



EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4106969/2023

Held in Glasgow via Cloud Video Platform (CVP) on 26 January 2024

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Employment Judge M Robison

Mr D O'Donnell

**Claimant
In Person**

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Poppy Maxwell Ltd

**Respondent
Represented by
Mr T Curtis
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim for holiday pay is not well-founded and therefore this claim is dismissed.

REASONS

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1. This claim relates to holiday pay only in respect of a period of approximately six months when the claimant worked for the respondent as a barista and barista supervisor at sites in central Glasgow.

2. The respondent resists the claim, on the basis that no holiday pay is due, accrued sums having been paid following termination of the claimant's employment.

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3. At this hearing which took place remotely by cloud video platform, the Tribunal heard evidence on oath from the claimant and from Mr Curtis, director for the respondent. Mr Curtis had lodged payslips relating to the period in question.

Findings in fact

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4. The Tribunal finds the following facts proved or admitted based on the evidence heard and the documents referred to.

5. The claimant commenced employment as a barista on 6 April 2024.
6. He was paid £10.50 per hour. He worked variable hours each week, as and when rota'd. The claimant was paid fortnightly.
7. After 6 hours the claimant would require to take a 30 minute unpaid break and after 10 hours the claimant would require to take an unpaid break of 1 hour. These were referred to by the respondent as "net" hours as opposed to "gross" (the latter being the hours of the shift without breaks).
8. On or around 10 July 2023, the claimant was promoted to barista supervisor. His pay increased to £11.50 per hour.
9. During August, the claimant took one day's annual leave, totalling 10 hours.
10. The claimant's employment ended on 29 September 2023.
11. The following facts relate to the period of the claimant's employment.

Payment date	Gross hours	Net hours	Pay rate £	Total pay	Plus tips	Total gross	£	Total net	£
14/4/23	55	53	10.50	556.50	-20	544.90		525.39	
28/4/23	89	86	10.50	903	50.16	953.16		795.46	
12/5/23	40	32	10.50	336	15.5	351.50		351.50	
26/5/23	55	81	10.50	850.5	38.7	889.20		759.58	
9/6/23	62	57	10.50	598.5	31.85	630.35		583.59	
23/6/23	118	110	10.50	1155	42.90	1197.90		969.43	
7/7/23	87	81	10.50	850.50	40.5	891		760.76	
21/7/23	81	75	11.50	862.50	30	892.50		752.28	
4/8/23	87	80	11.50	920		920		780.48	

18/8/23	101	94	11.50	1081		1081	889.96
1/9/23	90	83	11.50	954.5	33.20	987.70	815.26
15/9/23	62	60	11.50	690	22.80	712.80	639.74
29/9/23	42	39	11.50	448.5	18.33	466.83	466.83
TOTAL		931				£10,518.84	£9090.26

12. The claimant worked for a total of 25 weeks. His total gross pay over those 25 weeks was £10,518.84, which is an average of £420.75 per week. His total net pay over those 25 weeks was £9090.26, which is an average of £363.61 per week.
- 5 13. He worked 931 hours over the 25 weeks, which is an average of 37.24 hours per week.
14. On 13 October 2023, the claimant was paid outstanding holiday pay following termination of employment for 80 hours holiday pay in total. The respondent calculated sums due of 70 hours at £10.50 and 10 hours at £11.50. The total
10 gross sum due was £850 and net was £607.04.
15. On 15 November 2023, the claimant lodged this claim for holiday pay.
16. On 1 December 2023, the claimant was paid the balance which the respondent considered was due to the claimant after Mr Curtis had ascertained that the claimant had worked additional hours beyond what he had originally
15 understood. This was a payment of £201.50 gross and £161.30 net. This works out at payment for 17.5 hours.

Relevant law

17. The law relating to holiday pay is contained in the Working Time Regulations 1998. Regulation 13 provides that a worker is entitled to four weeks' annual
20 leave in each leave year. Regulation 13A provides that a worker is entitled to an additional 1.6 weeks' leave (that is 5.6 weeks in total).

18. By reason of regulation 13(9) leave may only be taken in the year in respect of which it is due and may not be replaced by a payment in lieu except where the worker's employment terminated.
19. Equivalent provisions relating to the additional 1.6 weeks leave are set out in regulation 13A.
20. Regulation 14 relates to where a worker's employment is terminated during the course of his leave year, and regulation 14(2) states that "where the proportion of the leave taken by the worker is less than the proportion of the leave year which has expired his employer shall make him a payment in lieu in accordance with paragraph (3)"
21. Paragraph 14(3) states that "the payment due under paragraph (2) shall be (a) such sum as may be provided for the purposes of this regulation in a relevant agreement or (b) where there are no provisions of a relevant agreement which apply" calculated in accordance with the formula set out there, namely $(A \times B) - C$, where A is the period of leave to which the worker is entitled under regulation 13 and 13 A; B is the proportion of the worker's leave year which expired before termination date and C is the period of leave taken by the worker between the start of the leave year and the termination date.
22. Regulation 13(5) states that where the worker starts after the date their first leave year began, "the leave to which he is entitled in that leave year is a proportion of the [5.6] equal to the proportion of that leave year remaining on the date on which his employment begins".
23. Regulation 30(1)(b) states that a worker may present a complaint to an employment tribunal where his employer has failed to pay him the whole or any part of any amount due to him by way of payment in lieu of accrued but untaken leave upon termination of employment.
24. Sections 221-224 of the Employment Rights Act sets out the provisions to calculate a week's pay.

Tribunal discussion and decision

25. During the hearing, the claimant accepted that the respondent had correctly set out his hours. He had not retained information about his hours.
26. Mr Curtis said he got the “raw data” about the claimant’s hours from the rotas (which he did not lodge). He had set out the so-called gross and net hours in his ET3, but these did not match exactly the hours on the pay slips which he subsequently lodged. Specifically, for pay period ending 12/5/23, the number of hours worked was 32 not 38, for period ending 26/5/23 81 not 50 and for 23/6/23 110 not 108.
27. I have used the hours on the pay slips. In respect of those pay slips which did not set out the hours I have divided the gross sum due by the hourly rate to get the number of hours worked.
28. This is because it was agreed that the claimant had not taken issue at the time with any of the figures, and he said that had they been wrong he would have done.
29. There is however a dispute about the amount due.
30. The claimant had calculated that he was due 13 days of holiday, which he calculated on the basis of 8 hours per day at £10.50 per hour for 3 days, and £11.50 per hour for 10 days. He calculated that he was due £1172 less what he had been paid, which was £161.30 plus £607.04 which totals £768.34. He therefore calculates that he is due £1172 - £768.34 which is £403.66.
31. At the hearing, the claimant indicated that he believed that the discrepancy related to the fact that the respondent had calculated pay due on the basis of his hourly rate of £10.50 and latterly £11.50 rather than on the basis of £11.50 for all the time accrued.
32. I agreed with the claimant’s submission on that matter. The outstanding sums due should be calculated on the hourly rate paid on termination (since a worker could take their leave any time in the leave year, and rolling up holiday pay is not currently permitted).

33. Mr Curtis claims that the difference is accounted for by the fact that claimant is seeking payment on a gross basis, whereas he has paid the claimant what he was due on termination on a net basis.
34. Another issue of dispute was in relation to when the claimant was promoted to barista. Again it is clear from the pay slips that the claimant's hourly rate increased as at pay period ending 27 July 2023. I therefore found that the claimant had been promoted as at 10 July 2023 which is what the claimant had said, whereas I did not accept Mr Curtis position that it was from the pay period ending 18 August 2023.
35. It did seem since it was "Sabrina" who promoted the claimant that Mr Curtis was not privy in any event to the decision to promote or at least in regard to the details of when he started his new job. Indeed, the hourly sum paid cannot be disputed because it is clear from the pay slips which were relied on by Mr Curtis.
36. Although there was apparently a disagreement about the start and end date, I understood that ultimately parties agreed those dates.
37. Mr Curtis used the language gross and net to distinguish hours on shift and hour less unpaid breaks. It was clear that the appropriate figures to use were the so-called "net" figures.
38. Although the claimant said that he had taken annual leave because he was ill, he did not dispute the fact that he had taken one day off as annual leave. While there was however a dispute about when it was exactly, it was agreed that the claimant had taken one day of holiday during August, that is 10 hours.
39. The 10 hours leave taken falls to be deducted from the outstanding accrued but untaken leave, expressed as weeks.
40. Regulation 13 and 13A of the Working Time Regulations 1998 sets out the amount of holiday pay due, namely 5.6 weeks. Regulation 14(2) confirms that an employer "shall" make a payment in lieu on termination for any untaken holidays.

41. In *Harpur Trust v Brazel* [2022] UKSC 21 the Supreme Court confirmed that holiday pay should be calculated by reference to ss.221–224 of the Employment Rights Act 1996 (ERA) which sets out how a week's pay is identified. That figure is then to be multiplied by 5.6.
- 5 42. The relevant section in a case where an employee has no normal working hours is s.224, which sets out the correct calculation of a week's pay which is the amount of the employee's average weekly remuneration over up to 52 weeks (as recently amended).
43. A worker who has worked for a full year of 52 weeks would be entitled to 5.6
10 weeks of holiday pay. The claimant in this case had worked for 25 weeks out of 52 weeks. If that is multiplied by 5.6 then that would mean the claimant was due to be paid for 2.7 weeks in total.
44. Thus in this case the claimant has already taken 10 hours of holiday pay. Although there are no regulations to convert hours to weeks, in this case the
15 claimant worked an average of 37.24 hours per week. 10 hours divided by 37.24 would amount to 0.27 of a week. If that is deducted from 2.7 weeks then the amount of outstanding weeks accrued but unpaid holidays is 2.44. That multiplied by the average (gross) weekly pay of £420.75 is a total of £1026.63.
45. That is the total gross amount due. However, the respondent first paid £850
20 (gross) on termination. To that he added £201.50 (gross). The respondent has therefore paid to the claimant the sum of £1051.50 (gross) in holiday pay on termination.
46. The claimant having been paid all outstanding sums due on termination is not entitled to any further payment for holiday pay. This claim must be dismissed.

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M Robison**Employment Judge
20 March 2024**

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Date**Date sent to parties** _____