



EMPLOYMENT TRIBUNALS

Claimant

v

Respondent

Mr James Joseph

Premium Coaches Ltd

Heard at: London South Employment Tribunal

On: 21 September 2022

Before: EJ Webster

Appearances

For the Claimant: Ms Y Slater (Litigation/Mackenzie friend)

**For the Respondent: Mr Robbins (Director) and
Ms Duncan (Business Administrator)**

JUDGMENT

1. The Respondent must pay the Claimant £485.36 (gross) in respect of a total of 9.5 days' underpaid holiday pay.
2. The Respondent must pay the Claimant £63.45 (gross) in respect of underpaid notice pay.
3. The Respondent must pay the Claimant £80.35 (gross) in respect of underpaid furlough pay on 31 May 2020.
4. **Total payable to the Claimant = £629.16.**

REASONS

5. Oral reasons were given at the hearing and Ms Slater requested written reasons at the conclusion of the hearing. These are now recorded below.

6. On the same day of the hearing, whilst writing the Judgment I realised that there had been an error in the original calculation. The Tribunal wrote to the parties suggesting a reconsideration on the Tribunal's own volition given that error and asking for their opinions on the suggested new calculations. Both parties responded promptly and agreed to the recalculation. It is those corrected figures that appear in the Judgment below.

The Hearing

7. The hearing took place by way of CVP. Ms Slater represented the claimant and provided a huge amount of assistance to the Tribunal for which I am grateful. Further, the attendance of Ms Duncan ensured that missing documents were sent to Ms Slater and the Tribunal swiftly which was helpful.
8. At the outset of the hearing I confirmed that I had received and read Ms Slater's introductory note. I was also provided with repeated copies of documents that had been produced for the purposes of the last hearing. Of most relevance (and the documents that I was referred to during today's hearing) were the digital bundle, the claimant's schedule of loss dated 19 January 2021 and the note prepared by Ms Slater. I also had reference to my Judgment dated 2 February 2022. Subsequently, in the course of the hearing, Ms Duncan sent the Tribunal and Ms Slater the following documents:
 - (i) Wages by Driver Report for the claimant from 21 February 2020 – 20 March 2020.
 - (ii) A Tacho Master sheet for the Claimant's vehicle on his last day worked (16 March 2020)

Facts

9. It was accepted that I was not going to go behind the Judgment I reached and sent the parties on 2 February 2022. Ms Slater confirmed that the claimant had appealed the decision to the EAT but understood that the exercise today was to calculate the claimant's losses in accordance with the Judgment dated 2 February 2022. I had not been aware of the appeal to the EAT until she informed me.
10. In order to make the correct calculations I had to determine what the relevant 52 week reference period was and which figures I would use to calculate a week's pay during that period.
11. The Claimant's last day worked was 16 March 2020. Thereafter, between that date and the termination of his employment on 18 September 2020, the claimant was on furlough and was paid through the furlough scheme.
12. The period on furlough must be disregarded for the purposes of the 52 weeks' reference period as this was not time worked. It was therefore agreed with the parties that the appropriate reference period was 52 weeks back from the last

date worked which was 16 March 2020. The claimant did not start work for the respondent until 21 March 2019 so this provided an almost 52 week reference period from 21 March 2019 to 16 March 2020.

13. In order to ascertain the pay received during that period, it was accepted by both parties that I should use the figures at page 39-40 of the bundle which were summarised in the Judgment dated 2 February in a table at paragraph 35. One small amendment was made to that table which I deal with below. The reason we used that table was that it appeared in the earlier hearings that the payslips supplied by the respondent were inaccurate and did not reflect the hours that Mr Robbins agreed the claimant had worked.
14. During the hearing and for the purposes of this Judgment, I have added a further column to the table which was the pay the claimant ought to have been paid based on a £12 hourly rate. My calculations were checked and agreed by the parties.

The table was therefore as follows:

15.

Dates	Hours worked	Pay @£12 p/h
21 March – 20 April 2019	257.25	3,087
21 April – 20 May	268	3,216
21 May – 20 June	281.5	3,378
21 June – 20 July	310.5	3,726
21 July – 20 August	266.25	3,195
21 August – 20 September	280.25	3,363
21 September – 20 October	270.25	3,243
21 October – 20 November	268.5	3,222
21 November – 20 December	235.75	2,829
21 December – 20 Jan	218.25	2,619
21 January to 20 Feb 2020	246	2,952
21 Feb – 18 March 2020 (lockdown)	150.25 plus 15 hours for 16 March 2022 = 165.25 hours	1,983
		TOTAL = £36,813

16. Ms Slater raised that the payment and hours for 21 February -18 March 2020 did not include the additional 32 hours which the claimant was eventually paid at the end of his employment and that this ought to be added in.

17. Mr Robbins stated that the claimant had only worked 15 hours on 16 March and that the additional payment of 17 hours was a goodwill payment because of the lateness of the payment.
18. When it was queried as to how Mr Robbins had reached the figure of 15 worked hours worked on 16 March 2020, he stated that the claimant's card would have logged it. However, the claimant said that he had not downloaded his card onto the system at the end of his shift on 16 March and Mr Robbins agreed. I was provided with no card log for that day. Ms Duncan then obtained and sent the tachograph figures for the vehicle which confirmed that the claimant had clocked his card into the vehicle for 14 hours and 1 minute that day. The claimant says that he worked approximately 30 minutes either side of clocking in. Although Mr Robbins disputed this, he accepted that for the purposes of today he agreed that the claimant was entitled to be paid 15 hours for the work done on 16 March 2022 and that this ought to be added into the table above. It was not suggested by Ms Slater or the claimant that he was entitled to add the entire 32 hours to the table for the purposes of determining the average weekly wage. That must be right given that we are only including pay for when the claimant actually worked.
19. Ms Slater raised that although she accepted the reference period in theory, the hours worked and pay received included 28 days' holiday which had been recorded as 8 hour days and paid at £96 and that these would skew the figures when calculating the average.
20. I agreed that this was the case and decided that the most appropriate way to amend the figures to ensure that this underpayment did not 'taint' the calculation, was in effect to remove the 28 days' from the calculation altogether as they did not represent days worked for the purposes of the calculation. This would therefore reduce the hours worked, the pay received and the 52 week reference period.
21. Therefore 224 hours (8hrs x 28 days) were deducted from the hours worked column, resulting in a reduction of £2,688 (224 x £12) of pay being removed from the pay total. It was agreed that the 28 day period amounts to 5.6 weeks' holiday. When removed from the 52 week period this gave a period of 46.4 weeks.

The Law 22. S221 Employment Rights Act 1996

- (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.
- (2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the

amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

(3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5) This section is subject to sections 227 and 228.

22. S222 ERA 1996

(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

(3) For the purposes of subsection (2)—

(a) the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and

(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.

(4) In subsection (3) "the relevant period of twelve weeks" means the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(5) This section is subject to sections 227 and 228.

23. S 223 ERA Supplementary

(1) For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours, shall be brought in.

(2) If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.

(3) Where—

(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime),

account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

24. S 224 Employments with no normal working hours

(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.

(4) This section is subject to sections 227 and 228.

25. S 234 ERA Normal working hours

(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case—

(a) the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b) that number or minimum number of hours exceeds the number of hours without overtime,

the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

26. Working Time Directive

The right to a paid holiday is provided for by the Working Time Regulations (“WTR”) 1998. These implement within the United Kingdom what is now provided for by the

Working Time Directive of 4th November 2003 (2003/88/EC, replacing Directive 93/104/EC) (the “WTD”). Article 7 of the WTD provides:

“Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions of entitlement to, and granting of such leave laid down by national legislation and/or practice.

2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.”

27. s 16 Working Time Regulations - Payment in respect of periods of leave

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week’s pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply— (a) as if references to the employee were references to the worker; (b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question; and
(d) as if the references to sections 227 and 228 did not apply.

28. The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 Amendments to regulation 16 of the Working Time Regulations 1998 [came into effect from April 2020]

10.—(1) Regulation 16 of the Working Time Regulations 1998(**1**) is amended as follows.

(2) At the end of paragraph (2) insert “and the exception in paragraph (3A)”.

(3) In paragraph (3)—

(a) in sub-paragraph (c) omit “and”; (b) after sub-paragraph (d) insert—

“(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—

(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.”.

(4) After paragraph (3) insert—

“(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to

the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.

(3B) For the purposes of paragraphs (3) and (3A) “week” means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.”

Calculations and Conclusions

29. The relevant reference period was 46.4 weeks long once the days representing the underpaid holiday taken was deducted. This was done to ensure that only weeks where the claimant had worked were taken into account. Further, the reference period was taken from before the furlough period, also to ensure that it was only weeks worked that were included in the reference period.
30. In order to ensure that only the relevant pay was used for that reference period, the pay received for the underpaid holiday was also removed. This reduced the pay for the reference period to £34,125.
31. One week’s pay for the purposes of ERA 1996 (s21-24) is therefore $34,125 \div 46.4 = £735.45$.
32. It was agreed that the same reference period should be used to calculate one week’s pay for both the 1 day of holiday pay for 11 March 2020 and the 8.5 days’ holiday that were payable on termination. This gave a total of 9.5 days’ underpaid leave which is 1.9 weeks based on a 5 day working week.
33. It was difficult to ascertain the claimant’s normal working week. He stated that he did not have a set pattern and would often work a different pattern to the 6 days on 2 days off pattern suggested by Mr Robbins. Mr Robbins said that it depended on the season and sometimes the working week would be 3 or 4 days per week only.
34. It was agreed by all that in effect the claimant had a ‘full time’ job and that the fairest way, in the absence of any data or information being provided to the Tribunal on this matter, was to assume an average of a 5 day working week across the year.
35. Therefore, 9.5 days’ leave is equivalent to 1.9 weeks.
36. The appropriate calculation is therefore $1.9 \times 735.45 = £1,397.36$.
37. It was accepted that contrary to my Judgment dated 2 February 2022, the amount that the claimant had already been paid in respect of that leave was £96 per day which amounts to £912. The final amount due to the claimant for those 9.5 days is therefore

£1,397.36 LESS amounts already received of £912 = **£485.36**

38. With regard to the one week's notice pay, the calculation is as follows:

£735.45 - £672 = **£63.45**

39. The claimant is also owed, as per my Judgment dated 2 February 2022, **£80.35** in respect of underpaid furlough pay on 31 May 2020 as the claimant ought to have been paid the maximum amount of £2,500 and was only paid £2,419.65.

40. The total payable to the claimant in respect of unpaid wages is therefore **£629.16.**

Employment Judge Webster

Date: 22 September 2022