



# EMPLOYMENT TRIBUNALS

## Claimant

Thomas Murphy

v

## Respondent

Alcema Ltd

**Heard at:** Watford by CVP

**On:** 24 September 2021

**Before:** Employment Judge Allen sitting alone

## Appearances

**For the Claimant:** In person, assisted by his wife Mrs Murphy

**For the Respondent:** Mr Jew, Keystone

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

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was Video. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Bundle comprised 70 pages the content of which is noted together with statements of the Claimant and Mr Spencer and the Respondent's submissions.

The order made is described below.

## JUDGMENT

1. The claim that the Claimant was entitled to notice from the Respondent in accordance with Regulation 15(2) of the Working Time Regulations 1998 (WTR) is not well founded and is dismissed. The claim for payment in lieu of 14.3 days accrued holiday entitlement arising from this is also dismissed.
2. The claim that the Claimant suffered unauthorised deduction from pay in respect of holiday pay is well founded and succeeds.
3. The Respondent will pay the Claimant the sum of **Gross £1081.71**.
4. This sum is subject to the usual deductions e.g., tax and national insurance which the Respondent will deduct from the gross sum before payment.

## REASONS

1. In a claim filed with the tribunal on 21 October 2020 the Claimant brings a claim for unauthorised deduction of wages in respect of holiday entitlement.
2. The Claimant commenced employment with the Respondent on 1 June 2016 and his contract was terminated by reason of redundancy on 12 October 2020; the effective date of termination (EDT).
3. The Respondent required the Claimant to take any accrued holiday entitlement as leave during the notice period.
4. Was the Claimant paid for the Bank Holiday's that fell between April and the effective date of termination? If he was paid did that payment comply with Regulation 16 WTR?

### Findings

5. Bundle pages 22-23 and 31.
  - 5.1 The Claimant was entitled to 20 days holiday per year.
  - 5.2 The Claimant received a further 8 days per year in respect of Bank Holidays.
  - 5.3 The holiday year ran from 1 January to 31 December each year.
  - 5.4 Clause 8.9 of the contract of employment states:

“The company reserves the right at its sole discretion to require you to take any outstanding holiday during any notice period (whether the notice is served by the company or you).”
6. By the EDT the Claimant had accrued 20.3 days leave 6 of which were Bank Holidays.
7. 9 April 2020 the Claimant was furloughed by his employer in accordance with the terms of the government's job retention scheme. The Claimant remained on furlough until his contract was terminated for reason of redundancy on 12 October 2020.
8. Bundle page 44 - The Claimant received a notice of redundancy by letter on 14 September 2020; there are no issues surrounding the redundancy process. At paragraph 3 of the first page the letter includes a 'notice' to the Claimant as follows:

*'You are required to take all accrued holiday during your notice period in accordance with clause 8.9. of your contract of employment.'*
9. The Claimant was contracted to work 4 days per week. He received 4 weeks' notice and consequently, the notice period covered 16 working days.

10. If the Respondent was entitled to require the Claimant to use holiday accrued but not taken during the notice period:

10.1 14.3 days would be holiday; and

10.2 the remaining 1.7 would count as work days.

In fact, the Claimant's final pay advice shows that he was paid 2 full days rather than 1.7.

11. The Claimant gave evidence today that on the 5 Bank Holidays that fell between 9 April and EDT he was paid at the capped furlough rate. He explained his ET1 claim form was based on discrepancies between the pay advices he received before furlough which always stated the payment he received for Bank Holidays as a separate entry. During furlough the pay advices he received did not address Bank Holidays consequently, he was labouring under the mistaken belief he had not been paid for these days when the claim was filed. The Claimant now accepts he had been paid at the capped furlough rate for those 5 days.

## The law

### Working Time Regulations 1998

12. Regulation 2. Interpretation

*"Relevant agreement", in relation to a worker, means a workforce agreement which applies to him, any provisions of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer.*

### **Regulation 13. Entitlement to 'Basic' annual leave**

(1) ....., a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is

—

(a) - (b) N/A

(c) in any leave year beginning after 23rd November 1999, four weeks. (20 days)

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; .....

(4) - (8) N/A

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu **except** where the worker's employment is terminated.

Regulation 13A. Entitlement to 'Additional' annual leave

(1) ....., a worker is entitled in each leave year to a period of 'Additional' leave determined in accordance with paragraph (2).

(2) The period of 'Additional' leave to which a worker is entitled under paragraph (1) is—

(a) - (d) N/A

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks. (8 days)

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4)-(5) N/A

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b)-(c) N/A.

Regulation 15. Dates on which leave is taken.

(2) A worker's employer may require the worker-

(a) to take leave to which the worker is entitled under [Regulation 13] [or Regulation 13 a]; Or

(b) N/A,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) a notice under paragraph (1) or (2)-

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; And

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) the relevant date, for the purposes of paragraph (3), is the date-

(a) in the case where notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case for notice under paragraph (2)(b), as many days in advance of the earliest date so specified as the number of days or part-days to which the notice relates.

**(5) any right or obligation under paragraphs (1) to (4) may be varied or excluded by relevant agreement.**

#### Regulation 16. Payment in respect of periods of leave

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulation 13 [and Regulation 13A] at the **rate of a week's pay in respect of each week of leave.**

#### Regulation 30. Remedies

(1)(b) A worker may present a complaint to an employment tribunal that his employer- has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

#### *Industrial & Commercial Maintenance Limited v Briffa UKEAT/0215/08*

Effect of 'relevant agreement' (Reg 2 WTR) on employer's obligation to give notice of holiday to be taken by employee, under Regulation 15.

In that case the Claimant received a letter of termination. That letter said, among other things: "... Your notice is one week and therefore your last day of work on the books is Friday, August 17th. However, we do not want or need you to work your notice. Instead, and **in accordance with our contract terms** (*my emphasis*), **insofar as you have accrued but not taken paid holiday you must take the holiday next week and will be paid accordingly...**"

#### **Conclusion**

13. Was the claim fatally flawed in that the Claimant stated he had not received ANY holiday pay for the relevant period; and if not
14. How much holiday entitlement had the Claimant accrued but not taken by the effective date of termination (EDT); Was the Claimant entitled to

Regulation 15(2) WTR notice from his employer to take accrued holiday entitlement during the notice period; and if so

15. Was the Claimant entitled to payment for accrued holiday not taken on termination of contract of employment? Or
16. Was there a 'relevant agreement' in place as set out in Regulation 15(5) WTR as defined by Regulation 2 WTR; and
17. Was the Claimant paid in accordance with Regulation 16 in respect of holiday entitlement regarding Bank Holidays that fell between April 2020 and EDT; and if not
18. What further sum is the Claimant entitled to by way of Remedy?
19. Was the claim fatally flawed in that the Claimant stated he had not received ANY holiday pay for the relevant period?
20. No. The Claimant's claim form asserts that he did not receive any holiday pay. During the course of the evidence, he conceded that in fact he was paid at the capped furlough rate.
21. It emerged during evidence that this was a mistake on his part due to the fact his furlough pay advices did not address payment for Bank Holidays which had been specifically stated in pay advices pre-furlough.
22. Is the claim defective in that it asserts a whole payment deduction was made from the Claimant's holiday pay rather than that a part payment deduction was made? Whilst the claim is defective it is not fatally so. In my view the Respondent is not seriously disadvantaged by this mistake. There was never any doubt that the claim was for an unauthorised deduction from wages in respect of holiday pay. Had the Claimant's claim been for unauthorised deduction from wages and then emerged during the hearing to be for some other infringement of employment law e.g., unfair dismissal I would not have drawn the same conclusion. In my view the only issue was whether it was a whole or a part deduction. A change to a part deduction is to a small degree to the Respondent's advantage, the company records to be reviewed are the same.
23. It was also argued on behalf of the Respondent the claim is out of time as regards the Bank Holidays in April and May.
24. I disagree, the final payment in question related to the August Bank Holiday and the claim was lodged some eight weeks later; well within the statutory three-month time limit. In any event had that not been the case I would have calculated the statutory time limit from the date of the pay advice that dealt with that payment namely 25 September. That is the first opportunity the Claimant would have received relevant information about the payment for the August Bank Holiday.

25. The right to bring a claim is contained in Section 13 Employment Rights Act 1996. Section 23(2) of the same act states that the tribunal shall not consider a claim lodged after three months beginning with the date of the payment from which the deduction was made. Section 23(3) talks about a series of deductions and sets the three-month time limit from the date of the last deduction. There is indeed a significant gap; almost four months between the April/May Bank Holidays payments and the August. Having said that I am minded to view these as a series of deductions since they relate to Bank Holidays specifically. (I am also mindful of the deficiency in the furlough pay advices referred to above which made it difficult for the Claimant to immediately recognise that a deduction had been made at all). On that basis I treat the claim as a series of deductions the last of which came to the attention of the Claimant on 25 September 2020 and it is not out of time.
26. How much holiday entitlement had the Claimant accrued but not taken by the effective date of termination (EDT)?
27. During the hearing the parties agreed it was 20.3 days from which 6 Bank Holidays were to be deducted leaving 14.3 days.
28. Was the Claimant entitled to Regulation 15(2) WTR notice from his employer to take accrued holiday entitlement during the notice period;
29. The Claimant argues he should not have been compelled to take his annual leave during his notice period without proper notice as set out in Regs 15(2) & (3) WTR.
30. Having considered also Regs 2 and 15(5) WTR together with the guidance provided by *Industrial & Commercial Maintenance Limited v Biffra* I am satisfied:
- 30.1 There is indeed a right enshrined in Reg 15(2)& (3) for an employee to receive notice from his employer to take his leave at a specified time. 14.3 days leave multiplied by two days' notice for each day of leave required to be taken making a total of 28/30 days' notice [whether 2 days' notice should also apply to the 0.3 of a day is moot given the 'relevant agreement'; see below). It is agreed that the Claimant did not receive 28/30 days' notice.
- 30.2 Reg 15(5) allows the right to notice to be varied by a 'relevant agreement'. Relevant agreement is defined by Reg 2 (see above).
- 30.3 In those circumstances Regulation 15(2) WTR does not apply and the Claimant was not entitled to Regulation 15(2)&(3) notice.
- 30.4 The Claimant explained that notwithstanding the respondent's reliance on *Industrial and Commercial Maintenance Limited v Briffa* in correspondence he dismissed it having taken advice. One of the functions of case law is to provide illustration and guidance on the interpretation and application of law. The case provides a clear

example of the operation of the Working Time Regulations, Reg 15(5) in particular. The case specifically addresses the issue of notice by the employer to the employee to take leave during the notice period. Paragraph 11 of the judgement concludes the contractual clause in that case was a 'relevant agreement' for the purposes of Regulation 15(5).

30.5 The only difference between that case and this was the relevant agreement was introduced as an amendment to the contract whereas here it was always a part of the contract.

30.6 I find that clause 8.9 of the employment contract in this case is a 'relevant agreement' for the purposes of Reg 15(5).

30.7 For the avoidance of doubt this means that clause 8.9 overrides the requirement of the employer to provide two days' notice for each day of leave to be taken.

31. In the circumstances I dismiss the claim for 14.3 days holiday pay. The employer was entitled to require the Claimant to take accrued leave during the notice period as it did in the 14 September letter.

32. Moving on to the issue regarding the payment of holiday pay for the Bank Holidays that fell between the start of furlough and the date of termination.

33. Was the Claimant paid in accordance with Regulation 16 in respect of holiday entitlement regarding Bank Holidays that fell between April 2020 and EDT?

34. Regulation 16 as set out above makes it plain that holiday accrues at the rate of a week's pay in respect of each week of leave and therefore not at the capped furlough rate.

35. I have found the Claimant was paid at the capped furlough rate (see below).

36. What further sum' if any, is the Claimant entitled to by way of Remedy?

37. There were 5 Bank Holidays over the relevant period for which the Claimant ought to have received **£1,802.90**.

38. The Claimant was paid at the capped furlough rate of [£144.23 per day] **£721.15 gross**.

39. The Claimant suffered an unauthorised deduction of **£1081.71** in total and the Respondent is therefore ordered to pay this amount to the Claimant having first made the appropriate deductions in respect for e.g., tax and national insurance.



- 40. These sums were agreed as accurate by the parties during the hearing.
- 41. The 25% uplift in respect of failure to follow guidelines does not apply to this case because it is a wages claim. No order is made.

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Employment Judge Allen

8<sup>th</sup> October 2021

Date: .....

Sent to the parties on: ..1<sup>st</sup> Nov 2021.

THY

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For the Tribunal Office