Case Number: 3200663/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr B Knight**

Respondent: **Off Broadway Limited**

JUDGMENT

The Respondent is ordered to pay to the Claimant **£1,109.62** in respect of carried over holiday pay accrued but untaken as at termination of employment.

REASONS

1. The question of carried over paid holiday has been referred back to me for decision by the EAT. I must answer the following questions:

    1.1. Did the Respondent do sufficient to comply with its obligations in Max-Plank-Gessellschaft zur Förderung der Wissenschaffen e.V. v Shimizu C-684/16 [2019] 1 CMLR 35

    1.2. If it did not, then what of the 4 weeks' leave was unused at the end of 2019/2020 leave year, if any; and if any such leave was unused, what was he entitled to be carried over what, and compensated for at the end of employment?

Relevant Findings of Fact

2. I have already made the following findings of fact.

3. It is agreed the holiday year ran from 1 October to 30 September.

4. Before the end of their working relationship on 8 November 2020 both the Claimant and Mr Selby thought they were business partners. Neither thought that the Claimant was an employee. The Claimant was never paid through the PAYE system and was always responsible for his own tax.

5. As manager of the bar, the Claimant was master of his own time. He rostered himself to work 'behind the bar' as bar tender 3 days a week but he also came and went at other times in his managerial/supervisory capacity. Crucially he could decide what days off to take and he could decide when to take holidays. He says he did not take any holidays but this does not prevent my finding that holidays were within his own gift as

the person who organised the roster and managed the bar. He was not under Mr Selby's direction about holidays. The Claimant was not paid hourly; he was salaried. His time was his to organise as he saw best.

6. I do not therefore agree with the Claimant that I found the Claimant worked 3 days a week. I made it clear that this was work *as a bar tender.* He was a manager and I clearly found that he worked other days as a manager. I find he expected to work a 5 day week and arranged his time around this. I found he had had plenty of opportunity to take holiday which, because he was salaried, would have been paid.

7. I accept the Claimant's evidence that he took no holidays in the sense of going anywhere. I infer during the period 1October 2019 to 30 September 2020 the Claimant likely took the odd days off, because he was master of his own time and had the opportunity to do so and only rostered himself to work as bar tender no more than 3 days a week. In the opposite direction I also bear in mind that the Claimant regarded himself as a partner and was clearly keen on running the establishment, so it was not likely that he took many such odd days off. I also take into account that for the period of the first lockdown there was no opportunity to take holiday. I find on a balance of probabilities that that Claimant likely took 8 such odd days off work in the holiday year 2019/20. Amounting to an average of one day off in each month from 1 October 2019 to March 2020 inclusive. And again from 1 August 2020 to 30 September 2020 inclusive. Each of these days was paid by dint of the fact that the Claimant was salaried full time.

8. I heard no evidence that Mr Selby did anything to remind the Claimant of his holiday leave entitlements and find that he did not do so because he did not understand himself to be his employer.

Legal Principles

9. While UK law provides for 4 weeks' plus 1.6 weeks' paid holiday in any holiday year. This case only concerns compensation for the 4 weeks' leave provided for under Regulation 13 of the Working Time Regulations 1998 (prior to amendment in 2020), which derive from the European Directive on Working Time. On termination of a worker's contract, Regulation 14 provides that a worker is entitled to payment for accrued but untaken leave in the final leave year.

10. The principles in Shimizu are best expressed by quoting its judgment paras.45 to 47:

> **"45. To that end, as the Advocate General also observed in points 41 to 43 of his Opinion, the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period.**

46. In addition, the burden of proof in that respect is on the employer (see, by analogy, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 68). Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Directive 2003/88.

47. However, if the employer is able to discharge the burden of proof in that regard, as a result of which it appears that it was deliberately and in full knowledge of the ensuing consequences that the worker refrained from taking the paid annual leave to which he was entitled after having been given the opportunity to exercise his right thereto, Article 7(1) and (2) of Directive 2003/88 does not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of the paid annual leave not taken."

Application of Facts and Law to Issues

11. Did the employer meet its Shimizu obligations? It follows from my findings of fact that it did not.

12. How much paid holiday did the Claimant take in the holiday year 2019/2020 – 8 working days.

13. The Claimant did not take his full entitlement of 20 days' paid holiday in the leave year 2019/20. He was, therefore, entitled to have this carried over because his employer, the owner of the business, had not reminded him to take the leave in good time as Shimizu requires.

14. As at termination of employment, the Claimant was entitled to 12 days' leave, i.e. 12/5 = 2.4 weeks that were carried over but not yet taken. This is additional to the leave I found the Claimant was entitled to in the first decision.

15. The Claimant's weekly net pay was £462.34 (see previous decision).

16. The Respondent must therefore pay to the Claimant 2.4 x 462.34 = £1,109.62.

Employment Judge Moor
Dated: 3 September 2024