



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4106830/2019**

**Held in Dundee on 27 September 2019**

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**Employment Judge I. Atack**

**Mr Andrzej Seremak**

**Claimant  
In Person**

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20 **All Renewable Energy Ltd**

**Respondent  
Represented by:  
Mr S Jakubczyk  
Director**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is

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1. That the claimant's claim in respect of notice pay is dismissed.

2. That the claimant's claim in respect of an alleged unlawful deduction from wages is dismissed

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3. That the respondent is ordered to pay the claimant the sum of Eight Hundred and Forty One Pounds Four Pence (£841.04) as compensation for accrued but untaken annual paid leave (holiday pay) in terms of Regulation 16 of the Working Time Regulations 1998.

E.T. Z4 (WR)

## REASONS

### Introduction

1. In his ET1 presented on 9 May 2019 the claimant made claims for notice pay, for holiday pay and for arrears of pay. The respondent claims that nothing is due to the claimant who has been paid all to which he is entitled.
2. The claimant gave evidence on his own behalf, assisted by Ms Monica Connelly, a Polish interpreter. Mr Sebastian.Jakubczyk, a director of the respondent company, gave evidence for the respondent.
3. The claimant lodged productions numbered C1 – C10 and the respondent documents numbered R1 to R5. The claimant's productions set out what he claimed to be due from the respondent and the respondent's productions comprised pages of a diary from January 2019.
4. From the evidence which I heard and the documents to which I was referred I found the following material facts to be admitted or proved.

### Material Facts

5. The claimant was employed by the respondent from 24 August 2018 until 25 January 2019 when his employment was terminated.
6. The claimant was employed as a worker by the respondent working on the renovation of a house owned by Mr Jakubczyk.
7. The claimant was given no contract of employment.
8. The claimant was paid by the hour and received payment monthly. No payslips were produced.
10. The claimant was paid at the rate of £10.50 per hour.
11. He was paid for the actual hours he worked.
12. No complaint was made by the claimant regarding alleged short payment of wages until he wrote to the respondent on 8 March 2019, C1. That letter raised a complaint relating to an alleged shortfall in respect of wages for January 2019. It also raised a complaint of non-payment of holiday pay

and notice pay. There was no complaint about a shortfall in payment for any months other than January.

13. On 22 March 2019 the claimant wrote again to the respondent, C4. That letter sought repayment in respect of a shortfall in wages going back to August 2018. The figures claimed for hours worked in January 2019 differed from the figures claimed in respect of the alleged shortfall for January in the letter of 8 March.
14. The claimant had financial problems whilst working for the respondent. He requested and received an advance of £500 which was repaid by him.
15. At the commencement of his employment the claimant was told that the work for which he was employed was for renovation of the house and when that was completed the work would end.
16. The claimant was in hospital for four days in October 2018.
17. There was a conversation between the claimant and Mr.Jakubczyk on Monday 21 January 2019. The parties' accounts differed as to what precisely had been stated but on balance I accepted that the claimant was told that his job would end on Friday, 25 January 2019.
18. The work on the property was completed.
19. Mr Jakubczyk kept a note of the hours which the claimant had worked in a diary. He gave the details of the hours which the claimant had worked to his accountant to prepare the wages for the claimant.
20. The diaries containing details of hours worked by the claimant prior to January 2019 have been destroyed.
21. There was no complaint made to the respondent by the claimant regarding any underpayment of wages whilst he was employed by them.
22. The claimant was paid by bank transfer each month.
23. The claimant was entitled to 28 days' holiday in a full year. He took no holidays in the period of his employment.

24. It was not disputed that the claimant had been paid the amounts shown as having been paid to him during his employment as shown on C5 to C9. In August 2018 he was paid £615. In September he was paid £2,100. In October he was paid £1,937.25. In November he was paid £2,032. In  
5 December he was paid £1,827 and in January 2019 he was paid £653.75.

### **Decision**

25. The claimant has three separate claims and I will deal with these in turn.

### **Breach of contract claim**

26. The claimant alleges that he is entitled to one week's notice and that he  
10 was not given proper notice of termination. The onus is upon the claimant to prove his case and I considered that he had failed to discharge that onus.

27. I accepted, on the balance of probabilities, that the evidence given by  
15 Mr Jakubczyk as to whether or not notice had been given was the more likely. The claimant admitted there had been a conversation with Mr Jakubczyk on Monday 21 January. Whilst he disputed he had been told his employment would end on Friday 25, he did say that he remembered being told by Mr Jakubczyk there might not be any more jobs. He also said that nothing had been confirmed to him, about that. I  
20 concluded that there had been a conversation on the Monday and that there had been a discussion about the claimant's job terminating. Having heard the evidence I considered that the report of the conversation given by Mr. Jakubczyk was, on balance, more likely to be correct.

28. I accepted that the claimant had been given notice that his employment  
25 would terminate and that he would require to work the period of notice. Accordingly, the claimant's claim for notice pay based upon a breach of contract is dismissed.

### **Unlawful deduction from wages claim**

29. A worker is entitled not to have unlawful deductions made from wages by  
30 his employer in terms of section 13 (1) of the Employment Rights Act 1996.

30. In terms of section 13(3) of that Act where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion the amount of the deficiency is to be treated for the purposes of the Act as a deduction made by the employer from the worker's wages on that occasion.
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31. The difficulty in this case is that no independent evidence has been produced as to the hours which the claimant worked. The claimant has produced at C1 to C10 allegations of the hours he claimed to have worked for the respondent and for which he is entitled to payment, but there was no corroboration of these figures. The respondent on the other hand has destroyed the diaries kept by Mr Jakubczyk allegedly showing the hours worked, on the basis that there was no need to keep them as the claimant had been paid. The only evidence from the respondent is contained in R1-15 R5 which are merely diary entries purporting to show the hours worked by the claimant on specified days in January 2019.
32. No evidence was given by either party that payslips were given to the claimant by the respondent. They may well have been given, but they were not produced. As a result there is no evidence other than what the parties have produced at the hearing to indicate the hours actually worked by the claimant and the amount, if any, of any shortfall.
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33. It is for the claimant to prove that there has been an unlawful deduction from his wages and in my opinion the claimant has failed to discharge that onus.
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34. The claimant accepted that he had financial difficulties and given that admission I found it surprising that he had not raised the issue of the alleged underpayment of wages until March 2019. If he had records of the hours worked, as claimed in C5-C9 I would have expected that the claimant would have raised the issue with the respondent well before that date if he had truly felt that he was not being correctly remunerated. I also noted that the first letter sent on 8 March referred only to an alleged shortfall in January 2019 and made no mention of the previous months.
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The alleged shortfalls (and in one case an overpayment) were not mentioned until the letter of 22 March, C4-10.

35. So far as the payments for January 2019 were concerned the parties differed considerably as to the days and hours which the claimant had worked. I could place no reliance upon the figures produced to me. I therefore concluded that the claimant had failed to prove, on the balance of probabilities, that the total amount of wages paid on any occasion by the respondent to him was less than the total amount of the wages properly payable to him. Accordingly, I cannot find that there has been an unlawful deduction from wages and the claim in respect of that matter is dismissed.

### **Holiday pay**

36. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holidays. The entitlement is 5.6 weeks' leave subject to a cap of 28 days.

37. Regulation 16 provides that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled at the rate of a week's pay in respect of each week of leave.

38. It was the respondent's position that the claimant did not want to wait until he took holidays to be paid holiday pay and wanted it to be paid immediately. They claimed that they agreed to that request and paid him an additional payment each month in respect of holidays, in effect as a rolled up holiday payment.

39. In the case of ***MPB Structures Ltd v Munro*** [2003] IRLR 350 the Court of Session held that rolled up holiday pay arrangements were void as being incompatible with the Directive of the European Parliament and of the Council (2003/88/EC) (the Working Time Directive).

40. In a reference to the European Court of Justice (as it was then called) in the case of ***Robinson-Steele v RD Retail Services Ltd*** 2006 ICR 932 the court held that the purpose of the requirement for payment for annual leave is to put the worker during such leave, in a position which is, as

regards remuneration, comparable to periods of work. They stated at paragraph 58:

5 “Furthermore, account must be taken of the fact that, under Article 7 (2) of the Directive, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. That prohibition is intended to ensure that the worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety...”.

10 41. Whilst the court held that rolled up holiday pay arrangements were precluded by the Working Time Directive it also went on to hold that the Directive does not preclude the setting off of sums actually paid under transparent and comprehensible arrangements for rolled up pay, from being set-off against any liability to pay in respect of any specific periods of leave taken by the worker.

15 42. In the case of *Lyddon v Englefield Brickwork Ltd* [2008] IRLR 198 the EAT applied the test set by the European Court of Justice, and held that payments must be made additional to remuneration for work done, and must be paid transparently and comprehensively as holiday pay. In that case the claimant received payslips setting out the amount of the basic wage and of the additional holiday pay, statutory deductions and total net pay. The payslips were in a standard form, generated by computer and issued in the same format to each of the respondent’s workforce. These facts were enough, the EAT concluded, to satisfy the requirements of the European Court of Justice. The contract clearly specified the fact of holiday pay, and it was to be inferred from the way that pay details were  
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25 issued that it also specified the rate.

30 43. In this case the respondent has not produced any evidence that the payment for each month included a payment for rolled up holiday pay. No payslips have been produced and no contract of employment has been produced. The claimant denies that he was told he would be paid rolled up holiday pay or that he received it. There is no evidence from the respondent as to what was paid allegedly to offset the liability for holiday pay. The arrangements were not transparent and comprehensible. There

was nothing in writing. There is only an uncorroborated statement that the pay includes rolled up holiday pay because the claimant had asked for it. Matters could have been put in writing and made transparent but they were not. It was for the respondent to ensure that if making a payment for rolled up holiday pay along with the claimant's monthly pay that the payments in respect of that holiday pay were transparent. They did not do so.

44. In the circumstances presented to me the only conclusion I can reach is that holiday pay was not paid on the face of it.

10 45. Alternatively, if such payments were made, they were not transparent and as a result even if they had been made they would be void in view of the decisions referred to above.

15 46. The respondent did not accept the hours claimed to have been worked by the claimant as set out in C5 – C10 but they did not take issue with the amounts shown as having been paid to him in respect of each month. They did not challenge at the hearing the claimant's evidence that the payment was made at the rate of £10.50 per hour.

20 47. Using the amounts paid, as shown in C5-C10, and the hourly rate of £10.50 the amount of hours for which the respondent actually paid the claimant can be calculated as follows:

August 58.57  
September 200  
October 184.50  
November 193.52  
December 174  
January 62

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30 48. The claimant did not have normal working hours and his remuneration varied with the hours which he worked. In terms of section 222 of the Employment Rights Act 1996 the amount of a week's pay is to be calculated by averaging the number of weekly hours worked over a period of 12 weeks. Having calculated the amount of the week's pay the claimant is entitled to be paid in respect of holiday pay at the rate of a week's pay



for each week of the employment. He is entitled to 1/5 of week's pay in respect of each day's leave.

49. In this case due to the lack of information, agreement on hours worked and payslips it is impossible to do anything other than to take a broad  
5 brush approach to the calculation of a week's pay.

50. In October the claimant was paid £1973.85 for 19 days claimed to have been worked at the rate of £10.50 per hour. That produces a calculation of £101.96 per day.

51. In November he was paid £2032 for 22 days claimed to have been worked  
10 giving a daily rate of £92.36.

52. In December he was paid £1827 for 19 days claimed to have been worked giving a daily rate of £96.15.

53. In January he was paid £635.75 for 18 days claimed to have been worked giving a daily rate of £36.32. The 4 November 2018 was the  
15 commencement of the period of 12 weeks prior to termination of the claimant's employment, the claimant worked 20 days at the rate of £92.36 per day making a total for that month of £1847.27. In December he earned £1827 and in January £653.75. That is a total of £4328.02 over a period of 12 weeks. The average weekly pay over that period was £360.66. That  
20 equates to a daily rate of pay of £72.13.

55. Regulation 14 (3)(b) of the Working Time Regulations provides that where there is no relevant agreement the sum payable to a worker in lieu of his unused holiday entitlement should be calculated under the principles set out regulation 16 but in relation to a period of leave determined according  
25 to the following formula:

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

where:

A is the minimum period of leave to which the worker is entitled under regulations 13 and 13 A

30 B is the proportion of the workers leave year which expired before the termination date

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

56. The claimant was entitled to 28 days' holiday in a full year but he was only employed from the 24 August 2018 until 25 January 2019, a period of approximately 5 months. Using the above formula,  $(28 \times 5/12) - 0$  produces a figure of 11.66 days' entitlement in respect of holiday pay.

57. The claimant had claimed entitlement to 12 days' holiday pay and no argument was taken or evidence led by the respondent to suggest that if the claimant was entitled to holiday pay that figure was erroneous. Using the figure shown above the claimant is entitled to a payment of £841.04 in respect of holiday pay.

58. It is difficult to be more accurate due to the absence of agreement as to the actual hours worked and absence of any documentation from either side regarding payments made and received. I have endeavoured to make what I can of the information given and evidence led at the hearing.

59. The respondent is ordered to make payment to the claimant in the sum of £841.04 in respect of holiday pay.

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30 **Employment Judge:** Ian McFatridge  
**Date of Judgment:** 10 October 2019  
**Date sent to parties:** 14 October 2019

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