



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4105505/2020 (V)**

**Held by Cloud Based Video Platform on 11 January 2021**

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**Employment Judge A Jones**

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**Miss E Foy**

**Claimant  
Represented by:  
Ms P Foy, mother**

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**Calum Grant The Hair Designers (CGTHD Ltd)**

**Respondent  
Represented by:  
Mr C Grant, director**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The Tribunal has determined that:
  - a. the claimant was entitled to receive payment in lieu of annual leave entitlement which accrued between 1 June 2019 to 1 September 2020 and Orders the respondent to pay to the claimant the sum of £252 in that regard, and
  - b. the claimant was entitled to be paid in lieu of two weeks' notice pay and Orders the respondent to pay to the claimant the sum of £60 in that regard.

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**Introduction**

2. The claimant raised a claim seeking payment of holiday pay and notice pay. The claims were resisted by the respondent. No preliminary hearings took place in advance of the final hearing in this case. At the final hearing, the claimant was represented by her mother. The respondent was represented by the owner and director of the company.
3. The Tribunal heard evidence from the claimant and Mr Grant, the director of the respondent company. Although initially, it was proposed that the respondent would call additional witnesses, Mr Grant accepted that those potential witnesses could not in fact provide evidence relevant to the issues the Tribunal required to determine. A bundle of documents had been produced but these documents were not relevant to the determination of the claim.
4. At the commencement of the hearing, the Tribunal discussed with the parties the issues in dispute.

**20 Issues to be determined**

5. Following discussion, it was agreed that the following issues were required to be determined:
- a. Was the claimant entitled to holiday pay when she was 15 and/or 16 years old and performing duties for the respondent?, and
- b. Was the claimant entitled to be paid in lieu of notice pay following the respondent advising her that he no longer required her services?
6. The claimant sought payment of £60 in respect of notice pay (being £30 for each of her two years of service) and a total of £504 in respect of holiday pay.

7. The respondent's position was that the claimant was a casual member of staff and was not entitled to receive notice pay. The respondent also submitted that the claimant's pay had included an element in respect of holiday pay, that she had not been entitled to be paid holiday pay until she reached the age of 16 years old and that in any event, she had received any amount to which she was entitled.

### **Findings in fact**

8. Having heard the evidence, the Tribunal found the following facts to have been established.
9. The claimant commenced working as a 'Saturday girl' at the respondent's hair salon on 19 August 2018 washing hair and carrying out general duties. At that time, she was 15 years old.
10. Mr Grant is the company director of the respondent. During the time the claimant was engaged by the respondent, he, the claimant and one other young woman who commenced work at the same time as the claimant were 'employed'. Mr Grant was director of two other related companies, which provided services to the respondent.
11. The claimant initially worked on a Saturday and Sunday and was paid £30 in cash for each day worked.
12. The respondent did not seek consent from Midlothian Council in relation to the claimant's employment and did not have a permit in relation to her employment.
13. No contract of employment or other written arrangement or agreement was ever provided to the claimant in relation to the work she carried out.
14. The claimant reached the age of sixteen on 31 May 2019.
15. From September 2019, the claimant only worked one day a week and continued to receive £30 for each shift worked.

16. Between March 2020 and July 2020, the claimant did not work at all for the respondent due to the Covid pandemic and the restrictions in relation to the opening of hair salons.

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17. A meeting took place on 7th July 2020 at which the claimant was present to discuss health and safety issues in relation to the re-opening of the salon.

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18. The claimant's hours changed so that she only worked on a Monday every week, commencing 20 July.

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19. Mr Grant contacted the claimant by phone on 1 September 2020 and advised her that she was no longer required. No written communications were sent to the claimant following the call. Mr Grant advised the claimant that she could call on him for any references for alternative work.

### **Observations on evidence**

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20. The Tribunal heard oral evidence from the claimant and Mr Grant, both of whom gave their evidence in a straightforward manner and were both credible and reliable. The only material dispute on the evidence was whether the claimant had been advised during her interview that she would normally be paid £25 per shift but that the respondent would pay £30 per shift in order to take into account holiday pay which might otherwise be payable. The Tribunal preferred the evidence of the claimant in this regard, although in the event this was not material to the legal issues to be determined. The Tribunal reached this conclusion on the basis that there was no paperwork at all setting out the terms of the claimant's employment, and that the respondent had not obtained any permit from the local authority as he was obliged to do in relation to the employment of a fifteen year old, and that his evidence was that he had not taken any advice on the issue of holiday pay entitlement.

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### **Discussion and decision**

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**Holiday pay**

21. The entitlement to accrue annual leave and payment in respect of annual leave is governed by the provisions of the Working Time Regulations 1998. The question of a person who is under the age of sixteen is a worker for the purposes of the Working Time Regulations 1998, and therefore entitled to annual leave, is not explicitly dealt with in those Regulations.
22. However, the question was answered in by the Employment Appeal Tribunal in the case of ***Addison and another (trading as Brayton News) v Ashby*** [2003] ICR 667. That case concerned a paper boy and whether or not he was entitled to certain employment rights. An Employment Tribunal found in his favour and made an award in respect of holiday pay, unfair dismissal and wrongful dismissal. The employer appealed only in respect of the findings relating to holiday pay. The claimant in that case had been 13 years old when he commenced work and 15 years old when he was dismissed.
23. The Employment Appeal Tribunal found in favour of the employer in the case, finding that the claimant had not been entitled to holiday pay. The Employment Appeal Tribunal reviewed the domestic and European statutory provisions in relation to the employment of children and young people. At paragraphs 65 and 66 of its judgement, it stated:
- For those reasons we disagree with the conclusions reached by the tribunal on the central construction issue. We have explained why, in our judgment, the *Working Time Regulations 1998* , when considered as a whole, can be seen not to have been intended to apply to children as opposed to young workers; and, while the 1933 Act, as amended, does include criminal sanctions for breach of the relevant provisions, we have no doubt that the amendments effected by the Children (Protection at Work) Regulations 1998 were intended to create in children contractual rights enforceable without resort to the common law and that the provisions of section 18(1) are so enforceable.

For the above reasons we have come to the conclusion that the applicant was not a worker who was entitled to the benefits, including annual leave, provided to adult workers and young workers under the *Working Time Regulations 1998* but was a child entitled to the benefits provided by section 18(1) of the 1933 Act, as amended, including a minimum of two consecutive weeks of annual rest in any one year, to be taken during school holidays, pursuant to section 18(1)(j) of that Act.

24. Therefore, the Tribunal concludes that the claimant in the present case did not accrue annual leave or any entitlement to payment in respect of annual leave until she reached the age of sixteen. The Children and Young Persons Act 1933 (as amended) makes provision in relation to the employment of children who had not yet reached the age at which they could leave school.

25. In Scotland, school age is defined in section 30 of the Education (Scotland) Act 1980 as someone who has attained the age of five years and not attained the age of sixteen years.

26. The claimant was sixteen years old on 31 May 2019 and was entitled to leave school at that date. She therefore accrued an entitlement to annual leave from that date until the termination of her employment on 1 September 2020.

27. The respondent's position was that any entitlement to holiday pay the claimant may have had was extinguished because her normal pay included an amount of holiday pay. This is commonly called 'rolled up holiday pay'. The extent to which rolled up holiday is lawful has been the subject of much litigation. The present position is that paying holiday pay in this way is unlikely to meet the requirements of the *Working Time Regulations 1998*.

28. In any event, the Tribunal did not accept that the pay received by the claimant included an element of 'rolled up holiday pay'. Further, no payslips or other written information was provided to the claimant to indicate what portion of her pay was said to amount to rolled up holiday pay.

29. Although the claimant did not work between March and July 2020, the Tribunal concluded that a contract of employment continued to exist during that time. The claimant was not, as one might have expected, placed on furlough leave during that time, she was simply advised that there was no work for her. She remained employed by the respondent. She therefore continued to accrue entitlement to annual leave in terms of the Working Time Regulations 1998.
30. Between 1 June 2019 and 1 September 2019, the claimant had been working for two shifts a week. She therefore accrued entitlement to 1.4 weeks' leave. Pay for 1.4 weeks amounted to £84.
31. From 1 September 2019 to 1 September 2020, the claimant worked one shift a week. She accrued 5.6 weeks' leave at £30 per week which is a total of £168.
32. Therefore, on termination of her employment, the claimant was entitled to receive a total amount of £252 in respect of annual leave which had accrued but had not been taken.

## 20 **Notice pay**

33. Section 86 of the Employment Rights Act 1996 makes provision for minimum notice entitlements on termination of employment. A person is entitled to not less than one week's notice for each year of continuous service.
34. Section 210 (5) of that Act states that a 'a person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.'
35. The respondent's position was that the claimant was not an employee and was only a 'casual worker' who was not entitled to notice pay. The Tribunal could not accept this characterisation of the claimant's employment. If the claimant did not attend for work, she was required to advise the respondent. The respondent gave evidence that he was unhappy that when the claimant could not attend work, that it was her mother who often got in touch to advise

him. The claimant's duties were then covered by another member of staff or Mr Grant himself if there was no one available to perform her duties.

- 5 36. The claimant worked continuously from the beginning of her employment until her dismissal, other than when she was ill, was otherwise unable to attend work, or when the respondent's premises were closed. On that basis, the Tribunal concluded that the claimant was an employee of the respondent and was entitled to be paid in lieu of notice on termination of her employment.
- 10 37. The Tribunal noted that in the **Addison** case referred to above, the question of entitlement to notice was not subject to appeal. The Tribunal also notes the commentary provided in Harvey on Industrial Relations and Employment Law at Division A1 paragraph 363

15 "Elsewhere in mainstream employment law, children and young persons are not treated separately. There used to be provisions which in effect prevented them from claiming major rights such as unfair dismissal and redundancy payments (eg preventing them from obtaining continuity of employment before a certain age or, to go back even further, requiring 16 hours work per week to qualify) but

20 these have now been repealed. Thus, there appears to be (at least in theory) no reason why a child or young person should not claim such rights if they have the necessary employment status and continuous service. It may be noted that in *Addison v Ashby* (para [\[362\]](#) above) the 15 year old paper boy had also claimed unfair and wrongful

25 dismissal; these claims were upheld by the tribunal (subject to 80% contributory fault, leading to an award of £22.50 plus £9 for one week's pay in lieu of notice) and the newsagent did *not* appeal against this element of the case."



38. The Tribunal therefore concludes that on the basis of the evidence provided, the claimant was an employee of the respondent, was entitled to be provided with two weeks' notice of termination of her employment and therefore is entitled to receive notice pay of £60 by way of pay in lieu of notice from the respondent.

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10 Employment Judge: Amanda Jones  
Date of Judgment: 20 January 2021  
Entered in register: 22 January 2021  
and copied to parties

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