



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101673/2022

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Hearing held via Cloud Video Platform (CVP) on 9 June 2022

Employment Judge: J McCluskey

10 Margaret Pollock

Claimant
In Person

Grey Side Ltd

Respondent
Not present and
Not represented

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent failed to make a payment to the claimant, on the termination of her employment, in respect of her accrued but untaken holiday entitlement and is ordered to pay the claimant the sum of **ONE THOUSAND SIX HUNDRED AND THREE POUNDS AND TWENTY PENCE (£1,603.20)** gross less such deductions for tax and national insurance as may require to be made.

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REASONS

Introduction

- 25 1. The claimant presented a claim to the Employment Tribunal on 28 March 2022 asserting that she had not been paid holiday pay on termination of her employment. In section 8 of her ET1 the claimant ticked one box, stating that she was claiming holiday pay, and in section 8.2 stated that her hourly rate paid was below the national minimum wage in force at the relevant time.
- 30 2. The respondent did not enter a response.

Issues

3. The issue to be determined was whether the claimant was entitled to any payment from the respondent for holiday pay on termination of her employment and, if so, how much.

5 Findings in fact

4. I heard evidence from the claimant. I accepted the claimant was employed by the respondent from 8 April 2021 until 2 January 2022. The claimant resigned from her employment and worked her period of notice. The claimant did not have a written contract of employment. The respondent emailed the claimant on commencement of her employment and stated she would be paid an annual salary of £20,000. The claimant agreed verbally with the respondent's General Manager Simon McLeod that she would work 9 hours per day and 5 days per week. The claimant worked these days and hours each week throughout her employment. The claimant was paid weekly in arrears. She received the sum of £384.62 gross weekly less relevant deductions for tax and national insurance. The claimant's daily rate of pay was £76.92 gross or £8.55 per hour gross based on 9 hours work per day.
5. The rate of national minimum wage which ought to have been paid to the claimant during her employment was £8.91 per hour. The claimant did not make any claim for unlawful deduction of wages during her employment and her claim was in respect of payment for accrued but untaken holiday entitlement on termination of employment only.
6. The claimant requested one day of annual leave during her employment. The respondent told her she could take this as a day in lieu instead of annual leave due to the hours she had been working. As at the date her employment ended the claimant had not taken any annual leave and had accrued unused holidays of 20 days.

Discussion and Decision

7. A worker is entitled to 5.6 weeks annual leave in each leave year under Sections 13 and 13A of the Working Time Regulations 1998 (WTR). Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken.
8. Regulation 13(3) WTR sets out when the leave year begins and provides that in the absence of a relevant agreement in writing the leave year begins on the date on which the employment begins. As the claimant had no relevant agreement in writing her leave year began on 8 April 2021.
9. Regulation 14 WTR, sets out the entitlement where a worker's employment ends during a leave year and provides, at 14(2), that where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with the formula set out in Regulation 14(3), which is $(A \times B) - C$.
10. The claimant was entitled to a period of leave of 5.6 weeks of annual leave (A). The proportion of her leave year which had expired before her termination date on 2 January 2022 was 270/365 days (B). The claimant had not taken any leave between the start of her leave year and the termination of her employment (C). In accordance with this formula the claimant had 20 days accrued but unused holidays. This generated wages in the sum of £1,538.40 gross (20 days x £76.92).
11. Regulation 7 of the National Minimum Wage Regulations 2015 (NMWR) sets out the calculation to determine whether the national minimum wage has been paid and provides that a worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation R/H where R is the remuneration in the pay reference period determined in accordance with Part 4 NMWR and H is the hours of work in the pay reference period determined in accordance with Part 5 NMWR. In

respect of the claimant R in respect of a day's pay is £76.92 and H is 9 hours per day, resulting in an hourly rate of £8.55.

12. The rate of national minimum wage which ought to have been paid to the claimant during her employment was £8.91 per hour. The sum of £8.55 per hour paid to the claimant is below the rate of the national minimum wage by £0.36p per hour or £3.24 per day, based on 9 hours work per day. Based on an entitlement to 20 days accrued but unused holidays this generated an additional entitlement to £64.80 (£3.24 x 20).
13. The claimant was not paid for holidays accrued but untaken as at the termination of her employment and there was no relevant agreement (involving an independent legal adviser) waiving her right to claim holiday pay. I was satisfied the claimant was owed the sum of £1,603.20 (£1,538.40 plus £64.80) gross for holidays accrued but untaken as at the termination of her employment.

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Employment Judge: Jacqueline McCluskey

Date of Judgment: 23 June 2022

Entered in register: 24 June 2022

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