



THE EMPLOYMENT TRIBUNALS

Claimant
Ms L Dodds

Respondent
Gills Fish and Chips Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NORTH SHIELDS
EMPLOYMENT JUDGE GARNON

ON 29 January 2019

JUDGMENT

Employment Tribunals Rules of Procedure 2013 –Rule 21

1. The name of the respondent is amended to that shown above, without the need for re-service.
2. The claim under Regulations 14 and 30 of the Working Time Regulations 1998 (WTR) is well founded. I order the respondent to pay compensation of £3341.04 gross of tax and national insurance.
3. The hearing listed for 22 February 2019 is vacated.

REASONS

1. The claim form named Gills Fish and Chip Shop Limited as respondent, as did the Early Conciliation certificate. A Companies House search shows a company named as above with a registered office at the address upon which the claim was served. No injustice is done by amending the title.

2. A response was due by 24 January 2019 but none was received. An Employment Judge is required by Rule 21 of the Employment Tribunals Rules of Procedure 2013 to decide on the available material whether a determination can be made and, if so, obliged to issue a judgment which may determine liability only or remedy as well. I have sufficient to enable me to find the claim proved on a balance of probability and decide the sums to be awarded.

3. The claim form in part 8 ticks the box for “ I am owed holiday pay “. Such a claim could be framed as unlawful deduction of wages (which includes holiday pay) under Part 2 of the Employment Rights Act 1996 (ERA) or under the WTR or as breach of contract. Under the ERA arrears of wages are limited by s 23(4A) to the preceding two years. If I treated this as a breach of contract claim it would require me to formulate implied contract terms in a way the claim form does not. I believe that would be possible and may have the same result as the one I have reached, or maybe one more favourable to the claimant.

4. In my view the WTR is the most appropriate route. Reg. 13, implementing the European Union's Working Time Directive (WTD) entitles every worker to four weeks per year annual leave. Reg 13 A, not implementing any European Union directive, grants workers an additional 1.6 weeks annual leave. Reg 14 includes:

(1) *This regulation applies where—*

(a) *a worker's employment is terminated during the course of his leave year, and*

(b) *on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*

(2) *Where the proportion of 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 of leave in accordance with paragraph (3).*

(3) *The payment due under paragraph (2) shall be—*

(a) *such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*

(b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

$$(A \times B) - C$$

where—

A *is the period of leave to which the worker is entitled under regulation 13 and regulation 13A);*

B *is the proportion of the worker's leave year which expired before the termination date, and*

C *is the period of leave taken by the worker between the start of the leave year and the termination date.*

5. Reg 16 states:-

"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.

6. Reg 30 includes

(1) *A worker may present a complaint to an employment tribunal that his employer—*

(a) *has refused to permit him to exercise any right he has under—*

(i) *regulation .. 13 or 13 A*

(b) *has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).*

(2) *An employment tribunal shall not consider a complaint under this regulation unless it is presented—*

(a) *before the end of the period of three months .. beginning with the date on which it is alleged that the exercise of the right should have been permitted ..or, as the case may be, the payment should have been made;*

(b) *within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three .. months.*

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.

7. The claimant worked from 31 January 2012 to 15 July 2018 without ever being allowed the paid annual leave to which she was entitled under Reg 13 or 13 A. At first sight it may be thought her claim in respect of years earlier than that in which termination occurred is out of time. In the absence of any argument to the contrary, I must read the WTR so as give effect to the Directive and afford a full remedy. That can be done by reading Reg 30 (2) as requiring the claim to be brought within three months of the last act complained of . If the respondent had taken the opportunity to defend , it could have argued otherwise. However, it is crystal clear from the file it was validly served at its registered office , no letter has been returned in the post and it has simply ignored the claim . The claim form says it took the same approach to her attempts to settle using Early Conciliation via ACAS.

8. The Court of Justice of the European Union have held where leave is untaken in a relevant year, not because the employee is unable to take it, but because the employer has refused to allow it, the employer is not allowed to benefit from this refusal and so any backdating of unpaid holiday pay due under Reg 13 can go back over the whole period of employment King v Sash Window Workshop Ltd [2018] IRLR 142 . In Max-Planck-Gesellschaft v Shimizu C-684/16 and Kreuziger v Land Berlin C-619/16 it held an employee may carry over untaken leave from a particular year unless the employer has actively facilitated the taking of the leave in the sense of informing the employee of the right and that it could be lost (so that the failure to take it is due to a deliberate and informed choice by the employee). The burden of proof is on the employer to show it exercised 'due diligence' in this respect . If it does not, the employee can maintain a claim for the untaken holiday (including on termination of the employment) with no temporal limitation. This is enforceable by the individual worker under Reg 30.

9. The claimant worked 16 hours a week and her weekly pay was £128. The cases cited in the preceding paragraph apply only to the 4 weeks annual leave due under Reg 13 not the additional 1.6 weeks under Reg 13 A. For that she may only be compensated under Reg 14 for leave untaken in the leave year in which her employment ended which , in the absence of a relevant agreement starts on the anniversary of her start date , ie 31 January .

10. So for each year from 2012 to 2018 she is owed four weeks pay = £512 per year x 6 = £3072 . For the year commencing 31 January 2018 to termination applying the formula in Reg 14 she is owed 5.6 x £128 = £716.80 divided by 365 and multiplied by the 137 days of

the year which had expired. That equals £269.04.

**TM Garnon Employment Judge
Date signed 29 January 2019 .**



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2503432/2018**

Name of case(s): **Miss L Dodds** v **Gills Fish and Chips Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **29 January 2019**

"the calculation day" is: **30 January 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.