



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Molly Turner

v

In-Home Carers Limited

Heard at: Bury St Edmunds (by CVP)

On: 18 June 2021

Before: Employment Judge M Warren (sitting alone)

Appearances

For the Claimant: Mr A Gascoigne, claimant's partner

For the Respondent: Mr Ash Malik, Director

RESERVED JUDGMENT

The Claimant's claim for unpaid holiday pay succeeds. The Respondent shall pay the Claimant compensation in the sum of **£771.90** of which £671.22 represents unpaid holiday pay and £100.68 represents uplift for failure to comply with the Acas Code. The sums are calculated gross, they are to be paid without deduction and are taxable in the hands of the Claimant.

RESERVED REASONS

Background

1. Ms Turner was employed by the Respondent between 28 March 2019 and 1 December 2019. After Acas Early Conciliation between 27 January 2020 and 27 February 2020, she issued these proceedings claiming holiday pay on 3 March 2020.
2. This hearing was conducted remotely and I did not have the Tribunal file in front of me. Initially, I had the Tribunal staff scan copies of the pleadings and a Schedule of Loss.
3. During the hearing, Mr Gascoigne emailed me a bundle and a witness statement by Ms Turner. They had been served on the Respondent.

4. I had been forwarded before the hearing by the staff, a zipped up file from Mr Malik which included pay slips for Ms Turner, some email correspondence he had engaged in through Acas and some documents purporting to show that the Claimant's first shift with the Respondent was on 22 April 2019.
5. During the hearing, Mr Malik forwarded to me a further zipped up file which included a document entitled 'Holiday Calculations' prepared by him, a letter which was undated addressed to "Honourable Judge" entitled 'Overview, Defence and Counter Claim Charges' and a Schedule of the clocked hours of Ms Turner from Monday 22 April 2019 through to Thursday 19 September 2019. He also sent me a copy of Ms Turner's pay slip for June 2019, which had been omitted from his earlier zipped up file.

The Issues

6. Ms Turner's claims are threefold
 - 6.1 She says that she was underpaid for holiday that she took over 11 days between 20 September 2019 and 6 October 2019;
 - 6.2 She says that she had accrued holiday due which was unpaid between 28 March 2019 and 30 September 2019; and
 - 6.3 She says she was promoted from Care Assistant working flexible hours to Care Co-ordinator on a salary and fixed hours with effect from 1 October 2019 and claims accrued unpaid holiday under that contract until the end of her employment on 1 December 2019.

The Law

7. The relevant law is contained in the Working Time Regulations 1998.
8. Regulations 13 and 13A provide together for a requirement that employers must allow workers a minimum of 5.6 weeks paid holiday per year. That is 28 days holiday for a full time worker.
9. Pursuant to regulation 14, a payment in lieu of untaken leave entitlement must be paid on termination of employment if the paid holiday taken is less than the accrued entitlement as at the date employment terminated.
10. The amount of holiday pay, as provided for by regulation 16, is to be calculated by reference to a week's pay as defined in sections 221 to 224 of the Employment Rights Act 1996. Where hours of work vary, one takes an average of the worker's pay over the previous 12 week's pay, (section 224), where hours of work do not vary but rate of pay does, one takes the previous 12 weeks average, where the hours of work and rate of pay does not vary, one takes the normal rate of pay.

11. Regulation 30 requires that a claim for unpaid holiday pay must be brought within 3 months of the date on which payment should have been made.
12. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See regulation 30B and Luton Borough Council v Haque [2018] UKEAT/0180/17.
13. By an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A, where in a case under the Working Time Regulations it appears that a relevant code of practice applies, the employer has failed to comply with that code and that failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award by up to 25%. The only ACAS code of practice to which that provision relates is the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2009) which sets out recommendations as to how an employer should handle a grievance which has been raised by an employee.

Evidence

14. I took evidence under oath from Ms Turner and Mr Malik.
15. Ms Turner provided a Witness Statement signed with a statement of truth and confirmed the contents thereof were true. She answered questions from me and from Mr Malik by way of cross examination.
16. Mr Malik had not provided a Witness Statement, (notwithstanding an Order that the parties were to do so). However, he referred me to the above mentioned letter addressed to the Honourable Judge and the holiday calculations document. He stated that the contents of those two documents were true. He then answered questions from me, followed by cross examination from Mr Gascoigne.
17. Ms Turner adopted the calculations set out in documents prepared for her by Mr Gascoigne, most notably her Schedule of Loss and the detailed calculations of her rates of pay in the 12 weeks prior to her holiday commencing 20 September 2019, set out at pages 29 to 33 of the Bundle.
18. Mr Malik for his part was unable to explain to me why those calculations were wrong. His case was simply that they have a computer programme

to work out holiday pay, Ms Turner was paid in accordance with that computer programme and therefore what she was paid must be correct.

Findings of Fact

19. As confirmed by her Contract of Employment, Ms Turner's employment began on 28 March 2019. It was a zero hours contract.
20. She took 11 days holiday between and including 20 September 2019 and 6 October 2019. Before that holiday she was paid £521.76.
21. In the 12 weeks prior to her holiday commencing, she worked an average of 36.10 hours. Her hourly rate of pay was £8.75.
22. She worked on average a five day week throughout her employment; sometimes four days, sometimes six days.
23. She took one other day's holiday during her employment, on 26 July 2019. No claim is made in that regard.
24. She had therefore taken a total of 12 days holiday during her employment.
25. Whilst Ms Turner's hours of work varied week to week under the terms of her original contract, on 1 October 2019 she was promoted to Care Co-ordinator and thereafter received a salary for 40 hours a week, five days a week in the sum of £18,500 or £71.15 per day.
26. Bank holidays were worked as normal.
27. Ms Turner's employment came to an end on 1 December 2019 and she received no additional pay in lieu of accrued holiday.
28. Ms Turner wrote emails to query her holiday pay on 24 October 2019, 7 November 2019, 18 December 2019 and 24 December 2019. The Respondent did not provide a considered response to any of them.

Conclusions

29. In respect of the holiday taken in September 2019, 11 days amounts to 2.2 weeks. Ms Turner's average weekly pay was for 36.10 hours at £8.75, £315.88 per week, which is £694.93 for 2.2 weeks. She received £521.76 and is therefore owed £173.17 in respect of the holiday taken at that time.
30. I considered whether the claim was out of time but it is not. Payment was due at the end of October 2019. Conciliation commenced just before time expired, stopping the clock for a period of one month and as the conciliation period ended within a month of expiry of the time limit, it extended that time limit by a period of a further one month.

31. Ms Turner was employed in round terms for eight months. It is not correct to break down her employment between when she was a zero hours worker on flexible hours and when she was salaried. The fact of the matter is, she was employed throughout that period. 8/12 (eight twelfths) x 28 days means that she accumulated 18.66 days holiday, which is rounded up to 19 days. She had taken 12 days holiday, which means that as at the date her employment ended she had accrued due but untaken, 7 days holiday.
32. The calculations are straight forward, the daily rate of pay is £71.15 x 7 is £498.05.
33. The total unpaid holiday for the two heads of claim comes to £671.22.
34. Ms Turner raised a grievance by writing a number of emails which the Respondent failed to deal with. It does not matter whether or not she labelled the emails, "*Grievance*".
35. Failing to deal with her grievance is a breach of the Acas Code of Practice in relation to Disciplinary and Grievance Procedures 2015, specifically by neither dealing with it informally nor by calling a meeting. The purpose of this piece of legislation is to encourage both parties to engage in meaningful dialogue to try and resolve employment disputes without resorting to litigation. By the respondent failing to engage meaningfully with Ms Turner, this litigation became necessary.
36. Ms Turner seeks an uplift of 15%. I find that it is just and equitable to uplift the award by that amount. 15% of £671.22 is £100.68.
37. The total award is therefore **£771.90**.

Employment Judge M Warren

Date: 13 July 2021

Sent to the parties on: ...5 August 2021..

THY

For the Tribunal Office