establish the presence or absence of the claimant from the shop on any particular date or time since it was the established practice of the shop not to record the claimant's working hours. In fact the record keeping in relation to the claimant is non-existent or almost so. That is doubtless because of the special nature of her relationship with Mr Bostock and the rather relaxed attitude of the respondent to the claimant's work. There was very little evidence, for example of the claimant regularly undertaking work which would account for the full 30 hours she was paid for.
27. In that regard the claimant was treated differently from other employees whose presence in the shop (doubtless for the purpose of calculation of wages) was recorded in the diary. Next it is the case that I have not seen any wage slips for the claimant and I infer from that the claimant received no itemised pay statements. That means that there is no contemporaneous record of the claimant receiving pay which would have been described as holiday. The likeliest reason for that is that any time out that the claimant did take would not have been treated as holiday on the assumption that the relationship was one of give and take and the claimant might do other things to justify her 30 hours a week wages other than just work in the shop.
28. It is incumbent upon an employer to keep appropriate records. That obligation extends even to where the employee concerned is in a personal relationship with the employer. If Mr Bostock wishes to persuade me that the claimant took what he regarded, *at the time*, as paid holidays then the burden rests on him to establish evidence of the fact that that is the case and that evidence is not before me. The evidence produced by Mr Bostock is simply evidence which he invites me establishes an inference of the claimant's absence from the shop.
29. Even if I were to infer that the claimant was absent from the shop that does not necessarily mean that that absence was treated by the employer as holiday eating into her entitlement to her paid holiday in any particular year.

30. Although there is force in Mr Bostock's observation that it is unlikely that the claimant, who has two children, would not have taken time out during Christmas and summer holidays, I observe that it is the agreed evidence of the parties that the claimant and Mr Bostock did not take whole weeks off on holidays as a family. Once again I return to my conclusion that a certain amount of give and take operated in the relationship and I think it likely that Miss Oakley's evidence that she did extra hours from time to time unrewarded is a correct and that therefore if the claimant took time out from the shop it was at the time regarded essentially as time off in lieu for extra hours worked elsewhere.
31. It is a well-established principle of evidence that where an obligation lies on a party to keep records or to produce records inferences can be drawn against that party from the absence of such records. In this case I draw the inference against Mr Bostock. That means that the claimant's case must be preferred, that is to say that she took no paid holiday and that accordingly she had built up an entitlement as set out at the head of this decision and her claim must therefore succeed.

Employment Judge Rostant

Date 17 December 2019