



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

MISS H JONES

OPEN AGE

JUDGMENT

The Respondent is to pay the Claimant the sum of £11,200 in respect of pay for holidays to which she was entitled under the Working Time Regulations 1998, but did not take during the period when she was engaged by the Respondent as a worker.

REASONS

1. Following the hearing in which the Claimant's ('C') claims of protected disclosures, discrimination and harassment were determined, C wrote to the tribunal, by email of 14 January 2022, asserting that there had been no determination of her claim for holiday pay.
2. In the ET1 C had ticked the box 'holiday pay'.
3. There is no further reference to a claim for holiday pay in any of the records of the PHs or in the List of Issues; and C did not seek to amend the List of Issues at the hearing to add a claim for holiday pay.
4. The tribunal heard no evidence from C (or anyone) about holiday pay, save that on instructions, Mr Ali, counsel for the Respondent ('R'), answered a question from the Judge to the effect that R had not made a payment of holiday pay to C. Neither party made any submission on whether and if so how much holiday pay C might be entitled to.
5. In the circumstances, the tribunal made directions with which (taking account of agreed extensions of time), the parties have complied.
6. R conceded in correspondence dated 4 February 2022 that the claim required determination. C put in a Schedule of Loss on 22 February 2022. R put in a Counter-Schedule on 11 March 2022.
7. R asked the tribunal to stay determination of the claim pending any appeal to the Supreme Court from the judgment of the Court of Appeal in Smith v Pimlico Plumbers Ltd 2022] EWCA Civ 70. I reject that application. This claim is already three years old; there is no certainty that permission will be given (if sought) to appeal to the Supreme Court; the time for determining any such appeal will likely exceed a further year at least if permission is granted; the sum involved is (whilst not insignificant) not considerable.

8. C seeks to claim in respect of 'preparation time' for her classes, either directly and/or as part of the hours to be taken into account in determining the holiday pay claim. I reject that argument. There is no claim extant for preparation time, which was included within the fee paid for each class (at an hourly rate of at least £24). The basis on which holiday pay is to be calculated is that of a 'week's pay' – what C was paid each week included pay for both the teaching time and the preparation time.
9. The following is agreed, following Smith v Pimlico Plumbers: that C is entitled to claim in respect of her entire period of work, that being roughly 11.5 years.
10. The statutory right during almost the entirety of the relevant period (late 2007 to early 2019) was pursuant to Regs 13 and 13A, to 5.6 weeks or 28 days paid holiday (whichever was the lower) each year. That equates to a total of approximately 64 weeks' paid leave over the whole of the relevant period.
11. C was paid an hourly rate (per hour of teaching time – including, as I have said, any necessary preparation time) of: R says £24 throughout, C says £24 rising to £26 from 2010. I have no payslips or invoices in the trial bundle and given the difference is relatively modest, I will apply an average hourly rate of £25.
12. The most significant area of dispute between the parties concerns the number of paid hours worked by C on average each week.
 - 12.1. R included in the trial bundle a schedule of hours worked between May 2013 and December 2018 indicating that C worked on average just over 6 hours per week during that period.
 - 12.2. C's original schedule of loss stated that she was paid for an average of 10 hours per week over the relevant period for the purpose of her holiday pay claim.
 - 12.3. In C's recent Schedule – and ignoring the preparation time – C contends for, on average 8 hours per week (4 classes of 2 hours each).
13. It would not, in my view, be proportionate (assuming it were even possible, which is doubtful) to reconvene a hearing to determine precisely what hours C worked

between 2007 and 2019 and thus precisely what annual leave entitlement she had to be carried forward for each of those years. I therefore calculate the claim based on a notional average of 7 hours per week during the entirety of the period.

14. That gives an average weekly pay of $25 \times 7 = \text{£}175$.

15. The calculation is therefore: $64 \text{ (weeks)} \times 175 \text{ (weekly pay)} = \text{£}11,200$.

Oliver Segal QC
Employment Judge

4 April, 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

04/04/2022.