



EMPLOYMENT TRIBUNALS

Claimant: Mr P Spence
Respondent: HS Linwood & Sons Limited
Heard at: East London Hearing Centre (by telephone)
On: 20 June 2022
Before: Employment Judge Hook

Representation

Claimant: In person
Respondent: Did not attend and was not represented

CORRECTED RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's claims for redundancy pay, notice pay and pay in lieu of holiday are well founded.
2. The Respondent is ordered to pay the Claimant £20,339.50 gross.

REASONS

CLAIMS

1. The Claimant brings claims against his former employer, the Respondent. He claims for payments that he says he is entitled to and which have not been made to him.
2. The Claimant began his claim with an ET1 claim form that was received by the Tribunal on 12/11/2021. In this form he set out the basic facts of his case and the amounts sought. He was employed by the Respondent as a fishmonger for 42 years. He was placed on furlough when the pandemic hit in March 2020. He was told that his employment was to end on 1/10/21 and he received his final pay and a P45 on 9/10/21. His gross pay had been £1735 and net pay £1495 monthly. He was told that the company would not pay him redundancy pay or any other sum as the company

did not have the funds to do so.

3. He set out in his ET1 the sums he believes he is owed:
 - a. Redundancy pay: £11,600 gross
 - b. Notice pay: 3 months x £1495 net = £4485
 - c. Holiday pay: 4 weeks in 2020 and 3 weeks in 2021 = 7 x £347.56 weekly - £2432.92
 - d. Eight bank holidays in 2020 and five bank holidays in 2021 = 13 x £69.51 per day = £903.65
4. The Respondent sent a response (form ET3) that was received by the Tribunal on 5/1/2022. The response said that his "salary had included holiday pay and bank holidays". It went on to say that the company was in a bad financial position and had been loss making for some years. The company proposes to cease trading.

SERVICE OF FURTHER DOCUMENTS

5. The Respondent filed a witness statement of Tracey Willbourne dated 27 May 2022 which gave slightly more detail but essentially the same information as in the response to the claim.
6. The witness statement had been sent to the Tribunal by a firm of accountants who indicated who described the Respondent as their client.
7. Neither side has served a bundle.

HEARING ON 20 JUNE 2022

8. The case was listed for 2pm on 20 June 2022 for final hearing. By 2.45pm the Respondent had not attended and nor had anyone to represent the Respondent.
9. The clerk of the Tribunal telephoned the representative as recorded on the Tribunal file who advised that the representation had been taken over by the firm who sent the statement in. The clerk called that person five times by telephone, leaving two voicemail messages. None of the calls were answered or the messages returned. There was no record of contact to the Tribunal by the Respondent or anyone on the Respondent's behalf.
10. The Claimant told me that he had not received any contact from the Respondent.
11. The Claimant told me was anxious to proceed with the case. Losing his job was difficult and he has had a nervous wait for months for this hearing which had been advised to the parties. He applied for me to continue in the absence of the Respondent.
12. I reminded myself of rule 47.

Non-attendance

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

13. Considering all the circumstances, in particular the importance of the case for the Claimant, the failure of the Respondent to make any contact with the Tribunal to explain their non-attendance and the reasonable efforts made by the clerk of the tribunal to make contact with the Respondent, I was content that it is in the interests of justice to proceed in the Respondent's absence.

EVIDENCE

14. I heard evidence from the Claimant. He gave evidence as to his length of employment, age (he was 59 when he was made redundant) and wages. During the period on furlough March 2020 to October 2021 he received 80% of his wages. He told me that he received four weeks paid holiday per year and paid leave on the statutory bank holidays that apply in England.
15. His normal gross monthly pay was £1735 and his weekly pay therefore was $(12 \times 1735)/52 = £400.38$.
16. He was given notice of the end of his employment on 1/10/21.
17. He did not take and was not asked to take any holiday while on furlough. He told me he had taken no leave in 2020 before furlough began and none after it began up to the termination of his employment on 1/10/21.
18. The Respondent was not present to give any evidence. I considered the written statement submitted by the Respondent. The statement makes no substantive denials of the Claimant's entitlement to the sums he has claimed but asserts that the company is not in a financial position to pay.
19. The Claimant submitted to me that the company's financial position makes no difference, and he is due what he is entitled to in law. The company had the benefit of his labour for 42 years and he is entitled to redundancy pay and other payments that arise from the Respondent ending his employment.
20. It is convenient for me to say at this point that I accept the Claimant's general submission. The Respondent's impecuniosity provides no defence in law to its liability to pay its employee sums that are due in law.

THE LAW AND THE TRIBUNAL'S FINDINGS ON EACH ISSUE

21. I will deal with each of the types of payment sought by the Claimant below.

Redundancy

22. Redundancy is defined in Employment Rights Act 1996 (ERA) s. 139 as being when

employment is ended due to the closure of the employer's business, the workplace or where there is a diminishing need for employees to do the available work.

23. The reasons given to the Claimant for the termination his employment make it clear that this was a redundancy. The business was closing or reducing due to a diminishing client base and he was no longer required to do work. I have no difficulty in finding that the Claimant was made redundant.
24. Section 135 provides that an employer must pay a redundancy payment to an employee who is dismissed by reason of redundancy.
25. The current scheme for determining redundancy payments is set out in Part XI of ERA:
 - a. An employee is entitled to 1.5 weeks pay for each complete year of service after the age of 41,
 - b. 1 weeks pay for each complete year between ages of 22 and 40, and
 - c. 0.5 weeks pay for each complete year of service below age 22.
 - d. The above is subject to the proviso that a maximum of 20 years are to be taken into account.
26. I find that the effective date of his redundancy was 1/10/21, his age at the time was 59 and his weekly pay was £400.38 gross.
27. The redundancy payment he was entitled to was, therefore, £11,611.02 gross.

Notice pay

28. ERA s. 86 creates minimum statutory notice periods. An employee employed for over 12 years is entitled to 12 weeks' notice.
29. Where an employer has failed to give notice then the employer is liable to pay the employee in lieu of notice. The failure to give notice is a breach of the contract of employment which can be met by damages.
30. I find the Claimant was entitled to 12 weeks' notice and having not been provided with notice is entitled to damages equal to 12 weeks' pay.
31. Twelve times his weekly pay is $£400.38 \times 12 = £4,804.56$ gross.

Holiday pay and bank holidays

32. It is convenient to deal with these together although the Claimant has raised them as separate lines in his schedule of loss.
33. The Claimant gave evidence that he was usually permitted by the Respondent to take to four weeks paid annual holiday plus the eight bank holidays in England in a year. In relation to 2021, he has correctly identified that having been in the employment of the Respondent for $\frac{3}{4}$ of that year he is entitled to three weeks paid holiday. There were six bank holidays from 1/1/21 to 1/10/21 when his employment ended.

34. The leave entitlement the Claimant said he normally enjoyed is consistent with the 5.6 weeks required by the Working Time Regulations 1998 and which can include the 1.6 weeks (eight days) of bank holidays (see Reg 13 and Reg 13A). 5.6 weeks for a person such as the Claimant who worked a five day week equals 28 days.
35. His holiday entitlement under the Working Time Regulations for the period in question is therefore:
- | | |
|-------|---------|
| 2020 | 28 days |
| 2021 | 21 days |
| Total | 49 days |
36. The WTR provides that an employee has a right to be paid during this minimum holiday entitlement and, by virtue of Reg 14, to receive a payment in lieu of unused annual leave on the termination of their employment.
37. The rate of holiday pay due is the employee's normal weekly pay which as noted about is £400.38. His daily rate would be on fifth of that, so £80.08.
38. 49 x £80.08 is £3923.92

CONCLUSION

39. I find the following sums are due to the Claimant:

Redundancy payment	£11,611.02
Notice pay	£4,804.56
Holiday pay (including bank holidays)	£3,923.92
Total	£20,339.50

40. The Tribunal gives judgment for the Claimant in the sum of £20,339.50 gross.

Employment Judge Hook
Dated: 23 June 2022