



EMPLOYMENT TRIBUNALS

Claimant: Mr P Omorogbe

Respondent: Mr R Wegiel and Miss M Axante t/a Julia's Removals

HELD AT: Manchester

ON: 12 November 2021

BEFORE: Employment Judge Leach

REPRESENTATION:

Claimant: In person

Respondent: Not in attendance

JUDGMENT having been sent to the parties on 16 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant brought a claim in the Employment Tribunal claiming that he had not received his holiday entitlement during his employment with the respondent or paid in lieu of accrued untaken holidays on termination of employment. His claim is that he did not receive any entitlement to paid holidays throughout his employment from 28 October 2018 to the date of dismissal, which was 2 April 2020.

This Hearing

2. This was an in person hearing at the Manchester Employment Tribunal. However, the respondents were not in attendance. They had emailed the Tribunal at 8.14pm on 11 November 2022 (the evening before this final hearing). The email was from an address for the respondent, Mr Wegiel, but was stated to have been signed by Miss Axante. The email was not copied to the claimant, but the Tribunal has made arrangements for a copy to be provided to him.

3. The email informed the Tribunal that Mr Wegiel was unwell and was not attending. It also informed the Tribunal that the other respondent, Miss Axante, was

in Romania and therefore would not be attending either. There was no documentary evidence supporting either of these reasons for non-attendance.

4. Although the email did not explicitly ask for this, I considered whether it was appropriate to postpone this hearing. I decided that it was not in the interests of justice to postpone the hearing. This is a relatively small claim about holiday pay. Considerable Tribunal time had already been taken up in dealing with this claim, including with a hearing almost a year ago which was supposed to be the final hearing but in fact was changed into a case management hearing.

5. I also took into account the very late submission of this information by the respondents and the lack of any documentary evidence.

6. I took into account the fact that the claimant was here at the Manchester Employment Tribunal ready for his case to be heard and determined, that notification of this hearing had been sent to the parties on 23 June 2021 and the Tribunal had provided valuable time and resources to the parties today, in order to determine this case.

7. There was limited documentation available to the Tribunal. At the beginning of 2021 the claimant provided a calculation of how much he claims the respondent owes to him. This was provided to the Employment Tribunal and to the respondent in accordance with Case Management Orders made in December 2020/beginning of 2021. The respondent was supposed to then provide any counter calculation to these calculations, but it did not so. The Tribunal file shows that documents were provided by the respondents, but these were original bank statements and they were only provided to the Tribunal and not the claimant. On 23 June 2021 the Tribunal returned these original documents to the respondents, instructing them to send information to the claimant. The claimant tells me, and I believe him, that he did not receive these or any other documents from the respondents: he received nothing at all from the respondents as far as this case is concerned.

8. As a result of the respondents' non-compliance the claimant did then not proceed with putting together a bundle of documents and the matter of witness statements simply fell away. The only documents that the claimant has, however, are payslips which the respondent had emailed to him.

Findings of Fact

9. The claimant started work for the respondent in October 2018. Initially he received no payslips and was paid in cash. However, this soon changed and the claimant started to be paid by direct bank transfer and to be provided with payslips. This change occurred as from 22 November 2018 or thereabouts.

10. The claimant recalls receiving a document (a contract) at an early stage of his employment and then another document partway through his employment, six months or so into his employment. He recalls signing the document but he has not kept copies.

11. The respondent has not provided the Tribunal with any document and not provided any disclosure to the claimant either. The claimant's evidence is:-

- a. that the contract did not set out any rights in relation to holiday entitlement or holiday pay,
- b. when he queried this he was specifically told by the respondent that he was not entitled to paid holidays. That may have been something to do with the zero hours or limited hours nature of his employment, but the claimant is not clear why.
- c. The claimant did not query this further, claiming that his employment was not always safe, including from a health and safety perspective, and also from the fact that a number of transactions (between respondent and its customers) were by way of cash in hand. In short, the claimant needed the work but this was not an operation in which he felt comfortable in raising concerns or demanding rights.

12. The claimant told me that the respondent changed its position in relation to holidays in June 2020. The claimant found out that his former co-worker, Joe Smith, had been provided with a new contract which specifically set out rights in relation to paid holidays but that this was a new arrangement. The claimant's employment of course had been terminated by this stage, and as at June 2020 the claimant had already gone through the ACAS early conciliation process and was in the course of bringing his Employment Tribunal proceedings.

13. Turning to the calculation provided by the claimant, this calculation is made up of information from the payslips received by the claimant throughout his employment with the respondent. These payslips set out the hours worked. The claimant in his calculation has set out 56 weeks for the period 22 November 2018 to 2 April 2020. These are all the times the claimant says he was paid. In some weeks the respondent had no work for the claimant and therefore he was not paid. Sometimes the respondent had a lot of work for the claimant and the respondent would not pay the claimant for all of the hours worked in that week they were worked but would carry forward some to the following week. The claimant told me, (and I accept his evidence), that the calculation provided by him sets out all of the weeks that were worked and all of the pay that was received from the date when he has records of this, being 22 November 2018.

14. In the course of the hearing I asked the claimant to provide me with three sample copy payslips, noting that they must include his last payslip. The claimant did so. I received and considered the payslips provided. It is clear from the last payslip that there is no mention of any calculation of any accrued untaken holidays. I took this into account when deciding whether, as the respondent had said, the claimant was in fact paid for holidays during periods of his employment. The claimant was paid exactly £10 an hour and there was no suggestion of any "rolled-up" holiday pay as is sometimes seen with casual employment. The claimant tells me that the weeks when there was no pay were because there was no work: these were not weeks that the claimant had elected not to work.

15. The claimant applied to amend his claim to add a claim of breach of contract (non payment of notice). It was apparent that he wanted to bring this claim from the terms of his calculation. This included a calculation for payment of one week's notice. I considered the claim form originally issued. It was clear that that complaint did not form part of the claim form. I considered whether to allow the amendment at

this stage but decided not to. The amendment application was made at a very late stage and the respondent was not in a position to respond to that amendment. I note that the respondent in its response form alleges that the claimant's employment was ended by reason of gross misconduct and therefore the respondent ought to have an opportunity of replying to that. I did consider allowing the amendment and then putting off the breach of contract claim to another date, but I decided (for the sae reasons as stated above) that it was not in the interests of justice to do so. It would have been disproportionate to have provided an additional hearing to this claim given its limited value, delays so far and the opportunity that the claimant had to have brought the breach of contract claim initially and/or to have made an amendment application at an early stage.

Conclusion and remedy

16. I am satisfied on the analysis of the evidence available, that the claimant was not in receipt of any paid holiday entitlement and that he was entitled to be paid for accrued untaken holidays as at the termination of his employment.

17. One issue that arose was that whether that paid holiday entitlement should include the entitlement for the previous holiday year or limited to the holiday year in which the claimant's employment terminated. Applying the Working Time Regulations, the most recent holiday year would have started on 28 October 2019 and ended on the dismissal date (2 April 2020). In the absence of agreement, the holiday year runs from anniversary of employment. The contracts provided did not include provisions relating to paid holidays.

18. I have considered the recent case of **Pimlico Plumbers v Smith [2021] IRLR 678**, and particularly the appendix to the Employment Appeal Tribunal's Judgment in that case which sets out the amended parts of the reinterpreted regulation 13 of the Working Time Regulations. Having regard to the added paragraph 13(16), I need to consider whether the claimant was unable or unwilling to take some or all of the leave to which he was entitled in the previous holiday year because of the employer's refusal to remunerate the worker in respect of that leave.

19. I am satisfied that the claimant's circumstances do fall within this regulation 13(16) and therefore the claimant is entitled to receive payment for accrued untaken holidays for the period from 22 November 2018 to the date of termination, being 2 April 2020. This is limited to the statutory entitlement of 5.6 weeks per year.

20. The claimant's calculation applies a percentage of 12.07% to hours worked which he told me he found on an ACAS website and which guided him to apply that percentage in order to work out his entitlement to holiday pay. The hours used in this calculation are all those hours received on his payslips. This amounts to a total amount of £1178.03.

Employment Judge Leach

Date: 14 December 2021

REASONS SENT TO THE PARTIES ON

20 December 2021

FOR THE TRIBUNAL OFFICE

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