



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Nikiel

**Respondent:** Metroline Travel Limited

**Heard at:** London South (in public by video) **On:** 17 January 2025

**Before:** Employment Judge N Wilson

## Appearances

For the claimant: Mr Nikiel (in person)

For the respondent: Ms C Nicolaou (solicitor)

## JUDGMENT

1. The complaint of holiday pay under the Working Time Regulations 1998 is not well founded and is dismissed.

## WRITTEN REASONS

2. These written reasons are provided following a request from the claimant and the respondent on the 23 and 24 January 2024. Unfortunately, there has been a delay of several months before the requests were sent to the Judge. I apologise for the consequent late provision of these written reasons.
3. This Judgment with reasons was delivered orally at the end of a one-day hearing.

## Background

4. The claimant has been employed by the respondent, as a bus driver from 24 May 2021. He remains in their employ. ACAS early conciliation started on 7 December 2023 and ended on 18 January 2024. The claim form was presented on 15 February 2024.
5. The claim is about holiday pay.
6. The claimant states the respondent has not paid holiday pay in accordance with the amount required by law.
7. The claimant's case is essentially two-fold:
  - a) When calculating the holiday pay the 52-week period used for the calculation purposes should include two payments he had received during that period; the first one was a retention bonus of £1000 paid in July 2023. And the second payment was a drive safe award of £5 paid in April 2022.
  - b) Secondly the claimant argues it is an error of law to apply one rate to the first 20 days of his holiday entitlement and another rate to his day 21 day to 28 holiday pay calculation.
8. The respondent's defence is pay for the respondent's drivers is negotiated and agreed with its recognised trade unions and, accordingly, each driver grade has an agreed weekly rate of pay, based upon a 38-hour working week spread over five days. The claimant's grade is DR11 and since 29 April 2023 the weekly rate for the claimant's grade is £660.06 which is an hourly rate of £17.37 and daily rate of £132.01. Overtime rates and enhanced rates for antisocial hours are also agreed.
9. Holiday pay is calculated in line with the provisions of the Working Time Directive (WTD) as implemented in the UK by the Working Time Regulations (WTR). The respondent uses a 52-week average when calculating holiday pay to ensure that drivers are paid at the correct rate. The rate of holiday pay is called the 'Pay Value', and this is the daily rate of pay calculated in accordance with the WTR. If the driver's weekly average pay over the previous 52 weeks is less than the agreed average for that grade (for example because the driver has been on sick leave and only in receipt of SSP), the driver is paid holiday pay at the agreed rate. In other words, the Pay Value does not drop below the agreed rate, even if the average earnings over the preceding weeks are less than the agreed rate.
10. Conversely, if the driver's weekly average over the previous 52 weeks is greater than the agreed rate (for example if the driver has consistently worked additional hours that have attracted the overtime rate) then the Pay Value is higher than the agreed rate and holiday is paid at that higher rate. This is why drivers are paid at different rates depending on when they take holiday.

11. Drivers are entitled to 28 days' holiday per year. Following the WTR, the first 20 days are paid at the average of the driver's previous 52-week earnings and include all elements of holiday pay, including voluntary overtime. The remaining 8 days are paid at the average of the previous 52-week earnings but without voluntary overtime. Irregular payments, such as safe driving awards, are not included in the calculations when calculating holiday pay.
12. The claimants claim for holiday pay is for 2 periods of holiday ending at the end of December 2023 (page 30)

## Findings of fact

13. I had an 88-page bundle which the parties had access to. I heard sworn evidence from the claimant and the respondent's Ms M Trindade.
  14. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the hearing bundles and/or witness statements. I have considered all the oral evidence heard and the relevant documents referred to in the bundle. I only refer to as much of the evidence as is necessary to explain my decision.
  15. The claimant was entitled to 28 days holiday in a leave year. Pursuant to his employment contract (page 71) his minimum standard working week was 38 hours spread over five days out of seven. It is not in issue that in addition to this he did overtime hours.
1. The claimant's rate of pay was based on a grade 11 driver. The applicable holiday rates were a basic holiday rate of £660.53 and a bonus rate of £829.59
  2. The lower holiday rate equates to a daily rate of £17.37 and the bonus rate equates to a daily rate of £21.83.
  3. I find the claimant had the bonus rate applied for the purpose of calculating his holiday pay by the respondent for both relevant periods of the holiday pay claim. This was demonstrated by the respondent in cross examination and is clearly disclosed on the payslips.
  4. I find the respondent calculated holiday pay entitlement based on the Working Time Regulations 1998 SI 1998/1833 ('the Regulations') which provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks basic annual leave under Reg 13(1) and 1.6 weeks additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks leave is subject to a cap of 28 days. Reg 13(1) implements Article 7(1) of the EU Working Time Directive (No.2003/88) ('the Directive'), which provides: 'Member States shall take the measures necessary to ensure that

every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.'

5. It is important to note that the amount of leave mentioned above constitutes an irreducible *minimum* to which workers are entitled under the relevant statutory provisions. A worker may also be entitled to enhanced holiday rights under his or her contract of employment but there is no enhanced contractual right that I have heard or seen any evidence of in the claimant's case.
6. The claimant seeks to persuade me the respondent has misapplied the law in that the entire 1 – 28 days of his holiday pay entitlement should be calculated applying the preceding 52-week average.
7. I find the respondent calculated the day 1 to day 20 holiday pay calculation based on a rolling preceding 52-week period. I find this 52-week calculation included overtime, any back pay, Bank Holiday payments, time in lieu payments, basic pay adjustments, cash adjustments, work rest days and all allowances. This is based on the very clear and consistent evidence of Ms Trindade.
8. The day 21-28 day pay also referred to as the 'regulation 13 pay' – was calculated and paid in accordance with the regulations. In other words, the respondent states all they had to do was pay the claimant basic pay plus pension contributions. In fact, I find the claimant was paid more than his basic hours when looking at the day 21-28 calculation as I accept the evidence of Ms Trindade that the only thing that was not included in the day 21–28 day calculation was anything considered to be overtime.
9. The Employment Rights Act 1996 ('ERA') stipulates that a worker still has normal working hours if he or she is entitled to be paid overtime when he or she works more than a fixed number of hours in a week or other period — S.234(1). The normal working hours in this situation will be that fixed number of hours — S.234(2). However, if the contract stipulates a fixed or minimum number of hours that the employee must work that exceeds the number of hours without overtime, then S.234(3) provides that that fixed or minimum number of hours shall be taken as the normal working hours, even if some of them are paid at an overtime rate. Thus, only overtime that is obligatory on *both* sides (i.e. the employer is obliged to provide it, and the employee is obliged to work it) constitutes part of the worker's 'normal working hours' under the ERA, meaning that in other cases, overtime is discounted in calculating a week's pay because 'normal working hours' are taken to be the hours fixed under the contract.
10. Furthermore, having considered the two payments the claimant seeks to include in the 52-week calculation, I cannot find they form part of his normal pay. The claimant accepts the payments are one off payments made to him. I have no evidence establishing the contrary. They are not even paid for the relevant period more than once to enable a consideration of whether they amount to regular payments. I do not find they can be included as the claimant's normal pay.

11. I find these 2 payments were correctly not included in the 52-week calculation by the respondent accordingly.
12. I therefore find the respondent has calculated the claimant's holiday pay in accordance with the Working Time Regulations and based on the evidence heard about the pay received for the 2 periods of holiday pay claim in dispute I do not find the claimant has established that holiday pay as claimed is owed to him.
13. The claim is not well founded and is accordingly dismissed.

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This decision was explained orally to the parties at the hearing.

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Employment Judge N Wilson  
Dated: 10 June 2025