



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101512/2019**

5

**Held in Glasgow on 26 April 2019**

**Employment Judge: David Hoey**

10

**Mr D Walsh**

**Claimant  
Represented by:  
Mr E Goodwin -  
Solicitor**

15

**Scotsman Publications Limited (in Administration)**

**Respondent  
Not present and  
Not represented**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgement of the Tribunal is that:

25

- (i) The claimant was a worker and entitled to paid annual leave.
- (ii) The claimant is entitled to holiday pay in the gross sum of £8,360 (Eight Thousand Three Hundred and Sixty pounds) which the respondent is ordered to pay to the claimant.
- (iii) The respondent must deduct from the above sum such deductions as

30

required by law.

**REASONS**

**The Claim**

1. This was a claim for non-payment of wages in the form of holiday pay. As the respondent is in administration the claimant had secured the consent of the

**E.T. Z4 (WR)**

administrators to proceed with the action. There was no response lodged to the claim. The hearing was fixed to determine the issues in this case.

2. The claimant was in attendance together with his solicitor. The contract that had been agreed between the parties was produced as were some invoices. I heard evidence from the claimant which was obviously unchallenged.

### Issues

3. When the case called I sought to identify the issues for determination. While there had been no response lodged, it was still necessary to ensure that there was a legal basis for the sums being sought. It was agreed that the following issues had to be determined:

- a) Was the claimant a worker in terms of Regulation 2(1)(b) of the Working Time Regulations 1998 ("the Regulations") (which replicates the provisions of section 230(3) of the Employment Rights Act 1996)?
- b) If so, what is his legal entitlement to paid holidays?

4. The second issue is not as straightforward as it appears. This is because the claim as pled is based expressly upon regulation 30 of the Regulations. It is argued that the claimant is due paid holidays that accrued for the duration of his engagement (as the respondent maintained he was not a worker and had therefore not provided the claimant with holiday entitlement).

### Facts

5. I find the following facts proven on the balance of probabilities having heard evidence from the claimant and considered the documents placed before me.
6. The claimant was engaged by the respondent by a written agreement executed in November 2014 ("the Agreement"). This document is headed "Freelance Journalist Agreement". In accordance with the terms of the Agreement, the Claimant agreed to provide journalistic services to the Respondent. The Agreement states that the claimant is self employed.

7. The Claimant worked initially on a casual basis (one or two days a month) until around April 2015 when he typically worked 40 hours per week consisting of 8 hour shifts for 5 days a week.
8. He initially carried out the work of multi media journalist and digital journalist. He then became Assistant News Editor responsible for breaking news.
9. The claimant personally performed the services for the respondent as outlined in the Agreement. In terms of the Agreement:
- a) Clause 2: The claimant would produce, on a non-exclusive basis, commissioned journalistic work and render to the respondent such other services in such other capacity as may from time to time be agreed.
- b) Clause 2.1: The claimant would at all times keep and provide on request by the respondent reports and records of work done and time spent.
- c) Clause 2.3: The claimant would be paid on a day rate as outlined in Appendix 1 of the Agreement. Any additional time, in excess of basic hours required to ensure the satisfactory completion of all assigned Work would require to be approved by the Editor of the respondent.
- d) Clause 2.4: Completion of any Work would be deemed to be satisfactory if there had been full and complete performance and observance by the claimant of the obligations and warranties under the Agreement. The Editor had the right to reject Work on the basis of it being poor quality or unduly delayed, and such Work would not be paid for.
- e) Clause 5.4: The claimant was required to protect and keep safe any property or equipment of the respondent which is placed at his disposal.

- f) Clause 5.5: In order to fulfil the obligations in terms of the Agreement, the respondent may at the sole discretion of the Editor provide access to office premises and computer equipment as deemed appropriate.
- g) Clause 7.8: The claimant would not use the respondent's time, facilities and equipment in carrying out any Services or producing any Work for a third party.
- h) Clause 8: The claimant was required to keep confidential all information of a confidential nature and value to the respondent and only use this information for the respondent's purposes.
- 10 10. When the respondent placed the claimant on the rota to work, it was expected that he would attend work but it was open to him to decline to attend work (provided some advance notice was given). He did not decline work often. If the claimant advised the respondent that he was unable to work specific days, the respondent would arrange for a colleague to cover his shift.
- 15 11. The claimant had no right to substitute another for himself to provide the service requested. The respondent would decide whether or not to permit any proposed substitution or find another person to do the work.
12. The claimant was only able to leave work when his job for the day was done. That would often involve him working over the 8 hour shift. He was also  
20 required to use the equipment provided by the respondent in carrying out his work. The claimant was part of the team and had become integral to the business and the running of the newsdesk. While he moved to launch a news app in October 2017 he returned to the newsdesk in March 2018 where he remained until he left in October 2018.
- 
- 25 13. The claimant was paid £95 per shift. The claimant was required to send an invoice setting out his shifts by the 25<sup>th</sup> of each month resulting in payment by 15<sup>th</sup> of the following month. He was to invoice the company gross (and he paid his own tax).

14. From 2015 the claimant took (on average) 2 weeks “off work” per year. He had been told that as the respondent did not consider him a worker he was not entitled to any holidays (as such) and no payment was made.
15. The respondent declined the claimant’s request for paid annual leave maintaining that the claimant was not entitled to paid holidays. Throughout the duration of his engagement he was given no paid holidays.
16. The claimant left the respondent on 26 October 2018.

### The law

17. In order to gain the benefit of the Regulations, a claimant requires to be a “worker” as defined. This is a wider concept than that of employee and covers those who undertake to do work personally for another whose status is not by virtue of that contract that of client or customer of any profession or business carried on by the individual.
18. There have been a number of cases consider this definition, including **Byrne Bros v Baird** 2002 IRLR 96 and more recently **Pimlico v Smith** 2017 IRLR 323 and **Uber** [2018] EWCA Civ 2748. A Tribunal must look at the reality of the relationship and assess whether or not the definition is satisfied in terms of the control exercised and how the work is carried out.
19. In terms of regulation 13 and regulation 13a of the Regulations a worker is entitled to the combined entitlement of 5.6 weeks paid holidays each year. Regulation 14 sets out how payments for accrued leave are calculated upon termination of employment.
20. Regulation 16 sets out how holiday pay is calculated and replicates the provisions of a week’s pay as defined in sections 221 to 224 of the Employment Rights Act 1996.
21. Regulation 30 sets out the remedies for failure to provide annual leave entitlement. In particular regulation 30(2) states that a claim should be lodged with the Tribunal within 3 months of the date payment for the holiday should have been made. If a claim is successful the Tribunal is to make an award in

terms of regulation 30(3)(b) which is (per regulation 30(4) to be such compensation that the Tribunal considers just and equitable having regard to the employer's default in refusing to permit the leave and any losses sustained.

5 22. Regulation 16 notes that rights under the Regulations cannot be enforced by a breach of contract claim.

HJ 23. In **Revenue and Customs v Stringer** 2009 IRLR 677 the then House of Lords confirmed that a claim for holiday pay can be brought as a claim for unlawful deductions under Part II of the Employment Rights Act 1996. This means a claimant could rely upon section 23(3) which allows a worker to bring a claim for a series of deductions provided the claim is brought within 3 months of the last in the series.

15 24. There are limitations upon the foregoing, including the Employment Appeal Tribunal's decision in **Bear Scotland v Fulton** 2015 IRLR 15 which stated that there had to be "sufficient factual and temporal links" between the deductions which essentially meant there should be no breaks between deductions in excess of 3 months or more. The Deductions from Wages (Limitations) Regulations 2014 also limit claims for holiday pay to 2 years prior to presentation of the claim.

20 25. A further issue that arises is that in **Stringer** the House of Lords noted that an unlawful deductions claim might not be available where the worker in question was not permitted to take holidays (rather than where the worker took holidays but was not paid for the leave). In the former situation the worker will have received their normal remuneration and arguably sustained no loss.

---

25 26. This point was raised in **Sash Windows v King** 2015 IRLR 348 at paragraphs 37 and 38. A Tribunal is entitled to award such compensation as is just and equitable in a claim under regulation 30.

30 27. In **Sash** the European Court was asked how an individual who was not considered to be a worker was to be paid holidays upon termination of the engagement where the individual was in fact found to be a worker. The court

held that the worker was entitled to be paid in lieu of holidays that had accrued up to the date of termination where the worker had been prevented from taking holidays by being wrongly characterised as not falling within the definition of worker. That reasoning applies to the 4 week annual leave entitlement under European law.

5

28. The court considered whether there ought to be any limitation upon the accrual period and decided that there should not be. This contrasts, for example, to the position of a worker who is unable to take leave due to illness, where the court has held an 18 month period to carry forward is reasonable (see **Larner VNHS2011** IRLR 894).

10

29. The practical effect of the European Court's judgment has yet to be seen within the UK given the domestic legislation that I set out above and in particular the limitations therein.

### Submissions

15 30. The claimant's solicitor lodged written submissions. It is argued that the claimant is a worker. He was required to personally perform services for the respondent and the above facts support a finding that he is a worker.

31. The claimant considers the Respondent's refusal to grant him paid annual leave is a breach of regulations 13(1) and 30(1) of the Regulations.

20 32. The claimant argues that the Respondent failed to grant the claimant paid annual leave since his engagement commenced in November 2014 and relies upon the Court of Justice of the European Union's judgment in the case of **Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Tetsuji Shimizu** (C-684/16), which, it is said, found that where an employer does not diligently give an employee the opportunity to take annual leave, an employee does not lose the right to that leave.

25

33. It is argued that in **King v Sash Windows** (C-214/16) the court held that where an employer will not grant paid holiday, the employer will not be entitled to the benefits of the normal limits on how much can be carried over.

34. Consequently, the claimant argues that as the respondent refused to grant the Claimant paid annual leave during his engagement, he seeks paid annual leave backdated to 2015.
35. The submissions note that claimant regularly worked 40 hours per week for the respondent, typically by way of 8 hour shifts based on a rota system. This equates to a weekly paid annual leave entitlement of £245.42.
36. The claimant claims a total of £4,319.39 in respect of annual leave, broken down as follows:
- a) In respect of 2018, 5.6 weeks paid annual leave which equates to £1,374.35.
  - b) In respect of 2017, 4 weeks paid annual leave which equates to £981.68.
  - c) In respect of 2016, 4 weeks of paid annual leave which equates to £981.68.
  - d) In respect of 2015, 4 weeks of paid annual leave which equates to £981.68.
37. The claimant seeks 4 weeks paid annual leave in respect of 2015, 2016 and 2017 in line with the European Union's Working Time Directive (2003/88/EC).
38. The claimant's solicitor in her submissions notes that at the Hearing on 26 April 2019 I raised the question as to whether reliance on the Regulations exclusively provided the claimant with a remedy in terms she sought given the absence of the ability to bring a claim for a series of deductions within regulation 30. The claimant's submissions argue that the breach of the Regulations in this case does enable the Tribunal to grant paid annual leave to the claimant for the period in question, albeit no explanation as to how this is achieved is provided.
39. The submissions stated that:



- 5 a. “Nonetheless, in order to assist the Tribunal reach their decision as to the Claimant’s entitlement to paid annual leave, his position is that the Respondent’s refusal to grant him paid annual leave constitutes an unlawful deduction of wages in accordance with section 13(3) of the Employment Rights Act 1996. The Claimant considers that he suffered a series of unlawful deductions from wages by the Respondent’s failure to grant him paid annual leave between 2015 - 2018.
- 10 b. Such claim for unlawful deduction of wages is limited to two years in accordance with section 23(4A) of the Employment Rights Act 1996. As such, the Claimant claims a total of £2,356.03 in respect of annual leave, broken down as follows:
- a) In respect of 2018, the Claimant claims for 5.6 weeks of paid annual leave which equates to £1,374.35.
- 15 b) In respect of 2017, the Claimant claims for 4 weeks of paid annual leave which equates to £981.68.”

40. I accept the foregoing as a formal amendment to the Claim Form on the basis that there is no real prejudice to the parties (given it has always been clear that the claimant seeks payment in respect of holidays from his engagement).

20 **Discussion and reasoning**

41. The first issue to determine is whether the claimant is a worker. The label applied by the parties is not conclusive. Tribunals are required to look at the substance of the relationship and make a qualitative assessment to determine whether the claimant falls within the definition of worker given the legal position as set out above.
- 25

42. I have considered this carefully in light of the evidence that was presented to me. I am satisfied on balance that the claimant was a worker. He had entered into a contract with the respondent. In terms of that contract the claimant was required to provide personal services. The dominant purpose of that contract was to provide his personal services to the respondent.
- 30

43. I accept that the Agreement suggests that the claimant is self employed and an independent contractor and that he was paid (and taxed) as such. Nevertheless in terms of the evidence before me (and in the absence of any challenge from the respondent) I was satisfied that the substance of the relationship and its day to day operation was such as to result in the claimant falling within the statutory definition. I require to assess the reality of the relationship as it worked in practice and not simply the label the parties applied to it.
44. The claimant provided services personally to the respondent and he had limited rights to refuse to do so. In fact he rarely did so. The person for whom the claimant was doing the work was not a client or customer of a business being run by the claimant. This could be the case if the work was carried out sporadically but the claimant began from 2015 to work lengthy hours each week. He was being treated as part of the respondent's staffing. He was an integral part of the particular team in which he worked. The relationship was not an arm's length relationship in this case.
45. It is clear that the dominant purpose of the arrangement was to provide personal service. The claimant was under the daily control of the respondent.
46. The claimant was therefore a worker.
47. The next question is what his entitlement to holiday pay is. The claimant was never entitled to any paid holidays as the respondent wrongly determined that the claimant was not a worker. The claimant argues he should be paid for his entire accrued holiday entitlement given the European Court's reasoning in **King v Sash Windows** which gave rise to a very similar set of facts. The European court held that leave was not lost just; instead it was carried forward. There was no requirement to take such leave or ask for it.
48. The claimant is entitled to paid holidays as a worker. He was not afforded that right during his engagement. Applying the reasoning of the European Court he is entitled to the sums sought by way of holiday pay. While there were no submissions on the point, I conclude that he is entitled to rely directly on European law thereby avoiding the need to navigate and surmount the

limitations domestic law places upon his entitlement. The European Court notes the importance of ensuring workers have an effective remedy and that domestic legislation should not create a barrier to entitlement to these rights (see para 46, 47 and 65 of the European Court's judgment). Applying that reasoning, I require to disapply regulation 14(3) so as to take account of earlier leave years and to provide the claimant with an effective remedy of his rights under European law.

5

10

49. Given there is no holiday year as such, in terms of regulation 13(3) I find that his holiday year begins on the anniversary of his date of his appointment which accords with the calculations of the claimant.

15

50. The claimant was paid £95 per shift. He worked 5 shifts a week resulting in a week's pay of £475. The claimant's solicitor calculations set out above are in respect of the net pay but I shall base the claimant's entitlement upon his gross pay (with the respondent being required to make such deductions as required by law).

20

51. The claimant is therefore entitled to holiday pay as follows: £2,660 for 5.6 week's leave in 2018, and £1900 for 4 week's paid leave for each of 2017, 2016 and 2015. The latter years are limited to 4 weeks given the European Court's reasoning only applies to the 4 week leave period stemming from European law. He is entitled to 5.6 weeks for his last year of engagement (his entitlement arising under the Regulations).

52. The claimant is therefore awarded a total of £8,360 (gross) by way of holiday pay-

25

Employment Judge: D Hoey  
Date of Judgment: 28 May 2019  
Entered in register: 4 June 2019  
and copied to parties

30



5