

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102619/18

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Held in Glasgow on 26 April 2018

Employment Judge: Neil Buzzard

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Mr Tearlach Brennan

Claimant
In Person

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Mr Steven Jacobs

Respondent
No Appearance

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is as follows:

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1. The claimant's claim for unpaid wages is well founded and succeeds. The respondent is ordered to pay the claimant the sum of £220.66 by way of compensation.

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2. The claimant's claim for payment for accrued and untaken annual leave on termination of his employment is well founded and succeeds. The respondent is ordered to pay the claimant the sum of £14.40 by way of compensation.

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REASONS

Absence of the Respondent

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1. On the morning of the hearing no appearance was made by the respondent or any representative of the respondent. There was no indication before me that the respondent had appointed a representative at any point in relation to the claimant's claim.

2. The respondent was contacted, and confirmed that he was aware of the hearing but was not going to attend. He confirmed this by email on the morning of the hearing. The respondent's email was very brief and merely stated

5 7 have just been overwhelmed by the flu-virus, unable to attend. To avoid further delay, I am willing to settle the case to the value as stated. °

- 10 3. It was noted that although the respondent indicated he was unable to attend he did not seek any postponement, nor had he made any contact with the Tribunal until he was phoned after the scheduled start time for the hearing. Further, it is noted that the respondent indicated that he wanted to avoid delay, and was willing to settle the case for the value as stated.

- 15 4. I took into account the nature of the claim, which is one for unpaid wages and payment in lieu of untaken holiday. Compensation for such claims is calculated by reference to loss without any duty on a claimant to mitigate loss, scope for reduction for contributory fault or other adjustment at the discretion of the Tribunal. In addition to this, the total value of the claim was taken into
20 consideration.

5. Taking all the above matters into account, I determined that it would be fair and proportionate to proceed with the hearing in the absence of the respondent.

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Issues

6. The claimant presented two complaints to the Tribunal as follows:

30 6.1 .on the termination of his employment he had been underpaid for work done; and

 6.2. on the termination of his employment, he was not paid in lieu of untaken annual leave accrued during his brief period of employment.

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Agreed Facts

- 40 7. There is very limited relevant dispute between the parties, based on the content of the claim form and defence. The facts that are agreed are as follows:

 7.1. the claimant had only worked for the respondent between 29 September 2017 and 16 November 2017;

45 7.2. the claimant was paid £7v20 per-hour, being aged-24 at-the relevant times;

 7.3. the claimant undertook a period of trial work on 29 September 2017;

 7.4. thereafter, for the following three weeks the claimant worked three days per
50 week;

7.5. from the week of 27 October 2017 to the end of his employment the claimant worked two days per week;

7.6. The claimant was paid the following amounts:

5 9 October 2017 £100.00
 16 October 2017 £100.00
 23 October 2017 £150.00
 31 November 2017 £369.14

10 There was an additional payment to the claimant on 2 October 2017. According to the claimant this was £25, accordingly to the respondent this payment was £100.

7.7. The claimant did not take any paid annual leave during his employment with the respondent.

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Disputed facts

8. The relevant facts that were not agreed were as follows:

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8.1. The number of hours the claimant worked on 29 September 2017 is in dispute. The claimant worked a part day as a 'fria' or 'interview'. The claimant claims he worked for three hours that day, the respondent claims he worked for one hour that day.

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8.2. The number of hours the claimant worked in each of the other working days is in dispute. The claimant claims that on all subsequent working days he worked for 7 hours, although during his employment the shifts varied between 10:30am to 5:30pm and 9:30am to 4:30pm. The claimant argues that although entitled to a lunch break he understood that was paid time, and as a result took far less than the allotted hour. The respondent, in his ET3, states the claimant worked 6 hours per day, 9:00am to 4:00pm each day he worked, with a one hour unpaid lunch break.

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8.3. The amount of the payment made on 2 October 2017 is in dispute. The claimant claims he was paid £25, the respondent in his ET3 states the payment was £100.

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40 Evidence

9. The claimant gave evidence on his own behalf. This evidence was not challenged as there was nobody present for the respondent to challenge the evidence. In addition, the claimant produced a payslip, an extract from one of his bank-statements and a calendar extract showing the days he worked. Other than his ET3, the respondent produced no evidence.

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Findings of fact

- 5 10. The claimant's bank statement clearly shows a payment to him of £25 on 2 October 2017. This was the Monday following on from the Friday 29 September 2017, the date of the claimant's trial period. The parties' pleadings agree that the claimant did not work any hours, other than on 29 September 2017, prior to the payment on 2 October 2017. The respondent's ET3 states that the claimant worked one hour on 29 September 2017, the claimant states he worked three hours.
- 15 11. There does not appear to be any credible reason for the respondent to pay the claimant £100 on the 2 October 2017, if he had only worked a single hour, as the respondent claims. The payment of £25, which appears on the claimant's bank statement, is roughly consistent with payment for three hours work, although not exactly so.
- 20 12. In the light of the evidence presented it is clear that the payment on 2 October 2017 was in the amount of £25 as the claimant claims. Further, balancing the evidence presented, it is more likely that this was for three hours work on the 29 September 2017 than for one hour. Accordingly, the evidence is found to show the claimant worked for three hours on 29 September 2017.
- 25 13. In relation to the length of the claimant's working day, there was no documentary evidence to assist the Tribunal. The claimant's payslip is of no assistance, identifying the total hours worked in an unspecified period as 51.27 hours. This would not accord with the information in the ET3 or the claimant's claim, as both agree the claimant worked days of either 6 or 7 hours only, i.e. multiples of whole hours.
- 30 14. The claimant's description, when giving evidence under oath, of his working day, of the change to his hours part way through his brief employment and the fact he worked during his lunch break was clear and consistent. Given the absence of evidence to the contrary, it is found to be accurate; the claimant worked for seven hours on each working day.
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Relevant Law

- 40 15. In relation to pay, the claimant has a contractual right to be paid £7.20 for each hour worked. It does not matter that this contractual right was not enshrined in a written contract, the fact the parties both confirm this in their pleadings is evidence that it was agreed.
- 45— 16. In relation to holiday pay, the applicable rules are contained in the Working-Time Regulations 1998. Under Regulation 13 and 13A combined, the claimant was entitled to 5.6 weeks paid annual leave per year, pro-rata. Under regulation 14(1) the claimant is entitled to be paid in lieu of his leave entitlement, as he was not employed for a full year.

17. Under regulation 15A, as this was the first year of the claimant's employment, any part day of leave accrued is rounded up to the nearest half day.

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Conclusions

18. The claimant worked for 17 seven hour days, and an additional three hour part day. Accordingly, the claimant worked for 122 hours for the respondent. The total pay the claimant should have received (the claimant as a student did not pay tax) is £878.40, given his hourly rate of pay was £7.20.

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19. The claimant worked during eight weeks. For one week he worked just under half a day, for three weeks he worked three days, and for four weeks he worked two days. The rate of accrual of annual leave under the Working Time Regulations per week would have differed with the number of days worked, so must be calculated individually as follows:

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19.1 . A full year working half a day a week, would result in the accrual of 5.6 half days, the equivalent of 5.6 weeks leave. Accordingly, working one week at this rate of accrual would result in the accrual of $\frac{1}{52}$ th of that annual rate of accrual. This gives a total accrual from that week of:

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$$\frac{1}{2} \times 5.6 \times \frac{1}{52} = 0.053 \text{ days}$$

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19.2. A full year working three days a week, would result in the accrual of 16.8 days ($5.6 \times 3 = 16.8$), the equivalent of 5.6 weeks leave. Accordingly, working three weeks at this rate of accrual would result in the accrual of $\frac{3}{52}$ th of that annual rate of accrual. This gives a total accrual from that week of:

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$$3 \times 5.6 \times \frac{3}{52} = 0.969 \text{ days}$$

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19.3. A full year working two days a week, would result in the accrual of 11.2 days ($5.6 \times 2 = 11.2$), the equivalent of 5.6 weeks leave. Accordingly, working four weeks at this rate of accrual would result in the accrual of $\frac{4}{52}$ th of that annual rate of accrual. This gives a total accrual from that week of:

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$$2 \times 5.6 \times \frac{4}{52} = 0.862 \text{ days}$$

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20. In total this is an accrual of just under 1.9 days annual leave. Following Regulation 15A, this must be rounded to two days annual leave. Given the finding that the claimant worked 7 hours in a full day, this is a total of 14 hours annual leave.

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21. The claimant was paid a total of £744.14. The respondent's ET3 states that the payments made to the claimant, included a payment of 12 hours pay in lieu of accrued holiday pay, which means £86.40 was holiday pay and £657.74 salary for hours actually worked.

22. The shortfalls in the payments made to the claimant are as follows:

22.1. Salary shortfall for hours worked is £878.40 - £657.74 = £220.66

22.2. Holiday pay shortfall is £100.8 - £86.4 = £14.40

23. Accordingly, judgment is in favour of the claimant for the above sums.

Employment Judge: N Buzzard
Date of Judgment: 12 May 2018
Entered in register: 25 May 2018
and copied to parties