



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105578/2023

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Held in Edinburgh on 19 December 2023

Employment Judge: Rory McPherson

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Mrs Claire Heyes

**Claimant
Represented by
Mr S Heyes**

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The Royal Regiment of Scotland Trust

**Respondent
Represented by
Mr J Tink and
Mr G Vevers**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The decision of the Employment Tribunal is that the complaint under Regulation 30
25 of the Working Time Regulations 1988 is not well founded and is dismissed.

REASONS

Introduction

Preliminary Procedure

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1. The claimant presented her claim on 2 October 2023 following referral to ACAS Early Conciliation and the issue of the certificate.
2. The claimant in her ET1 sets out that she seeks by way of remedy:

E.T. Z4 (WR)

1. The monetary payment sought in relation to a period which is indicated to be, in effect, the first holiday/leave year (and which monetary sum sought was effectively recalculated by 10 December 2023); and
- 5 2. that the respondent *“uses the correct process for calculating holiday pay in all future years, including this year...”*; and
3. whether the claimant requires, as she indicates the respondent has requested, to nominate days on which she intends to take holidays, *“or if ...holiday pay is granted without a worker needing to nominate actual calendar dates for that holiday.”*
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3. The respondent subsequently presented its ET3. The claims are resisted. The respondent in their ET3 set out that in response to remedies as sought that
 - 15 1. in relation to the monetary sum sought, in summary, they would review after the Tribunal decision; and
 2. in relation to the second matter that the Tribunal’s *“decision will have a direct impact”*; and
 - 20 3. the respondent set out that they would encourage workers to take accrued holidays.
4. The claimant was represented by her husband, Mr Simon Heyes. The respondent was represented by Mr Gordon Vevers and Mr Jonathan Tink, as
- 25 officers of the respondent.
5. The claimant and respondent each provided a separate bundle. Within the claimant bundle, the claimant provided a spreadsheet showing working days, the day of the week (whether Saturday or Sunday), hours, hourly rate, and
- 30 which pay slip the day was recorded on. The claimant’s breakdown within that spreadsheet was not disputed.

6. Further and within the claimant bundle, the claimant provided Guidance published by the relevant Government department in 2020 headed Holiday Pay Guidance on calculating holiday pay for workers without fixed hours or pay.

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7. Also, within the claimant bundle, the ET1 and paper apart were provided. The ET1 paper apart extended to 6 pages and set out elements of communication with ACAS (on page 5, headed *Royal Regiment of Scotland responses during "early conciliation"*), it was agreed that in accordance with s18 (7) of the Employment Tribunals Act 1996 (ETA 1996) and separately s18 (c) that this limited element of the ET1 should not be admitted.

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8. The claimant and Mr Vevers, as representative of the respondent, both gave oral evidence.

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9. At the conclusion of the hearing, a full written judgment (rather than oral judgment) was requested. This is the full written judgment.

Issues for Holiday pay claim

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10. As neither party was represented, it is considered appropriate to set out, so far as relevant here, the decision of Tribunal judgment is to determine an (existing) claim, or part of a claim, as regards liability, remedy (or costs). It is not to generally adjudicate matters which may or may not arise between the parties. The second and third matters, while set out as remedies sought, are not relevant matters for this Tribunal.

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11. The following issues, so far as relevant to the issues before the Tribunal in relation to this claim for unpaid holiday pay asserted under the Working Time Regulations 1998, were identified by the Tribunal.

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1. What were the dates of the claimant's leave year?

2. To what extent did the respondent deny the claimant the right to request and take holidays in the relevant leave year?
3. To what extent did the respondent fail to pay leave taken in the relevant leave year?
- 5 4. How much, if any, pay is outstanding to be paid to the claimant?

Findings in Fact

- 10 12. Before the claimant's engagement as a worker with the respondent, the claimant was employed in several full-time administrative roles connected with or related to the armed forces. In that period, the claimant took paid holidays. The leave year in those earlier roles reflected the tax year.
- 15 13. The respondent is a Scottish registered charity based at Edinburgh Castle and operates the Museum of the Royal Regiment of Scotland at the Castle.
14. In **2020** (to the extent it was relied upon by the claimant and provided in the claimant bundle) Guidance (the 2020 Guidance) was published by the relevant Government department headed Holiday pay Guidance on calculating holiday pay for workers without fixed hours or pay, that set out guidance extending to 29 pages and set out at page 5 that *"this guidance has been designed to **assist workers** and employers in calculating holiday pay for workers without fixed hours or fixed pay"*. (emphasis added). It expressly sets out that the 2020 Guidance does not and cannot provide definitive answers to all individual queries and is not intended to be relied upon in any specific context or as a substitute for seeking advice (legal or otherwise) on a specific circumstance, as each case may be different.
- 20 25
- 30 15. In **May 2022**, following COVID-19, the Museum reopened, and the respondent engaged two casual workers in addition to their two employees. The claimant was one of those casual workers. The claimant was engaged to provide cover at the weekends as a **Museum Weekend Casual Worker** on

15 May 2022. No written terms of engagement were issued to the claimant at that time.

- 5 16. After the claimant provides details of her proposed weekend availability to the respondent, the claimant becomes aware of allocated paid shift days (Saturday and or Sunday) offered via a rota covering around 3 months created by the respondent's line manager and both the claimant and respondent seek to be flexible as to cover should unanticipated requirements for cover arise. The paid shift at the relevant period was generally either 7 or 8 hours, although 10 there was one instance in March 2023 where the shift was restricted to 5 hours (due to a Regimental Fun Day). The claimant is paid monthly, and a monthly pay slip is provided, which sets out the number of hours worked and the hourly rate. While confusing, the pay slip narrates that the hourly rate is the hours worked; it shows both the total hours worked and the hourly rate applied, and 15 the claimant understands the monthly pay slip. The claimant was initially paid £10 per hour, which increased to £10.30 in 2023.
17. The claimant remains a worker engaged by the respondent as a Museum Weekend Casual Worker.
- 20 18. In early **May 2023**, Mr Vevers, whose role with the respondent extends to managerial responsibility for staffing matters within the respondent, was made aware by a colleague of the respondent's obligation to permit casual workers to take paid holidays.
- 25 19. Before that time, neither the claimant nor the respondent, despite the publication of the 2020 Guidance (and statutory provisions), had been aware of any entitlement to paid holidays nor any obligation to pay for such holidays taken for such casual workers. As such, the claimant had not requested, nor 30 was she refused, any period of paid or unpaid holiday up to that time.
20. Subsequently, on **23 May 2023**, the respondent issued an email to the claimant a document headed Casual Worker – Letter of Understanding (the 2023 L of U), the email set out "*in the agreement that in formalising your status*

as a casual worker you are entitled to statutory paid leave” and described that the respondent had identified 2 methodologies for fulfilling leave, “*Option 1 is to take your leave entitlement as standard paid days off, which Option 2 being, in essence, a form of rolled-up holiday pay. That leave entitlement has been*”
5 *calculated on working 1 day per week (summer hours) on average across the year”* and that Holiday pay would be paid from 1 May 2023.

21. After researching the issue in response, the claimant concluded that the respondent's approach was incorrect and that she had entitlement to
10 outstanding holiday pay for the initial holiday pay year. The claimant assumed that the leave year would reflect the tax year (as with her previous employment). After raising some questions with her line manager, the claimant spoke to Mr Vevers for the respondent, who has overall responsibility for staff matters and who carried out a calculation on holiday pay again for the
15 assumed previous leave year, being the tax year. Subsequently, the respondent emailed the claimant on 8 June 2023 that she would receive “*a payment of £293 as back payment for last year's holiday entitlement, based on your hours worked between May 2022 and March 2023.*” While offering a calculation, it did not set out that there was agreement on what the relevant
20 leave year was. The payment of £293 was subsequently paid into the claimant's bank account.

22. The claimant considered that the calculation of £293 was in error. By 10
December 2023, the claimant calculated that the sum should amount to
25 £483.93 based on an average pay of £94.15 with holiday entitlement in what was said to be the relevant leave year. In her calculations, the claimant noted that the April 2023 pay statement included 5 hours worked in March 2023, which the claimant considered should be included in the relevant calculation period. Before the issue of this claim, the claimant raised a grievance, which
30 the respondent responded to, intimating that they regarded the matter as closed. The respondents themselves consider now that their calculations had some errors, although the effect of the respondent's approach to recalculation would have been to reduce the sum paid.

23. The 2023 L of U (or at least the final iteration) contained 15 paragraphs and set out various matters, including an hourly rate and services. The 2023 L of U did not set out any agreement on what the relevant leave year was. In relation to Holidays, the 2023 L of U did not specify annual leave entitlement and set out:

“You are entitled to holiday pay (HP) in accordance with current Government Guidance. Your HP will be calculated based on average hours per week over a 52-week period (or part year). This calculation will confirm the amount payable as HP and the number of hours payable as HP and the number of hours payable in HP for the next holiday period.

There is no entitlement for payments in lieu of holidays not taken.

You shall give at least two weeks’ notice of any proposed holiday days and these must be agreed through” the claimant’s named Line Manager.

24. The claimant declined to sign the 2023 M of U in its initial or final iteration. By 12 June 2023, Mr Vevers' for the respondent, set out in an email in relation to the calculation that they were *“conscious that you might not agree with my calculations and if we have got it wrong, then of course we will make up the difference asap”* and that the claimant should not *“feel obliged to sign it, it is not a contract, but merely a letter which puts a framework in place to show the casual worker that we are a fair employer, and we value the work you do on the museum side of the business. I’ll make a few more tweaks to the letter and send out v2 in the next week or so.”*

25. No findings of fact are made in relation to leave entitlement beyond the initial leave year, as that does not form part of this complaint.

26. In advance of this hearing and following various communications, the claimant arranged for the issue of a detailed 4-page letter dated 10 December 2023, which noted there was a difference between the parties on the calculation and

indicated that it was believed that the difference could be explained by the payment made in April 2023 pay statement which included the 5-hour day worked on 25 March 2023. Further reflecting the hourly pay rate in January 2023 as £10 per hour rather than the subsequent £10.30 per hour, a revised calculation of £483.93 as the total sum was provided.

Evidence

27. Both the claimant and Mr Vevers were straightforward in their evidence. The claimant had taken considerable care to set out matters in a detailed fashion. This dispute does not, the Tribunal considers, arise out of dispute of credibility of the respective parties but rather from the application of the Working Time Regulations 1998.

Relevant Law

28. **Working Time Regulations 1998.**

29. In terms of **Regulation 30 (1) (a)** of the Working Time Regulations 1998 (WTR), a complaint may be made to a Tribunal that an employer had *refused* to *permit* a worker to exercise their rights to take paid annual leave in connection with entitlement to annual leave.

30. **Regulation 30** WTR does not, however, create a remedy where a worker had **not** sought to exercise their rights in connection with entitlement to annual leave. That is consistent with the separate remedy afforded by **Regulation 16**, which provides, in effect, that on termination of employment, accrued but untaken leave for the calendar year in question should be paid, as a worker would not have had the full calendar year to exercise those rights. Equally, there is no relevant obligation, under Regulation 30, for an employer to provide advice to a worker as to that worker's entitlement to annual leave.

31. **Regulation 2** WTR defines a '*relevant agreement*' and requires that such an agreement be in writing and be legally enforceable (at least if it is not part of a workforce or collective agreement).
- 5 32. **Regulation 13** and **13A** WTR provides that in the absence of a relevant agreement to vary the leave year, the claimant's leave year runs from the date she commenced and annually after that from the anniversary of that date (Reg 13(3)(b) and 13A(4)).
- 10 33. **Regulations 13, 13A, and 14** WTR, at the relevant time, gave workers a statutory entitlement to 5.6 weeks of paid holiday per year, made up of a basic leave of 4 weeks and an additional leave of 1.6 weeks.
- 15 34. **Regulation 15A** WTR provides deeming provisions for workers in their first year of employment, although these do not materially impact in the present instance. While workers with more than one year's service are entitled to seek statutory annual leave at any time during the leave year, in the initial year, workers are only entitled to request and take holidays they have accrued over the worker's first year at the rate of one-twelfth of the workers' annual
20 entitlement on the first day of each month of that year (subject to rounding up of fractions of such entitlement of a half day to a half day and where more than a half to a whole day)].

Discussion and Decision.

- 25 35. Both parties set out their representative positions clearly and genuinely.
- 30 36. There is no relevant claim asserted beyond the initial leave year. In the current claim, there was no agreement in writing between the worker and respondent that was legally enforceable. While the claimant had set out her position on the assumed leave year, the respondent did not, in responding including on 8 and 12 June 2023, set out a position on the assumed leave year, which was legally enforceable within the meaning of Reg 2 and 13 WTR. As such the first Leave Year ran from 15 May 2022 to 14 May 2023.

37. The claimant argues in the ET1 that no contract was provided, she sets out in the ET1 that she was provided with a draft and then revised **Casual Worker Agreement**, which proposed that she would be “*awarded*” holiday pay only from 1 May 2023. After the claimant raised concerns, the claimant was thereafter paid a sum that the employer had calculated for the earlier period. The claimant argues that the calculation deployed by the respondent is unsound. The claimant argues, in effect, that she is entitled to a balance payment (of £190.93- being the sum calculated of £483.93 less the £293 already paid) for the previous leave year.
38. The claimant's complaint is, in essence, that once the respondent understood their obligation to allow workers to exercise the right in May 2023 and offered an agreement to provide some limited clarity going forward, the respondent elected to carry out a calculation of what it considered the holiday pay in the preceding year would have been and paid that sum; however, that sum was wrongly calculated. It is not disputed that the respondent's calculated sum was paid.
39. The claimant fairly points, on the assumption that the tax year accorded to the leave year, to an error in the respondent's calculation based on her application of the published 2020 Guidance.
40. The claimant points to the 2020 Guidance. That guidance was published and expressly identifies that it is for *workers* and employers.
41. In fact, notwithstanding the statutory right and the published 2020 Guidance on which she now relies, the claimant did not seek to take leave in the Leave Year, 15 May 2022 to 14 May 2023.
42. That was because the claimant, who had previously worked full-time as an administrator in various roles where she had taken holiday leave, did not appreciate that she had been entitled to take said leave in her current role until the respondent's communication altering her to same along with the draft

and then revised **Casual Worker Agreement**. This did not arise through, for instance, the respondent misleading the claimant or denying the claimant her entitlement to take such paid leave. The employer had been silent. That silence was because the employer also had not appreciated the entitlement.

5 There was no refusal to permit this worker to exercise their rights in connection with entitlement to annual leave. As such, Regulation 30 does not afford a remedy.

43. Entitlement to holiday pay in this context is conditional upon leave being requested. It was not requested nor taken in the relevant leave year. There was no refusal by the respondent to permit this worker to exercise her rights in connection with entitlement to annual leave.

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44. In all the circumstances, there is no remedy for the claimant in terms of Regulation 30 WTR, and this claim is dismissed.

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R McPherson

Employment Judge
3 January 2024

Date of Judgment

04/01/2024

**Entered in register
and copied to parties**

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