**Case Nos. 2415213/2020 &**
**2415214/2020**
**Code V**

# EMPLOYMENT TRIBUNALS

**Claimants:** Mr Dariusz Drop & Mrs Karen Drop

**Respondent:** Jintana Limited

**Heard at:** Manchester (by CVP) **On:** 11 January 2021

**Before:** Employment Judge Newstead Taylor (sitting alone)

**REPRESENTATION:**

**Claimants:** Mr Drop & Mrs Drop (In person)

**Respondent:** Mr M Siddall (Director)

Judgment having been sent to the parties on 14 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

# WRITTEN REASONS

**Introduction:**

1. This is the hearing of the claimants' complaints that the respondent has made unlawful deductions from their wages by failing to pay accrued but untaken holiday on termination. The respondent alleges that the claimants were given notice of the requirement to take holiday whilst on furlough, that furlough has been paid correctly and that nothing more is owed.

**The Agreed Facts:**

2. On 25 March 2019 Mrs Drop was employed as a waitress at the respondent. She had average weekly earnings of £95.60 gross. She was on a zero hours contract.

3. On 8 April 2019 Mr Drop was employed as a kitchen porter at the respondent. He had average weekly earnings of £87.63 gross. He was on a zero hours contract.

4. On 23 March 2020 both Mr and Mrs Drop were placed on furlough by the respondent. They received 80% of their wage. In respect of Mrs Drop, this was £76.48 per week. In respect of Mr Drop this was £70.10 per week.

5. In total, Mrs Drop was paid £1,271.21 and Mr Drop was paid £1,362.11 from the start of furlough through to the termination of their employment on 20 July 2020.

6. On 4 August 2020 the claimants went to ACAS. On 2 September 2020 the claimants received the ACAS certificate. On 20 September 2020, the ET1 was issued. On 3 November 2020, the ET3 was received. On 17 November 2020, the respondent sent evidence and documents to the claimants.

**The Tribunal Hearing:**

7. The hearing took place on 11 January 2021.

8. The claimants represented themselves. Both Mr. Drop and Mrs. Drop gave evidence.

9. The respondent was represented by Mr. Mark Siddall, the Director. Mr. Siddall gave evidence on behalf of the respondent.

10. A joint bundle of 92 pages had been prepared for the Employment Tribunal ("the Tribunal.") The Tribunal read the bundle. The Tribunal informed the parties that they should refer the Tribunal to the documents on which they relied regardless of the Tribunal's reading and the cross references in the witness statements. References in square brackets in this Judgment are to the pages of this bundle.

11. The Bundle included a witness statement from Mr Alejandro Garcia. Mr Garcia attended the hearing on 11 January 2021. At the outset of the hearing the Tribunal raised with the parties its concerns as to the relevance of Mr Garcia's evidence. Specifically, Mr Garcia's employment with the respondent began around 5 November 2019 and terminated on 17 December 2019, being approximately 3 months before the period of which the claimants complained. He was not furloughed by the respondent. Accordingly, he had no evidence to give in that regard. Mr and Mrs Drop submitted that Mr Garcia's witness statement provided a picture of the practices in the respondent, specifically concerning foreign employees. However, they agreed, if the Tribunal considered Mr Garcia's evidence not to be relevant, that he should not be called to give evidence. Mr Siddall contended that Mr Garcia's evidence was not relevant. In accordance with Rule 41 of the Employment Tribunal Rules of Procedure 2013 ("the Rules") and the overriding objective, the Tribunal concluded that it would not assist it for Mr Garcia to be called to give evidence. The Tribunal stated that it had read Mr Garcia's witness statement and that the parties could make closing submissions on the basis of that statement if they wished. In fact, neither party did so. In coming to its decision, the Tribunal placed little weight on Mr Garcia's witness statement for the reasons detailed above.

**The Claims & Issues:**

12. At the outset of the hearing, it was agreed that the following issues arose:

12.1 Did the respondent correctly notify the claimants of the respondent's requirement that they take holiday whilst on furlough?

12.2 If they did correctly notify the claimants, were they paid at the correct rate?

The respondent accepted that if the claimants were correctly notified to take their holiday whilst on furlough, then they were not paid at the correct rate because they were paid at the 80% furloughed rate for holiday as opposed to the 100% rate.

12.3 Was there a relevant agreement between the parties that allowed the claimants to carry over the 1.6 weeks leave from the 2019-2020 leave year?

If the claimants were not correctly notified to take their holiday whilst on furlough, then the respondent accepted that they did not take any holiday whilst on furlough and would be entitled to a payment in lieu on termination. Further, the respondent accepted that the claimants were entitled to carry over four-weeks' accrued but untaken leave from the 2019 to 2020 leave year. The dispute was whether or not the claimants were entitled to carry over the additional 1.6 weeks leave from the same year. The claimants said they were, the respondent said they were not.

12.4 It was accepted by the respondent that it had failed to provide a written statement of terms and conditions to each of the claimant's contrary to sections 1-3 of the Employment Rights Act 1996 ("ERA") and section 38 of the Employment Act 2002 ("EA.") The issue was if an award was made whether it should be made for the minimum two weeks or the maximum four weeks.

12.5 Whether or not it was just and equitable for there to be an ACAS uplift for failure to follow the disciplinary and grievance procedure? If so, what percentage uplift should be awarded?

**Findings of Fact:**

13. The Employment Tribunal makes the following findings in this case.

14. As to whether or not the respondent correctly notified the claimants of the requirement to take holiday whilst on furlough, the Tribunal finds that:

14.1 Mr Siddall was responsible for dealing with the relevant paperwork.

14.2 He thought that it was the right thing to do to require the claimants to take holiday whilst on furlough.

14.3 He obtained the template letter from the internet [73.]

14.4 There is no copy of the allegedly completed version sent to the claimants. The template in the bundle is not referable to the claimants. Specifically, it does not contain any personal details or any relevant information [73.]

14.5 There is no record of notice being sent to the claimants. Mr Siddall did not send it recorded delivery. He did not receive a certificate of posting.

14.7 The claimants did not receive the notices.

14.8 On or around 28 June 2020, 5 July 2020 and 10/11 July 2020, Mrs Drop was asked to work by Chef Wi [47-49.]

14.9 On 27 and 30 July 2020, Mr Siddall met with the claimants. In neither of these meetings did Mr Siddall refer to the template letter [73.]

14.10 The first time the claimants were notified that they had taken holiday whilst on furlough was in the meetings on 27 and 30 July 2020 as confirmed by their payslips received on 30 July 2020.

14.11 The first time that the claimants saw the template letter [73] was when it was provided by the respondent in evidence to this claim.

15. As to annual leave:

16.1 The respondent never advised the claimant that they were entitled to take holiday.

15.2 The claimants never asked to take holiday.

15.3 The respondent never encouraged the claimants to take holiday.

15.4 As accepted by the parties in evidence, there was no relevant agreement between the parties that allowed the claimants to carry over the 1.6 weeks leave from the 2019-2020 leave year.

15.5 Mr Drop accrued leave on furlough. Specifically, Mr Drop's leave year ran from 8 April. His employment ended on 20 July 2020.Therefore from 8 April 2020 –20 July 2020 is a period of 103 days or 14.7 weeks.

15.6 Mrs Drop accrued leave on furlough. Specifically, her leave year ran from 25 March 2020. Her employment ended on 20 July 2020. Therefore, from 25 March 2020 through to 20 July 2020 is a period of 117 days or 16.7 weeks.

16. As to the statement of written terms and conditions:

16.1 Neither at the start of their employment nor at any time during their employment did the respondent provide the claimants with written statements of terms and conditions.

16.2 Despite undertaking checks, at no stage prior to these proceedings was Mr Siddall aware that the claimants had not been provided with written statements of terms and conditions.

16.3 Mrs Drop was employed from 25 March 2019 to 20 July 2020, being 1 year, 3 months and 25 days.

16.2 Mr Drop was employed from 8 April 2019 to 20 July 2020, being 1 year 3 months and 12 days.

17. As to the ACAS uplift:

17.1 On 21 July 2020, the claimants raised a formal grievance by email [58.]

17.2 On 27 July 2020, the claimants met with Mr Siddall and discussed that email [65.]

17.3 On 30 July 2020, the claimants again met with Mr Siddall.

17.4 Following those meetings the respondent did not communicate in writing with the claimants about how the grievance was going to be dealt with. Also, the respondent did not inform the claimants of their right to appeal.

17.4 This failure was not intentional but a mistake arising in difficult circumstances, generated in part by the COVID-19 pandemic.

**The Law:**

18. It is possible for employers to require employees to take annual leave whilst on furlough. Any such annual leave must be paid at 100%, not 80%, and the employer must follow the notice requirements in the Working Time Regulations 1998 ("WTR.")

19. Regulation 15 of the WTR, so far as relevant, states:

> **"*15.*—...**
> *(2) A worker's employer may require the worker—*
> *(a)to take leave to which the worker is entitled under regulation 13(1); or*
> *(b)not to take such leave,*
> *on particular days, by giving notice to the worker in accordance with paragraph (3).*
>
> *(3) A notice under paragraph (1) or (2)—*
> *(a)may relate to all or part of the leave to which a worker is entitled in a leave year;*
> *(b)shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
> *(c)shall be given to the employer or, as the case may be, the worker before the relevant date.*
>
> *(4) The relevant date, for the purposes of paragraph (3), is the date—*
> *(a)in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and*
> *(b)in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.*
>
> *(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement..."*

20. In summary, regulation 15(2)(a) WTR entitles an employer to require a worker to take leave, but in order to do so the employer must give notice in accordance with Regulations 15(3)(a)-(c) and Regulation 15(4) WTR. This requires the employer to give notice to the employee before the start date of the holiday period, and the employer must give twice as many days' notice as there are holiday days being taken. So, in this case, if Mr and Mrs Drop were to take five weeks' holiday, they required ten weeks' notice before the first date of that holiday period. However, Regulation 15 WTR does not specify how the notice is to be communicated to the employee I.e. orally and/or in writing.

21. Regulation 13, 13A and 14 WTR, so far as relevant, state:

> ***"13.***
> *(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).*
>
> *(2) The period of leave to which a worker is entitled under paragraph (1) is—...*
> *(c)in any leave year beginning after 23rd November 1999, four weeks.*
>
> *(3) A worker's leave year, for the purposes of this regulation, begins— ...*
> *(b)where there are no provisions of a relevant agreement which apply—...*
> *(ii)if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date....*
>
> *(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—*
> *(a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and*
> *(b)it may not be replaced by a payment in lieu except where the worker's employment is terminated."*
>
> *"**13A** Entitlement to additional annual leave*
>
> *(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).*
>
> *(2) The period of additional leave to which a worker is entitled under paragraph (1) is— ...*
> *(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.*
>
> *(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.*
>
> *(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13...*
>
> *(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due."*

> ***"14.—***
> *(1) Paragraphs (1) to (4) of this regulation apply where—]*
> *(a)a worker's employment is terminated during the course of his leave year, and*
> *(b)on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*
>
> *(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*
>
> *(3) The payment due under paragraph (2) shall be—*
> *(b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*
>
> $$(A \times B) - C$$
>
> *where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;*
> *B is the proportion of the worker's leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date...*
>
> *(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave."*

22. Further, the WTR address the carrying over of leave. In accordance with Regulation 13(1) WTR, the claimants were each entitled to four weeks' annual leave in each leave year. Further, pursuant to Regulation 13(A) (2) (e) WTR the claimants were each entitled to an additional 1.6 weeks, so the total is 5.6 weeks or 28 days; Regulation 13(3) WTR. There are no express provisions for carrying forward unused leave from the four weeks. However, caselaw has established certain exceptions, which include where the worker has been denied their entitlement to holiday leave (***King v Sash Window Workshop [*2018] IRLR 142 ECJ** ) and where the employer has taken insufficient steps to encourage the worker to take holiday (***Kreuziger v Land Berlin Case C-619/16 ECJ)***, which allow the carrying over of the 4 weeks leave. Also, an employer and employee can agree by means of a relevant agreement to carry over the additional 1.6 weeks leave; Regulation 13A (7) WTR. Any leave that is carried over can be paid in lieu on termination; Regulation 14 (5) WTR.

23. Further, as a result of the COVID-19 Pandemic, The Working Time (Coronavirus) (Amendment) Regulations 2020 were enacted. These Regulations have introduced a temporary relaxation of the general rule in Regulation 13 (9) WTR that the 4 weeks leave cannot be carried over and taken in a subsequent leave year.

> ***"13...***

> *(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).*
>
> *(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.*
>
> *(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.*
>
> *(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2)."*

24. In short, as amended, Regulations 13 (10-13) WTR permit the carrying forward of untaken leave where it was not 'reasonably practicable' for the worker to take some or all of their 4 weeks leave in the relevant leave years as a result of the effects of COVID-19. Further, if the employment terminates before the leave has been taken, the worker can receive a payment in lieu of the carried over leave; Regulation 14 (5) WTR. However, these new rules do not apply to the additional 1.6 weeks leave.

25. As to the failure to provide a written statement of terms and conditions, Section 1 ERA and Section 38 EA state

> ***" 1.*** *Statement of initial employment particulars.*
> *(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment..."*
>
> ***"38.***
> ***(****1) This section applies to proceedings before an employment tribunal relating to a claim by [****F1****a worker] under any of the jurisdictions listed in Schedule 5....*
>
> *(3) If in the case of proceedings to which this section applies—*
> *(a)the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and*
> *(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by a worker) under section 41B or 41C of that Act,*
> *the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead..*
>
> *(4) In subsections (2) and (3)—*
> *(a)references to the minimum amount are to an amount equal to two weeks' pay, and*
> *(b)references to the higher amount are to an amount equal to four weeks' pay.*

*(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."*

26. In summary, s.1 ERA and s.38 EA, require, at the start of employment, that the worker is provided with a statement of terms and conditions, and, in default, Section 38 of the Act provides that the sanction is 2-4 weeks' pay.

27. The law in relation to compliance with the ACAS Disciplinary and Grievance Code 2015 is set out in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), which states:

*"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

*(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b)the employer has failed to comply with that Code in relation to that matter, and*

*(c)that failure was unreasonable,*
*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

28. In summary, where a claim concerns a matter to which a relevant Code of Practice applies, if the employer fails to comply with the Code of Practice and that failure is unreasonable the Tribunal may, if it just and equitable, increase any award by up to 25%.

**Discussion & Conclusions:**

29. The first issue is whether or not the respondent correctly notified the claimants of the respondent's requirement that they took holiday whilst on furlough. The claimants contended that no notices were sent, but that, in any event, no notices were received. The respondent contends that notices were sent. Specifically, Mr Siddall's evidence was that he completed the templates with the claimants' details and, on 23 March 2020, posted it in the post box with stamps. The Tribunal has considered all the evidence and, in light of the above findings of fact, concluded that the notices were not sent to the claimants. If, however, the Tribunal is wrong on that then the Tribunal further concludes, as found above, that the claimants did not receive the notices. The Tribunal considers, in analogy with notices of dismissal, that the notice must have been communicated or come to the mind of the addressee in order to be effective; ***Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood*** **[2018] UKSC 22**. Accordingly, the Tribunal has decided that the respondent failed to give notice to the claimants in advance in accordance with the WTR to take their holiday whilst on furlough, and therefore that the claimants did not do so. In coming to this conclusion, the Tribunal has specifically

taken into account the fact that according to the respondent Mrs Drop was on holiday from 1 June – 6 July 2020, but she was asked, by the respondent, to work during that time, the two being mutually inconsistent.

30. Second, as to the carried over leave. It is agreed between the parties that the claimants are entitled to carry over the Regulation 13 WTR 4 weeks leave. Further and for the avoidance of doubt, the Tribunal would, if there had been no agreement between the parties, have concluded that, in the absence of the respondent telling the claimants of their holiday entitlement or encouraging them to take that entitlement, and taking into account Regulation 13 (10-13) WTR, the claimants were entitled to carry over the 4 weeks leave. Also, in accordance with Regulation 14 (5) WTR the claimants are entitled to a payment in lieu in respect of this carried over leave on termination.

30.1 Mr Drop is entitled to four weeks at £87.63, which comes to a total of £350.52.

30.2 Mrs Drop is entitled to four weeks at £95.60, which comes to a total of £382.40.

31. However, as admitted by the parties, there was no relevant agreement between the parties entitling the claimants to carry over the 1.6 weeks leave from the 2019-2020 leave year as required by Regulation 13A (7) WTR and, accordingly, they are not entitled to do so.

32. Third, as to the claimants' payments in lieu for accrued but untaken holiday on termination. Neither Mr nor Mrs Drop have an employment contract. In accordance with Regulation 13 (3) (b) (ii) WTR, their leave year begins on the start date of their employment, being 25th March for Mrs Drop and 9th April for Mr Drop. The claimants accrued holiday whilst on furlough. They are entitled on termination to be paid for the accrued but untaken holiday; Regulations 13 (9) (b) and 14 (2) WTR.

32.1 Mr Drop is entitled to £138.72 calculated as follows 14.7 weeks ÷ 52 x 5.6 = 1.58307692 and 1.58307692 x £87.63 = £138.72.

32.2 Mrs Drop is entitled to £171.93 calculated as follows 16.7 weeks ÷ 52 x 5.6 = 1.79846154 and 1.79846154 x £95.60 = £171.93.

33. Accordingly, Mr Drop is entitled to £350.52 plus £138.72 which is £489.24, being the difference between what Mr Drop has been paid (£1,362.11) and what he should have been paid (£1,851.35). Further, Mrs Drop is entitled to £382.40 plus £171.93 which is £554.33, being the difference between what Mrs Drop has been paid (£1,271.21) and what she should have been paid (£1,825.54).

34. Fourth, as to the respondent's failure to comply with the ACAS Disciplinary and Grievance Code 2015. the Tribunal has found that the respondent failed to comply in full with the ACAS Disciplinary and Grievance Code 2015 for the reasons detailed above. Whilst the failure was unintentional, it was unreasonable. In particular, it left the claimants unaware both of how the grievance would be dealt with and that they could have an appeal if they were unhappy with the outcome. The Tribunal invited Mr Siddal to address this point in evidence and/or submissions. Mr Siddall's evidence was that it weas not intentional. He was run off his feet. It was a mistake and he apologised.

In the circumstances the Tribunal considers it just and equitable to increase the award by 15% to reflect the failure. The uplift is applied to the balance owing to the claimants excluding the award for failing to provide them with written statements of terms and conditions.

33.1 Mr Drop is awarded £489.24/100 x 15 = £73.39.

33.2 Mrs Drop is awarded £554.33/100 x 15 = £83.15

35. Fifth, as to the respondent's failure to provide the claimants with written statements of terms and conditions. The claimants have recovered an award under their claims for unlawful deduction from wages which is a claim within S.38 and Schedule 5 EA. At the start of these proceedings, as conceded, the respondent had not provided the claimants with written statements of their terms and conditions, therefore the Tribunal must increase the award by the minimum of two weeks' pay. The Tribunal has considered whether it is just and equitable to increase the award to the maximum of four weeks' pay. The Tribunal invited Mr Siddall to address this point in his evidence and/or submissions. Mr Siddall's evidence was that the omission was not intentional. It was just a lapse in procedure. He submitted that any award should be for the minimum of 2 weeks. The Tribunal considered the evidence and the submissions and has decided that it is just and equitable to increase the award by the maximum of four weeks. In particular because the claimants were never provided with written statements despite both working for the respondent for over a year, which is a significant period of time, and there was no good reason given for the failure to do so.

34.1 Mr Drop is awarded £350.52, being 4 x £87.63.

34.2 Mrs Drop is awarded £382.40, being 4 x £95.60.

36. In conclusion, Mr Drop is entitled to:

35.1 £350.52, for the 4 weeks carried over leave.

35.2 £138.72, for the leave accrued on furlough.

35.3 £73.39, for the ACAS uplift.

36.4 £350.52, for the failure to provide a written statement of terms and conditions.

TOTAL: **£913.15**

37. Mrs Drop is entitled to:

36.1 £382.40, for the 4 weeks carried over leave.

36.2 £171.93, for the leave accrued on furlough.

36.3 £83.15, for the ACAS uplift.

36.4 £382.40, for the failure to provide a written statement of terms and conditions.

TOTAL: **£1,019.88**

38. The figures given above differ from those given in the oral judgment during the hearing. A full explanation of that difference was provided in the written judgment set to the parties on 14 January 2021**.**

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Employment Judge Newstead Taylor

Date: 5 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 February 2021

FOR THE TRIBUNAL OFFICE