Case No: 3310943/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Amanda Sergeant	**v**	**Colin Sclare Ltd**

Heard at: Watford **On:** 14, 15, 16 December 2020 (& 5 January 2021 in chambers)

Before: Employment Judge Shastri-Hurst

Appearances:

For the Claimant: Ms Maria Aisha (Free Representation Unit)
For the Respondent: Mr Colin Sclare (Director of the Respondent)

JUDGMENT having been sent to the parties on…… and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. By her claim form dated 4 March 2019, the Claimant brought a claim for holiday pay under the Working Time Regulations 1998.

2. In determining those claims, I heard from Mr Sclare for the Respondent, and the Claimant. I received a bundle prepared for the final hearing of 355 pages. I am grateful to Ms Aisha for producing a helpful skeleton argument and authorities bundle. I also had a Schedule of Loss for the Claimant.

3. From the Respondent, I also had a pdf document entitled "Witness Statement of Melina Ball". In reality, this is not a formal statement, but Ms Ball's comments on various parts of the Claimant's witness statement relevant to a fall out between Ms Ball and the Claimant that led to the Claimant leaving her working arrangement with the Respondent.

4. Such matters as to how and why the Claimant ended her relationship with the Respondent are of little immediate relevance to the legal issues I have to decide. I admitted the document, but gave it little weight as (a) Ms Ball has not produced a signed witness statement, (b) she is not here to be

cross-examined and (c) in truth, her evidence is not of great relevance to the issues as to whether the Claimant was a worker and, if so, what holiday pay she is entitled to.

5. On a related note, Mr Sclare initially objected to the admission of a document within the bundle at p355, a text exchange between the Claimant and someone who also had a working relationship with the Respondent, Mr Bobby Genchev. Mr Sclare objected to its admission on the basis that he knew Mr Genchev did not wish to be dragged into this matter. I again consider that this text exchange is of little relevance to the issues I have to determine in this matter. I therefore permitted p355 to remain in the bundle, but again gave it little weight for the same reasons applied to Ms Ball's comments.

6. Having handed down my judgment and reasons orally on 16 December 2020, I realised I had made an error in my mathematics regarding the number of years for which the Claimant was able to claim. I therefore instructed the clerk to write to both parties, setting out the proposed amended calculation, inviting any representations they wanted to make on that point, and also on the period of time for payment (whether 14 or 28 days). Responses were received from both parties, and I am grateful to them for those responses, the contents of which I will address as appropriate in my reasoning below. In light of this, I have provided written reasons for my judgment, in order to assist the parties in understanding my conclusions, despite neither party making a formal request for such reasons.

ISSUES

7. The issues had been set out by Employment Judge Alliott at a preliminary hearing on 27 January 2020 – see p64:

Worker status

7.1 Was the Claimant a worker or employee? Although there is a letter in the bundle from the Respondent stating that the Claimant was a worker, the Respondent is not bound by that, given that the Respondent is not legally represented and it was stated in the spirit of settlement.

7.2 It is the Respondent's position for the purposes of these proceedings that the Claimant was a self-employed consultant.

Holiday pay

7.3 When the Claimant's work at the Respondent came to an end, was she paid all the compensation she was entitled to in relation to holiday pay? Such issues may include:

7.4 What was the Claimant's holiday entitlement?

7.5 What was the Claimant's holiday year?

7.6 How much paid holiday was taken by the Claimant in each year from June 2012 to 6 November 2018?

7.7 What is the nature of the Claimant's claim; is it an unauthorised deduction of wages claim or a right to claim annual leave?

7.8 Are any of the Claimant's claims restricted to the two year limitation period set out in s23(4A) Employment Rights Act 1996 ("ERA")? We must also read into this point two further issues:

7.9 For what period can the Claimant back-claim if her claim is governed by the Working Time Regulations 1998 ("WTR")?

7.10 Whether, at the time the Claimant's working relationship came to an end, any holiday carried forward needs to be pro-rated to reflect the fact that she only worked 20 out of 52 weeks of that year last leave year (2018/19)?

7.11 If the Claimant's claim is successful, we would then need to consider what damages or compensation she is entitled to receive.

LAW

Worker Status

8. The first issue is whether the Claimant was a worker. If she was, as the Respondent claims, self-employed, she has no right to holiday pay under the WTR.

9. The definition of a worker is set out at s230(3) ERA and reg 2(1) WTR:

> *An individual who has entered into or works under (or, where the employment has ceased, worked under) –*
>
> *(a) A contract of employment, or*
>
> *(b) Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
>
> *...*

10. The Claimant claims she falls into the second category, known as a "limb (b) worker": these are workers who provide personal service under a contract, such as casual or freelance workers.

11. To fall within limb (b), a claimant must show:

11.1 There was a contract (whether written or oral, express or implied);

11.2 That they undertook work to personally perform work or service for the company. This was found in the case of **Pimlico Plumbers Ltd and anor v Smith [2018] ICR 1511 SC** to be the sole test, whilst stating that it is still helpful to assess other factors such as the ability for a claimant to substitute someone else into their role, in deciding what the dominant feature of the contract is.

11.3 That the company is not a client or customer of a profession or business undertaking carried on by the claimant. An example of that type of set up is a barrister who contracts to work for a client, but would not be classed as a worker of that client.

12. Overall, there needs also to be a mutuality of obligation between the parties. This means that there is an obligation for a company to provide work and for a claimant to do that work.

13. The question as to whether someone is a worker is primarily a question of fact for the tribunal. As the determination depends on the value attached to the individual facts of the case, it is a matter of degree, and therefore of fact – **O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728**.

14. There are various factors which can be placed into the melting pot when considering such a decision, for example (the following being a non-exhaustive list):

14.1 How a claimant was paid;

14.2 Whether they were paid for time they were not at work;

14.3 How much control the company had over a claimant's work;

14.4 How integrated a claimant was within the company. For example, whether a claimant was provided with any equipment by the company.

Entitlement to leave under the WTR

15. Reg 13 provides that a worker is entitled to 4 weeks' leave ("basic leave").

16. Reg 13A provides that a worker is entitled to an additional 1.6 weeks' leave ("additional leave").

17. Reg 14 provides that a worker is entitled to be paid for holiday leave accrued but untaken at the time of termination of her employment.

18. Reg 16 entitles a worker to payment in respect of periods of leave. A worker is entitled to be paid in respect of any period of annual leave to which they are entitled under reg 13 and reg 13A (basic and additional leave), at the rate of a week's pay in respect of each week of leave.

19. Many of the issues set out in the preliminary hearing can be dispensed with relatively swiftly as follows.

What was the Claimant's holiday entitlement?

20. I find that there was no additional contractual annual leave: the contract between the parties did not provide for any contractual annual leave. The Claimant was therefore entitled to her statutory leave of 4 weeks' basic and 1.6 weeks additional leave.

What was the Claimant's holiday year?

21. Reg 13(3)(b)(ii) provides that, where there is no express provision within an agreement as to the start date of the leave year, the leave year is deemed to start on the date on which the Claimant's employment started, and on each anniversary thereafter.

22. The earliest invoice I have in the bundle records the Claimant's first day of work as 20 June 2012. There was no express provision regarding the holiday year within the contract between the two parties. The leave year therefore runs from 20 June one year to 19 June the next year.

How much holiday was taken by the Claimant in each year from June 2012 to 6 November 2018?

23. This refers to paid holiday, as opposed to unpaid holiday. On the facts, it is agreed that the Claimant took no paid holiday leave during her work with the Respondent.

What is the nature of the Claimant's claim: is it unlawful deduction of wages or a claim pursuant to the WTR?

24. The Claimant clarified in her response to the orders from the preliminary hearing on 27 January 2020 that she was claiming under the WTR, not the ERA.

Are any of the Claimant's claims restricted to the two-year limitation period set out in s23(4A) ERA?

25. In short, given that the Claimant does not pursue a claim under the ERA, the answer is "no".

Is the Claimant limited by the WTR as to the period over which she can claim back-pay?

26. This is a thorny issue in terms of the legal framework, that I will deal with now in some depth.

27. Regarding the carrying over of leave, reg 13A(7) regarding additional leave provides that leave may be carried over into the next leave year where there is an agreement between the employer and employee.

28. There was no such agreement here, so it is not possible for the Claimant to carry forward any additional leave (that is the 1.6 weeks leave per year).

29. Reg 13(9) regarding basic leave provides that an employee's annual leave must be taken in the leave year during which it is due. However, it is possible for part or all of the basic four weeks' statutory leave entitlement to be carried over under the Working Time Directive 2003/88 ("WTD"). This comes from the case of **Federatie Nederlandse Vakbeweging v Staat de Nederlanden 2006 ICR 962 ECJ**.

30. The European Court of Justice ("ECJ") held that a worker must be permitted to carry over his or her unused holiday entitlement to the next leave year (and sometimes beyond) where one of four situations arises:

    30.1 A worker is unable or unwilling to take annual leave because they are on sick leave;

    30.2 A worker is unable to take annual leave because she is on maternity leave;

    30.3 A worker does not take annual leave because the employer refuses to provide paid holidays – **King v Sash Window Workshop and anor 2018 ICR 693, ECJ**;

    30.4 The employer does not give the worker an effective opportunity to take annual leave – **Kreuziger v Land Berlin Case C-619/16 ECJ** and **Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ**.

31. This provides a conflict between our national law (WTR reg 13(9)(a)) which prevents workers from carrying forward holiday leave, and EU law (WTD Art 7(1)) which appears to allow it.

32. This apparent conflict has been resolved through the national courts. National cases showed us that workers who were absent on sick leave could carry over leave. This was then extended, in order to give full effect to the purpose of the WTR – **NHS Leeds v Larner 2012 ICR 1389, CA**.

33. More recently, there have been two ECJ cases – **Stadt Wuppertal v Bauer and anor 2019 IRLR 148** and **Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ**.

34. The ECJ in these cases found that the right to be paid annual leave that appears in Art 31(2) of the Charter of Fundamental Rights of the European Union ("the Charter") is a fundamental principle of EU law that is directly enforceable by workers in Member States.

35. This means that now, workers who have been prevented from taking their 4 weeks' leave have a right to carry over that paid annual leave. The question then becomes, "what does it mean to prevent a worker from taking their leave?". This has been interpreted by the courts to mean "was the worker given an effective opportunity to take her annual leave?".

36. We go back to **Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ** and **Kreuziger v Land Berlin Case C-619/16**.

37. The ECJ was asked to consider whether EU law stops national law that means workers lose their allowance for any untaken leave, where the worker did not apply to take that leave before the end of the working relationship.

38. The ECJ found that it would not be compliant with Art 7 WTD if a worker automatically lost the right to be paid for backdated untaken holiday pay if that worker had not had the effective opportunity to take that annual leave.

39. It is not enough for an employer to say that a worker failed to ask to enforce their right to leave, unless the employer can show it provided the worker with sufficient information to be able to allow the worker to exercise their right to leave.

40. Ultimately the burden of proof is on the employer to demonstrate that the worker was given an effective opportunity.

41. So, what is required of an employer to prove it has given a worker sufficient opportunity to take leave? According to the ECJ in **Kreuziger v Land Berlin Case C-619/16** and **Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ**, the employer should:

    41.1 Give the worker the opportunity to take annual leave;

    41.2 Encourage the worker to do so;

    41.3 Inform the worker, in good time, that if they do not take holiday, they will lose it at the end of the relevant period.

42. The Claimant has relied upon the case of **King v Sash Window Workshop and anor 2018 ICR 693 ECJ**. Mr Sclare seeks to say that this case is different to **King** because King was only paid commission, and was specifically told he could not take holiday.

43. Although Mr Sclare is right about those factual differences, I consider that I am still bound by that decision from the ECJ in terms of how I apply the law to the facts of this case. The decision in **King** is not just restricted to apply to cases which are factually identical to it. Also, I read it alongside the other ECJ cases I have mentioned of **Land Berlin** and **Shimizu**, which are also binding on me: it is now accepted that an employer must take positive steps to ensure that annual leave is taken during the relevant leave year.

44. I repeat however that this only relates to the 4 weeks' basic leave, not the 1.6 weeks' additional leave.

If the Claimant is entitled to carry over any leave into her last leave year, does the full amount of annual leave have to be pro-rated down to reflect the fact she left after 20 weeks of that leave year?

45. Again, I turn to **King**, in which the ECJ found that to prevent a worker from their acquired entitlement to paid annual leave would be to allow employers to be unjustly enriched, at the cost of the intention of the WTD, which was to protect workers' health.

46. Article 47 of the Charter provides that:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

47. I accept that reg 14(3)(b) WTR could (in certain circumstances) be incompatible with the entitlement under Art 47 of the Charter to an effective remedy, and that I am bound to disapply any domestic provision that is incompatible with the principle set out in Art 47 – **Kucukdeveci v Swedex GmbH und Co KG [2011] 2 CMLR 27 ECJ**.

FINDINGS OF FACT

48. I make these findings of fact on the balance of probabilities.

49. I state at the beginning of this part of my judgment that I found both witnesses credible, honest, and I believe that they were both doing their best to assist me. There was in truth little disagreement over the relevant facts of this matter. This claim is really about the interpretation and legal implications of those facts.

50. The Respondent is an estate agency, of which Mr Sclare and his wife are directors: it was set up in 2012 by Mr Sclare.

51. The Claimant and Mr Sclare had worked together previously at Penny Kenton Property Centre for over 10 years.

52. When Mr Sclare set up on his own, he invited the Claimant to come and work with him. It is agreed that the working relationship grew out of an oral conversation between the Claimant and Mr Sclare. In the spring/summer of 2012, Mr Sclare asked the Claimant whether she could do some hours to help out at his new estate agent's business: the Claimant said "yes".

53. From the text messages in the bundle, I can see that Mr Sclare asked his accountant whether he could pay the Claimant by way of a fee paid on the basis of the Claimant providing an invoice for her work done, paying the Claimant as a casual worker – p89. This is how the relationship progressed, with the Claimant and Mr Sclare agreeing days and hours for the Claimant to work and the Respondent to pay her following production of an invoice.

54. I find therefore that the terms of the oral contract that existed between the parties were as follows:

54.1 Hours and days of work to be agreed between the Claimant and Mr Sclare on a rolling basis;

54.2 The Claimant to be paid on production of an invoice for the hours worked;

54.3 The Respondent to pay her for those hours, and pay her the gross figure.

54.4 The Claimant to deduct tax and national insurance contributions herself.

55. That was the extent of the oral contract between the parties. Nothing was discussed regarding holiday leave, or the right to be paid for it. This was because it was understood by both parties at this stage that the Claimant would be working on a consultancy basis.

The working relationship in practice

56. In terms of the Claimant's hours, the parties' working relationship evolved organically: for the first few years, the Claimant worked ad hoc hours. In 2016, it is agreed between both parties that her hours became more regular; again, this happened organically. The Claimant and Mr Sclare would touch base in advance of the following week, to agree the dates that the Claimant was to work that week.

57. There were times when Mr Sclare would ask the Claimant to work different days or additional days. If the Claimant could do those times, she would, but she was not obliged to do so. There are examples in the bundle of times she both accepted those requests, and times when she rejected them – for example pp91, 94, 101.

58. In practice, the Claimant and Mr Sclare would simply come to an agreement as to which hours she would work each week, without too much difficulty: it was a flexible working relationship.

59. The Claimant, as routine, did not work on Saturdays, whereas when the Respondent had employees who were subject to a contract of employment, they worked on Saturdays under a rota system. The Claimant did sometimes work Saturdays if asked to cover – for example invoice p244. The Claimant was also not obliged to work over the Christmas period.

60. In terms of the Claimant's rate of pay, this varied over her years with the Respondent, as set out at p335. It was the Respondent who set the rate of pay (see p103) and, in the event, the Claimant never disputed the rate, although she would have been free to simply turn down the offer of work had she felt the pay was not sufficient.

61. The Claimant was paid commission on top of an hourly rate. This commission changed over time, from a flat rate to a percentage of a week's rent on letting deals secured by the Claimant – p98.

62. Regarding holidays, the Claimant arranged her working days with the Respondent so that she could take unpaid holiday when she wished to do so – see p96 as an example.

63. There was never a discussion between the parties as to whether the Claimant could or should be paid to take holiday leave, due to the understanding she was a self-employed consultant.

64. The Respondent says the Claimant was free to take as much holiday as she wanted and, in fact, some years she did so: for example, at p339 we see that she was on holiday from 10-27 September 2015.

65. The Claimant's position is that, knowing she would not be paid for holiday, she did limit what holiday she took.

66. These two positions are not incompatible. I accept that there were never any discussions about the situation regarding holiday pay, and therefore it is entirely plausible, and I find as fact, that Mr Sclare believed the Claimant would take as much holiday as she wanted, whilst the Claimant in fact was somewhat reticent to do so without verbalising this to the Respondent.

67. It is agreed that the Claimant has never been paid for any holiday taken.

68. Other matters of relevance are as follows:

    68.1 The Respondent paid the Claimant her travel expenses – p97;

    68.2 The Claimant was provided (upon her request) with the Respondent's branded cards, giving her the job title of Senior Lettings and Sales Negotiator – p84;

    68.3 There was never a time in the memory of either the Claimant or Mr Sclare when the Claimant simply failed to turn up or cancelled a shift at the last minute;

    68.4 There was never a time when the Claimant was unable to do a shift and so sent someone along in her place: indeed, no such ability to substitute her attendance for someone else was ever discussed.

69. I have heard about another person who worked for the Respondent, a Mr Bob Genchev. I am told that he had a similar working relationship with the Respondent to the Claimant, but then at some stage was given an employment contract.

70. The relevance of Mr Genchev's arrangement with the Respondent is of tangential relevance, as the issue of worker status of the Claimant has little to do with the worker status of Mr Genchev on the facts in front of me. The key is the mechanism of the working relationship between the Claimant and the Respondent.

71. The Claimant worked for the Respondent until November 2018, when she left due to a disagreement in the office. I put it neutrally as the detail of why the Claimant left is not relevant to my decision.

72. The Claimant was not paid for holiday accrued but untaken at the time of her ending the working relationship.

73. At that stage, following the Claimant's departure, she sought legal advice and spoke to ACAS, and came to the conclusion that she was not in fact a self-employed consultant but a worker – p111.

74. On that basis she pursued back-pay for holiday leave that she says she never took; this being the subject matter of her claim before me.

CONCLUSIONS

Was the Claimant a worker?

75. I find that the Claimant was a worker. I do so for the following reasons:

75.1 An oral contract existed between the parties;

75.2 By way of that oral contract, once hours had been agreed between the parties, the Claimant was required to do those hours and the Respondent was required to pay her for doing them. That demonstrates a mutuality of obligation;

75.3 The Claimant was expected to attend personally to fulfil her role, and therefore was required to perform her work herself. It was never the case that she sent along a substitute to cover her agreed hours. That demonstrates to me that the Claimant was required to provide personal service;

75.4 The Respondent was not her customer or client. The Claimant was not at arm's length or independent from the Respondent but did the work that she was told to do by Mr Sclare, in relation to properties on the Respondent's books;

75.5 Looking at other relevant factors that I place in the melting pot:

75.5.1 I accept that the Claimant did not work for anyone else during her time with the Respondent. Although she could have done, she did not do so as a matter of fact and the matter was never discussed with Mr Sclare;

75.5.2 The Respondent had some element of control over the Claimant. A summary of her role (not challenged by the Respondent) is at p26, and I see in the text message exchanges in the bundle a flow of conversation between the Claimant and Mr Sclare, in which the Claimant reports back to Mr Sclare what is happening on various properties on the Respondent's books.

75.5.3 Although the Claimant was paid gross sums on receipt of invoices, this is not fatal to a finding of worker status, and is just one factor to be weighed in the balance;

75.5.4 The Claimant was provided with reimbursement for travel costs, a desk and business cards. She was integrated within the Respondent's business.

76. As a worker, the Claimant therefore had a right to annual leave under the WTR 1998.

What holiday pay was the Claimant entitled to receive?

77. The Claimant was entitled to both basic and additional annual leave under regulations 13/13A WTR. She is therefore entitled to compensation for basic and additional holiday accrued but untaken for the proportion of the leave year at the time of her termination under reg 14. She is also entitled to payment in respect of periods of leave under reg 16.

78. As I have stated, there was no express agreement for the Claimant to carry over her 1.6 weeks additional leave at any time. The Claimant therefore cannot be entitled to carry forward the additional leave of 1.6 weeks each year between 2012 and 2018.

For what period is she entitled to claim for her basic annual leave under regulations 16 and 13?

79. On the legal interpretation as I have set out earlier in this judgment, the Claimant was not given the effective opportunity to take her annual leave. I make this finding because:

79.1 Paid holiday was simply never discussed; whether for the Respondent to encourage the Claimant to take holiday, or to inform her of her rights;

79.2 There was no annual leave policy with which the Claimant was provided.

80. In those circumstances, I find that the Respondent has not managed to prove that the Claimant was given an effective opportunity to take her basic annual leave.

81. The Claimant is therefore entitled to carry forward 4 weeks' pay for each complete leave year from 20 June 2012 to 19 June 2018. That is 24 weeks. In my oral reasons given on 16 December 2020, I misstated that this period was 20 weeks, which in turn led to an error in my calculations. On realising this, after having given my reasons on 16 December, I gave both parties the opportunity to make written representations regarding the change of the period from 20 weeks to 24 weeks: both parties accepted that the correct period was 24 weeks.

82. The Claimant therefore carried that 24 weeks' leave into her last leave year with the Respondent, in which she would be entitled to her statutory 4 weeks' basic and 1.6 weeks' additional holiday. In the leave year starting on 20 June 2018, the Claimant went into that year being entitled to 29.6 weeks' annual leave.

How many weeks' leave was the Claimant entitled to be paid for under Reg 14(3) WTR?

83. Under reg 14(3)(b), at the time of leaving the Respondent's employment, the Claimant was entitled to payment for her holiday leave accrued but not taken, pro-rated to reflect the fact that she left 20 weeks into the leave year.

84. The question is, "does the full 29.6 weeks need to be pro-rated to reflect that the Claimant left 20 weeks into the 2018/2019 holiday year, or is the Claimant entitled to 24 weeks for her historic carried-over leave in full, and then a pro-rated amount of her 5.6 weeks for the leave accrued in that final portion of the Claimant's last leave year?".

85. I bear in mind Art 47 of the Charter, and the need to ensure the Claimant obtains an effective remedy. In line with that Article and the EU case-law cited above, I accept that, if I say the full leave entitlement of 29.6 weeks is to be pro-rated down to reflect the proportion of the leave year that the Claimant worked in 2018/19, that would be incompatible with the requirement for an effective remedy, and the Claimant would be deprived of holiday pay for the past years that I have found she was due.

86. Therefore, the total number of weeks for which the Claimant is entitled to holiday pay is:

    86.1 4 weeks x 6 full years for the leave years from 20 June 2012 to 19 June 2018; and,

    86.2 5.6 weeks pro-rated on the basis that the Claimant had only served 20 weeks out of the 2018/19 leave year, that being 5.6 x 20/52 = 2.15 weeks.

    86.3 The Claimant is therefore entitled to pay for a total of 26.15 weeks.

Remedy

87. Let me first address Mr Sclare's concern about the fact that the Claimant was a part-time worker. Mr Sclare raised this both in his submissions and in his written representations dated 22 December 2020: Mr Sclare argued that, as the Claimant worked three days a week, her annual holiday entitlement should be pro-rated down from 5.6 to (3/5 x 5.6) 16.8 days.

88. However, there is no need to pro-rata part-time workers' holiday entitlement due to the fact that it is calculated in weeks. Let me explain: the reason why leave is expressed in weeks (4 weeks' EU and 1.6 weeks' domestic leave) is that this necessarily takes into account that holiday will be pro-rated for part time workers. Take for example a part-time worker paid £100 a day for 3 days a week and a full-time worker paid £100 a day for 5 days a week. The part-time worker will be entitled to 5.6 weeks' leave at a weekly rate of £300 (£1,680), whereas the full-time worker will be entitled to 5.6 weeks' leave at a weekly rate of £500 (£2,800). The way the maths works does therefore pro-rata pay for part-time workers automatically.

89. That is the reason that part-time workers, including the Claimant, are entitled to 5.6 weeks leave, and that is the reason why it would be wrong for me to pro-rata the Claimant's annual entitlement down to 16.8 days a year.

90. I hope the above assures Mr Sclare and the Respondent that the Claimant is not getting the same amount of money as she would if she had worked a 5 day week.

What was the Claimant's weekly pay?

91. Reg 16 WTR entitles a worker to be paid at the rate of a week's pay for each week of annual leave to which she is entitled under reg 13 and reg 13A.

92. What was the Claimant's weekly pay? "Weekly pay" is defined in ss221-224 ERA. First, it needs to be "normal remuneration", and so will include the Claimant's basic hourly rate and commission – **Bear Scotland Ltd v Fulton and anor 2015 ICR 221, EAT** and **British Gas Trading Ltd v Lock and anor 2017 ICR 1, CA**.

93. The Claimant falls under the umbrella of s224, as her work equated to employment with 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 with the calculation date, that being her last day of working, which was 6 November 2018.

94. I say that this is the correct reference period for the entirety of the Claimant's entitlement as it is her entitlement to the holiday pay that has accrued at the time of her leaving for which the Claimant is entitled to be paid. Accrued but untaken holiday is calculated with reference to a worker's pay at the time of termination.

95. Therefore, the reference period of twelve weeks will be the twelve weeks immediately prior to the end of the Claimant and the Respondent's working relationship. In a week where nothing is earnt, that week will be ignored for the purposes of the reference period.

96. To calculate the Claimant's pay twelve weeks prior to the Claimant's departure, I cross-referenced the Respondent's schedule of payments at p333 with the invoices for the weeks we do have in that period. The last twelve weeks' pay, from invoices dated 28 August 2018 to 10 November 2018, are the last twelve lines in the right-hand column of p333. Where we have the invoices for weeks within that period, I have cross-referenced them and the figures are accurate.

97. I therefore take p333 as an accurate account of what the Claimant was paid in her last 12 weeks: Ms Aisha was given the chance to correct me at the hearing on 16 December 2020 if it transpired that those figures were not accepted.

98. On those figures, for the last twelve weeks of the Claimant's work, she earned £3763.92. This gives an average over that twelve-week period of £313.66 per week.

99. In Ms Aisha's written representations of 22 December 2020, she raised an issue with this weekly figure (an issue that I had not invited representations on), stating that the last entry on p333 (£100.44) was in fact commission that was paid to the Claimant, rather than remuneration of hours worked that week. Ms Aisha therefore argued that I should ignore the last week of £100.44 and go back one more week in the table on p333.

100. The last thirteen entries in the table on p333 are as set out below. Unfortunately, the catalogue of invoices within the bundle is incomplete and I have not had sight of all the invoices to cross-reference the figures on p333, however Ms Aisha accepted the figures on p333 as accurate:

Amount paid	**Date**	**Page in bundle**
283.50	18 August 2018	
480.60	25 August 2018	
283.50	1 September 2018	
283.50	8 September 2018	
283.50	15 September 2018	
396.90	22 September 2018	261
283.50	29 September 2018	
283.50	6 October 2018	
355.14	13 October 2018	262
385.50	20 October 2018	263
344.34	27 October 2018	
283.50	3 November 2018	
100.44	10 November 2018	265

101. The Claimant's invoices were dated the Saturday at the end of the week for which the invoice charged. For example, the invoice dated 20 October 2018 claimed for payment due for work done in the week of 14 to 19 October 2018.

102. At p265 I have the invoice dated 10 November 2018: this does indeed cover solely commission. In other words, the Claimant was not paid for any hours worked in the week of 4 to 9 November 2018, presumably because she did not in fact work any hours on those days (I heard no evidence to the contrary).

103. Section 224(3) ERA provides that:

In arriving at the average weekly remuneration no account shall be taken of a week ***in which no remuneration was payable*** *by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.* – my emphasis.

104. I have no evidence to demonstrate when the work was done for which the Claimant earned the commission, however I find it more likely than not that

the commission related to work done in the preceding twelve-week period. This is because commission relates to "new deals" – see p98. It therefore seems to me that commission would fall payable within a short period of a deal being done, and therefore commission would be paid shortly after the work done to secure such a deal.

105. Therefore, although the Claimant did not undertake any hours of work in the week covered by the invoice of 10 November 2018, commission (remuneration) did become "payable" in that week due to a new deal being finalised. Therefore, I remain of the view that my original calculation is correct, that the correct reference period is the 12 week period covered by the invoices dated 25 August 2018 to 10 November 2018, and that the Claimant's average weekly pay is £313.66.

106. The Claimant's total entitlement to pay for accrued annual leave is therefore 26.15 x 313.66 = £8,202.21.

107. The Respondent has already paid £3,476.09 to the Claimant. The balance due to the Claimant is therefore £8202.21 – £3476.09 = £4726.12.

108. This sum is a gross figure, and therefore to the extent that there is any tax liability attached the Claimant's award of £4726.12, it is the Claimant who will be liable for that tax.

Timeframe for payment of award

109. In terms of the time frame in which the Respondent is to pay the Claimant, again, I asked the parties for representations as to whether the Respondent should be given 28 days, rather than the usual 14 days, from the date the judgment is sent to the parties to pay.

110. The Claimant, via Ms Aisha's written response of 22 December, argued that she has been kept from her money long enough, and should not be made to wait longer than necessary. The Respondent requests a time frame of 28 days.

111. I am acutely aware that, at the date of writing, we have just entered another national lockdown. I am aware that everyone is feeling the financial effects of the pandemic. On balance, I consider that the Respondent should be given the period of 28 days to pay the sum awarded: the Respondent is a company that is trying, like all others, to weather this economic storm. I have sympathy for the Claimant, however I consider that, having waited this long, she can wait an additional 14 days for her award.

_____

Employment Judge Shastri-Hurst

Date: …29/01/2021

Judgment sent to the parties on

.29/01/2021

Jon Marlowe
For the Tribunal office