EMPLOYMENT TRIBUNALS

Claimant: Mrs J Bowens

Respondent: Zippy Care Ltd

HELD AT: London South (Croydon) (Remote Hearing via CVP) **ON:** 8 July 2022

BEFORE: Employment Judge McCann

REPRESENTATION:

Claimant: In person
Respondent: Mr Adetayo Adelaja (Director)

RECONSIDERATION OF THE JUDGMENT
Employment Tribunals Rules of Procedure 2013

(1) By letter to the parties dated ***14 July 2022***, the tribunal proposed, of its own initiative (under rules 70 and 73 of the Employment Tribunals Rules of Procedure 2013), that it was in the interests of justice for the decision given orally at the conclusion of the Final Hearing on ***8 July 2022*** to be reconsidered in part. It was also proposed that any reconsideration could be done without a hearing. The parties were given an opportunity to send in further written representations by ***4 August 2022***. Representations were received by email from the claimant on ***29 July 2022***. No representations have been received from the respondent.

(2) Employment Judge McCann considers – for the reasons set out in the tribunal's letter of ***14 July 2022*** – that it is in the interests of justice to conduct a reconsideration of the decision on the award under s38 Employment Act 2002, since the decision to make an additional award of 3 weeks' pay (i.e. in addition to the award in respect of holiday pay) is likely to have been wrong.

(3) At the Hearing on ***8 July 2022***, the parties had a full opportunity to address the tribunal on the issue of an award under s38 Employment Act 2002 (as set out in issue (2) of the Case Management Order sent to the parties on ***24 May 2022***); and they have had a further opportunity to make written representations since then.

(4) The issue for reconsideration is a narrow one, turning on the scope of the tribunal's power under s38 Employment Act 2002.

(5) Accordingly, and having had regard to the claimant's representations via email, Employment Judge McCann considers that it is in the interests of justice and in accordance with the overriding objective to deal with cases fairly and justly (including in ways which are proportionate to the complexity and importance of the issues and to avoid delay and save expense), for the tribunal the reconsider its decision (in part) without a hearing (under rule 72(2) of the Employment Tribunal Rules of Procedure 2013).

Reconsideration

UPON a reconsideration by Employment Judge McCann of the judgment given orally at the conclusion of the Final Hearing on ***8 July 2022***, on the tribunal's own initiative and without a hearing (having had regard to the claimant's representations via email on ***29 July 2022***), the decision to increase the award in respect of the claimant's holiday pay claim by a sum equivalent to three weeks' pay is substituted with the decision to increase the award by the minimum amount of two weeks' pay, under s38(3) of the Employment Act 2002.

The Judgment otherwise remains as delivered to the parties orally on 8 July 2022 – namely, that the claimant's claim for payment in respect of her accrued holiday on termination of employment under Regulation 30 of the Working Time Regulations 1998 succeeds and the respondent is ordered to pay her £213.18 (gross).

The Judgment and written reasons, following the request for written reasons made by the respondent at the Final Hearing on 8 July 2022, are set out below.

JUDGMENT

1. The respondent failed to pay the claimant in respect of her paid holiday entitlement which had accrued on termination of employment and is ordered to pay to the claimant the sum of **£213.18** being the gross sum due.

2. The respondent is ordered to pay to the claimant additional compensation of two weeks' pay (**£660**) pursuant to section 38 Employment Act 2002 for failure to provide the claimant with a written statement of employment particulars.

REASONS

Claims and Issues

1. The claimant claimed that she had not been permitted to take paid holiday during her employment with the respondent and brings a claim under Regulations 14(2) and/or 16(1) and 30 Working Time Regulations 1998 for payment in respect of her entitlement to paid holiday which had accrued up to and as at the date of termination of her employment. The claimant also claimed that she had not been

provided with a written statement of particulars of employment and she sought an increase to any award in respect of her holiday pay claim under section 38 Employment Act 2002.

2. There was a telephone preliminary hearing for case management on 11 May 2022 at which the claimant appeared in person and the respondent was represented by its 'London Branch Manager', Mr Adetayo Adelaja. On that occasion the tribunal identified the issues which would arise for determination at the Final Hearing as follows:

   (1) Holiday Pay (Working Time Regulations 1998)

   1.1. On what date did the Claimant's employment commence, 21 August 2020 (claimant's case) or 24 August 2020 (respondent's case)?

   1.2. How much of the leave year had passed when the claimant's employment ended on 5 October 2020?

   1.3. How much leave had accrued for that year by that date?

   1.4. How much paid leave had the claimant taken in the year?

   1.5. How many days remain unpaid?

   1.6. What is the relevant daily rate of pay?

   (2) Remedy

   2.1. How much should the claimant be awarded?

   2.2. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

   2.3. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

   2.4. Would it be just and equitable to award four weeks' pay?

3. At the telephone preliminary hearing, it was accepted on behalf of the respondent that the claimant was an employee and that no written statement of particulars of employment had been provided to her (the terms of employment having been agreed orally) (these points are recorded at paragraph 20 of the Case Summary).

4. The Case Management Order and Case Summary (setting out the above issues, at paragraph 22) was sent to the parties on 24 May 2022.

5. At the start of the Final Hearing, the parties were reminded that the above issues had been identified and agreed and that they were the issues to be decided at the hearing.

Procedure, documents and evidence heard

6. At the telephone preliminary hearing, straightforward case management orders were made for the parties to send each other copies of all documents relevant to the issues identified and to prepare written statements containing all of the evidence they and their witnesses intended to give at the final hearing. An order was made for the parties to each submit to the tribunal electronic copies of their witness statements and documents no later than 2 working days prior to the hearing. The claimant was also ordered to provide a schedule of loss.

7. On 18 May 2022, the claimant emailed the tribunal providing an 8-page document with a section headed “Schedule of Loss” and a section described as the “outline” for her statement which was in the form of a chronology. She also provided a copy of an email from her to the respondent from 24 September 2020. No documents were received on behalf of the respondent.

8. At the outset of the hearing, Mr Adelaja told me that he had a copy of the contract which had been signed by the claimant. When asked why this had not been provided in accordance with the case management orders, Mr Adelaja stated that he had been in Africa as his mother was unwell; but he confirmed that he had returned to the UK on 10 June 2022. He said he had not provided any documents at that point as he thought it was too late. The date for witness statements, however, had been set for 15 June 2022 and for any documents to be sent to the tribunal by no later than 6 July 2022.

9. I adjourned the hearing for ten minutes to allow Mr Adelaja to email the document to the claimant so that she could consider it first before any decision was made by me as to whether it should be provided to the tribunal.

10. When the hearing resumed, the claimant told me that the documentation emailed by Mr Adelaja was not the same documentation that she recalled having signed towards the beginning of her employment. The claimant stated that she wanted the documentation to be provided to the tribunal to be considered and that she believed that it was not authentic.

11. Given the claimant’s agreement, I instructed Mr Adelaja to email the documentation to the tribunal which he proceeded to do at 15:24. The documentation emailed by Mr Adelaja consisted of two attachments: a four-page unsigned word document with the claimant’s name and address on the front page; and a photographic image (.jpg file) of a single page with the claimant’s signature and Mr Adelaja’s signature on it and a handwritten date of 26 August 2020.

12. I heard evidence from the claimant and she relied on the contents of her ET1 and the documents she had emailed to the tribunal. I heard evidence from Mr Adelaja for the respondent. He produced no documents, other than the documentation emailed at 15:24. I asked a number of questions of both the claimant and Mr Adelaja based on the list of issues (above) and about the documentation emailed by Mr Adelaja. The parties had an opportunity to ask questions of each other. They each made brief closing submissions.

13. I adjourned and then gave judgment with brief oral reasons. Mr Adelaja requested written reasons on behalf of the respondent.

Fact findings

14. The respondent operates an agency in the health and social care sector.

15. As expressly accepted by the respondent, the claimant was an employee. She was employed to work in the respondent’s office in Lewisham, having answered an advertisement via a WhatsApp Group. The parties agree that the claimant was interviewed and offered the role on Friday 21 August 2020. They also agree that she worked (and was paid) for a few hours that day. The claimant says that her employment commenced that day whilst Mr Adelaja states that this was her induction for which she was paid, but that her employment commenced on Monday 24 August 2020.

16. I find that the claimant’s employment under her contract of employment actually

commenced on 24 August 2020 as this is consistent with the statement/chronology provided by the claimant (on page two) ("*I….was then asked to stay a further 3 hours as part of an induction to do calls etc and would be paid. I was then told by Adetayo he wanted me to start on Monday 24th August 2020"*).

17. The parties agree that the claimant's employment terminated on 5 October 2020. The claimant was employed for six weeks.

18. On 26 August 2020, the claimant signed a document which she understood was her contract of employment. She refers to that contract in an email of the same date (which is copied and pasted into her statement/chronology) and says in that email that, from looking at her contract, she has worked out that her rate of pay is £11 per hour. In the documentation provided by the claimant to the tribunal, under the date of 28 August 2020, the claimant says she signed a contract for 30 hours per week and £11 per hour and that she was told she would get a copy of the contract "later". The documentation emailed to the tribunal by Mr Adelaja during the course of the Hearing provides for pay of £330 per week for working 30 hours per week. That is consistent with the claimant's email in which she stated that she had worked out her rate of pay as being £11 per hour.

19. However, the four-page document provided by Mr Adelaja during the hearing on 8 July 2022 is unsigned and refers to the claimant's employment commencing on 2 September 2020, which is not a date that either party has ever asserted as the start date of the claimant's employment. The photographic image provided to the tribunal by Mr Adelaja of a single page with the claimant's signature on it (dated 26 August 2020, in handwriting) appears to be the last page of a longer document but the rest of that document has not been provided. In his evidence, Mr Adelaja stated that he had been looking for the contract he had sent to HR and that he had a photo on his phone of just one page of the signed contract but that the document the claimant had signed was the same as the four-page document attached to his email to the tribunal.

20. The claimant emailed the respondent asking for a copy of her contract on 1 October 2020 and 5 October 2020. In the latter email, she made reference to Mr Adelaja having told her that he had ripped up the contract which she had signed. There is no evidence that Mr Adelaja responded to the claimant's emails with a copy of her contract.

21. I find that the claimant signed a contract that is very similar in its content to the four-page document emailed to the tribunal by Mr Adelaja during the Hearing on 8 July 2022. However, in my judgment, it is more likely than not that the contract signed by the claimant on 26 August 2020 is not the four-page document emailed by Mr Adelaja to the tribunal because that document is unsigned and has the wrong start date on it.

22. Both the claimant and Mr Adelaja referred in their oral evidence to some further discussions about the claimant's hours. In his evidence, Mr Adelaja stated that, after the contract had been signed, the claimant wanted to change her hours and was not consistent about which hours she wanted to work so they agreed the contract "would be torn". I find that, because of these discussions, Mr Adelaja did tell the claimant that he would be ripping up the original contract which she had signed. I find that the claimant was never provided with a copy of her contract or any other written particulars of employment, even when she asked for a copy by her emails on 1 and 5 October 2020. Accordingly, at the time that the claimant issued these proceedings, she had not been provided with a copy of written particulars of employment.

23. The claimant asserts that, during her employment, she did not work on Monday

31 August 2020, a bank holiday, and took two days' holiday on Friday 25 and Monday 28 September 2020. Mr Adelaja, in his evidence, accepted that she did not work on the bank holiday and, initially, denied that she was away on annual leave on 25 and 28 September 2020. However, later in his evidence, he referred to the claimant having gone away for a long weekend. The email provided to the tribunal by the claimant dated Thursday 24 September 2020 refers to "*my return on Tuesday*". This is consistent with the claimant not working on Friday 25 or Monday 28 September 2020. Accordingly, I accept her evidence that she took those two days off.

24. However, both the claimant and Mr Adelaja agree that, whatever time off she may or may not have taken, the claimant was not paid in respect of any holiday taken or untaken. Mr Adelaja said in his oral evidence that this is because, in his view, she had no right to paid holiday as she was "on probation".

25. In their evidence, both the claimant and Mr Adelaja referred to the claimant working Mondays to Fridays, from about 9:30am to about 4 or 4:30pm and to working about 7 hours per day including an unpaid lunch break. I find that the claimant worked a 30-hour week and was paid £11 per hour. This is consistent with the evidence given by the claimant and Mr Adelaja at the hearing but also the claimant's email of 26 August 2020. It is also consistent with the attachment to the claimant's ET1 which states "*I signed a contract with Adetayao where it confirmed 30 hours weekly at £11 per hour….additionally 4 weeks Annual Leave. I asked for the contract and was told I would get it later*".

Law

Holiday pay

26. The Working Time Regulations 1998 provide for minimum periods of annual leave (Regulations 13 and 13A); for payment in respect of any period of annual leave to which the worker is entitled (Regulation 16); and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends (Regulation 14).

27. The Regulations provide for 5.6 weeks leave per annum (four weeks' leave, derived from European law, in Regulation 13 and an additional 1.6 week provided for in Regulation 13A).

28. An employer must ensure that the worker takes the leave to which they are entitled under the Working Time Regulations 1998 and that they are paid for it. This is a 'day one' right. In other words, the right to paid leave starts to accrue from the commencement of employment and does not depend on any qualifying period of service. Taking annual leave and being paid at the time of taking that leave are all part and parcel of the right to four weeks' paid leave under Regulation 13 Working Time Regulations 1998 (as recently re-emphasised by the Court of Appeal in ***Smith v Pimlico Plumbers*** [2022] EWCA Civ 70; [2022] ICR 818, at [71] and [72]).

29. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the worker and employer provides for a different leave year.

30. If the employer fails to pay the claimant for any annual leave which they took in accordance with their entitlement; and/or on termination of employment in lieu of any accrued but untaken paid leave, this will breach Regulations 16(1) and/or 14(2) of the 1998 Regulations and give rise to a claim under Regulation 30.

31. A worker is entitled to be paid a week's pay for each week of leave to which they were entitled. A week's pay is calculated in accordance with the provisions in sections 221 – 224 Employment Rights Act 1996 with some modifications. There is no statutory cap on a week's pay for this purpose. All elements of a worker's normal remuneration must be taken into account when calculating holiday pay for the basic 4 weeks' leave derived from European law (although not for the additional 1.6 weeks leave which is purely domestic in origin) (see ***Bear Scotland and Others v Fulton and Others*** [2015] ICR 221 and ***Smith v Pimlico Plumbers***).

Section 38 Employment Act 2002

32. Where a tribunal finds in favour of an employee in a claim under Regulation 30 Working Time Regulations 1998, and the tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars as at the date that proceedings were issued, the Tribunal must award the employee an additional two weeks' pay unless there are exceptional circumstances which would make that unjust or inequitable; and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

Holiday pay

33. The claimant took 3 days off work during her six weeks of employment (on 31 August 2020, 25 and 28 September 2020) but was not paid for this time off as paid annual leave.

34. The leave year commenced on 24 August 2020. The claimant was employed until 5 October 2020. She had, therefore, accrued 6/52 of her annual entitlement to leave by the effective date of termination. She worked 5 days a week. The claimant's entitlement to 5.6 weeks' leave, therefore, amounted to 28 days per annum. The claimant had, accordingly, accrued a right to 3.23 days' paid annual leave at the point of termination of her employment (28 x 6/52).

35. The respondent did not make any payment for holiday pay to the claimant (in breach of Regulation 16(1)); nor did it make any payment in lieu of paid leave which had accrued as at the date of termination of employment, in breach of Regulation 14(2) Working Time Regulations 1998.

36. I calculate the amount of payment due on a gross basis, but the respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

37. The claimant's gross weekly pay was £330, giving a daily rate of pay of £66 as the claimant worked a five-day week. The amount due is accordingly 3.23 x £66 = £213.18.

Failure to provide employment particulars

38. The claimant has succeeded in her holiday pay claim. An award of additional pay under section 38 Employment Act 2002 for failure to provide a written statement of employment particulars is, therefore, possible.

39. The claimant was an employee and was entitled under section 1 Employment Rights Act 1996 to be provided with a written statement of employment particulars no later than the start of her employment on 24 August 2020.

40. I have found that the claimant was never actually given a written statement of employment particulars and so had not been provided with such a statement at the time she issued these proceedings. She signed a document she understood to be her contract of employment (which may or may not have complied with the requirements in section 1 Employment Rights Act 1996) but was told by Mr Adelaja that she would be given it "later" and was then told, after further discussions about her working hours, that it would be ripped up and, when she emailed to ask for a copy on 1 and 5 October 2020, a copy was not provided.

41. At the hearing, the claimant stated that she believed that the four-page document (emailed to the tribunal by Mr Adelaja during the hearing on 8 July 2022) was not authentic. This was because (1) its contents were not exactly as she remembered, and (2) despite having asked for a copy of her contract, it was not provided to her and Mr Adelaja had told her that he had ripped it up. In her representations emailed to the tribunal on 29 July 2022, the claimant states that the four-page document is "fraudulent" and that Mr Adelaja has been dishonest.

42. I conclude that the four-page unsigned document was the standard statement of employment particulars used by the respondent at the time of these events. I conclude that the respondent retained only a photograph of the last page which had been signed by the claimant on 26 August 2020. It did not retain the previous pages which is why only the final page – bearing the claimant's signature and with a handwritten date on it of 26 August 2020 – was provided as an image (in .jpg format) by the respondent to the tribunal during the hearing on 8 July 2022. However, since the key details of employment in the four-page unsigned document are the same as the details recalled by the claimant (as stated in paragraph 18 above), I do not consider that the four-page document is fraudulent in the sense that it has been deliberately created in the knowledge that it is false. Rather, I conclude that the respondent has provided the tribunal with a copy of its four-page standard employment particulars (unsigned) as well as an image of the last page of the document actually signed by the claimant on 26 August 2020.

43. The respondent has not put forward any evidence of any exceptional circumstances which would make it unjust or inequitable to order it to pay the claimant an additional amount for the failure to provide the claimant with a written statement of employment particulars, in accordance with section 38 Employment Act 2002. I must, therefore, order the respondent to pay an additional two weeks' pay and may, if I consider it just and equitable in all the circumstances, order the respondent to pay an additional four weeks' pay.

44. The respondent should have provided the written statement of employment particulars by 24 August 2020. It appears that the respondent sought to put in place a written contract that same week (which may or may not have complied with the requirements of section 1 Employment Rights Act 1996) so it was not in serious default. Furthermore, the claimant's employment ended on 5 October 2020 so the failure to provide the written statement was not of long duration. In these circumstances, I do not consider it would be just and equitable to order the respondent to pay an additional 4 weeks' pay so I order it to pay an additional two weeks' pay – i.e. 2 x £330 = £660.

Employment Judge **McCann**

30th August 2022