EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110355/2019 (P)

Decided on the papers on 22 June 2020

Employment Judge M Whitcombe

Miss M Szalek	**Claimant** **No representative**
Pure Cleaning (Scotland) Ltd	**Respondent** **No representative**

JUDGMENT

The judgment of the Tribunal is as follows:

(1) The claimant is entitled to the sum of £131.79, either as an unlawful deduction from wages or as compensation due under regulation 30 of the Working Time Regulations 1998. That sum represents holiday pay due upon termination under regulation 14 of the same regulations.

(2) I decline to make an award for expenses or preparation time under rules 74 to 79 of the ET Rules of Procedure (2013).

REASONS

Introduction

1. With the consent of the parties, this decision was made on the papers without a hearing. The issues and the scope of the evidence are both very narrow and an early decision on the papers is intended to be a proportionate response to the practical implications of the pandemic given the modest sums at stake. “In person” hearings are not currently possible and neither side thought that a remote hearing by video or telephone would add anything to a consideration of the papers.

2. These reasons are intended to be fairly concise but compliant with rule 62(4). That rule requires that reasons should be “proportionate to the significance of the issue”, which I interpret as including the complexity of the issues and the amount of money at stake.

Claims and issues

3. The claimant formerly worked for the respondent as a cleaner. The claimant seeks allegedly accrued but unpaid holiday pay upon termination of £114.94. The respondent concedes that £101.00 is owed but has not paid it. The respondent failed to submit a response within the applicable time limit. An application for reconsideration of the decision to reject a late response was dismissed. It follows that the respondent is entitled to participate on questions of remedy (only) as a result of ***Office Equipment v Hughes*** [2018] EWCA Civ 1842.

4. Additionally, as a result of the respondent’s allegedly unreasonable conduct of proceedings (including a failure to attend earlier “in person” or telephone hearings conducted by EJ McMahon and by me) the claimant now seeks to recover taxi fares and an order for 10 hours of preparation time.

Reasoning and conclusions

5. The parties are agreed that the respondent's holiday year ran from 1 January to 31 December each year. They also agree that the effective date of termination was 28 May 2019 and that the claimant worked a 5 day week. This is not a case in which the claimant claims to have been entitled to carry over unused holiday from a previous holiday year.

6. On the basis of the facts in the preceding paragraph, I calculate that 148/365 of the holiday year had expired by the effective date of termination. The combined effect of regulations 13 and 13A of the Working Time Regulations 1998 is to grant an entitlement to 5.6 weeks' paid leave during each holiday year, reduced *pro rata* for unexpired years such as the one under consideration (see the formula in regulation 14).

7. The accrued entitlement to paid annual leave under regulations 13 and 13A of the Working Time Regulations 1998 was therefore 148/365 x 5.6 = 2.27 weeks' pay (to two decimal places).

8. I accept the respondent's evidence that the claimant had taken 4 days' holiday during the relevant leave year. I have not seen time sheets but that figure has been given by an accountant who has examined a "pay details spreadsheet". That equates to 0.8 weeks of leave taken.

9. The accrued entitlement for which the claimant is entitled to a payment under regulation 14 is therefore (2.27-0.8) = 1.47 weeks' pay.

10. The respondent has calculated the claimant's average pay over a 12 week reference period from its records. Alternative methods were offered by the respondent's accountant but I have chosen the one consistent with the formula in section 224 of the Employment Rights Act 1996, which defines "a week's pay" for present purposes. The calculation should be based on a 12 week average ending with the last full week prior to termination: see section 224(2)(b). Although the reference period is now 52 weeks that amended rule does not apply to this claim.

11. I therefore adopt the figure of £89.65 for "a week's pay". This comes from the paragraph of explanation attached to the (late, rejected) response reading, "*If you ignore the week she left, and count back 12 weeks prior (and include the holiday pay of £34.06 paid on the 17th May pay run) then we get a higher 12-weekly average for the final holiday pay calculations £89.65*". That would be the right approach under the statute. Again, I accept the accuracy of the respondent's records on the balance of probabilities since they appear to be taken from payroll data and the claimant has not offered any more reliable records of her own.

12. The total sum owed is therefore 1.47 x £89.65 = £131.79. The claimant is owed that sum either as an unlawful deduction from wages, or as compensation under regulation 30 of the Working Time Regulations 1998, it makes no difference which.

Application for expenses/costs

13. My power to award expenses or costs depends on a threshold finding that the respondent has conducted the proceedings (among other things) *unreasonably* (rule 76(1)(a)) or that the proceedings had no reasonable prospect of success (rule 76(1)(b)). I would not go that far. While I have found against the respondent and have awarded a sum greater than that sought by the claimant, the respondent had relied on an alternative method of calculation suggested by its accountant. While that alternative method was in my judgment incorrect, I can see why the respondent adopted it and I do not think it was unreasonable to adopt that position in the litigation or that it was an argument which lacked reasonable prospects of success.

14. I take at face value the respondent's explanation for its failure to attend the preliminary hearing for case management conducted by me on 14 April 2020. The respondent claims that it was unable to connect and gave that explanation promptly on 15 April 2020. There were occasional problems with the telephone conferencing service used at that time and I am prepared to accept this explanation.

15. The respondent's failure to attend the hearing conducted by EJ McMahon on 1 November 2019 is a separate issue. However, that hearing was adjourned not because the respondent failed to attend but because the respondent's application for a reconsideration of the decision to reject the response remained outstanding at that time. While there remained a possibility that the response might be accepted EJ McMahon was almost bound to adjourn that hearing and the additional costs or expenses incurred by the claimant are not attributable to any unreasonable failure to attend that hearing on the part of the respondent.

16. I therefore reject the claimant's application for preparation time or expenses. I am not satisfied that the respondent's defence of the proceedings lacked a reasonable prospect of success or that the proceedings were defended or conducted unreasonably.

Employment Judge: Mark Whitcombe
Date of Judgment: 22 June 2020
Entered in register: 01 July 2020
and copied to parties