



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107106/2020

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Held via Cloud Video Platform (CVP) on 28 January 2021

Employment Judge B Campbell

10 **Mr J Bugaila**

**Claimant
In Person**

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Muirfield Recruitment Limited

**Respondent
No appearance and
No representation**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that the claimant was not paid his full entitlement to accrued annual leave under the Working Time Regulations 1998 and the respondent is ordered to pay the claimant the sum of £545.87 as compensation.

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REASONS

1. This claim arises out of the claimant's employment by the respondent, which began in April 2017 and ended on 14 October 2020 with his resignation. The claimant asserts that he accrued annual leave in 2020 which was not taken as holidays nor paid upon the termination of his employment.
- 30 2. The claimant represented himself at this hearing and gave evidence, assisted by an interpreter. There were no material issues in understanding his submissions or his evidence using that method. The respondent had been precluded from defending the claim at an earlier stage by virtue of not lodging a response form. However, the respondent's owner and employee Mr Graeme
35 Dickie attended the hearing and was permitted to give evidence, including

being cross-examined by the claimant. This assisted the tribunal in forming a fuller picture of the factual background.

Legal issues

3. The issues in the claim boiled down to the following:

5 3.1. Did the claimant take any days of paid annual leave in January 2020, and if so how many?

3.2. Did the claimant take any days of paid annual leave in July 2020, and if so how many?

10 3.3. Based on the above, did he have any accrued holidays left for which he was not paid following his employment ending on 14 October 2020?

3.4. If so, what is the monetary value of those holidays?

4. Under the Working Time Regulations 1998 each worker is entitled to a minimum amount of annual leave. For a full time worker that entitlement is 28 days per year. The employer can decide when a holiday reference period will begin and end, provided that period is a full 12 months. Employees generally can request when to use their leave, and they must be paid at their normal rate in full for leave days taken. However, within reason and subject to conditions discussed in more detail below, an employer can refuse a holiday request for a given date or dates, or dictate that workers should use their accrued leave on given dates. Workers should not agree to receive payment instead of taking leave as a rule, but at the point when their service ends they are entitled to be paid for any accrued leave not taken at the same rate. The right to be paid for accrued holidays on termination of employment and the method of their calculation are set out in Regulation 14(2) and (3). If a worker does not receive the pay they are due they can submit a claim to the employment tribunal under Regulation 30.

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5. It was a matter of agreement between the parties that the respondent's holiday year is the calendar year, that the claimant was entitled to 28 days per year, and that the claimant accrued 22 days of annual leave in 2020.

6. The claimant's position, in summary, is that he never requested or took any holidays in 2020 and wanted to accrue them, and that he therefore expected to be paid for all of those days when he resigned. The respondent's position is that he took holidays by his own request between 1 and 10 January 2020 inclusive, that he was required to take two weeks of holidays in the weeks ending 24 and 31 July 2020 at the respondent's direction, and that he was paid for the remainder of his accrued leave upon termination.

Findings in fact

7. The following findings of fact were made as they are relevant to the issues in the claim.
8. The claimant was an employee of the respondent. His work involved processing potato harvests, including the handling and sorting of potatoes. He reported to a manager named Andrey Andreyev. The claimant does not speak English fluently. His dealings with the respondent were through Mr Andreyev, with whom he could communicate.
9. The claimant did not have written terms and conditions of employment. He worked variable hours which tended to be approximately 40 per week when there was sufficient work available, which was dependent on the timing of harvests. He was paid weekly and provided with payslips calculated on that basis. He would tend to have his payslips provided to him by hand. He would work Monday to Friday inclusive.

Wednesday 1 to Friday 3 January 2020

10. It was usual for the respondent to have a shutdown over Christmas and New Year when no harvesting would be done. The claimant was on leave between 1 and 3 January 2020 inclusive. His recollection was that the holidays he took on those dates involved him using up the remainder of his 2019 allocation rather than using any days from 2020. Mr Dickie's evidence was that the respondent has a firm rule that no holidays can be carried forward from one year to a later year. Those days would have to come out of the 2020 allocation for each employee.

11. The evidence of Mr Dickie is preferred on this point. His recollection was clearer and more consistent with general practice, which would be to include New Year holidays as part of the allocation for the calendar year in which they fall.

5 *Monday 6 to Friday 10 January 2020*

12. The claimant insisted he worked as normal from 6 to 10 January 2020 and was paid in the usual way. Mr Dickie's evidence was that the claimant took these days as paid annual leave by request. The claimant said that it would be out of character for him to take a week's holiday immediately after he had taken a break over Christmas, and when there was work to be done. His
10 recollection was that there was a harvest ready to be sorted from 6 January 2020. He also understood that he would not be permitted to take holidays before he had accrued them, which is what he would have been doing at this time. Mr Dickie understood that the respondent could be flexible in this regard
15 for a more longstanding employee which it trusted. He agreed that work generally would have resumed on that Monday.

13. The claimant's evidence is preferred in relation to what happened on these dates. By his own admission Mr Dickie was not involved with approving the claimant's holiday requests or generally in the process of recording holidays
20 taken by employees or the payments to be made. There was a degree of logic to what the claimant said, and his recollection appeared clear.

Monday 20 to Friday 24 July and Monday 27 to Friday 31 July 2020

14. The respondent placed a number of its employees, including the claimant, on furlough in terms of the UK government's Coronavirus Job Retention Scheme
25 (the 'scheme'). The claimant was placed on furlough on or around Monday 6 April 2020. From that point he was paid 80% of his normal weekly wages, calculated as an average as the scheme requires given that he did not work fixed hours or receive fixed pay. This equated to £226.03 gross per week and £210.00 net of deductions.

15. The claimant was still on furlough entering July but was offered work under the revised 'flexible furlough' scheme which had been introduced as a variation to the original version of the scheme. The claimant was offered work in the week commencing 20 July 2020 but refused it. The respondent as a result did not pay him any furlough pay in that week. The apparent dispute had been resolved by the following week when the claimant was paid £419.62. This represented his furlough pay for that week and also for the week before. The outcome therefore was that he had been reinstated on furlough and had received the pay he was expecting by the end of July 2020.
16. The respondent's position in relation to these two weeks is that they were treated as holidays at its insistence. Mr Dickie's evidence was that he was expecting an upturn in work which would allow him to bring more employees off furlough and did not want that to be hindered by workers then taking leave. He gave instructions to various managers to communicate to those reporting to them that they should take the last two weeks of July as leave. Mr Dickie believed he asked the claimant's manager to communicate that to his team, but did not know whether it happened, or when if so. The claimant insisted that he had received no communication about taking holidays at this time. He was, by this time, considering leaving his role and wanted to have his holidays as a payment rather than take leave.
17. Whilst the Working Time Regulations 1998 allow an employer to dictate when workers will or will not take their annual leave, that is subject to certain conditions and safeguards. One of those, by virtue of Regulation 15(3) and (4) combined is that the employer must give double the amount of time to be used up by way of advance notice. It is found that in the claimant's case he did not receive any notice at all and therefore, whatever the respondent's intentions were in relation to him at least, he was not on annual leave in July 2020. His evidence is clearer than that of Mr Dickie, who did not claim to have given any such notice himself and could not state categorically that it had been given to the claimant. Furthermore, the claimant's earnings in the last two weeks of July 2020 were at his normal furlough pay level. Had these days

been processed as leave they would have had to be topped up to 100% by the respondent.

Resignation and final pay

18. The claimant resigned and it is a matter of agreement that he left the respondent's service on 14 October 2020. He was still on furlough at this time, 5
albeit that by this point he was performing some work and being treated as on furlough for the balance. His final payslip was dated 16 October 2020 and contained an entry for 'Annual Leave' in the sum of £282.54 gross. This is his weekly average earnings figure at 100% - i.e. the figure on which his furlough 10
pay was based. He was therefore paid for 5 days of accrued annual leave at this time.

Conclusions

19. On the basis of the above findings the claimant's position in relation to accrued annual leave when he resigned is as follows:

15 19.1. He had accrued 22 days in 2020;

19.2. He had used, and was paid for, 3 of those days between 1 and 3 January 2020;

19.3. He did not use any of those days in July 2020 (or at any other time in 2020);

20 19.4. He received payment for 5 accrued days in his final pay on 16 October 2020;

19.5. He therefore had 14 days of unpaid accrued leave.

20. Using the figure for the claimant's average earnings, 14 days would equate to £791.11 gross. Applying income tax at 19% and deducting for National 25
Insurance contributions (12%) would result in a net figure of £545.87.

21. This is the amount which he was due in real terms and this is what the respondent is now ordered to pay.

Employment Judge

B Campbell

5 **Date of Judgment**

11th of February 2021

Date sent to parties

11th of February 2021

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