



EMPLOYMENT TRIBUNALS

Claimant: Mr A Saleban

Respondent: Mitie Limited

Heard at: London Central by CVP

On: 8th January 2021

Before: Employment Judge F Spencer

Representation

Claimant: No appearance

Respondent: Mr K Wilson, counsel

This was a remote hearing which had not objected to by the parties. The form of remote hearing was by cloud video platform (CVP). A face-to-face hearing was not held because Victory House is shut, and all issues could be determined in a remote hearing.

JUDGMENT ON RECONSIDERATION

UPON A RECONSIDERATION of the judgment dated 16th September 2020 under Rules 70-72 of the Employment Tribunals Rules of Procedure 2013 the Judgment **is revoked**.

REASONS

1. Following a hearing on 14 September 2020 I issued a judgment that the Claimant was entitled to an additional 12 days leave for the holiday year 2019/2020.
2. The Respondent applied for a reconsideration of the Judgment, pursuant to rules 70- 72 of the Employment Tribunal's Rules of Procedure 2013. The basis of that application was that the judgment of the Court of Appeal *in Harpur Trust v Lesley Brazel 2019 EWCA Civ 1402* had been central to my judgement and had not been referred to during the course of the hearing, either by the parties or by the tribunal. I granted that application for a reconsideration.
3. The Claimant did not attend the reconsideration hearing. It appeared that

the notice of hearing and the joining instructions had been properly sent to the Claimant and Mr Wilson noted that the Respondent had sent the Claimant the reconsideration bundle and all relevant correspondence. Accordingly, he applied for the hearing to go ahead in the Claimant's absence. As I understood that the Claimant had received all relevant notices and documentation I agreed to that request.

4. The basis of the application for reconsideration was that Harpur Trust was distinguishable from the Claimant's case. Harpur Trust concerned individuals described by Underhill LJ as "part year workers". The Respondent submitted that the Claimant in this case was not a part year worker, and his position was more akin to that of a part-time worker addressed at paragraphs 57 and 63 of the judgment in Harpur Trust.
5. I accept that Mr Saleban in this case is not a part year worker of the type described in Harpur Trust. He is also not a part-time worker as described in paragraph 64 of the judgment in Harpur Trust i.e. someone who works regularly 2 days a week. He is on a zero hours contract, and though, for the most part throughout the holiday year he worked 2 or more days a week he was not obliged to do so. At paragraph 73 of the judgment in Harpur Trust the Court of Appeal says this "*On any natural construction the WTR make no provision for pro rating. They simply require, as the Claimant says, the straightforward exercise of identifying a weeks pay in accordance with the provisions of section 221 to 224 [of the Employment Rights Act 1996] and multiplying that figure by 5.6.*"
6. This is not what the Respondent has done. Instead, as set out in paragraph 9 of my judgment, it has pro-rated his leave entitlement to the percentage of the year that he has worked. Then for each day of leave he has been paid a day's pay, properly calculated in accordance with sections 221-224 of the Employment Rights Act. The Respondent submits that this is equivalent to providing a week's pay multiplied by 5.6 "because for each 2 days off he receives the equivalent of a full week's average pay based on his average working week. Using this method the Claimant would receive his full entitlement to holiday pay in 11.6 days – it is his leave entitlement is pro-rated rather than the rate of pay for the time taken off."
7. As I set out in my earlier Judgment the method used by the Respondent is a fair one. However, in that Judgement I considered that I was bound by the decision in Harpur Trust
8. Nonetheless after reconsideration I accept the Respondent's submission that Harpur Trust is distinguishable because
 - a. The Claimant in this case is not a "part year worker".
 - b. The decision in Harpur Trust related to how payments in respect of annual leave should be calculated, rather than to the question of leave entitlement more generally (see paragraph 5 of the written application for reconsideration) .
 - c. The decision in Harpur Trust related to the 12.07% accrual rate, which is not the method used in respect of this Claimant.

9. I therefore revoke my decision.
10. The notice of the consideration hearing sent to the parties provided that if the Judgment was revoked the case would be adjourned to be reheard on its merits on a date to be fixed. It seems to me that if Harper Trust is not applicable then the claim holiday pay is unlikely to succeed. However ,if the Claimant wishes for the case to be reheard on its merits he should write to the tribunal within 14 days of the date that this judgement is sent to the parties, failing which the claim holiday pay will be dismissed.

Employment Judge F Spencer

8th March 2021

JUDGMENT SENT TO THE PARTIES ON

.08/03/2021.

FOR THE TRIBUNAL OFFICE