



EMPLOYMENT TRIBUNALS

Claimant: Mr K Lewis

Respondent: Mulleys Motorways Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: 1 February 2022

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: In Person
For the respondent: Ms Jayne Munson, director

RESERVED JUDGMENT

- (1) The Respondent is ordered to pay the Claimant £749.43 as damages for breach of contract.
- (2) The complaint of breach of the Working Time Regulations 1998 is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant is a coach driver who worked for the Respondent. During employment, the parties appear to have got on well with each other and to have parted on good terms. This dispute is around the payment in lieu of holiday which was made on termination of employment.
2. The agreed facts include that employment started on 31 July 2018 and that the Claimant's last day of work was 30 April 2021 (following his resignation with notice) and that his final payment was made on 7 May 2021, and that the payment on that date included £953.80 gross as a payment for unused holiday entitlement.

The Claims and The Issues

3. I was satisfied, and the Respondent did not argue to the contrary, that the ET1 should be interpreted as including both a claim under the Working Time Regulations 1998 and a claim for breach of contract. Although the Claimant suggested at one point that he did not think that he could rely on a breach of contract argument, I am satisfied both (a) that he simply meant that he did not have a written document, customised to him as an individual, which he sought to rely on and (b) that the arguments which he actually presented to me were, in legal terms, an argument that he had a contractual right to the sums in dispute.
4. The issues which I told the parties I would need to address, in the absence of agreement, were:
 - 4.1 What is start and finish of leave year:
 - 4.2 Was there a contractual right to carry over entitlement from one holiday year to the next and, if so, how many days were brought forward (or owed) from any previous leave year into the final (part) year?
 - 4.3 What is the calculation of the holiday entitlement accruing for the final (part) leave year?
 - 4.4 Did the Claimant take any holiday in that final part leave year? If so, when/how much?
 - 4.5 As of the termination date, how much unused entitlement was left taking account of above
 - 4.6 Was the Claimant entitled to a payment in lieu? If so, what should have been paid for those days to which entitlement accrued but had not been taken.
 - 4.7 Is there therefore a shortfall between what he was actually paid, and the sums to which he was actually entitled? If so, how much?
5. I stated that the method to be adopted when answering these points would depend on whether I was considering the Working Time Regulations claim (for which there was a specific statutory formula) or the contract claim (which would potentially depend on interpretation of the contract). I informed the parties that the Claimant was perfectly free to argue both claims in the alternative, and that I would consider each set of arguments separately.

The Hearing and the Evidence

6. The hearing was fully remote by video. There were no significant connection issues during the hearings. The Respondent's representative was delayed slightly in seeking in rejoining after a break.
7. We went over our 2 hour allotted time, by the end of submissions, and the parties for my next case were already in the video hearing room and waiting. I therefore reserved judgment.

8. Neither side had prepared a written statement. The Claimant gave evidence on oath with his evidence in chief being to answer my questions. He was questioned by the Respondent's representative. On behalf of the Respondent, Ms Laura Munson gave evidence on oath. Her evidence in chief was to answer the Respondent's representative's questions. She also answered my questions and those from the Claimant. As Ms Laura Munson was giving evidence, the Respondent's representative (who was sitting next to the witness) repeatedly spoke, despite being told several times not to do so. Notwithstanding that, I am satisfied that each witness answered questions honestly according to their recollection and understanding. Ms Laura Munson's evidence was largely stating her opinion that the payments had been calculated correctly. There was no factual dispute between the parties and she did not disagree with the facts stated by the Claimant. Furthermore, the Respondent's representative did not challenge the Claimant on his evidence.
9. The Respondent had prepared an 85 page pdf. The Claimant had a copy. A copy had not made its way to me prior to the hearing (through no fault of either party). The Respondent was unable to supply me with a copy during the hearing, but the Claimant succeeded.
10. The Respondent also wanted me to have a document setting out the dates of holiday which the Claimant had taken. They tried sending it to me during the hearing but it did not arrive (it was presumably caught in a filter of some sort because I did eventually receive it after the hearing, and I can see it was sent during the hearing at 11.23 (incorrectly addressed) and again at 11.27am. As I said at the time, I did not necessarily need the dates in writing because I could (and the Claimant could) make a note of them as they were read out orally. That is what we did. In any event, I have now received the written document (which was also copied to the Claimant) and I have noted that its contents do match the answers I was given orally.

The Facts

11. Regardless of the dates of employment given in the ET1, the both parties agree that his employment was 31 July 2018 to 30 April 2021.
12. Both parties agree that the leave year was 1 January to 31 December each year. There is a staff handbook which I have not seen.
13. In relation to holiday, the Claimant had always been entitled to carry over the holiday entitlement which he had not used by 31 December 2021 and to use all of it the following year. He also believes that all the other coach drivers were allowed to do the same. He was not challenged on either of these assertions. On the contrary, as the Respondent's representative explained to me orally during the hearing (and as the email she sent during the hearing also shows), the current leave year's entitlement remained untouched until the unused entitlement from the previous year had been used up.
14. The Claimant had a part year's entitlement for 2018. He had not used all that up by 31 December 2018. Therefore, when he took half day on 22 January 2019, and

full days on each of 25 February 2019 and 31 May 2019, he was deemed to be finishing off his 2018 leave entitlement.

15. The agreement between the parties was that the Claimant did not work on the 8 public holidays and would be paid for those days. The agreement is also that there was an entitlement to an additional 20 days paid time off per year.
16. In 2019, apart from the 8 public holidays, and apart from the 2.5 days finishing off his 2018 entitlement, the Claimant took the following days as leave: 25 July; 26 July; 8 August; 9 August; 12 August; 4 November; 23 December; 24 December; 27 December; 30 December; 31 December. In other words that was a total of 11 days. Because of the agreement that he could carry over unused entitlement, that meant that he had 9 days to carry over into 2020.
17. The 9 days in 2020 on which he was deemed to have used that remaining 2019 entitlement were: 2 January; 3 January; 15 January; 16 January; 26 October; 15 December; 21 December; 22 December; 23 December.
18. In 2020, apart from public holidays (as to which, see below), and apart from the 9 days finishing off his 2019 entitlement, the Claimant took the following days as leave: 24, 29, 30 and 31 December. In other words that was a total of 4 days. Because of the agreement that he could carry over unused entitlement, that meant (subject to the disputed issues that I will discuss below) that he had 16 days to carry over into 2020.
19. In 2021, he was off on the following 4 days: 3, 4, 5 February and 17 March 2021. The Respondent had treated those as being using up 4 days of his 2020 entitlement. On that basis, because $16 - 4 = 12$, he would have had 12 days left of his 2020 entitlement as of the termination date, and, in addition, had not used any of his 2021 entitlement. (That is the pro rata entitlement for 1 January 2021 to 30 April 2021).
20. The reason that there is a dispute dates back to that fact that, as with many other employers and employees, during 2020 the Claimant was on an agreed furlough, during which time he agreed to accept 80% of gross pay and during which time the Respondent made use of the government's Coronavirus Job Retention Scheme.
21. According to the summary "Attach (v)" as sent to the Claimant by the Respondent on 1 November 2021, the furlough period was 29 March 2020 to 29 August 2020. The Claimant was paid weekly at all times, and during furlough he received £345 gross each week. Since that was 80% of full pay, this implies that his full pay had been deemed to be £431.25 for furlough purposes.
22. During that furlough period, there were 4 public holidays: 10 and 13 April 2020 and 8 and 25 May 2020. His pay was not topped up (for any of the furlough period including) for those 4 days. He received 80% not 100%.
23. Upon termination of the Claimant's employment, the Office Manager, Ms Laura Munson sent a letter dated 5 May 2021 to set out the Respondent's calculation of the sum due as payment in lieu of holiday. Since that letter matches the Respondent's position in this litigation, up to and including the hearing, I will

discuss the details of the calculation under the heading “submissions” below. Suffice to say that the Respondent said that the grand total was 12.55 days.

24. The Claimant’s final payslip shows that the Respondent paid for 12.55 days at a rate of £76 per day. Hence, the figure was £953.80 gross, and the Claimant admits receiving that sum (less PAYE deductions).
25. The payslip also shows that the hourly rate of pay was £10.00 and that, in that last week, the Claimant’s gross earnings were £452.50 which the Claimant regarded as typical, though the hours did fluctuate. The Respondent suggested the typical weekly amount might be lower, with £422.80 being the average according to the “Average Earnings Report” submitted to the Claimant. The Claimant does not dispute the accuracy of that report. I only have the final payslip, not any others, and so I will treat it as accurate. On that basis, the last 11 weeks’ pay, prior to the £452.50 on 7 May were:

380.00
440.00
462.50
483.50
455.00
441.00
495.00
443.50
441.99
452.50
455.00

26. So that is an aggregate of £5402.49 for the last 12 weeks, meaning that the average was £450.21.
27. It is common ground that during furlough, there was no time period which the Respondent informed the Claimant that he was instructed to use his annual leave. At the risk of labouring the point, the only dates on which he is alleged to have actually taken annual leave are those set out above, and they are agreed by both parties to be correct.

The Law

28. The Working Time Regulations 1998 (“WTR”) provide employees (and other workers) with a minimum statutory entitlement to paid time off.
29. Regulation 15 WTR sets out how a mechanism by which the worker can inform the employer of the intention to take a period of leave (and the employer’s opportunity to say “no”) and also a mechanism by which the employer can instruct the employee that they must use their entitlement to paid time off on specified dates.
30. Regulation 14 WTR sets out the employee’s entitlement for a payment in lieu on termination. The formula is:

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

31. The combined effect of Regulations 13(1) and 13A WTR is that an employee is entitled to 5.6 weeks per year as paid time off (which includes any such paid time off on public holidays) subject to a maximum of 28 days per year.
32. Paragraphs 9 to 13 of Regulation 13 WTR specify:
- (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—
 - (a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and
 - (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.
 - (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).
 - (11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.
 - (12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.
 - (13) For the purpose of this regulation "*coronavirus*" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).
33. So, notably, as per Reg 13(9)(b), if an employee does not use their entitlement to leave, then the employer does not satisfy their obligation under WTR by making a payment to the employee instead.
34. That being said, if the employee does not use their entitlement in the leave year in question then, as per Regulation 13(9), they lose that entitlement. That is, they do not have the right to insist upon carrying it over and using it in the next year. (There are potentially exceptions to that literal interpretation where there is long term sickness or where the employer prevents the leave being taken, but those exceptions are not relevant in this case). As Regulation 13(9) states, an exception is where the employee was unable to take the leave because of the pandemic. This amendment to Regulation 13(9), as well as all of paragraphs 10 to 13, came into effect on 26 March 2020.
35. As per Regulation 17 WTR, while WTR sets out minimum entitlements for the matters covered, if an employee's contract provides a right which is more beneficial to the employee, then he may enforce that right instead. In other words, for annual leave (for example) the employee does not get double recovery. He cannot have the contractual leave, plus the WTR minimum on top. However, a claimant may invite the tribunal to calculate each of his WTR right and his contractual right. While any compensation or damages will not give him both things, he can have whichever one is more favourable to him.

36. In terms of contractual entitlement, it is not the case that tribunals should assume that there is a right paid time off, or a right to carry over holiday entitlement from one year to the next, or a right to be paid in lieu of unused holiday entitlement. Whether any of these rights exist in a particular contract between a particular employee and particular employer is a matter to be determined in accordance with the usual methods of contractual interpretation. The contents of a staff handbook can, in some circumstances, potentially be incorporated into the contract of an individual employee. Where a tribunal has to consider what the agreement between the parties was, when the written terms of employment do not expressly address the matter, the tests to be applied when considering whether there is an implied term to deal with the matter are not limited to those tests used in construing commercial contracts. The tests used may include consideration of all the circumstances of the case, including the actions the employer and employee have taken under the contract.
37. In the case of Beijing Ton Ren Tang (UK) Ltd v Ms S P Wang UKEAT/0024/09/DA, the EAT had to consider a dispute in which the claimant had successfully obtained an award from the employment tribunal in relation to unused holiday entitlement. Her case was that she had been told orally that her holiday entitlement was 30 days per year and that she could receive a payment in lieu of any unused entitlement upon termination. Her employment terminated after about 6 years and she sought a payment in lieu of about 130 days holiday. She calculated from start of employment for what was left unused. The tribunal found in her favour on the basis that the employer had agreed with her that she could have all of her unused leave upon termination, and not (for example) just the unused leave from the final leave year. The employer's appeal failed. The EAT decided that
- 37.1 The tribunal had been entitled to make its decision based on the contractual entitlement rather than the WTR entitlement (referring to Reg 17 of WTR).
- 37.2 Contrary to the employer's argument, the contractual term which the Claimant had argued for (and which the tribunal had found to exist) was not void as a result of Regulation 35 WTR.
- 37.3 The fact that the right to be paid in lieu of previous years' entitlement had been lost (or never existed in the first place) under WTR did not prevent a decision that the claimant had a contractual right to receive such a payment in lieu.

Submissions

38. The Respondent's position is that its 5 May 2021 letter is correct and accurate. The relevant part of that letter being:

2020	16 days holiday entitlement remaining including public holidays This includes 12 days holiday (including public holidays) accrued during your period of furlough and during this time you were paid at 80%. In line with HMRC guidance you have therefore now been paid 12 days at 20% plus the remaining 4 days = 6.4 days for 2020
------	---

2021	9.15 days entitlement to date of leaving, less 3 public holidays already paid = 6.15 days for 2021
------	--

39. That is how they arrived at the 12.55 days figure mentioned in the findings of fact. 6.4 plus 6.15 equals 12.55.
40. I put it to the Respondent's representative that what they were asking me to decide was that the period on furlough should be treated as annual leave. The Respondent's representative strenuously objected to that characterisation of the argument and said the correct way of looking at it is that the Claimant had already been paid for the days of holiday which accrued during furlough (albeit at 80%) and that only 20% remained to be paid (which was paid on termination) and that a decision to now award him payment in lieu of unused holiday would mean that he would be receiving 180%. The Respondent's representative also suggested that if I did make any award, the Claimant should potentially be required to reimburse his furlough pay to the Respondent. (She also added that the Respondent might be required to reimburse the government. As I said at the time, I will not be addressing that particular contention in my decision as that is not something in the employment tribunal's jurisdiction).
41. The Respondent's representative also relies on advice and guidance to the effect that it was perfectly lawful at the relevant time that, if a furloughed employee took holiday, then (while the employee was entitled to 100% of pay rather than 80%, for that period) the employer need only pay the 20% from their own resources, and could use the CJRS payment for the 80%.
42. The Claimant argues that if it were hypothetically true that he was made to take holiday while on furlough, then there should be evidence to show that his wages were topped up to 100% at the time. He states that, after the furlough period had ended, the employer cannot retrospectively designate some of that period as holiday, and simply pay the extra 20% and claim to have satisfied their obligations.
43. He argues that he was in full-time employment at the relevant times and that he had 22.15 days holiday entitlement (including public holidays). The Claimant accepts the Respondent's submissions above that the 2021 entitlement is 6.15 days (being 9.15 days less 3 days public holidays). He argues that he had a full 16 days for 2020, and the fact that the Respondent alleges that 12 days should be deemed to have accrued during the furlough period (even if technically correct) does not mean that his entitlements for those 12 days are reduced.
44. He argues that the Respondent never told him that he had to take holiday during the (22 week) furlough period and he did not, in fact, take any.

Analysis and conclusions

45. In relation to the Claimant's submissions that the Respondent never told him that he had to take holiday during furlough (and that no dates were designated as holiday during furlough at the time), the Respondent's representative expressly conceded the point several times, including during her own closing submissions when I asked her to confirm again.

WTR

46. As I said during the hearing, even if I make two assumptions in the Claimant's favour (that Regulation 13(10) applies to all of his unused leave for 2020 and that the weekly rate was £452.50) then he would not have received, on termination less than the amount required by Regulation 14 WTR.
47. The calculation is this:
 - 47.1 Under WTR, there is no carry over from 2019 into 2020. So every day of leave actually used in 2020 comes off his 2020 entitlement.
 - 47.2 In 2020, there was a total of 13 days plus 8 public holidays that were taken as leave. 4 of those bank holidays were only paid at 80%, but the other 17 days were paid at 100%.
 - 47.3 If we calculate in days, then he had used 21 of 28 days (so had 7 left).
 - 47.4 If we calculate in weeks, then he had used 4.2 out of 5.6 weeks (so had 1.4 left).
48. Assume in his favour that all of that can be carried over as a result of Regulation 13(10).
49. For 2021, the calculation is:
 - 49.1 He left after 4/12 of the year. So a third of the way through. (Alternatively, he left after 120/365 of the year, which is less than 1/3).
 - 49.2 One third of 28 days is 9.33 or one third of 5.6 weeks is 1.87.
 - 49.3 He took 7 days (or 1.4 weeks) in total, including 3 public holidays, and was paid 100%.
 - 49.4 So his remainder was 2.33 days or 0.47 weeks.
50. So adding 2020 to 2021 means that he had 1.4 plus 0.47 weeks which is 1.87.
51. £452.50 multiplied by 1.87 is £846.18.
52. Even if we add back in the shortfall [for the 4 bank holidays in 2020 that were paid only at 80%], that shortfall is only £72.40, because it is $0.8 \times 0.2 \times £452.50$.
53. Even the aggregate of £846.18 plus £72.40 comes to £918.58 which is less than the £953.80 which was actually paid.

Contract

54. In this case, there is no dispute between the parties that there was a contractual right for employees (including the Claimant) to carry over leave entitlement. As the Respondent's own figures demonstrate, there was no cut off date by which the previous year's entitlement had to be used. He was still using up the last of his

2019 entitlement in December 2020, almost a full 12 months after the 2019 leave year had ended.

55. The Respondent admits that there was a contractual entitlement to have a payment in lieu of unused holiday entitlement upon termination of employment. Furthermore, it admits that the payment in lieu was not only for the current (part) leave year which contained the termination date, but was also for any unused carry over from prior years. In any event, that would have been my finding, given that the 5 May 2021 letter demonstrated that the Respondent regarded itself as contractually obliged to make the payments. Amongst other things, the Respondent states that it carefully considered the Claimant's entitlement before writing that letter, and that it took advice. Had it only been intending to pay the WTR minimum – in the belief that that was all that the Claimant was entitled to – it would not have included any calculation or entitlement for 2020.
56. The parties agree that the holiday arrangements which the Claimant had were the same as those for the other coach drivers. The Claimant entered into his contract in July 2018. At that time, the agreement did not have any express or implied provision for what would happen in the event that an employee was furloughed by agreement, on 80% of pay, with the Respondent receiving a government grant to pay these wages. At the risk of stating the obvious, the parties did not have that in their contemplation as of 2018.
57. I accept the Claimant's evidence (and I do not understand the Respondent to be arguing otherwise) that he was not told either (a) prior to agreeing to be furloughed on 80% pay or (b) at any other time before or during furlough, that part of the furlough period would be treated as annual leave. Since he was not told that that was the Respondent's position, he did not expressly agree. I also find that there was no implied agreement to that effect either. Even in the hearing before me, the Respondent has argued that it did NOT instruct the Claimant that he was obliged to take holiday at the time. In other words, during the furlough neither the Claimant nor the Respondent regarded it as annual leave.
58. The agreement was that, for each full year of employment, running 1 January to 31 December, the Claimant would have holiday entitlement of 20 days plus public holidays. There was no agreement between the parties that this entitlement would be reduced for 2020 (because of furlough, or for any other reason).
59. The parties have not supplied me with copies of the provisions (if any) from the staff handbook which deal with how the pro rata calculation would be done for the final leave year. The 2021 calculation seems a little lower than pro rata. However, the Claimant has not disputed the 2021 calculation. He is content that, having taken account of the 3 bank holidays, he accrued 6.15 days for 2021 by 30 April.
60. The real point of dispute is over 2020.
61. In my judgment, the actual agreement reached between the parties in 2018 was straightforward. For a full year (such as 2020), the employee was entitled to 20 days plus 8 bank holidays. If he took X days of that entitlement in a particular year, and if he was off on Y bank holiday dates, then his remaining entitlement was $[(20 - X) + (8 - Y)]$ days. [The notation "X" and "Y" is mine, not the parties'.]

62. If he remained in employment he could use all of that entitlement as holiday in the next leave year, but if he left employment, he was entitled to a payment in lieu of all of it.
63. For bank holidays in 2020, I have considered whether I should decide that $Y=4$ (paid time off on just 1 January 2020; 31 August 2020; 25 and 28 December). The argument that the Claimant was not paid in full at the time for 10 April 2020, 13 April 2020, 8 May 2020 and 25 May 2020, and therefore they were being treated as furlough days and not holiday days has some merit. However, I am not persuaded that when the parties agreed furlough (and I was not shown any written agreement) they agreed to vary the 2018 agreement that, on bank holidays, the Claimant would be treated as being on paid time off (aka "holiday"). They did not expressly address their minds to the point at the start of furlough, but, taking into account what they each say about the generally good relationship between employer and employee, I am satisfied that if a bystander had asked them, at the time they entered the furlough agreement, *"What about bank holidays? Will they be treated as holiday? Or will they be treated as if the Claimant was due to work, and entitled to be paid for that day, and will therefore be paid furlough, retaining the right to a day off in lieu later?"* then the parties would have unhesitatingly each said *"Holiday"*. Thus, for each of 10 April 2020, 13 April 2020, 8 May 2020 and 25 May 2020, the Respondent, at the time, failed to pay the full amount that was due (ie failed to top up the 80% furlough pay with an extra 20% because it was a holiday day), but it is not the case that the Claimant retained his contractual entitlement to holiday for those days. He used it up. In my notation, $Y = 8$, because the contractual agreement was that he be treated as being on paid time off (holiday) for each of the 8 bank holidays in 2020.
64. For non-bank holidays, in 2020, $X = 4$. That is he took 24, 29, 30 and 31 December 2020 (and the time off earlier in 2020 was, as part of his contractual agreement, taken from his 2019 entitlement). So he rolled over 16 days ($20 - 4$) into 2021. He then took 3, 4, 5 February and 17 March 2021. As part of his contractual agreement, these 4 days came off his 2020 entitlement, leaving 12 days. He was entitled to be paid in lieu of those days, because his employment ended before he used them..
65. Therefore, on termination, the Claimant was contractually entitled to be paid:
- 65.1 20% top up for the 4 days 10 April 2020, 13 April 2020, 8 May 2020 and 25 May 2020. (The Respondent concedes he is entitled to this).
- 65.2 Payment for 6.15 days' of holiday entitlement for 2021. (The parties agree this is correct, and, for a contractual claim, I do not think I should interfere, even though it is slightly less than a straight pro rata calculation).
- 65.3 Payment for 12 days' of holiday entitlement for 2020.
66. For the 20% top up, that is effectively owing from each of the dates in question, and should be calculated by reference to what the Claimant was actually getting at the time. The 80% per week was £345, and so the remaining 20% was £86.25 weekly, or (dividing by 5) £17.25 daily. Therefore the gross amount for the top ups should be $£17.25 \times 4 = £69$.

67. For the other sums, based on the evidence presented, the parties agreement was silent as to the exact formula for calculating the “payment in lieu” which was due for unused days. Therefore, the implied term is that the method that was to be used was to be that which is reasonable. I will therefore use the average weekly pay for the last 12 weeks of employment (£450.21) and divide by 5 for a daily rate. That gives £90.04 per day. Therefore, the Claimant was entitled to $(6.15 + 12) \times £90.04$ in lieu of unused entitlement, which is £1634.23.
68. So, adding the top up and the payment in lieu, the Claimant’s contractual entitlement was to receive the gross amount of £1703.23.
69. He only received £953.80. Therefore, the Respondent breached his contract by paying £749.43 (gross) less than the full entitlement. He is entitled to an award of damages for the loss of the net sum he ought to have received. That is, £749.43 less the PAYE deductions that would have been made.
70. Whatever award I make will be taxable in the Claimant’s hands. Therefore, I must gross up the sum for damages to ensure that the net amount that the Claimant is left with, after he has accounted to HMRC, matches the net loss.
71. Doing the best I can with the information available, I assess the grossed up figure as £749.43, and that is the sum I award as damages for breach of contract.
72. The suggestion that fact that I have made this award means that the Claimant is obliged to repay any of the income which he received during furlough is misconceived. Other than the days mentioned above, during the furlough period, he was not on annual leave, and his annual leave entitlement did not accrue at a slower rate than in non-furlough periods.

Employment Judge Quill

Date: 5 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25/2/2022

N Gotecha

FOR EMPLOYMENT TRIBUNALS