



EMPLOYMENT TRIBUNALS

Claimant: Mr K Addison and Mr C Cardenas

Respondent: TLBE Ltd

Heard at: London South Employment Tribunal by video hearing

On: 16 March 2022

Before: Employment Judge Robinson

Representation

Claimants: Ms Cunningham (Counsel)

Respondent: Did not attend

REMEDY JUDGMENT

1. The judgment of the Tribunal is that the respondent must pay to the claimants the following total sums, being the amounts due for accrued but unpaid annual leave:
 - a. to Mr Addison £2,279.24, and
 - b. to Mr Cardenas £10,800.05.
2. The claimants will need to submit a tax self-assessment, if applicable.

REASONS

Worker status

1. By judgment dated 6 December 2021, the claimants were declared to be workers for the purposes of the Working Time Regulations 1998 ("WTR") and the Employment Rights Act 1996 ("ERA").
2. That judgment also provided for this 3 hour remedy hearing to be listed.

The remedy hearing

3. The respondent failed to attend this hearing, having also failed to attend the

previous hearing on 6 December 2021.

4. No explanation was given by the respondent for failing to attend and, on that basis, the Tribunal decided to proceed with this remedy hearing in the respondent's absence.
5. It was agreed with the claimants that the purpose of this 3 hour remedy hearing was to determine:
 - a. the amount of untaken annual leave the claimants had accrued when their employment ended, and
 - b. the rate at which such accrued annual leave should be paid.

The findings of fact

6. Counsel for the claimants made submissions on a number of principles for how the accrued annual leave should be calculated. The Tribunal also heard witness evidence from each of the claimants in relation to their employment dates and pay arrangements. These issues fall under the following headings in which the Tribunal sets out its findings of fact.

The claimants' dates of employment

Mr Addison

7. Mr Addison's ET1, Grounds of Claim, witness statement and oral evidence at the hearing set out that his dates of employment were 13 November 2014 to 22 November 2019. His leave year ran from 13 November to 12 November the following year.
8. Mr Addison did not provide a copy of his signed and dated written contract to demonstrate his start date. However, the bundle did contain copies of his invoices. In addition, during the course of the hearing, Mr Addison submitted documents to the Tribunal showing correspondence with the respondent in relation to his first invoice at the end of November 2014.
9. Although the respondent did not attend this hearing nor the previous one, the respondent did confirm in its ET3 form that the employment dates given by Mr Addison in his Grounds of Claim (attached to the ET1) were correct.
10. The Tribunal finds, on the balance of probabilities, that Mr Addison worked for the respondent from 13 November 2014 to 22 November 2019.

Mr Cardenas

11. Mr Cardenas's ET1, Grounds of Claim, witness statement and oral evidence at the hearing set out that his dates of employment were 10 February 2008 (when the respondent's business opened) to 22 November 2019. His leave year ran from 10 February to 9 February the following year.
12. Mr Cardenas did not provide a copy of his signed and dated written contract to demonstrate his start date. However, the bundle did contain copies of

Case No: 2301387/2020 & 2301403/2020

his invoices. In addition, during the course of the hearing, Mr Cardenas submitted documents to the Tribunal showing correspondence with the respondent in relation to his first invoice in March 2008.

13. The respondent did not attend this hearing nor the previous one. The respondent ticked both the “yes” and the “no” box in response to the ET3 questions about whether the claimants dates of employment were correct. It is therefore not clear whether the respondent agrees these dates.
14. However, the Tribunal finds, on the balance of probabilities, that Mr Cardenas worked for the respondent from 10 February 2008 to 22 November 2019.

The rate of pay for annual leave

15. Counsel for the claimants accepted during the hearing that the correct method of calculating a weeks’ pay was to use a 52 week period to work out the average.
16. Using the invoices for the final year of their contracts, this calculation equates to £113.17 for Mr Addison and £223.28 for Mr Cardenas.

The amount of leave that can be carried forward

17. Counsel for the claimant submitted that it was 5.6 weeks (or 28 days) that could be carried forward (and accrued) for each of the claimant’s years of work. The Tribunal was referred to the authority of *Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70*. Counsel asserted that there was nothing in the WTR that would prevent the 1.6 weeks of leave (derived from regulation 13A) from being carried forward for each year of employment, in the same way as the 4 weeks of leave derived from regulation 13.
18. However, for the reasons set out in the Law section below, the Tribunal is not persuaded by that argument. The amount of leave accruing for each full year is therefore 4 weeks, with the exception of the final year of employment, which attracts 5.6 weeks (or part thereof). Taking into account part years, the full calculation of accrued leave for each claimant is as follows.

Mr Addison

19. From 13 November 2014 to 12 November 2019 (5 years), Mr Addison accrued 20 weeks (5 years x the 4 weeks that can be carried forward).
20. From 13 November 2019 to 22 November 2019 (9 days), Mr Addison worked for 9/365ths (or 0.025) of his final leave year and therefore accrued $0.025 \times 5.6 \text{ weeks} = 0.14 \text{ weeks}$.
21. His total accrued amount of annual leave for the duration of his contract is therefore $20 + 0.14 = 20.14 \text{ weeks}$.

Mr Cardenas

Case No: 2301387/2020 & 2301403/2020

22. From 10 February 2008 to 9 February 2019 (11 years), Mr Cardenas accrued 44 weeks (11 years x the 4 weeks that can be carried forward).
23. From 10 February 2019 to 22 November 2019 (9 months and 12 days), Mr Cardenas worked for 286/365ths (or 0.78) of his final leave year and therefore accrued 0.78×5.6 weeks = 4.37 weeks.
24. His total accrued amount of annual leave for the duration of his contract is therefore $44 + 4.37 = 48.37$ weeks.

The Law

Working Time Regulations

25. Regulation 13 of the WTR provides that workers are entitled to 4 weeks annual leave in each leave year. A leave year runs from the date on which the employment began.
26. Regulation 16 (as amended by the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018) provides a gloss to s.224 of the ERA. That gloss provides that the basis for calculating a weeks' pay for those with no normal working hours is based on a 52 week calculation.

Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70

27. The Court of Appeal has confirmed that the 4 week period of EU origin (i.e. the leave provided for in regulation 13 of the WTR) can be carried forward where it has been untaken or taken but unpaid, for every year of employment by those with worker status. However, the Court did not apply such carry-forward to the 1.6 weeks of additional leave of domestic origin (i.e. the leave provided for in regulation 13A of the WTR).
28. The effect of this Court of Appeal judgment is that where a claim for holiday pay is based on the WTR (as opposed to s.13 of the ERA), the 2 year limitation restriction in s.23(4A) of the ERA does not apply.

Conclusion

29. Based on the findings of fact and the relevant law referred to above, the total amounts due to the claimants are as follows:
- a. Mr Addison is entitled to 20.14 weeks of accrued leave at a rate of £113.17 per week, which amounts to £2,279.24.
 - b. Mr Cardenas is entitled to 48.37 weeks of accrued leave at a rate of £223.28 per week, which amounts to £10,800.05.
30. Both of these amounts are to be paid in full by the respondent. However, the claimants will need to submit a tax self-assessment, if applicable.

Employment Judge Robinson

23 March 2022