



EMPLOYMENT TRIBUNALS

Claimant: Ms Jatinder Kaur

Respondent: TG Beauty Ltd

Heard at: Watford Employment Tribunal

On: 26th July 2021 **by:** CVP

Before: Employment Judge Clarke (sitting alone)

Representation

Claimant: Ms Jatinder Kaur

Interpreter: Ms Sakina Ismail (Hindi)

Respondent: Mr Rizwan (Respondent's accountant)

RESERVED JUDGMENT

- (1) By consent, the Respondent's name is amended to TG Beauty Ltd.
- (2) The Claimant's claim for holiday pay pursuant to the Working Time Regulations 1998 is well founded. This means that her claim succeeds.
- (3) The Respondent is ordered to pay to the Claimant the sum of **£333.01 (gross)** calculated as set out in the reasons below.

REASONS

Introduction

1. By a claim form presented on 13th March 2020 the Claimant complained that she was owed holiday pay.

2. The Respondent submitted a response form on 20th May 2020 and resists the Claimants case, in essence saying that the Claimant has miscalculated her holiday entitlement and had been paid all that was due to her.
3. The case was listed for hearing by Cloud Video Platform at 14:00 on 26th July 2020 with a time estimate of 2 hours. Connection problems caused substantial delays before and during the hearing and the interpreter was unable to remain beyond 16:40. I therefore reserved judgment, there being insufficient time for judgment to be given with the interpreter present.
4. The Claimant represented herself and the Respondent was represented by Mr Rizwan. The Respondent has ceased trading and Mr Rizwan is the accountant assisting with the Respondent's winding down.

The evidence

5. I heard sworn oral evidence from the Claimant herself and considered the ET1, ET3, the Claimant's contract of employment and payslips covering the period January 2019 to December 2019 which were provided electronically during the hearing.
6. At the conclusion of the evidence both the Claimant and the Respondent made brief oral submissions.

Issues for the Tribunal

7. The Issues for the Tribunal were as follows:
 - (i) What was the Claimant's leave year?
 - (ii) How much of the leave year had passed when the Claimant's employment ended?
 - (iii) How much leave had accrued for the year by that date?
 - (iv) How much paid leave had the Claimant taken in the year?
 - (v) Were any days carried over from previous years?
 - (vi) What is the relevant daily rate of pay?
 - (vii) Has the Claimant been paid for all her accrued holiday entitlement?

Relevant Findings of Fact:

8. There was no dispute as to the primary facts in relation to the nature and duration of the Claimant's employment.
9. The Claimant was employed by the Respondent as a beautician/beauty therapist between 5th December 2018 and 20th December 2019 and worked at a number of locations.

10. The Claimant's contract of employment is dated 21st March 2019 but shows the employment start date at paragraph 9 above. The Claimant's remuneration [set out on page 3 of the contract] was £8.50 per hour and hours of work were variable and to be organised by a rota. No minimum or maximum number of hours were specified or guaranteed (essentially it was a "zero hours" contract).
11. The contract specifies that the holiday year runs from 1st January to 31st December and statutory holiday entitlement would be accrued on a pro-rata basis to actual hours worked in accordance with the Working Time Regulations 1998. It further states that full time workers accrued 28 days per year and part-time employees annual holiday entitlement would be pro rata in accordance with the formula: (hours worked over 35) multiplied by 25. There is no entitlement to carry over unused holiday [pages 5-6 of the contract].
12. The contract also specifically provided for the right to deduct overpayments.
13. The Claimant confirmed she had:
 - (i) Been away in India for a total of 5 weeks between 3rd April 2019 and 5th May 2019, an agreed period of 4 weeks which had to be extended to 5 weeks because the airline closed and she could not return.
 - (ii) Not been paid for her holiday time in April/May 2019.
 - (iii) Been told that holiday there was no holiday but that she would receive holiday pay at the end of the year.
 - (iv) Resigned giving 1 months notice at the end of 2019.
 - (v) Been paid for 14 days holiday at the termination of her employment.
 - (vi) Been told that she received only 14 days holiday due to the time spent in India as she had taken a total of 19 days holiday between 1st January 2019 and 29th April 2019;
 - (vii) Worked between 35 to 42 hours per week earning an average of £59.50 per day.
14. No issue was taken by the Respondent's representative with any of the above save for the amount of holiday accrued or paid, which he asserted had been based on hours rather than days.
15. Although it was suggested by the Respondent's representative that the Claimant might have had 2 separate periods of employment being (1) the period before her trip to India in April 2019 and (2) the period after her return in May 2019, the Claimant denied that there had been two separate contracts and asserted that her employment was continuous.
16. There was no evidence advanced to support the Respondent's suggestion and only one contract of employment showing a start date of 5th December 2018 was provided as evidence. Accordingly, I reject that suggestion and find that the Claimant's employment was continuous throughout the period 5th December 2018 to 20th December 2019.
17. The Claimant did not recall receiving holiday pay prior to her final (December 2019) pay packet but accepted that it was possible that she had received some.

Having seen the Claimant's payslips, I am satisfied that she was paid £170.00 of holiday pay for each of the months of September and October 2019 (a total of £340.00), in addition to the holiday pay of £492.00 shown on her final payslip dated December 2019. She had therefore been paid a total of £832.00 in the relevant holiday year. Her payslips did however confirm that she was not paid holiday pay during her 5 week absence in April/May 2019 and I find that this period which (save for the additional week) had been pre-agreed before the Claimant commenced employment was taken as authorised but unpaid leave.

Relevant Law and Conclusions

18. Regulation 14(2) of the Working time Regulations 1998 ("the WTR") give a worker a right to a payment in lieu of accrued but untaken/unpaid holiday on termination of employment.
19. Regulation 13 provides that a worker is entitled to four weeks' annual leave in each leave year.
20. Regulation 16(1) of the Working time Regulations 1998 ("the WTR") states that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulation 13 at the rate of a week's pay in respect of each week of leave.
21. Regulation 30(1) of the Working time Regulations 1998 ("the WTR") confers on a worker the right to complain to the Tribunal in the event that their employer has failed to pay him the whole or part of any amount due to him under Regulations 14(2) or 16(1).
22. Under section 30(1)(b) of the WTR, claims must be presented within 3 months beginning with the date of payment of the wages from which the deduction was made, or where there has been a series of deduction, within 3 months of the last deduction in the series – section 23(3).
23. The rate of holiday pay will be in accordance with the provisions of the contract or the WTR, whichever is the more favourable, as Regulation 17 of the WTR provide for an irreducible minimum entitlement.
24. Pursuant to Regulation 16(2) of the WTR, a "week's pay" is be calculated in accordance with s. 221 to 224 of the Employment Rights Act 1996 ("the ERA"). This will essentially be the normal remuneration.
25. As the Claimant does not have normal working hours, but her hours vary, s.224 ERA is applicable and the weeks' pay is to be calculated using an average of the earning for the 12 complete weeks prior to the calculation date (her date of termination) although any week in which the employee was not working is disregarded for the purposes of the 12 week period and an earlier week is brought in to make up the 12 weeks.

26. Although s.16(3) of WTR now amends the applicable period of consideration in s224 ERA from 12 to 52 weeks, this amendment is effective from 6th April 2020 and will not apply to the current claim as the amendment post-dates the date of calculation.
27. I note that the Claimant's payslips show that she was paid travelling expenses in addition to an hourly rate of £8.50/hr for each hour worked. In accordance with *Bear Scotland Ltd -v- Ors -v- Fulton and ors and other cases 2015 ICR 221, EAT*, these should be included in the calculation of the normal week's pay under s224 ERA.
28. In this case, the Claimant was an employee of the Respondent and was therefore a worker within the definition of s.230(3) of the ERA. She was therefore entitled to the protection conferred by Regulation 14(2) of the WTR.
29. She claims in respect of holiday pay accrued but unpaid at termination of her employment, namely that she was not paid for her full accrued entitlement in her final pay package for December 2019 (or indeed at any time subsequently). Her claim was presented on 13th March 2020, within 3 months of the end of her employment and the claimed deduction.
30. As the Claimant's contract of employment reflects the statutory scheme and does not permit holiday to be carried over from one year to the next, in order to succeed in her claim that the Respondent has unlawfully failed to pay her sums due in respect of accrued holiday pay, the Claimant must show that she had accrued more holiday than she was paid for over the relevant leave year in which her employment came to an end.
31. Under the Claimant's contract of employment, the Claimant's leave year was 1st January to 31st December and therefore any holiday accrued between the commencement of her employment on 5th December 2018 and 31st December 2018 cannot be considered. The Claimant's employment came to an end on 20th December 2019.
32. I have found it impossible to make any sense of the calculation for pro rata holiday pay in the contract of employment (as set out at set out at paragraph 11 above), notwithstanding that it refers to the WTR and appears to have been intended to be based upon them. Neither have I been assisted by the evidence or submissions to understand how the formula in the contract was applied so as to arrive at the payments in fact made by the Respondent to the Claimant.
33. The claim has been brought as a claim under the WTR and therefore the calculation provisions of the WTR apply. Although the Claimant's employment contract provides a pro rata method of calculating holiday entitlement based on working hours, the WTR do not. Further and in any event, the WTR provide for an irreducible minimum due to an employee.
34. Accordingly, for the purposes of determining whether or not the Claimant has been paid what she is entitled to by way of holiday pay at the termination of her

employment, I find that the most appropriate way to calculate what was due to the Claimant is to use the calculation method set out in the WTR.

35. Using the WTR, pursuant to Regulation 13, the Claimant was entitled to 4 weeks annual leave in each leave year. She had therefore accrued 27.1 days (or 3.89 weeks) of holiday during the period 1st January 2019 to 20th December 2019.
36. Her date of termination was Thursday 20th December 2019. Accordingly, in order to calculate a weeks pay, pursuant to s.224 of ERA, the relevant period for averaging is the 12 week period 1st October 2019 to 16th December 2019.
37. The Claimant was paid monthly and her payslips are monthly and are not broken down into weekly amounts. None of the evidence before me allows me to ascertain what she was paid on a weekly basis or during the period 1st October 2019 to 16th December 2019. However, I am able to determine what she was paid from 1st October 2019 to 20th October 2019, and I have therefore used this 12.57 week period as the basis for the calculation of a weeks' pay.
38. Her payslips show that during this period she was paid £1,378.96 gross in October, £1,280.85 gross in November and £1,104.80 gross in December (including her travel expenses but excluding her final holiday pay in lieu), a total of £3,764.60 gross. Over a 12.57 week period this equates to a weeks' pay of £299.49.
39. The Claimant's accrued entitlement at 20th December 2019 was therefore 3.89 weeks x £299.49 = £1,165.01.
40. Of this accrued entitlement, she had been paid £340.00 holiday pay during the leave year (see paragraph 17 above) and £492.00 in respect of holiday pay in her final payslip, a total of £832.00.
41. Deducting the amount paid in the leave year from the amount due in the leave year, I find that the Claimant has been underpaid her holiday entitlement by a total amount of £333.01.
42. Accordingly, I find that the Claimant's claim for holiday pay pursuant to the WTR is well-founded and there will therefore be judgment in the sum of £333.01.

Employment Judge Clarke
Date: 30th August 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON:

FOR EMPLOYMENT TRIBUNALS: