



# EMPLOYMENT TRIBUNALS

**Claimant: Ms N Fodor**

**Respondent: Westwood Hotel  
Limited**

**v**

**Heard at:** by CVP

**On: 2 February 2021**

**Before:** Employment Judge Milner-Moore

## **Appearances**

**For the Claimant:** Mr Fodor (Claimant's father)

**For the Respondent:** Mr A Healey

## **JUDGMENT**

1. The claim for unpaid holiday pay succeeds, the claimant is awarded the sum of £896.
2. The claim for breach of contract succeeds, the claimant is awarded the sum of £1,056.

## **REASONS**

1. This case was listed for a three-hour hearing to determine a claim brought by the claimant that she had not been paid the holiday pay due to her. In a schedule. In a schedule of loss submitted well in advance of loss the hearing the claimant also included a claim for breach of contract in respect of the failure to give her the contractual notice to which she was entitled on termination of her employment.
2. The hearing took place remotely by video using the CVP platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The parties were able to use the technology effectively.

### **Documents and conduct of the hearing**

3. Orders had been made regarding the steps to be taken by the parties before the hearing. The parties had been ordered to provide disclosure by 28 December 2020. The respondent was ordered to produce a bundle of

documents for the hearing and to provide copies to the claimant and the Tribunal by 11 January 2021. The parties were ordered to exchange witness statements by 29 January 2021.

4. On 13 December 2020, the claimant produced a summary of her case and a schedule of loss accompanying bundle of documents of 36 pages which was filed with the Tribunal and the respondent. The respondent did not produce a bundle but on 1 February 2021 sent to the Tribunal two emails containing 31 individual pdfs of documents. These had been sent to Mr Fodor on 30 January 2021. Neither party had produced a formal witness statement. Mr Healey had not taken any steps to ensure that he had a copy of the claimant's bundle accessible to him during the hearing, despite it's having been sent to him in good time. I considered whether it was possible to conduct a fair hearing in the circumstances and concluded that it was.
5. I treated the claimant's ET1 and case summary as her witness statement. I invited Mr Healey to confirm whether there was any document which summarised the respondent's case, aside from the ET3. He directed me to a short email dated 30 January 2021 which he had written to Mr Fodor. I therefore treated the ET3 and this email as Mr Healey's statement. Mr Fodor raised no objection to the late provision of material by the respondent. In fact, there was some degree of overlap between the material produced by the respondent (in so far as it was relevant) and the contents of the claimant's bundle, so the amount of additional material to be considered on either side was fairly limited.
6. I asked Mr Healey to identify what he considered to be the key documents amongst the 31 pdfs that had been emailed over, as some did not appear to be relevant. (For example, the documents included the respondent's consolidated accounts which Mr Healey relied on to show that the respondent had made a loss.) Mr Healey said that he would rely particularly on some holiday charts, on the claimant's payslips, and on a schedule detailing the payments made to the claimant. I focussed my pre-reading on these documents but, having reserved my decision, I can confirm that I have read all of the documents submitted by Mr Healey.
7. Mr Healey had been assisted by a family member to access the CVP room and did not feel confident about his ability to enter and leave the room unaided. He had printed out the respondent's documents but had not printed the claimant's bundle. Although this had been sent to him electronically, he did not feel able to read the electronic document on the computer that he was using to access the hearing. He was concerned that he might inadvertently disconnect himself and be unable to reconnect. He had no other device on which he could access the claimant's bundle and was unable to print it for himself. He confirmed that he had nonetheless had an opportunity to read the claimant's case summary and documents ahead of the hearing. Much of the claimant's bundle consisted of documents that had also been produced by the respondent (the ET3, pay slips and summary of payments made). The key additional document of relevance was a copy of the claimant's contract of employment which was something

that Mr Healey could be expected to be familiar with. The claimant's case summary was also read aloud to him so that he had an opportunity to remind himself of its contents before cross examining the claimant.

### Facts

8. The claimant began her employment with the respondent on the 10<sup>th</sup> December 2018 as a Hotel receptionist/Front of House supervisor. The respondent operates a Hotel based in Oxford. The claimant was paid £8.21 an hour at the relevant time. Her contract of employment provided that she was guaranteed up to 30 hours of work a week but could be required to work up to 40 hours a week. The claimant was entitled to 28 days a year annual leave (including public holidays). The contract provided "*On termination your annual leave entitlement will be calculated on a pro rata basis and you will receive payment in lieu of any accrued but untaken annual leave. If you leave the Company having taken more annual leave than you were entitled to, you hereby consent to the Company making a deduction from your final salary payment.*" The claimant was provided with accommodation at the hotel and the contract provided "*For £40 a week, you will receive accommodation in room 10. This amount will also include staff food, which must not be abused. A minimum of one-month notice will be given from the employer is the business closes. During this 1 month notice period, the employee is entitled to receive the salary of one month salary, for the expected hours worked in 1 month and accommodation as mentioned above*". The contract provided for termination by giving written notice and required a notice period of 4 weeks. The contract contained a clause authorising a deduction from wages "*you authorise the Company to deduct from your salary any sums due to the Company including, without limitation, any overpayment of salary, any advances or loans made to you by the Company and the cost of repairing any damage or losses to the Company or its property caused by you or as a result of any neglect or breach of duty by you.*"
9. The Hotel appears went through periods of shutdowns and as a result employees were anxious about whether they would be paid. It was agreed that they would be paid weekly. However pay slips were issued monthly. The payslips are not specific about the dates and times in respect of which payment was made. The claimant found it difficult therefore to establish whether she had received the correct amounts of pay. The payslips do not show £40 per week for accommodation being routinely deducted from the claimant's pay. Deductions for rent, of various amounts, appear in some pay slips but not others. The claimant's evidence, which Mr Healey accepted, was that the respondent adopted a policy of not deducting rent in weeks when employees had not received the minimum guaranteed hours. Mr Healey denied that this policy would have been applied to the claimant in practice because she usually worked at least the minimum hours. He suggested that if rent was not deducted in any month, it must have been an oversight. However, I find that if no rent was deducted in some months this was because the respondent had decided not to require the claimant to pay rent during those months.

10. The respondent seems to have taken the view that it could close the hotel from time to time and place the employment relationship “on hold” and then resume that relationship once it was clear that the hotel could reopen. The hotel closed down for a period in August 2019. A schedule was produced to record the leave entitlement for each member of staff. The note recorded that, as at the end of July 2019, the claimant had accrued entitlement to 12.65 days annual leave of which she had taken 4 days. The claimant was therefore entitled to 8.65 days. The respondent elected to pay the claimant for untaken annual leave and calculated this to amount to £497 (gross) £422 (net). The claimant signed to record “*I agree that with the above payment all of my holidays until end of July will be paid. My next holiday will be calculated from 1 September 2019*”. On 22 August 2019, the claimant was paid £422 and I find that this payment related to the holiday listed in this schedule. The hotel then reopened in September. It appears from the schedule that the respondent was treating the employment relationship as terminated during August. However, the respondent did not expressly terminate the claimant’s employment and there was no contractual entitlement for the respondent to lay off staff. The claimant therefore continued to be employed and continued to accrue holiday entitlement during August.
11. The ET3 filed by the respondent states that the claimant was given notice on 8 December 2019 that her employment would terminate on 15 December 2019. The claimant was required to sign schedule in December which recorded her holiday entitlement for the period September to end November 2019 as 7 days and the amount payable in respect of this entitlement as £459 (gross) (7 x 8 hours x £8.21). The claimant was asked to sign a form to confirm that she agreed with the record and to acknowledge that “*with the above payment, all of my holidays until the end of January 2020 will be paid*”. The form indicated that payment would be made by 15 January 2020. However, no such payment was made. The claimant’s last payslip was dated 3 January 2020 and made payment for 31 hours and appears to relate the claimant’s work during the first week in December. It included no element for holiday pay and no notice pay in respect of the notice period.
12. The claimant left the hotel on 15 December 2019 and emailed on 8 January 2020 to state that she would not be returning and wished to receive her holiday pay of £459. Mr Healey described this as a resignation and was critical of the claimant’s failure to return. It is not clear why he took this stance given that his own case was that her employment had already terminated by this point.
13. In her case summary, the claimant claimed unpaid holiday from April 2019 to the end of 2019 (21 days x 8 x £8.21 = £1379.28). She also claimed one month’s notice (4.3 weeks times 40 hours x £8.21 = £1,412.12) and unpaid holiday during the notice period (2 x 8 x £8.21 = 131.36) plus damages for injury to feelings. The respondent’s response suggested that the claimant had been given notice on 8 December that the hotel would close and that her employment would terminate on 15 December 2019. The respondent’s

position as to whether the claimant was owed any money has shifted over time. The ET3 appeared to accept that the claimant was owed holiday for October and November “*less rent of £28.57*” and so was owed £209.39. In his email of 30 January 2021, Mr Healey suggested that in fact the claimant was owed nothing because her gross holiday pay of £459 would be £400 (after deduction of tax and national insurance) and was extinguished by £420 owed in rent. Mr Healey provided no evidence in support of his assertion that £420 was owed in rent nor did he explain how this figure had been arrived at.

## Law

14. Regulation 14 of the Working Time Regulations 1998 sets out the way in which compensation relating to untaken annual leave is to be calculated on termination of employment

**14.— Compensation related to entitlement to leave**

(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—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(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.

15. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 article 3 provides:

3.

Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages,

or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

## **Conclusions**

16. **Unpaid annual leave:** The claimant was employed for just over one year (10 December 2018 to 15 December 2019) and so was entitled to 28 days' annual leave. During that year, she took 4 days annual leave. Although the respondent had no entitlement to pay for untaken annual leave whilst employment was continuing, she was paid in August 2019 for the balance of her accrued leave as at 31 July (8.5 days leave). When her employment ended, she was therefore entitled to 11.5 days leave and to compensation of  $11.5 \times 8 \times \text{£}8.21 = \text{£}755$ . The claimant would also have been entitled to a further 2.15 days annual leave in respect of the four-week period of her notice.  $2.15 \times 8 \times \text{£}8.21 = \text{£}141$ . Sums payable for unpaid annual leave are awarded gross and it is for the claimant to deduct tax and national insurance etc.
17. The respondent asserts that £420 in rent is owed and should be set off against any sum payable. However, I do not consider that any such deduction should be made. First, I have found that rent is not owed because the respondent had actively decided not to charge the claimant rent during some of the months her employment. Even if I am incorrect to draw that conclusion, I consider that the respondent has failed to evidence the amount of rent that is owed or to explain how the figure of £420 has been arrived at. (I note that the respondent has advanced differing accounts of the amounts said to be owed in rent). The onus is on the respondent to evidence the sums that it wishes to have set off against what is owed, and the respondent has failed to do so.
18. **Notice pay:** Although the ET1 did not include a claim for notice pay I considered that it would be in the interests of justice to allow the inclusion of this claim by amendment. Whilst represents a new head of claim, it is one that arose out of the facts set out by the respondent in its ET3. I considered that the respondent's practice towards its employees during periods in which the hotel was to be closed would have left the claimant uncertain regarding the status of her employment during December 2019, which is why she purported to resign in January 2020. However, in its ET3, respondent had positively asserted a case that it had terminated the claimant's employment on a weeks' notice. The respondent was aware of this claim for notice pay after receiving the claimant's case statement and schedule of loss in December 2020. I considered therefore that the respondent was not placed at a disadvantage by the addition of this claim and had sufficient time to address it.

19. The claimant's contract provided that she was entitled to 4 weeks' notice.  $4 \times 8 \times 5 \times \text{£}8.21 = \text{£}1,313.60$ . I have assumed that the respondent would have elected to exercise its contractual right to charge rent during the notice period and so  $\text{£}160$  ( $4 \times \text{£}40$ ) must be deducted, giving a total of  $\text{£}1,153.60$ . I have calculated that after deduction of tax (approximately  $\text{£}39$ ) and national insurance (approximately  $\text{£}59$ ), the claimant would have been entitled to a net sum of  $\text{£}1,056$ .

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**Employment Judge Milner-Moore**  
**Dated 15 February 2021**

Date: .....

Sent to the parties on: .8 March 2021  
T Henry-Yeo

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For the Tribunals Office

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**Note:**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.