



EMPLOYMENT TRIBUNALS

Claimant: Miss C Galpin

Respondent: Liquid Leisure Limited

REMEDY JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The correct name of the respondent is Liquid Leisure Limited.
2. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant the sum of £4,648.16.
3. This is the gross figure. If the respondent pays the tax and national insurance due to HMRC, payment of the net amount will meet the judgment debt.

REASONS

Introduction

1. The claimant presented her claim on 25 April 2019 after a period of Acas early conciliation from 25 March 2019 to 25 April 2019. She claims unpaid holiday pay.
2. The respondent's response was due to be presented on 24 July 2019. The respondent failed to present a response. A rule 21 judgment on liability was issued on 28 August 2019. The claimant's claim succeeded and the amount of holiday pay owing was to be determined at a remedy hearing on 1 April 2020.
3. The remedy hearing on 1 April 2020 was converted to a telephone preliminary hearing for case management on the direction of the Employment Tribunal Presidents of 19 March 2020 in light of the Covid-19 pandemic. The claimant attended the hearing, there was no attendance or representation by the respondent.
4. At the preliminary hearing the claimant asked if she could provide further information so that the tribunal could consider whether a decision could be made under rule 21(2) regarding remedy, without the need for another hearing. I made an order for further

information to be provided by the claimant. The claimant provided further information on 11 April 2020, 19 July 2020 and 3 October 2020. I apologise for the delays which arose during this process, this was as a result of pressure on the tribunal staff during the covid-19 pandemic.

5. I have considered the further information provided by the claimant and my remedy judgment made under rule 21(2) is set out above.

The issue for decision

6. There has already been a judgment that the claimant is owed holiday pay by the respondent. The issue for me to decide is how much holiday pay she is owed. I set out below a summary of the relevant legal principles.
7. I have to decide what happened (the facts). I reach my decision about what happened by considering the documents, and deciding what I think is most likely to have happened. I then apply the legal principles and reach conclusions as to what holiday pay the claimant is owed.

The law

8. The Working Time Regulations 1998 give workers a minimum entitlement to paid holiday. The minimum entitlement is to 4 weeks paid holiday each year, plus an additional 1.6 weeks per year which can include bank holidays (regulations 13 and 13A).
9. A week's pay is calculated by an average of hours and remuneration over the 12 week period prior to the holiday. Since 6 April 2020, the calculation is by reference to a 52 week period but this does not apply here because the claim relates to a period prior to 6 April 2020.
10. A claim for non-payment of holiday pay can be brought under section 23 of the Employment Rights Act 1996 which prevents unauthorised deductions from wages. The claim must be submitted to the employment tribunal before the end of the period of 3 months from the date on which the payment was due. Where there is a series of related non-payments, the claim must be submitted before the end of 3 months from the date on which the last payment was due. In claims relating to holiday pay, for a number of non-payments to amount to a series, the gap between them must be no more than 3 months (Bear Scotland Ltd v Fulton [2015] ICR 221, EAT)
11. Where a tribunal finds that there has been non-payment of holiday pay, it must order the employer to pay the amount owing. However, there is a two year limit on back pay. The tribunal cannot order payment where it was due more than two years before the employment tribunal complaint was submitted (section 23(4A) of the Employment Rights Act 1996).

Facts

12. The claimant worked for the respondent from 1 August 2016 to 22 February 2019. She was an employee of the respondent. From July 2017 she was paid £10.00 per hour. Her hours were variable.
13. The claimant was not given any paid holiday during her time working for the respondent. Her contract of employment said at clause 11.4: "Holidays and sick leave are not paid."
14. I find, based on the copy diaries provided by the claimant, that the claimant took the following periods of absence from work which were unpaid:
 - a. 19 November 2017 to 18 February 2018 (13 weeks)
 - b. 1 May 2018 (1 day)
 - c. 24, 25 July 2018 (2 days)
 - d. 4, 5 September 2018 (2 days)
 - e. 18 November 2018 to 23 December 2018 (5 weeks)
15. I accept the claimant's evidence, based on her payslips and diary records, that her average weekly hours in the 12 weeks before her period of leave in November – February 2018 were 49.9 hours and in the 12 week period before her period of leave from 18 November 2018 to 23 December 2018 they were 57.93 hours.
16. The claimant's pay for November 2018 was due on 5 December 2018. Her pay for December 2018 was due on 4 January 2019.

Conclusions

17. As an employee the claimant was entitled to paid holiday of 5.6 weeks per holiday year.
18. The claimant's holiday year ran from 1 August each year, because that was the date on which she started working for the respondent, and her terms and conditions did not provide for any other holiday year.
19. The claimant's first holiday year was 1 August 2016 to 31 July 2017. Her claim was submitted to the employment tribunal on 25 April 2019. No backpay can be awarded for any period prior to 25 April 2017 because of the two year limit on backpay. The claimant did not seek pay in respect of any holiday taken during the period 26 April 2017 to 31 July 2017.
20. The periods I have to consider are a) the holiday year 1 August 2017 to 31 July 2018 and b) the holiday year 1 August 2018 to 22 February 2019.
 - a) Holiday year 1 August 2017 to 31 July 2018
21. The claimant was entitled to 5.6 weeks paid holiday in this year. I have found that she took over 5.6 weeks holiday and that none of it was paid.
22. The claimant's average weekly hours before 19 November 2017 were 49.9. 5.6 weeks at 49.9 hours per week is an entitlement to 279.44 hours of paid holiday. The claimant's

hourly rate was £10.00 per hour. Her unpaid holiday pay for this holiday year totals £2,794.40.

23. Not all of the holiday leave taken by the claimant in this holiday year was holiday for which the claimant was entitled to be paid, because the claimant took more holiday than her paid holiday entitlement. The claimant did not nominate particular days as paid leave and others as unpaid leave, because she was told that she was not entitled to any paid leave. If the respondent had correctly informed the claimant of her entitlement to take paid holiday, she would have been able to decide which of the days she would take as paid holiday.
24. In the interests of proportionality, I have not identified which of the days of unpaid leave taken by the claimant would have been paid and which would have been unpaid. Instead, I have calculated the full 5.6 weeks holiday pay due by reference to the average weekly hours for the longer period of leave. This means it is not necessary to carry out a separate calculation of the average weekly hours worked in the 12 weeks prior to the shorter periods of unpaid holiday taken on 1 May, 24 July and 25 July 2018. I have used the average for the longer period on the basis that any difference in the calculation if these other three days were paid would be de minimis (which means so small it can be overlooked).

b) Holiday year 1 August 2018 to 22 February 2019

25. The claimant was entitled to 3.2 weeks paid holiday in this year, as her employment ended part-way through the holiday year. I have found that in this part-year the claimant took over 5 weeks holiday and that none of it was paid.
26. The claimant's average weekly hours in the 12 weeks before 18 November 2018 were 57.93. 3.2 weeks at 57.93 hours per week is an entitlement to 185.38 hours of paid holiday. At £10.00 per hour, unpaid holiday pay for this holiday year totals £1,853.76.
27. Again, not all of the holiday leave taken by the claimant in this year was holiday for which she was entitled to be paid. In the interests of proportionality, I have not identified which days were paid and which unpaid, and I have not carried out a separate calculation of the pay due for the shorter period of unpaid holiday taken on 4 and 5 September 2018. Again, any difference in the calculation of pay due arising from doing so would be de minimis.

Time limit

28. The holiday pay for paid holiday taken during the period 18 November 2018 to 23 December 2018 would have been payable to the claimant on 5 December 2018 and 4 January 2019. (This position would be the same if 4 and 5 September 2018 were paid holiday.)
29. The claimant notified Acas for early conciliation on 25 March 2019. This was within 3 months of the date of the last deduction on 4 January 2019. The early conciliation certificate was issued on 25 April 2019. The claimant submitted her employment tribunal

claim on 25 April 2019. As this was within one month of the date of the early conciliation certificate, the claim was presented in time by virtue of section 207B(4) of the Employment Rights Act 1996. The claim was presented in time in respect of the deduction made on 4 January 2019.

Series of deductions

30. As set out above, the claimant did not identify which of the dates of unpaid holiday were to be paid holiday and which unpaid. This was because the respondent told her that she was not entitled to any paid holiday. However, the gaps between each of the dates were all shorter than 3 months. In the circumstances, the non-payment of holiday pay in respect of a series of occasions of unpaid leave amounts to a series of deductions.

31. The time limit runs from the last of the deductions on 4 January 2019, and the claim was therefore presented in time in respect of each of the deductions.

Summary

32. The respondent made deductions from the claimant's pay in respect of holiday pay. The respondent is ordered to pay the claimant the following:

Holiday pay 1 August 2017 to 31 July 2018	£2,794.40	
Holiday pay 1 August 2018 to 22 February 2019	£1,853.76	
Total		£4,648.16

33. These are the gross figures. If the respondent pays the tax and national insurance due to HMRC, payment of the net amount will meet the judgment debt.

Employment Judge Hawksworth

Date: 2 November 2020

JUDGMENT SENT TO THE PARTIES ON

7 December 20

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE