



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103631/2020

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Held via Cloud Video Platform (CVP) on 14 January 2021

Employment Judge A Jones

10 **Mrs N Keel**

**Claimant
Represented by:
Ms J Mullen -
Sister**

15 **Coffee Club**

**Respondent
Represented by:
Mrs A Potter -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was entitled to be paid in lieu of 7.94 days' annual leave which had accrued and not been taken on termination of her employment. The respondent is ordered to pay to the claimant the sum of £510.94.

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REASONS

Introduction

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1. The claimant raised a claim alleging that the respondent had failed to pay the claimant in lieu of annual leave accrued but not taken at the date of termination of her employment. A preliminary hearing took place on 21 September 2020 in this matter, and the Note of that hearing set out the evidence the Tribunal would require to hear in order to determine the claim.

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2. Both parties lodged documents with the Tribunal in advance of the hearing. The claimant was represented by her sister, Ms Mullen and the respondent was represented by the respondent's director, Mrs Potter. The Tribunal heard evidence from the claimant and Mrs Potter, both of whom gave their evidence in a straightforward manner.

Findings in fact

3. Having heard the evidence and considered the documents to which reference was made, the Tribunal found the following facts to have been established (in addition to the agreed facts set out in the Note of the Tribunal).
- 5 4. The claimant was employed by the respondent as an Assistant Floor Manager.
5. Prior to being placed on furlough, the claimant had booked annual leave on 8,9,17-19, 28-30 April, 1-3 May and 2 June. She had not taken any annual leave before 20 March.
- 10 6. The claimant texted Mrs Potter on 13 March, to cancel her leave between 27 April and 1 May. Mrs Potter agreed to that request and advised the claimant not to book any leave as she would not be able to get any insurance for travel.
7. The claimant was placed on furlough from 20 March 2020 until 15 June 2020. An email was sent by the respondent to the claimant requesting her
15 agreement to being placed on furlough. There was no mention in the letter of whether or not the claimant could take annual leave during furlough. The claimant was paid 80% of her normal income during the period of furlough.
8. There was no communication between the respondent and the claimant in relation to annual leave during furlough.
- 20 9. The claimant resigned from her employment and her employment terminated on 16 June 2020
10. The respondent paid the claimant the sum of £61.06 following the termination
25 of the claimant's employment, which was said to be a top up payment to the furlough pay the claimant had received during the period of annual leave the respondent said the claimant had taken, when the claimant ought to have received her normal pay.

Observations on the evidence

11. There was little disagreement on the facts of this case. The only material dispute was the interpretation of the text exchange between the claimant and respondent regarding the cancellation of holidays. The respondent's position was that the claimant was only being helpful in offering to cancel her leave, that this offer wasn't accepted and that a subsequent discussion took place where the respondent indicated that the claimant did not need to cancel the holidays. The claimant's position was that although the text said 'I can' rather than 'can I', this was due to the claimant's dyslexia and that it was clear what she meant. The claimant also indicated that she took the respondent's response to mean that the leave was cancelled. The claimant denied any subsequent conversation took place regarding the leave. The Tribunal preferred the evidence of the claimant in this regard. It seemed to the Tribunal the claimant was entitled to conclude that the text exchange meant that her request or offer (which ever it was) was accepted by the respondent. The Tribunal accepted the claimant's evidence that there was no further discussion in relation to the matter.

Discussion and decision

12. The question for the Tribunal to determine is whether an employee who has booked annual leave and is then placed on furlough is deemed to have taken that annual leave in these particular circumstances. The relevant circumstances were

- a. where there has been no discussion between the employee and employer about the effect of being on furlough on pre booked annual leave, and
- b. where the employee's pay is not topped up during the period of putative annual leave.

13. It was agreed between the parties that the claimant had accrued 7.94 days leave by the termination of her employment. During the days on which the respondent said that the claimant was on leave the respondent paid her 80%

of her normal pay and did not pay the top up amount until after the termination of the claimant's employment, and after the claimant had raised the issue with the respondent.

- 5 14. The Tribunal had considerable sympathy with the respondent's position, given that there was no government advice provided in relation to the taking of annual leave during furlough until 15 May. Further, that advice did not make any reference to what should happen to leave which had been pre-booked prior to furlough commencing.
- 10 15. However, the Tribunal also noted that the respondent did not discuss with any of its staff what impact being on furlough would have to any pre-booked annual leave. The terms of the email sent to the claimant made no reference to annual leave at all and simply stated that staff would be placed on furlough and be paid 80% of their normal pay.
- 15 16. Further, and crucially, there was no top up payment made to the claimant at the time she was said to be on leave. In these circumstances, and taking into account the terms of the email sent to the claimant regarding furlough arrangements, the Tribunal concluded that the claimant did not take any annual leave during the period she was on furlough and was entitled to be paid in lieu of that annual leave on termination of her employment.
- 20 17. Therefore, the respondent is required to pay the claimant the sum of £572, being calculated on the basis of 66.62 hours, being 7.94 days at an hourly rate of £8.60. However, the respondent should be given credit for the sum of £61.06 which was paid to the claimant after the termination of her employment. Therefore, the respondent is Ordered to pay to the claimant the
25 sum of £510.94 in lieu of leave entitlement accrued but untaken on the termination of the claimant's employment.
- 30 18. If the Tribunal is wrong in this regard, then as the Tribunal concluded that the claimant had cancelled a week's leave from 28th April, the claimant would have been entitled to receive holiday pay for that period, subject to deduction

of element of top up pay paid to the claimant by the respondent after the termination of her employment.

- 5 Employment Judge: Amanda Jones
- Date of Judgment: 10th February 2021
- Entered in Register: 16th February 2021
- Copied to Parties