



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr MA Bruggemann

v

Papa Johns South Coast LTD

Judgment

Heard at: Southampton

On: 28 August 2020

Before: Employment Judge Rayner

Appearances

For the Claimant: In person
For the Respondent: Mr Liddiard
Interpreter (Polish): Ms A Rai

1. This has been an in-person hearing.
2. The claimant is owed holiday pay on termination of employment of £750.15, calculated on the basis of 2.67 weeks holiday outstanding, payable at the rate of £280.95 per week (average of last 12 weeks' Pay).
3. The respondent will pay to the claimant the sum of **£750.15.**

REASONS

1. By a claim dated 31 December 2019 the claimant brought the following claims:
 - a. unfair dismissal
 - b. holiday pay
2. The claimant was employed as a delivery driver by the respondent from the 1 December 2018 until the 21 September 2019.
3. The claimant does not have the requisite service to be able to claim unfair dismissal and that part of his claim was struck out by employment Judge

Dawson in a judgement dated 4 March 2020 sent to the parties on 6 March 2020.

4. The claimant contacted ACAS on the 30 November 2019 and his certificate was issued on the 30 December 2019. His claim for holiday pay is therefore brought within time.
5. The claimants remaining claim in respect of holiday pay is set out in paragraph of 8.2 of his ET1.
6. He states that he did not receive his last pay slip with his holiday pay and p45. He states that he is owed outstanding holiday pay of £726.06 gross.
7. The Claimant has not set out in his ET form either the rate of pay or the number of hours he worked each week, but has set out the amounts he says he earned in each tax year.
8. The respondent, whose correct name is PJ South Coast Ltd, states that the claimant was paid a total of £741.87 holiday pay on termination of his employment. The ET3 does not set out the rate of pay, or the number of hours worked by the claimant each week.
9. The respondent denies that any further pay in respect of holiday is owed.
10. The respondent has calculated the holiday pay owed to the claimant on the basis of holiday accrued but not taken for the period of a holiday year from 1 April 2019 running to 21 September 2019. The respondent asserts that in the 25 weeks that the work done by the claimant entitled him to the amount paid, according to the government calculator.
11. Before me the claimant asserted that he was entitled to holiday pay in respect of holiday accrued and not taken during the entire period of his employment, and not just in respect of the 25 weeks relied up by the respondent.

The relevant legal principles for calculating holiday pay.

12. Regulation 16(1) of the Working Time Regulations 1998 provides that a worker is entitled to be paid at the rate of a weeks pay in respect of each week of annual leave to which they are entitled.
13. A week's pay is calculated in accordance with section 221 - 224 ERA 1996. Where a worker for does not have normal working hours an average of the hours worked over a period of 12 weeks is used.
14. The 12-week period used will depend on the calculation date and this is the first day of the period of leave which the worker is taking.

15. Where outstanding leave is to be calculated at termination of employment, the calculation period will be the last 12 weeks of the claimant's employment.
16. The leave year can be set by the employer in a relevant agreement (regulation 13(3) WTR 1998) or if there is no relevant agreement, the leave year will start on the first day of employment and run for 12 months. (Reg 13 (3) ii WTR 1998).
17. Where an employee leaves his employment part way through a leave year, his leave entitlement will be the amount of leave that has accrued during the period of his employment. (see regulation 15A(1) WTR 1998).

Findings of Fact

18. The claimant was paid minimum wage and worked variable hours each week, depending on the needs of the business.
19. The claimant has provided 14 weeks of pay slips. Taking the last 12 weeks' pay from those pay slips the average weekly pay is £280.95.
20. This is a week's pay for the basis of calculating the entitlement to holiday pay.
21. The claimant is Polish and required the assistance of an interpreter for these proceedings.
22. The first question was whether or not here was any relevant agreement as to the leave year.
23. The claimant did not receive any form of statement of terms and conditions of employment.
24. The respondent told me that usually the employees would be told that the leave year ran from 1 April each year, but produced no evidence that this had ever been communicated to the claimant, and accepted that he did not know if the claimant had ever been told by his manager what the company practice was.
25. The claimant's evidence, which I accept was that he had never been told that he had to take his leave within any time frame, and had not been told that there was a leave year which ran from April. He had assumed that he could take his accrued leave at any time, and had, he said, been unable to take it when he wanted on several occasions because of the needs of the business.
26. The next question is how much leave had the claimant accrued, and how much leave had he taken during the relevant period.
27. The claimant took two weeks leave during his period of employment, 1 week in June 2019 and one week in July 2019.

28. The claimant was paid £383.34 in respect of the first week and £346.82 in respect of the second week.
29. In total his holiday pay was £736.16.
30. The claimant worked for 10 months and his holiday entitlement for the period was therefore $10/12 \times 5.6$ weeks, using the minimum leave entitlement set out in the regulations.
31. The respondent asserted that the claimant had, in addition to the two weeks paid leave, taken a further week of leave in March 2019 and that he had been paid for it.
32. The claimants evidence was that he had not taken a further week of leave and had not been paid for it in any event.
33. The respondent did not produce any pay records or time sheets, or records of holiday pay or leave. There was no evidence of whether holiday was recorded or of how pay for holiday had been calculated.

Conclusions

34. I conclude that there was no relevant agreement within the meaning of the regulations. The claimants leave year therefore ran from the first date of his employment and he was therefore entitled to be paid on termination for any leave which he had accrued, but not taken during tht period.
35. In the absence of any evidence of holiday pay records or calculations and on the basis of the claimants evidence, that he did not take the leave, I find that the claimant did not take leave taken and was not paid for a weeks leave in March 2019.
36. The claimant is therefore entitled to be paid for the remaining 2.67 weeks of accrued but untaken annual leave at the rate of £280.95 per week, totalling £750.15.

Employment Judge Rayner

Dated: 7 October 2020

.....

Note: online publication of Judgments and reasons

The ET is required to maintain a register of all Judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at:
<https://www.gov.uk/employment-tribunal-decisions>.

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness