



EMPLOYMENT TRIBUNALS

Claimant: Mr D. V. Toader
Respondent: Jinkichi Ltd

London Central Remote Hearing (CVP) On: 6 April 2021

Before: Employment Judge Goodman

Representation

Claimant: in person
Respondent: did not attend

JUDGMENT

The respondent is ordered to pay the claimant £1,622.31 for holiday pay outstanding on termination of employment.

REASONS

1. The claimant worked for the respondent as a grilling assistant in their restaurant in Hampstead from 12 March 2019 to 13 September 2020.
2. On 20 December 2020 he presented a claim for holiday pay to the tribunal.
3. He named his employer as Kazumasa Seki of Jinkichi Restaurant at the NW3 6G address of the premises where he worked. The claim was posted to that address, with a notice of the hearing today, but the respondent has not entered a response to the claim.
4. In recent correspondence the claimant has confirmed that Mr Seki conducted staff administration and that he had engaged with him on holiday pay issues. A check on the Companies House registration confirms that the respondent is a going concern, not in administration, and that Mr Seki is one of the statutory directors.
5. The Employment Tribunal Rules of Procedure provide in rule 21:

Effect of non-presentation or rejection of response, or case not contested

1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

6. Employment Judge Baty, noting the lack of response, directed on 25 March that the claimant be asked to clarify the status and email address of the respondent, which he did, and then directed on 30 March that the respondent be asked for information about their response. Unfortunately, the tribunal staff did not send this email. This morning I caused the hearing clerk to forward the joining instructions for this hearing to the two email addresses for the respondent identified.

Evidence

7. The claimant had outlined the claim on the claim form and attached photographs of two notices posted by his employer about holiday payment, one in February and one in August 2020. I asked a number of questions about his employment. He showed me the document confirming his contract terms. He has forwarded to me emails and texts from the respondent about furlough, and his payslips from April 2019 to September 2020, except January 2020, but he has sent his Excel spreadsheet for hours worked in 2020 from which the expected payment for that month can be calculated. The payslips themselves do not show the hours worked or the hourly rate. The claimant stated that every 2-3 months he would be shown a slip of paper with accrued hours and the rate, but he does not have them.

Findings of Fact

8. The claimant worked on a zero hours contract, that is, as and when his employer required. The initial document provides for payment at a hourly rate of £8 per hour (at a time when the national minimum wage was £8.21 per hour) but at some stage his rate increased to £9.20 per hour (which exceeds the national minimum rate from April 2020, £8.72). The contract document is silent on holiday pay arrangements.
9. In February 2020 he was notified that the restaurant would be closed for four days in February, which would be paid as holiday. At the same time he was informed that as he had worked 1,871 hours from March to December 2019 he was entitled to 7 days holiday pay at 8 hours per day. This translates to 56 hours, which is 3% of his total hours. The February payslip makes no mention of holiday pay
10. On 8 April he was notified he would be placed on furlough at 80% wages

from 15 April. He accepted. In June 2020 staff were asked to return to work at the beginning of July, first to clean, then for take away, and then full reopening after lockdown. From then he worked normally.

11. On 11 July the claimant emailed asking for the total of his accumulated holiday from the start of employment. He was told face to face by Mr Seki that furlough was taking holiday. On 20 August a notice was posted at work for all staff saying: "Staff have been received paid holiday March April May Jun this year 2020. During Covid-19 lockdown period all entitled holiday have been used as government furlough staff scheme".
12. There was no further discussion. In September the claimant decided to look for work with more flexible hours as he was starting a university course, and he resigned with effect from 13 September.
13. Other than the four days in February 2020 the claimant has not taken paid holiday. He did take some days unpaid. From January to September, excluding the furlough period, his timesheet showed he worked 909 hours.
14. The respondent did not reply after the claimant contacted ACAS prior to starting these proceedings. The claimant, whose flatmate is still employed by the respondent, confirmed that the restaurant continued open up to the last lockdown on 5 November 2020; its staff are currently furloughed.

Relevant Law

15. By the Working Time Regulations 1996 workers are entitled to 5.6 weeks per annum paid holiday, to be taken during the year and not carried over (save in special circumstances, such as illness preventing the taking of holiday) or paid in lieu. Holiday outstanding in the current year may be paid on termination.
16. Under the Coronavirus Act of 2020, HMRC issued a Treasury Direction on 15 April 2020 setting out the operation of the CJRS scheme (furlough), which provides that if an employee has been notified in writing that he is to be retained in employment without working (furloughed), then HMRC will reimburse the employer 80% of the wages the worker could have expected if actually at work. Where wages vary, the reimbursement is 80% of the wages paid to the worker in the corresponding week in the previous tax year, or the average amount earned in the previous tax year.
17. This is an arrangement between the employer and HMRC. As between employer and worker, rights and obligations are governed by the contract between the parties, and any variation to that contract, and as supplemented by statute. When a worker agrees to be furloughed, he agrees to a variation of the contract as to wages payable to 80% of those wages, unless the employer offers a top up. This does not vary the law on holiday pay, and holiday entitlement continues to accrue during furlough. As there was some confusion on this point at the start of the CJRS, the Department for Business Enterprise and Industrial Strategy issued guidance on 13 May 2020 confirming that holiday continued to accrue to furloughed workers; employers could require employees to take holiday while furloughed, provided they gave the statutory notice of double the

amount of holiday required to be taken. It also made clear to employers that they could use the HMRC furlough payments to set against holiday, which means that in practice, if an employer requires an employee to take holiday while furloughed, it would have to top up the missing 20% of wages.

18. One change to holiday legislation in the Working Time Regulations was introduced by the Working Time (Coronavirus) (Amendment) Regulations of 2020, laid before Parliament 27 March 2020. This allows workers to carry holiday over from year to year if it had not been reasonably practicable to take it.
19. Where a worker on variable hours (such as a zero hours contract) is paid is 5.6 weeks holiday each year, his holiday pay for a holiday week was until April 2020 calculated on the basis of an average of the last 12 weeks in which the worker had been paid, and from that date the reference period is the average of the last 52 paid weeks, taken from the last 104 weeks.
20. Where a worker is not paid holiday to which he is entitled, he can bring a claim for unlawful deductions from wages under section 23 of the Employment Rights Act 1996 for the difference between the wages “properly payable” and the amount actually paid. By section 27 (1) (a) holiday pay counts as wages. There is a time limit of three months to present such a claim, starting from the date the wages were payable, or the last of those dates if there was a series of deductions. If a claim is presented outside that 3 months (extended for early conciliation) a tribunal can allow it if it was not reasonably practicable to have presented it in time, and it is presented within a reasonable time thereafter – section 23(4).

Discussion and Conclusion

21. In the absence of the respondent or its response it must be assumed that the notice to all staff of 20 August 2020 represents their position, that the period of furlough substituted for holiday, and they were not entitled to more.
22. This is wrong on two counts. First, the claimant had not been notified that he was to take any outstanding holiday during furlough, although he had from time to time been notified by text if the salary payment was going to be late. Second, if he had taken holiday during furlough he would have been entitled to 100% of his wages for those days, not 80%, and the employer would have had to pay the extra 20%. There is nothing in the staff notice of 20 August 2020 to suggest that this had happened or would happen.
23. In my finding, the claimant was, as of 12 March 2020, still entitled to 3 days holiday pay calculated by the employer at 24 hours pay in total by reference to hours worked March to December 2020, and as he had already taken unpaid holiday (probably over the Christmas period when the restaurant is likely to have been closed on bank holidays), this represents an unlawful deduction for those three days which had accrued

from 2019. It appears from the February 2020 notice to the claimant that the employer permitted, even expected, that to be rolled over. That amount on the employer's calculation is $24 \times \text{£}9.20$, or $\text{£}220.80$.

24. I have considered whether the tribunal has jurisdiction in view of the three month time limit. In my finding, it was not practicable for the claimant to have presented a claim in time. His contract was silent on holiday pay arrangements, even though by section 1 of the 1996 Act it should have told him. His employer made the announcement and paid some holiday in February, with an opaque calculation and without stating when any outstanding leave must be taken by; clearly it was already being taken in arrears. Furlough then made the picture even less clear. When the claimant enquired as to his entitlement he was told any holiday pay accrued had been extinguished by the payment of furlough, confirmed in writing to all staff at the end of August 2020, three weeks before the claimant left. In these circumstances it was not reasonably practicable to present an earlier claim and it was presented in a reasonable time thereafter.

25. As for the period 1 January to 13 September 2020, that is 37 weeks, so his holiday pay entitlement to the date of termination was $37/52 \times 5.6$ weeks, 3.98 weeks, with an average pay in those 39 weeks (working from the payslips for January to September) of $\text{£}352.39$ per week before deduction for tax and national insurance. So the holiday pay entitlement pro rata for 3.98 weeks is $\text{£}1,402.11$. This claim was presented in time.

26. The amount is awarded gross, a total of $\text{£}1,622.31$. It is liable to income tax in the claimant's hands for the current tax year, 2021/22.

Employment Judge Goodman

Date: 6th April 2021

JUDGMENT and REASONS SENT to the PARTIES
ON

06/04/21..

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FOR THE TRIBUNAL OFFICE