



EMPLOYMENT TRIBUNALS

Claimant: Mr M Edmunds

Respondent: AM Fire Systems Ltd

Heard at: Manchester Employment Tribunal (by CVP) **On:** 10 November 2021

Before: Employment Judge Dunlop
Mr A Murphy
Mrs C Titherington

Representation

Claimant: In person (for part of the hearing only)

Respondent: Mr S.A. Brochwicz-Lewinski (Counsel)

JUDGMENT

The respondent did not fail to pay the claimant in respect of accrued, untaken annual leave at the termination of this employment. This claim fails and is dismissed.

REASONS

1. This judgment should be read alongside the Tribunal Judgment sent to the parties on 20 July 2021. All of the background is contained in that Judgment.
2. This hearing was convened to deal with one outstanding claim following a complex liability hearing. All the claims considered at the liability hearing were determined in favour of the respondent.
3. When the claimant joined the hearing this morning he was extremely agitated. He made it clear he was very angry about the earlier decision. Discussions took place about the way in which this hearing would be conducted and the matters to be decided. I will not rehearse the detail of those discussions in this judgment. However, the claimant became

more agitated through the course of them and eventually disconnected from the CVP hearing after around twenty minutes.

4. After a short break, we reconvened and heard the respondent's submissions. The claimant did not rejoin. Due to the claimant's agitated state, we considered it was appropriate to do the best we could to have regard to arguments the claimant might have put forward if he had been represented, and to make a substantive determination on the merits of the issue.
5. The only issue was whether, at the time of his termination of employment, the claimant has accrued outstanding annual leave which ought to have been paid to him and wasn't.
6. It was clear on the papers that the holiday year ran from 1 January each year. The respondent acknowledged that the claimant would have accrued holiday between 1 January 2019 and the termination of his employment on 14 May 2019, and that he had not taken any holiday in that period.
7. We considered whether there was any entitlement to carry forward unused holiday from the previous year but concluded on the basis of the claimant's contract and handbook that there was not. He had been suspended for around a month at the end of 2018, but the suspension letter made it clear he could take holiday with permission. In those circumstances, the Tribunal concluded that there was no 'carried over' holiday to be added to the 2019 total.
8. Mr Brochwicz-Lewinski presented calculations which showed the Claimant's accrued entitlement was 2.21 weeks. We accept those calculations.
9. The claimant was an employee, director and shareholder. He was paid only £719 per month. The rest of his earnings from the respondent took the form of dividends. We accepted that entitlement to holiday pay could only be based on his wages (as a worker). We raised a concern that, on the face of it, these wages were most likely below national minimum wage threshold and queried whether there was an argument that holiday pay should be paid at national minimum wage level in such circumstances.
10. The claimant's claim had originally included claims that he had been underpaid as a worker/employee, but these had been withdrawn by his then representatives. This matter is dealt with in case management orders.
11. Mr Brochwicz-Lewinski submitted that it was for the parties to determine what proportion of his work the claimant undertook as a worker, as a director or as a shareholder. They had chosen to minimise the proportion attributable to being a 'worker' and there were significant tax advantages in doing so. The Tribunal had no basis to go behind that arrangement make findings of fact as to portions of the Claimant's time

when he was acting as a worker. No evidence was directly addressed to that point in the substantive hearing, not least because the claims of underpayment had been withdrawn.

12. We accepted Mr Brochwicz-Lewinski's submissions and found that the payment due for outstanding accrued holiday should be based on the £719 rate (arguably, a slightly lower rate, as the claimant's pay had recently increased to £719 from £702 per month, but for reasons that will become apparent that difference is not material).
13. Although the claimant's employment was expressly terminated on 14 May 2019, he was in fact paid to the end of that month. We accept the calculations put forward by Mr Brochwicz-Lewinski which show that this payment slightly exceeded the amount the claimant was due to receive in respect of accrued untaken holiday pay. (If the holiday pay had been calculated at a lower average rate, the amount by which it would have been exceeded would have been greater.)
14. In the circumstances, we were satisfied that there was no holiday pay due to the claimant on the termination of his employment.
15. On the Tribunal's own motion, I have prepared a judgment with written reasons for the benefit of the claimant, given that he left the hearing before the substantive matters were discussed.
16. There remains one issue – the claimant's claim in respect of an alleged underpayment was withdrawn but not dismissed due to the claimant having indicated that he wished to pursue the matter in the civil courts. I had hoped to confirm with the claimant today whether he was content for that claim to be dismissed. As I was unable to do so, this will be taken up with the parties in separate correspondence.

Employment Judge Dunlop
Date: 10 November 2021

SENT TO THE PARTIES ON
15 November 2021

FOR EMPLOYMENT TRIBUNALS

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