



EMPLOYMENT TRIBUNALS

Claimant: Georgina P Foster
Respondent: Nursing and Midwifery Council
Heard at: Croydon
On: 16 September 2024
Before: Employment Judge Liz Ord
Representation:
Claimant: In person
Respondent: Simon Gorton KC

JUDGMENT having been given orally on 16 September 2024 and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Background

1. The claimant's complaints were for unpaid holiday pay and payment of pension contributions. The tribunal has no jurisdiction to hear the pension contributions claim by virtue of section 34 of the Pensions Act 2008. There were no material disputes of fact and liability was conceded.
2. The issue between the parties was in respect of remedy and specifically the methodology for calculating the holiday pay owed. The claimant agreed the figure of £10,562.69, if the respondent's methodology were accepted by the tribunal. The respondent's methodology was so accepted.

Law

3. Article 7 of the **Working Time Directive 2003** (WTD) provides a right to 4

weeks paid annual leave.

4. **The Working Time Regulations 1998** (WTR) provide:

Reg 13

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.] (I shall call this the EU leave)

Paragraph 5 is a pro-rata provision.

Reg 13A

(1) ...a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2)

(2)...

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks (I shall call this UK leave)

5. **Employment Rights Act 1996** (ERA)

S13 - Right not to suffer unauthorised deductions

(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 or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

S23 - Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal –

(a) that his employer has made a deduction from his wages in contravention of section 13 ...

[(4A) An employment tribunal is not ... to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

6. The case of **Mr R Somerville v Nursing and Midwifery Council** (2413617/2018) found that:

- The claimant was entitled to 4 weeks' pay per annum (on a pro rata basis) in accordance with the direct effect of Article 7 of the WTD. (EU leave)

- The claimant was entitled to this sum from the date he started work with the NMC until the date he presented his claim.
 - The claimant was entitled to a payment in respect of 1.6 weeks annual leave (on a pro rata basis) pursuant to regulation 13A WTR and sections 13 and 23 ERA. (UK leave)
 - Due to the 1.6 weeks' annual leave being derived from UK law and not EU law, it can only be claimed for a period of 2 years prior to presentation of the claim.
7. There is no statutory entitlement to interest and, as the employment tribunal is a body created by statute, there is no jurisdiction to award interest.

Facts

8. The claimant is an appointed fitness to practice panel member for the respondent. She has worked for the respondent in this capacity since 15 June 2017 and continues to do so. She works on a fee-paid, intermittent basis.
9. It is accepted that the claimant is a worker for the purposes of section 230(3)(b) of the ERA and/or regulation 2(1)(b) of the WTR.
10. The claimant was not paid holiday pay since commencement of her appointment. She presented a claim for holiday pay on 12 February 2024.
11. The claimant accepted at the hearing that she could only claim holiday pay from 15 July 2017 up to the date of presentation of the claim.
12. The claimant had been provided with FAQs, which suggested a minimum of 2 years holiday pay would be given. She relied on these when presenting her case.

Discussion and calculation

13. The FAQs do not imply any contractual right, and I have not relied on them when making my findings.
14. I adopt the reasoning in the **Somerville** case, which leads me to the same conclusions as reached in that case. Consequently, due to the direct effect of Article 7, the claimant is entitled to her unpaid holiday pay from the start of her appointment for the 4 weeks' EU leave. However, this does not apply to the additional 1.6 weeks' UK leave, which is limited to 2 years going back from the date of the presentation of her claim.
15. The claimant is entitled to:
- 15.1. 4 weeks' holiday pay (EU leave) pro-rata per annum from 15 June 2017 to 11 February 2022;
 - 15.2. 1.6 weeks' holiday pay (UK leave) pro-rata per annum for the 2 years immediately prior to presentation of her claim, being from 12 February 2022 to 12 February 2024.

16. There is an agreed spreadsheet of earnings in the bundle from which the calculations have been made.
17. For the 4 weeks' EU leave, the claimant is entitled to 8.33% of the total sum earned. The 8.33% is based on a full-time worker working 48 weeks and taking 4 weeks' holiday, giving a ratio of 4:48, which provides a percentage of 8.33%. 8.33% of the claimant's total agreed earnings is £5,720.21.
18. For the 1.6 weeks' UK leave, the claimant is entitled to 12.07% of the sum earned for the relevant 2 years. This is the 1.6 weeks remaining of the 5.6 weeks' UK entitlement not covered by the 4 weeks' EU leave. The 12.07% is based on a full-time worker working 46.4 weeks and taking 5.6 weeks' holiday, giving a ratio of 5.6:46.4, which provides a percentage of 12.07%. 12.07% of the claimant's agreed earnings for the relevant 2 years is £4,842.48.
19. Therefore, the total award is £5,720.21 plus £4,842.48, equalling **£10,562.69**.

Employment Judge Liz Ord

Date 20 November 2024

Notes

Public access to employment tribunal decisions

Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.