



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

**Respondent**

Mr D Lika

**AND**

Top Star Hand Car Wash Ltd

**RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT Birmingham** by CVP

**ON 30 July 2020**

**EMPLOYMENT JUDGE Dean sitting alone**

**Representation**

**For the Claimant: in person**

**For the Respondent: Mr R Prais, solicitor**

## **JUDGMENT**

**The judgment of the Tribunal is that:**

The claimant's complaint that the respondent has failed to pay accrued holiday pay in breach of Regulation 16 Working Time Regulations 1998 does not succeed. The complaint is dismissed.

## **REASONS**

### **Background**

1. By way of background in this case the claimant Work for the respondent from the 1st of September 2016 until the 8th of August 2019 when he resigned with immediate effect.
2. The claimant began early conciliation through the offices of ACAS on the 11th of September 2019 and an early conciliation certificate was

issued on the same day. The claimant issued proceedings in the employment tribunal on the 11th of September 2019. The claimant brings a claim for holiday pay accrued from 1st September 2016 until the termination of his employment. The case comes before me following a preliminary hearing by telephone on the 16th of April 2020 before Employment Judge Lloyd. He gave case management directions for a hearing before an employment judge sitting alone.

### **Issues**

3. The issues before the employment tribunal to be determined by me are:-
  - a. Is there outstanding accrued holiday pay due to the claimant?
  - b. Are the timesheet and payment records produced by the respondent, accurate or not, and similarly are the records produced by the claimant accurate or not?
  - c. How far has the claimant back dated his holiday pay claim?

### **Evidence and findings of fact**

4. I have heard evidence from the claimant on his own behalf and from Mr Patel the owner of the business. I have been referred to a bundle of documents that has been prepared as directed by Employment Judge Lloyd that extends over 156 pages. I have considered the witness statement from the parties, the claimant and from Mr Patel the owner of the business. Mr Lika has been assisted by his wife in presenting his case.
5. The Respondent began the hearing asserting that this was a case in which the claim should be struck out as having no reasonable prospect of success. The respondent asserts that although the claimant was engaged initially on a "Zero hours" contract the claimant was paid the same amount each month and that his pay included a sum that was accruing holiday pay. The claimant asserts that the pay documentation issued by the respondent in the bundle was a sham and does not reflect the truth of the arrangements between the parties. Mr Lika claims that he was paid weekly in cash and was not paid for holidays. On the basis of the papers before me without hearing evidence to explain the documentation and the likely truth in the case I am unable to say that the claim has no reasonable prospect of success. I concluded that it would be necessary for me to hear evidence that can be examined by each party and clarified by me to reach findings of fact and reach a conclusion on the issues that I am required to determine.
6. The respondent's application that the claimant's complaint should be struck out under rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 does not succeed.

7. The claimants complaint as originally detailed in his claim form was bare in it's detail. At the claim is identified as being a claim for holiday pay at 8.1 and at 8.2 he states :  
*"I had been working at top star car wash from first September 2016 until 8th August 2019. During this time I have not been paid any holiday pay I would like to claim back my holiday pay from these dates."*
8. The claimant does not provide details of his holiday claim until in his statement the tribunal [23-24]. The claimant states that he was paid cash each week and was given a pay slip each month which confirmed at that tax was deducted from his money. By reference to the pay advice slips which the claimant says he received Every month he was paid an hourly rate which I know it was at the national minimum wage and month in month out he is credited with having worked a standard number of hours in each month deductions were made for PAYE tax and National Insurance and employers and employees pension contributions. Claimant confirms that at no time during the course of his employment did he query that the net payment he received was different from that notified to him on his pay advice slip. At the tribunal the claimant has suggested that the pay advice slips were a device that the respondent used to satisfy HMRC recordkeeping requirements.
9. I have been referred to a contract of employment issued to the claimant on the 1st of September 2019 [21] which states the claimant was working a zero hours contract. The claimant has confirmed in his account to me that his weekly hours of work fluctuated and that on average the claimant worked 8 to 9 hours a day often 6 days a week. The claimant worked as the manager of the site.
10. On 1 June 2017 at the claimant request Mr Patel wrote a letter for the claimant to show a third party confirmation of his employment and his income [148]. The letter confirmed that the claimant was employed as a manager in the company and detailed:  
*" He has a full time position within the company and is secure in his position for as long as he wishes. He is currently being paid £7.50 per hour. Accumulating in the region of £13800+ per annum. He is paid by cash."*
11. I have been referred to a variety of pay advice slips by the parties and in respect of the periods when the claimant says he took holiday and was not paid it is evident that in every style of pay advice slip to which I have been referred that the claimant was paid the same amount of pay recorded in his advice slip whether working at work or absent on holiday.
12. The claimant in his witness statement [23-24] which was part of the bundle of documents submitted to me states that he received no pay for the holidays he took in the periods he claims:

*“Ref 1 October 28<sup>th</sup> 2016 to November 6<sup>th</sup> 2016 10 days  
Ref 2 May 3<sup>rd</sup> 2017 to May 12<sup>th</sup> 2017 10 days  
Ref 3 July 3<sup>rd</sup> 2018 to July 18<sup>th</sup> 2018  
Ref 4 February 21<sup>st</sup> 2019 to March 4<sup>th</sup> 2019 10 days”*

13. The parties have referred me to a number of styles of pay advice slips for the continuous period of the claimant's employment. The pay slips are consistent and refer to a standard number of units or hours attributed to being worked in the relevant pay period being 173.33 units of an hour which was paid at the national minimum wage rate.
14. Having heard the evidence I find that working within the car wash business the claimant was the manager and was as confirmed in the letter the claimant gave to third parties was paid in cash. I accept the evidence given by Mr Patel that on occasions the claimant would ask for an advance to be made on his wages and from time to time advance payments were made and that the total sum paid to him each week was balanced to the total net sum detailed in the pay advice slip.
15. The claimant does not dispute in his complaint to the Tribunal that the respondent failed to pay him all of the monies due for the time that he worked. The claimant has provided no evidence to me that the monies he received each month did not tally with the net sum that he was stated to have received in his pay advice note.
16. The only occasion when the claimant was not paid the full hourly rate of pay was on a single occasion when the payment was made for Statutory sick pay when the claimant was self certified as unwell.
17. I find that the contractual arrangements between the parties that the claimant was paid as a manager and paid for a fixed number of hours irrespective of the actual hours worked in any week.
18. The claimant's suggestion that he was not paid for the weeks when he was absent from work on holiday does not have a credible ring to it. The claimant worked for the respondent for a significant period of time and raised no complaint or grievance to his employer if, as the claimant asserts he was not paid while he was absent from work. I accept the evidence given by Mr Patel, which is supported by the letter written at the claimant's request that the claimant was employed full time and that his income was the same each month, the variable being the annual increase in the national minimum pay rate.
19. The claimant has not provided any personal records on relation to his claim and not kept a record of the sums that he says he was paid on a weekly basis if different to the sum identified by the respondent as being paid to the claimant in his monthly pay advice. The claimant in his opening remarks has suggested that he was paid weekly in cash and that he did not receive monthly pay slips. It became evident

however that the claimant received monthly pay slips from the start of his employment [108]. The claimant has understandably been confused by the different format of pay advice slips in respect of his employment that the respondent's accountant prepared for their records. What is clear is that all versions of the pay advice slips for the relevant periods and throughout employment consistently identified the monthly pay, hours and rate of monthly payment and the deductions that were lawfully made.

20. Having considered the evidence I find that the claimant was informed by the respondent that he was paid for the time he was away from work on holiday in the same way as he was whilst at work. I find that while on holiday the claimant was paid the same monthly pay as when he was at work.
21. The claimant has queried why the respondent made a deduction from his pay when he was unfit [107]. I am satisfied that the respondent made a deduction from the claimant pay in reducing his hours to the rate of Statutory Sick pay where appropriate.
22. The respondent company is not a sophisticated employer. The respondent has been open in confirming that following an HMRC investigation in January 2018 it began to keep the time sheet records on their staff which numbered on average 8 employees including the claimant that previously the respondent had destroyed as redundant information once the hours worked had been paid.
23. I have no doubt that had the claimant not been paid at the end of each month the monies that he claimed to be due if working more than the 173.33 hours allocated to him on the pay advice slips he would have raised a compliant to his employer or at very least kept a record of the monies that he claimed were due. The respondent paid the claimant for an average weekly working week of 40 hours per week even when the hours worked were less. The respondent considered the claimant did a good job for him and that was the rate paid for the job.
24. I have considered the time sheets that have been included in the hearing bundle. The respondent has explained that prior to an HMRC audit the company had not retained its copies of time sheets which are presented to me from January 2018 onwards. Although the claimant has suggested that his copies of time sheets are different to those submitted by the respondent I find that the substantive content in so far as it relates to hours worked by the claimant is consistent in the two sets of time sheets produced to me. Mr Patel has annotated with an 'H' where the claimant has been on holiday.
25. What is evident from the time sheets is that irrespective of days identified as holiday the claimants accrued worked hours each week are, with only 2 exceptions, below 40 hours a week. Those two exceptions were in weeks 11.02.19 – 17.02.19 [63] which record 42 hours being worked by the claimant and 1.07.19 – 7.07.19 [89] which

recorded 42 hours being worked by the claimant. I find that based upon the undisputed hours recorded as being the hours in respect of which the claimant was paid each month the timesheets made available to me demonstrate that the claimant was paid for hours in excess of those on which he worked. In reality the hours recorded on occasions were often significantly less than a 37 hour week. I find that the claimant was paid a normal weeks pay monthly that was based on 173.33 hours each month, 40 hours a week.

26. The claimant has stated that the reason he brought no complaint about the non-payment of holiday pay whilst he was in employment was because he feared losing his job, were that to be the case I would have a reasonable expectation that the claimant would be able to inform me what monies he received for the relevant monthly pay period that was different to that stated in the monthly pay advice slip, no such evidence is before me. Were the claimant's account to be considered by me to be credible I would have expected him to have identified where his pay was more or less than the sums credited to him in the monthly advice slips that were given to him, no such evidence has been provided.
27. In conclusion I find that the claimant was employed by the respondent to manage the car wash business. The claimant's employment, though initially stated to be on a zero hours contract, was varied and he was paid a normal weeks pay based on working full time 40 hours a week working 173.33 hours a month. The claimant was paid based upon an average 40 hours work per week at national minimum wage and was paid monthly with weekly cash payments being made to the claimant on account of his monthly entitlement that was balanced at the end of the month to the net sum on the pay advice slip. I find no evidence to persuade me that the pay advice slips sent to the claimant were anything other than an accurate reflection of the pay arrangements between the parties. The claimant was entitled to take his annual working time holiday entitlement and when on holiday he continued to be paid his normal weeks' pay.
28. The claimant was paid his monthly pay in cash regardless of whether on holiday or not. The claimant was paid the monthly sum due to him regardless of whether he was at work or on holiday. The claimant was paid his normal months pay while on holiday and I am unable to find that the claimant has an entitlement to unpaid holiday pay for the holiday dates that he claims.
29. The pay advice records the claimant confirmed were sent to him on a monthly basis and were not challenged by him as not representing the contractual arrangements between him and his employer. Whilst the respondent can be criticised for not issuing to the claimant an updated contract of employment or statement of terms and conditions of employment to reflect the contractual arrangements as I have found them to be, the documentary evidence supports the respondent account that the claimant was paid for normal working hours that did

not vary month to month and which on many occasions were more than his actual worked hours recorded on time sheets.

30. The documentary evidence establishes that the claimant was paid for a normal weeks pay calculated by reference to a normal working weeks of 40 hours that were paid. The respondent I have no doubt has been made aware by these proceedings of the wisdom of reducing the agreed contract terms to writing.
31. The claimant's compliant that he is entitled to pay in respect of holidays accrued to him and taken does not succeed.

Signed by Employment Judge Dean on 8 February 2021