



EMPLOYMENT TRIBUNALS

Claimant: Mr D Roe

Respondent: The Trustees of Driffield Community Centre

HELD at Leeds by Cloud Video Platform (CVP)

ON: 23 May 2023

BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: In person

Respondent: Ms M Wells, Administrator

JUDGMENT

1. The respondent shall pay the claimant the sum of £2105.24 by way of holiday pay.

REASONS

1. **Claim**

- 1.1. No holiday pay.

2. **Issues**

These can be found at paragraph 20.1 of the case management orders dated 6 March 2023.

3. **The Law**

- 3.1. The law on annual leave can be found in Regulations 13 to 17 of the **Working Time Regulations 1998** (WTR).
- 3.2. This is a case to which **Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70** (Pimlico) applies. In that case it was decided that if a worker takes unpaid leave when the employer disputes the right and

refuses to pay for the leave the worker is not exercising the right. Although legislation can provide for the loss of the right at the end of each leave year, to lose it the worker must actually have had the opportunity to exercise the right conferred by the WTR. A worker can only lose the right to take leave at the end of the leave year (not in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take the paid annual leave, encourage the worker to take the paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden then the right does not lapse but carries over and accumulates until the termination of the contract, at which point the worker is entitled to a payment in respect of the untaken periods.

4. **Facts**

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

- 4.1. The claimant was employed by the respondent as a part-time caretaker from a day in January 2019 until 2 September 2022. He worked 15 hours per week.
- 4.2. This is an unusual case in that the claimant says that at least during the first year of his employment he was told by a Mr Rounding and/or Mr Stocker of the respondent that the claimant was not entitled to holiday pay.
- 4.3. Although Ms Wells, who gave evidence on behalf of the respondent, denied that the claimant was told that he was not entitled to holiday pay, she was not a party to any of the conversations as alleged and the best the respondent could do was present written letters and not witness evidence of the denial that the claimant was so told.
- 4.4. The respondent put to the claimant an example of the claimant taking time off, but only on one occasion, when the claimant went to Spain for seven days and the claimant was paid. The respondent was otherwise unable to prove that the claimant was paid holiday pay on any of the other absences.
- 4.5. Indeed when Ms Wells took over the job, which, amongst other things, would entail paying the claimant, to her credit she made sure that from 1 February 2022 the claimant did receive holiday pay until termination, which makes the claimant's claim from January 2019 to 31 January 2022.
- 4.6. The parties agree that if and only if holiday pay is due from the respondent to the claimant the holiday pay is as follows: January 2019 to 18 April 2019 - £130.80; 19 April 2019 to 20 March 2020 - £732.48; 21 March 2020 to 31 March 2021 - £748.44; 1 April 2021 to 31 January 2022 - £623.70. Sub total - £2,235.42 (Ms Wells gave evidence that she commenced holiday payments to the claimant from 1 February 2022).

Less 7 days for the Spanish trip - £130.18.

Total claim £2,105.24.

- 4.7. What made it difficult for the respondent is that it conceded that the claimant never had a contract of employment. The respondent produced a specimen contract which made it clear that there was holiday pay but we find that the claimant never saw such a contract of employment.
- 4.8. Further the respondent did not produce any holiday pay records for the hearing.
5. **Determination of the Issues (after listening to the factual and legal submissions made by and behalf of the respective parties):**
 - 5.1. As far as the figures for holiday pay are concerned these are agreed between the parties. We therefore do not need to adjudicate on the holiday year, nor how much of the leave year had passed at termination, nor how much had accrued that is holiday pay, nor how many days were unpaid and nor what is the relevant daily rate of pay.
 - 5.2. The days in previous holiday years other than the year of termination may be the subject of inclusion in the claim because of the case of Pimlico.
 - 5.3. We find that the claimant has proved on the balance of probabilities that he was told at the relevant time that he had no right to holiday pay and as such he never exercised the right to holiday pay until Ms Wells came. Therefore the question of carry over in its normal sense does not apply and less the seven days for the Spanish trip, we find that the respondent is entitled to £2,105.24 as set out in paragraph 4.6.
 - 5.4. In all the circumstances the claimant is entitled to that sum by way of holiday pay and the respondent shall pay the claimant it accordingly.

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Employment Judge Shulman

Date: 6 June 2023