



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Peter Cayabyab**

**v James Zimmer LLP**

**Heard at:** Watford (Remote Hearing via CVP)

**On:** 9 March 2021

**Before:** Employment Judge Hanning

## **Appearances**

**For the Claimant:** In person (assisted by his daughter)

**For the Respondent:** Mr R Neuberger (Accountant)

**COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

*"This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing."*

## **JUDGMENT**

1. The claim for unpaid overtime is not well founded and is dismissed
2. The claim for unpaid accrued annual leave is not well founded and is dismissed
3. The claim for unpaid travel expenses is not well founded and is dismissed

## **REASONS**

1. The respondent provides event catering services and the claimant worked for the respondent as a 'back of house' manager. He resigned from the position in January 2020 and this is a claim for some £18,000 in unpaid wages and/or holiday pay which the claimant says is due on account of his being entitled to but not taking time off in lieu of overtime he had worked

and his annual leave entitlement over the course of his employment with the respondent. The claimant also claimed some unpaid motoring expenses.

2. In spite of tribunal orders no statements had been prepared nor was I provided with a bundle for use at the hearing. Some documents however were sent by email shortly before the hearing. For the claimant these essentially comprised copy pay slips and what I can treat as an unsigned statement. For the respondent they comprised key parts of the ET3 and some other documents which, in the event, were not referred to.
3. In terms of evidence I was able to hear directly from the claimant and also from Mr Zimmer, on behalf of the respondent. The respondent was represented very helpfully by Mr Neuberger.
4. In both cases I took as read on behalf of both witnesses the contents of the ET1 and ET3 and in the case of the claimant also an additional document; the one I referred to earlier as being an unsigned statement.
5. The claimant was cross examined for some time by Mr Neuberger and the result was that I heard what I would call helpful evidence.
6. Based on all of that evidence I find that when the claimant started work for the respondent there was a meeting at which the terms of his employment were discussed but that did not include any discussion about overtime or payment for overtime. I find that the respondent had a practice of not paying overtime on an hourly rate but instead allowing staff to take time off in lieu to reflect any additional hours that they had worked.
7. The claimant confirmed that he had in fact taken time off and used that to go on holiday and was paid his basic salary for those absences. He acknowledged he understood that pay to reflect the fact that he was taking time off in lieu of overtime that he had earned and that is consistent with the respondent's case about how it dealt with overtime hours.
8. However, the claimant believed that he was still entitled to his statutory holiday entitlement and that at no point did he use up all of the time in lieu that he was entitled to, nor did he use up his statutory holiday entitlement.
9. That comes to a head then when he finishes employment in January. He was paid for some accrued holiday which I find was in fact more than would have accrued in less than the month of January, based on the respondent's holiday year being the calendar year. So, he was overpaid in terms of statutory holiday in respect of that month.
10. But what the claimant was claiming was for hours he said he had worked in excess of his normal hours and additional overtime which had never been compensated for either in pay nor through additional time off in lieu.
11. There was quite a detailed discussion and dispute about exactly what those hours might have been. It is clear to me that there are no reliable records to evidence what those hours might have been. But I also record that I have

absolutely no doubt whatsoever that the claimant worked extremely hard for the respondent. To its credit, the respondent does not challenge that either. There is no suggestion of any poor performance or shirking. On the contrary, every indication I got was that the respondent appreciated the work that the claimant had done. The question was really about his entitlement rather than any challenge to his abilities or his commitment.

12. So, to consider that it is necessary to consider the law and, in this respect, really there are two points which arise. One is around holiday pay and the other is around overtime.
13. The combined effect of the Working Time Regulations 1998 and *NHS Leeds v Larner* [2012] EWCA Civ 1034 is that workers are entitled to 28 days paid annual leave each year and are entitled to be paid upon termination of their employment for accrued (untaken) annual leave which: (i) has accrued in the leave year in which their employment terminates; as well as (ii) that which has been carried over from a previous leave year because the worker was unable or unwilling to take that annual leave because they were on sick leave.
14. In other words, and critically here, there is a very limited amount of statutory holiday pay which can be carried forward from year to year. Annual leave, or holiday pay, does not accrue and carry forward year by year except in the case of long-term sickness and, even then, there are limits.
15. There is no suggestion here that annual leave was not taken because of sickness. It was simply not taken because the claimant was too busy to take the time off or wanted pay rather than additional holiday. It is true he could not take it off but that was not on account of sickness.
16. So, under the legislative provisions, by law, the claimant was only entitled to be paid for annual leave which had accrued in the year in which his employment came to an end, that is to say, January 2020. There was no statutory entitlement to be paid for any annual leave from any previous years.
17. In terms of overtime, there is no statutory right to be provided with or to be paid for overtime. It is entirely a matter of understanding the contract which is reached between the employer and the employee (see *Driver v Air India Ltd* [2011] EWCA Civ 830, [2011] IRLR 992).
18. There may be express terms, that is where something is specifically agreed, and that can be agreed in a conversation or can be agreed in writing. It might be an implied term, that is to say one which has not been explicitly agreed but which arises because it is what everybody understood.
19. In any case, the claimant has the burden of proving both that they worked the overtime and was entitled to be paid for it.
20. Here, there is nothing agreed in writing and based on the evidence that I have heard, I find that there was very clearly no express or implied term of

the contract that the claimant would be paid for overtime. The only agreement was that if he worked extra hours, he would be given time off in lieu of those hours so that he was compensated in that way.

21. The claimant has the burden of proving that he worked the overtime. If I was forced to give a judgment about what hours were worked as overtime, I would not be able to be satisfied that that burden had been discharged. I cannot find that the claimant has proved to my satisfaction, on the balance of probabilities, what hours of overtime he actually worked. His claim seems to have been largely guesswork, based on a law of averages and an assessment of what he thought he had worked. But I do not need to come to that judgment because I find that there was no agreement that he would be paid. So, the claim for overtime payment fails for that reason.
22. In conclusion, while not doubting at all that the claimant did work extremely hard and by all accounts perfectly well, I am unable to award any holiday pay because the law does not give any entitlement to accrued holiday pay except that which is untaken in the year in which the employment comes to an end and that has been paid. Nor can I order any payment for overtime because there was no agreement, or contract, which provides that payment would be made for that overtime.
23. When giving my oral judgment to the parties I to deal with the claim for motor expenses. This was a claim was for a total of 620 miles at a rate of 49p per mile.
24. When asked to explain that mileage the claimant referred to 4 or 5 trips to Makro, a distance of 5 or 6 miles, and 7 or 8 trips to a function about 18 miles away. Taken at its highest however, those trips total 348 miles. The claimant explained that he had included other functions in November and December for which he had not been reimbursed.
25. Mr Zimmer's evidence was that the claimant had been paid for everything in November and December at the end of December and any genuine mileage due for January was met by a payment of £250 which the claimant been given for general expenses but neither spent nor returned.
26. The claimant was unable to identify the functions in November and December for which he had not been reimbursed let alone explain the mileage in question. In the absence of any proper records kept by the claimant, I was unable to find that the earlier functions had not been covered off or that estimate of 600 miles was accurate.
27. Taking the highest possible mileage of 348 miles, the expenses would be £170.52 which is less than the £250 'float' which the claimant did not deny having retained. Therefore no further sum was due.

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Employment Judge Hanning

Date: 5 May 21

Sent to the parties on: 13 May 21

For the Tribunal Office