



EMPLOYMENT TRIBUNALS

Claimant: Mr Rahman

Respondent: Network IT Recruitment Ltd

Heard at: 10am

On: 22 July 2023

Before: Employment Judge K Wright

Representation

Claimant: The Claimant appeared in person

Respondent: Ms Perry (HR)

JUDGMENT

The Claimant's claim for unpaid holiday pay is well founded. The Respondent is ordered to pay the Claimant the sum of £1,112.76 less any tax and employee national insurance deductions due.

REASONS

Background

1. This case was heard by CVP at Midlands West Employment Tribunal on 8 June 2023.
2. The Claimant gave evidence. Mr Chorley gave evidence on behalf of the Respondent.
3. I had before me a bundle of 66 pages.
4. Judgment was given orally in respect of this case, with the exception of that related to the calculation of holiday pay due, which was reserved in part.
5. This was because, when the hearing reconvened for Judgment in the case to be given, upon further questioning by me as to how holiday pay had been calculated, both the Respondent and the Claimant confirmed that this has been paid based on basic pay only. The Claimant had brought claims for both unlawful deduction of wages and breach of contract.

The law and facts

6. Section 27 of the Employment Rights Act 1996 sets out the meaning of wages:

(1) In this Part “wages”, in relation to a worker, means any sums payable worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise...’

7. It was not in dispute that the Claimant’s wages included commission payments and, whilst the amount paid varied, that this was part of his normal remuneration.

8. Section 13 of the Employment Rights Act 1996 sets out a worker’s right not to suffer unauthorised deductions from wages. The relevant sections are set out below:

‘(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision...

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.

9. It is well established case law that holiday pay should be based on a worker’s “normal” remuneration. It is not disputed that the Claimant’s normal remuneration included commission payments, yet the Respondent has paid holiday pay based on the Claimant’s basic pay.

10. As such, the Claimant has suffered an unlawful deduction to his wages, or, in the alternative, a breach of contract as the Claimant has been paid incorrectly in respect of his holiday pay over the course of his employment with the Respondent.

11. There was a dispute over the number of days holiday that was outstanding on termination of the Claimant’s employment. The Respondent had paid the Claimant 4.41 days, the Claimant claimed an additional 15 days.

12. There was no dispute over the fact that the Claimant’s contractual entitlement to holiday pay was 23 days per year.

13. No record however of the days taken by the Claimant had been included in the documentation before the tribunal. The Respondent confirmed it was able to provide this and the hearing was adjourned for this very relevant evidence to be provided.

14. The Respondent produced a record confirming the holiday dates that had been recorded on its system and sent this to the tribunal as an attachment by email at 10.42 am on 8 June 2023. At my request, the Respondent's representative clarified on this document which holiday dates of those listed were bank holidays. The Claimant clarified the process for booking holiday on the Respondent's system. The Respondent clarified, in respect of the final entry on the attachment, that the Claimant had then worked this period and therefore been paid in lieu of this upon termination. The Claimant agreed that he had worked this period and not taken holiday.
15. With this agreed correction between the parties, I found no reason to indicate that the record was otherwise inaccurate and accepted that the Claimant had taken the 9 days leave of the 13.42 days he had accrued (excluding bank holidays).
16. $13.42 \text{ days} - 9 \text{ days} = 4.41 \text{ days}$.
17. The Respondent stated that it calculates holiday pay accrual based on 1.91 days per month. I confirmed at the time that I had reached a different figure to the Respondent in respect of the rate that holiday pay should accrue at.
18. This is because if 1.91 is multiplied by 12 months, this gives a figure of 22.92 days not 23 days. The correct calculation is 23 days divided by 12 = 1.92 days (as the figure is 1.916 reoccurring). This error would have made no difference had the Respondent rounded up the Claimant's holiday pay to the nearest half-day, but as the Respondent has paid this based on an exact calculation, it is inaccurate and resulted in an underpayment.
19. The Claimant should have been paid 6 bank holidays and 13.42 days of accrued holiday on the basis of his normal remuneration rather than just on the basis of his basic pay.
20. It is not possible, based on the information that was before me, to undertake a forensic analysis of the sums that should have been paid, or proportionate to do so. In the bundle at pages 60 and 61 there are wages slips. I find that those dated July and August are likely to contain the most accurate figures in respect of commission, as they are less impacted by holiday days taken.
21. In order to calculate the Claimant's average commission and therefore what he should have been paid for holiday taken and accrued, I have added on to the August commission figure the £350 additional commission that the Claimant would have earned in August from his team's performance had he remained in employment. Whilst it was found that no additional commission payments were owing to the Claimant, if he had remained in employment, it is not disputed that he would have been entitled to this sum. As such, this is a sound basis for including this sum for the purpose of calculating what his normal commission would have been during employment. Not to do so, would result on the commission being calculated on a sum that is too low.
22. Taking the commission figures from July and August of 1,007.50 and £1,115.50 + £350 respectively and dividing these by 2 = £1,236.5

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commission per month. Multiply this by 12 and divide by 52 = £2.85.37 per week. If this is then divided by 5 to give a daily figure, this is £57.07. £57.07 x 21.42 days holiday (13.42 + 8 days) = £1,108.30. In addition to this there is a short fall in the outstanding holiday pay that was paid to the Claimant based on his basic salary not yet accounted for of 4.41 days - 4.37 days = 0.04. This equates to £4.46 based on the Respondent's basic salary figures used.

Conclusion

23. The Respondent is ordered to pay the Claimant £1,112.76 less any tax and employee national insurance deductions that may be due.

Employment Judge **K Wright**

Date 22 July 2023