Case Number: 3319616/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr B Wright	v	**Brunel University London**

Heard at: Watford (by CVP) **On**: 28 February 2022

Before: Employment Judge R Lewis
Mr C Grant
Mr A Scott

Appearances
For the Claimant: In person
For the Respondent: Mr O Holloway, Counsel

REMEDY JUDGMENT

1. The respondent is ordered to pay to the claimant the sum of £4962.66 in respect of holiday pay for 2018/2019.

2. The above is a gross figure. The respondent may comply with this Judgment by deducting and paying tax and National Insurance; but if it does so, it must send the claimant documentary evidence of the deductions made and of their payment, such evidence to be sent to the claimant within 21 days of payment to him.

3. The respondent's application for an Order for Costs is refused.

REASONS

1. The Tribunal's Reserved Judgment, and a Case Management Order listing this hearing, were sent to the parties by email on 16 December 2021.

2. By letter dated 25 January 2022, the Judge refused both the claimant's application for reconsideration and the respondent's application for postponement.

3. The parties had prepared a bundle of 28 pages for use at this hearing. At the start of the hearing, the Tribunal put to the parties its understanding of the respondent's calculations. Mr Holloway confirmed that that understanding was broadly correct, although the Judge's figures needed some fine tuning.

4. The parties agreed that sworn evidence was not required at this hearing, which would therefore proceed by submissions only. The claimant was heard first. Mr Holloway replied, and after a short adjournment, the Tribunal gave the above judgment. The claimant applied for written reasons.

5. Mr Holloway then applied for costs. We took a short adjournment, before asking the claimant whether he wished to reply straightaway, or later in the day, or indeed later by writing. He wished to proceed straightaway and replied to the costs application. After the lunch adjournment, we gave judgment on the costs application.

Holiday pay

6. As Mr Holloway pointed out, the Tribunal's first judgment at paragraphs 267-269 closed all issues in relation to holiday except calculation of an hourly rate of pay. The Tribunal had found that the claimant was entitled to be paid for 146.09 hours holiday (a fraction under 21 days). The task of the Tribunal was therefore only to calculate the correct hourly rate.

7. The bundle contained a witness statement from Ms Bailey on behalf of the respondent (7-8). She attached two schedules, the first showing her leave calculation and the second showing deductions (9 and 10 respectively).

8. The leave calculation did not set out the precise calculation. It did not explain the calculation of the hourly rate of pay at £33.97 per hour.

9. On considering the documents before the start of the hearing, especially page 9 of the bundle, and drawing on its own experience, the Tribunal's understanding was that the basis of calculation appeared to be the following. We have rounded our figures.

10. The first step is that the annual leave year runs from 1 September of each year; that was agreed.

11. The second step is that the working year has 260 days; Mr Holloway said that the correct figure is actually a fraction over 261 days.

12. The third step is that for calculation purposes, each day has 7 hours. (We accept Mr Holloway's point that even where the contract specifies 7.5 hours, a calculation based on 7 hours produces a higher outcome, and therefore is the safe basis upon which we proceed).

13. The working year therefore has about 1,827 (261 x 7) hours.

14. For working purposes, the claimant's gross pay in 2018-2019 was £61,994. That figure is divided by 1827, and the product is an hourly rate of £33.97 per hour.

15. The respondent's calculation was therefore £146.09 x £33.97 = £4962.66.

16. We agree that calculation.

17. The claimant did not agree the respondent's calculation, and in correspondence before the hearing had put forward a number of different points and approaches, each of which would reach a higher total. We do not deal with every point which he raised, but the main ones were the following:-

    17.1 The claimant asked us to approach the calculations by monthly salary figures. Although the claimant was paid monthly, a monthly figure was not the holiday pay figure, nor is it the holiday pay figure in statute, and was not the basis of our Judgment and we therefore reject that approach.

    17.2 The claimant invited us to make an award for untaken holiday in the year 2017-2018: we had dealt with that in our earlier judgment and declined to do so.

    17.3 The claimant invited us to award pay for the meeting on 14 August 2018, which he stated he had been required to attend although on holiday. We do not agree that that is payable as an extra day.

    17.4 The claimant's calculation of the impact of Bank Holidays was unclear. The approach which we find the respondent adopted treated Bank Holidays as any other day. For the week before and after Easter, the claimant was paid five days per week, not four. He has therefore been paid for those Bank Holidays and is not entitled to any additional pay.

    17.5 The claimant submitted that the periods during which the respondent closed its premises over Christmas and Easter should be excluded from the calculation; and then the periods of closure should be added to the period of employment so as to extend his employment and postpone the effective date of termination.

    17.6 We disagree on both points. It is the same point as about Bank Holidays. Even though unable to attend work in the week between Christmas and New Year, the claimant was paid in full for that week, and has no entitlement to be paid for it a second time.

    17.7 The effective date of termination is a statutory construct and must be interpreted in accordance with the definition found in s.97

Employment Rights Act 1996. The Tribunal cannot and does not agree to extend it in accordance with the claimant's suggestion.

17.8 The claimant submitted that the 52 weeks per year on which the respondent based its calculations could be reduced by holiday or close-down periods, thereby increasing the proportion by which he would be entitled to be paid for holiday pay. We disagree.

17.9 The claimant submitted that the respondent had known that holiday pay was due and outstanding over the last three years, and that he should therefore be entitled to interest. Mr Holloway commented that the respondent had not known that holiday pay was due and owing until it received the judgment of the Tribunal. That comment is difficult to reconcile with the contemporaneous correspondence, and with the respondent's reasons for not paying on its own calculations; see in particular the second half of paragraph 266 of our earlier judgment. However, the critical point is that the Tribunal has no power to award interest in this case, and therefore cannot do so.

Tax

18. Ms Bailey set out at Schedule 2 of her statement (10) the deductions which she considered were required from the holiday pay sum, calculated in accordance with the claimant's tax code when he was last on the respondent's PAYE system.

19. The Tribunal does not have the power or capacity to calculate if those figures are correct. That is a matter for HMRC. During one of the adjournments, we asked Mr Holloway to take instructions on whether there was any mechanism which might, for example, enable the entire sum to be taxed at basic rate. He replied later that the respondent considered itself under legal obligation to make the deductions set out at Schedule 2.

20. We understand that that will be done, and that if (depending on the claimant's earnings for the remainder of the tax year 2019-2020) the claimant has been taxed excessively, that is unfortunately a matter for him to take up with HMRC.

Costs application

21. On 1 February the respondent's solicitors had written a short letter (27) in reply to one of the claimant's holiday pay calculations. It had by then sent him Ms Bailey's statements and schedules. The letter said:

"**Cost warning**

Given the information you have put forward to date, if the University is required to incur further substantive costs in respect of the calculation of holiday pay, including but not limited to the cost of instructing counsel and

attending the hearing on 28 February, and the Tribunal agrees with the position as set out in Ms Bailey's witness statement, we will make an application for costs against you based on what we see as your unreasonable behaviour. This is not something the University wants to do and we hope it will not be necessary."

22. Mr Holloway submitted that the claimant had conducted this hearing unreasonably. The Tribunal had made a clear finding in its first Judgment, leaving as the only open question the calculation of the hourly rate. The respondent had done the obvious calculation of dividing annual salary by the number of working hours per year. It had put its calculation to the claimant, and he was duty bound to make sufficient enquiries to understand it and make an informed response.

23. Mr Holloway submitted that rather than do that, the claimant had pursued a range of hopeless points, which were unreasonable both as a matter of common sense and law; and he had failed to engage with the solicitor's correspondence which had invited him to enter dialogue about the basis of calculation.

24. Mr Holloway's over-arching point was briefly put: BUL is only here today because of the unreasonable conduct of the claimant. He applied for costs of £3,000.00 which he said did not include a VAT element.

25. In an emotive reply, which went beyond the costs application, the claimant said that he had been unable to afford to take advice, but he had independently reached a different calculation, and, albeit expressed rhetorically, he put a good point: it is not unreasonable for him to have lack of specialist knowledge.

26. He pointed out that the respondent had made a deduction at Schedule 2, which he would never have agreed, and that therefore today's hearing could not have been avoided, because he would have wished a judicial determination on the issue whether the award should be made gross or net.

27. The judge had explained to the claimant that he was at liberty to give the Tribunal information about ability to pay, to which he replied that he had no savings and was unable to meet any costs award.

28. This was an application under Rule 74-80. At the first step we ask ourselves whether the claimant has conducted today's hearing unreasonably. While we can see the frustration expressed by Mr Holloway, and the force of argument that the points advanced by the claimant at this hearing were bad points and weak points, we cannot agree in principle that where a litigant in person makes mistakes borne of ignorance and inexperience of the law and legal process, that necessarily amounts to unreasonable conduct. There is a boundary between conduct which is awkward and demanding and that which is unreasonable; and while the claimant in this respect came close to the boundary, we find that he did not cross it.

29. That is particularly so in this jurisdiction, given the unrestricted access of any claimant, with or without representation. A factor in our adjudication is that the information given to the claimant in the letter of 1 February was scanty; the Tribunal has experience of solicitors setting out at some length to a litigant in person the basis in law of a possible costs application; the factual basis in the particular case; the amount to be applied for and the basis of calculation; and drawing the attention of the litigant in person to his right to give the Tribunal information about ability to pay. Mr Holloway rightly pointed out that there is no obligation to do any of that. While we agree that there is no such express obligation, it seems to us implied in the language of the overriding objective, and in particular in the imbalance between a litigant in person and a professionally represented respondent.

30. Although that finding concludes the matter we also go on to consider the interests of justice. The interest of justice requires the Tribunal to balance its duty to safeguard respondents from unmeritorious claims with its obligations to offer open access to the public; and to ensure that the limited resources of the Tribunal are properly used. Costs do not follow the event in this jurisdiction, they are an exception, and this hearing does not seem to us to meet the test of exceptionality. The costs application fails.

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Employment Judge R Lewis

Date: 21 March 2022

Sent to the parties on: 24 March 2022

For the Tribunal Office

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