



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111942/2021

Hearing Held by Cloud Video Platform (CVP) on 10 February 2022

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Employment Judge J McCluskey

Mrs M Cowan

**Claimant
In Person**

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20 **Tummas Ltd**

**Respondent
Not Present
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Tribunal is that:

- (1) The respondent failed to make a payment to the claimant, on termination of her employment, in respect of her accrued but untaken holiday entitlement and is ordered to pay the sum of One Thousand, Three Hundred and Sixty Seven Pounds (£1,367) less deductions for tax and national insurance.

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REASONS

Introduction

1. The claimant presented a complaint of failure to pay holiday pay. The respondent denied that the claimant was entitled to any further holiday pay.
5 They asserted that all sums due to the claimant had been paid to her.
2. The claimant gave evidence on her own behalf. She was accompanied by her friend, Ms McLarin, who was present to assist the claimant with her use of technology for the purpose of the final hearing, which was taking place remotely by way of the Cloud Video Platform (CVP). I was satisfied
10 that the hearing was able to proceed by way of CVP.
3. The respondent had lodged an ET3 and had lodged documents with the Tribunal in response to standard case management orders dated 24 November 2021. The respondent was not present and not represented at the final hearing. Mr Sammut, the owner of the respondent, had written
15 to the Tribunal, in advance of the final hearing, to inform the Tribunal that the respondent did not intend to appear or be represented at the final hearing and would await the outcome. Having checked that the respondent was not present or represented, the final hearing proceeded with the claimant giving evidence on her own behalf.

20 Issues

4. The Tribunal identified the following issues for determination:
 - (i) Was the claimant entitled to any payment from the respondent for holiday pay?
 - (ii) If so, what sum is due to the claimant?

25 Findings in fact

The Tribunal made the following findings in fact which are relevant to the matters to be decided:

5. The claimant did not have a written contract of employment.

6. The claimant's employment commenced on 29 March 2016. Her employment ended on 9 July 2021.
7. Prior to her employment terminating the claimant worked as a bar manager. She was responsible for the hours of work for herself and the other bar staff. On the instructions of the respondent, she liaised regularly with the respondent's accountant about wages for herself and the other bar staff.
8. The claimant worked 28 hours per week. Her hourly rate of pay was £10 gross. Her weekly rate of pay was £280 gross.
9. The claimant was on furlough from March 2020 to July 2020 and received furlough pay at 80% of her wages. The claimant was not required by the respondent to take accrued holidays during that period.
10. The claimant worked from July 2020 to 9 October 2020. She worked 28 hours per week. The claimant was not required by the respondent to take accrued holidays during that period.
11. The claimant was on furlough from 10 October 2020 until her employment ended on 9 July 2021. She received furlough pay at around 100% of her wages. The claimant was not required to take accrued holidays during that period.
12. On 7 October 2020 Mr Sammut texted the claimant about payment of wages for herself and the other staff during furlough. The text was about the instructions which the claimant was to give to the respondent's accountant about wages. Mr Sammut said "...make sure he [the accountant] knows everyone is furloughed and make sure he knows I will make up the total amount to 100% of wages so 60% from the government and 40% from me. Don't say I'm not good to you all. LOL" The claimant responded by text "Thank you Henry. Didn't see that coming. Much appreciated truly".
13. The claimant emailed the respondent's accountant on 12 October 2020 and said "That's us back on furlough. Henry has asked that you pay the

furlough at the rate it's at the moment and he will top up the rest of the wages to 100% wages".

14. As at the termination date on 9 July 2021 the claimant had accrued but untaken holiday entitlement of 197.7 hours (namely £1,977 gross).

5 15. The claimant was paid for 61 hours of accrued but untaken holiday entitlement (namely £610 gross) on termination of her employment. This left a balance of 136.7 hours of accrued but untaken holiday entitlement for which the claimant has not received payment (namely £1,367 gross).

10 16. There was no agreement involving an independent legal adviser waiving the claimant's right to claim holiday pay.

Observations on the evidence

17. The Tribunal found the claimant to be credible and reliable and accepted the evidence she gave to the Tribunal.

Relevant law

15 18. Regulation 14 of the Working Time Regulations 1998 (WTR), sets out the entitlement where a worker's employment ends during a leave year and provides at Regulation 14(2) that on the termination date "where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph 3".
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Discussion and decision

19. The respondent averred in their ET3 that the sums paid to the claimant on a weekly basis during the second period of furlough, from October 2020 until the claimant left employment, were higher than the £224 gross weekly sum (£280 x 80% = £224) shown on the claimant's pay slips during the period. The respondent provided screenshots from the respondent's banking app purporting to show that the sums paid to the claimant were higher than the sums shown on her payslips. The respondent averred in
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its ET3 that such higher sums paid to the claimant were intended to be payments for accrued but untaken holiday entitlement.

- 5 20. The claimant accepted that the sums she received weekly during the second period of furlough were higher than the 80% of her wages shown on her payslips. The claimant submitted that she had understood the higher weekly sums received to be payments to top up her wages to 100% as set out in the text she had received from Mr Sammut on 7 October 2020.
- 10 21. In accordance with Regulation 14 WTR the claimant's entitlement to payment in lieu of accrued but untaken holiday entitlement arises on termination of employment and not throughout the holiday year. Even if Mr Sammut intended such payments to be for holiday pay, contrary to his text to the claimant on 7 October 2020, such payments do not comply with the WTR.
- 15 22. The claimant was not required to take her outstanding holidays from March 2020 when the first period of furlough commenced through to the end of her employment. To do so would have required formal notice to be given to her by the respondent in accordance with Regulation 15 WTR which did not happen.
- 20 23. Further, the claimant did not validly waive her entitlement to receive a payment in respect of her accrued but untaken holiday entitlement (which could only be done by way of an agreement meeting the conditions set out in Regulation 35(3) WTR, such as settlement agreement). The claimant said in evidence that she had not received any paperwork from the respondent. I am satisfied that the parties have not entered into an agreement, such as a settlement agreement, meeting the conditions set out in Regulation 35(3) WTR. Therefore, the claimant remains entitled to a payment in respect of her outstanding accrued but untaken annual leave entitlement and this has not been paid to her.
- 25 24. The sum outstanding in respect of holiday pay is £1,367 less deductions for tax and national insurance. This sum is set out in the annual leave calculations carried out by the respondent's accountant and provided to
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the Tribunal by the respondent in response to the standard case management orders dated 24 November 2021. The claimant confirmed that she accepted such sum as accurate.

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Employment Judge:
Date of Judgment
Date sent to parties:

J McCluskey
03 March 2022
04 March 2022

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