



EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Smith

Respondent: HGV Drivers UK Limited

Heard at: Manchester via CVP

On: 4 October 2022

Before: Judge Miller-Varey sitting alone

Representation

For the Claimant: In person

For the Respondent: Did not attend and was not represented

RESERVED JUDGMENT

1. The Respondent shall pay the gross sum of £442.54 to the Claimant in respect of accrued but untaken holiday pay due at the termination of the agency agreement between the parties.
2. The Respondent shall pay the gross sum of £135.10 to the Claimant in respect of unlawful deductions from earnings.

REASONS

Background

1. By a claim issued on 22 May 2022 the Claimant seeks payment of holiday pay outstanding on termination. The ET1 records the basis and amount of the claim in the following terms:

“For the weeks that I worked...I earned a gross total of £5044.53 of which I should of received £608.87 holiday pay at 12.07% which I’ve never received”

Procedure

2. The Claimant attended the hearing. At just after 8am on the morning of the hearing, HGV Drivers UK Limited (via its managing director, Mr Wes Seare) submitted a two-page letter and other documents via email to the Tribunal. This was copied to the Claimant. Mr Seare asked for his letter to be taken into account. His key points were:

(a) He asked for HGV Drivers UK Limited to be substituted as the Respondent (para (ix));

(b) He indicated that he was “unable to deal with the matter” (his letter) and “unable to attend today’s virtual hearing” (his covering email); and

(c) That the Respondent did not understand the basis of the claim because holiday pay had been paid to the Claimant, who was a part-time worker, as shown in two payslips with payment dates of 24/12/2021 and 31/12/2021.

3. I had regard (in the following order) to rules 47 and 42, by which respectively:

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party’s absence. (Rule 47)

The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing (Rule 42)

4. There was no need to make further enquiries; the true and proper Respondent to the proceedings was manifestly aware of the date and time of the hearing, as is plain from the letter. Within that same letter, the Respondent has not provided an explanation for their being unable to attend. The barriers to participation were few considering, as the Respondent appreciated, it was a video hearing. It was accordingly entirely

reasonable to proceed in the absence of the Respondent who had knowingly absented itself.

5. Rule 42 did not require me to have regard to the contents of the letter given the late stage at which it was furnished. I note that by a direction of EJ Feeney on 24 August 2022, the Respondent was supposed to make clear its position in respect of the matters dealt with, by 7 September 2022.
6. However, it was in accordance with the overriding objective for written submissions to be taken into account for three main reasons: the letter properly conceded the amendment point on behalf of the (then) un-joined HGV Drivers UK Limited who is consistently named on the payslips and agency agreement, the proper Respondent was not seeking any extra time or delay to the final hearing and extent of the defence advanced was limited and could fairly be dealt with by the Claimant on the day.
7. I therefore permitted the amendment of the Respondent's name and the substitution of the existing ET3 with the Respondent's letter of 3 October 2022.
8. I heard evidence from the Claimant and received copies of some additional WhatsApp messages from him (beyond those sent with his email of 2 October 2022).
9. I reserved my decision in order to consider in the application of the relevant statutory provisions as they relate to part time agency workers without fixed days or hours.

Issues

10. The defence acknowledges that the Claimant has rights against the Respondent in respect of holiday entitlement and holiday pay which are reflected in clause 7 of the Claimant's terms of engagement. In terms of the amount claimed, the Respondent contends that it is "unaware" of the calculation used by the Claimant but states that the £171.23 reflects the Claimant's full entitlement up to the termination of the engagement. Accordingly, it says, the claim should be dismissed.
11. Correspondingly, the issues for me to determine are:
 - What was the Claimant's entitlement to leave in respect of the period worked under the terms of engagement?
 - As at the date of termination, what if any amount of the leave had been as paid leave or had the Claimant been paid?
 - What is any amount of leave was then still outstanding?

Facts

12. The Claimant was engaged between 5 October 2021 and 23 December 2021 as a worker under an agency agreement entered into with the

Respondent on 1 October 2021. His engagements were all as a HGV tipper driver working at the Cemex sites. He did not have fixed hours of work nor fixed days.

13. Within the personal details pro forma details collected by the Respondent, the box was ticked to say that holiday pay would be accrued.

14. The relevant parts of the Agency Agreement provides that:

The agency worker is entitled to be paid annual leave according to the statutory minimum as provided by the Working Time Regulations... The current statutory entitlement to paid annual leave under the Working Time Regulations is 5.6 weeks. Or 12.07% when paid weekly on top of your hourly rate (clause 7.1)

Entitlement to payment for leave accrues in proportion to the amount of time worked by the Worker on Assignment during the Leave Year (clause 7.2) and the Leave year is “the period during which the Agency Worker accrues and may take statutory leave commencing on 1st January and runs until the anniversary of that date”

All entitlement to leave must be taken during the course of the Leave Year in which it accrues and save as may be set out in the relevant Assignment Details Form or any variation to the relevant Assignment Details Form, none may be carried forward the next year. The Agency Worker is responsible for ensuring that all paid annual leave is requested and taken within the Leave Year (clause 7.4)

Where the contract is terminated by either party the Agency Worker shall be entitled to a payment in lieu of any untaken leave where the amount of leave taken is less than the amount accrued in accordance with clause 7 at the date of termination (clause 7.9)

15. Shortly prior to signing the Agency Agreement with the Respondent, the Claimant asked for Luke Krawczyk on behalf of the Respondent, whether he accrued holiday pay. At that stage deductions for work at the Cemex site had already been discussed between them. The reply from Luke Krawczyk was “Yes”.

16. The Claimant was paid weekly in arrears. On 5 October 2021, the Claimant also asked Luke Krawczyk via WhatsApp to confirm the hourly rate of pay. He replied that it was £17.44. This was acceptable to the Claimant. There were never any subsequent discussions between the Claimant and the Respondent about the rate of pay. However, the Respondent paid the hourly rate of £17.37 during the first 5 of the 7 weeks work. The Respondent unilaterally purported to reduce the Claimant’s pay to £15.50 per hour starting in the pay period from 20 December 2021 through to 2 January 2022, as I will come to further.

17. The Claimant had a period of unpaid leave between in or around 24 October 2021 and 29 November 2021. Outside of this period, he was paid weekly by

the Respondent and the relevant payslips (all save the one starred below were provided by the Respondent) may be summarised as follows:

Payment Date	Pay Period	Regular Hours	Regular Hours Rate of Pay	Holiday Pay Hours	Holiday Pay Rate
15/10/21	11/10/21 - 17/10/21	36.5	£17.37	0	0
22/10/21	18/10/21- 24/10/21	47.25	£17.37	0	0
3/12/21	29/11/21 - 5/12/21	40.75	£17.37	0	0
*10/12/21	6/12/21 - 12/12/21	51.5	£17.37	0	0
17/12/21	13/12/21 - 19/12/21	44.5	£17.37	0	0
24/12/21	20/12/21 - 26/12/21	46	£15.50	46	£2.37
31/12/21	27/12/21 - 2/1/22	26.25	£15.50	26.25	£2.37

18. On 22 December 2021 the Claimant asked Luke Krawczyk via WhatsApp whether he needed to take his holidays he had accrued before the end of the year. Luke Krawczyk replied “No deadline”.

19. Holiday pay appeared “rolled up” with the Claimant’s pay, for the first time in his penultimate and last payslip, which apportioned £15.50 to his hourly rate of pay and £2.37 to holiday pay. The total holiday pay which the Respondent purported to pay across the final two payslips was £171.23.

20. The Claimant pursued the question of his outstanding holiday pay in the early part of 2022 with Luke Krawczyk. After the Claimant pointed out that “rolled up” holiday pay was never agreed, nor appeared until a later stage on his payslips, Luke Krawczyk agreed that it was his fault and that he would resolve matters. Subsequently on 16 March 2022, the Claimant asked Luke Krawczyk via WhatsApp whether his holiday pay was still being paid that week. On 18 March 2022 Luke replied that he was dealing with it and would call the Claimant back. The Claimant chased this up on the same day, twice, to which Luke responded that he would get it sorted.

21. In the event, no payment was made and the Claimant issued proceedings.

The Law

22. Where there is an express entitlement to be paid in lieu of accrued by untaken leave on termination, the claim may be brought as breach of contract, an unlawful deduction of earnings claim or as a Working Time Regulations claim.
23. The Claimant's entitlement to leave is contractual but in accordance with the WTR.
24. Correspondingly, the Claimant has a leave entitlement of 5.6 weeks.
25. This accrues under the contract in proportion to the amount of time worked by the Claimant during the leave year - i.e. between 1 January 2021 and 31 December 2021. The Respondent accepts that termination took place before the end of the leave year such that the question of carried over leave does not arise.
26. Given the contract adopts the WTR formula, the calculation of a week's pay in section 221-224 ERA 1996 applies to determine the rate of holiday pay with slight modifications. So far as relevant to this case, those modifications are that there is no statutory maximum on a week's pay, the calculation date is the first day of the period of the leave in question and the statutory mechanism for calculating a week's pay when an employee has worked for less than 12 weeks found in s.228 ERA is disapplied – Regulations 16(2) and (3).
27. The relevant regulations provide:

WRT 1998 Regulation 16(e)

- (e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—
- (i) *in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or*
- (ii) *in any other case, 52; and*

221.— General.

- (1) *This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.*
- (2) *Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.*

(3) *Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—*

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(4) *In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.*

(5) *This section is subject to sections 227 and 228.*

223.— Supplementary.

(1) *For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—*

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours, shall be brought in.

(2) *If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.*

(3) *Where—*

(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime),

account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

224.— Employments with no normal working hours.

(1) *This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

(2) *The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—*

(a) *where the calculation date is the last day of a week, with that week, and*

(b) *otherwise, with the last complete week before the calculation date.*

(3) *In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.*

(4) *This section is subject to sections 227 and 228.*

28. When applied to a worker working a different number of hours per week and variable number of days each week, the application of the above provisions is expressed properly in the Claimant's contract (albeit stated there as a percentage) i.e. the worker accrues 0.1207 of an hour of holiday for each hour worked.

Conclusions

29. The Claimant's hourly rate was £17.37 He worked a total of 292.75 hours. His entitlement to holiday pay, in hours, is therefore 292.75×0.1207 or 35.33 hours. This equates to £613.77. He took no paid leave.

30. The Respondent has purported to pay the Claimant £171.23. This can be taken into account, but the Respondent must also put right the deduction from wages which was used to achieve this payment. This requires technical amendment of the Claimant's claim to include a deductions from wages claim, which it is in the interests of justice to grant.

31. The sum due in respect of holiday pay on termination is therefore £442.54.

32. The Respondent has also wrongly made deductions from the Claimant's wages, whereby his hourly rate and hours worked meant that the sums properly due in the two final payslips were: £799.02 ($46 \times £17.37$) and £455.96 ($26.25 \times £17.37$) and not, respectively, £713 and £406.88. Correspondingly, the Respondent must pay the sum of £135.10 ($£86.02 + £49.08$) in respect of unlawful deductions from wages.

**Tribunal Judge A Miller-Varey
(acting as an Employment Judge)**

24 October 2022

Sent to the parties on:

28 October 2022

For the Tribunals Office

Notes

1. Judgments 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.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2403111/2022**

Name of case: **Mr C Smith** v **HGV Drivers UK Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day, the calculation day, and the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 28 October 2022

the calculation day in this case is: 29 October 2022

the stipulated rate of interest is: **8% per annum.**

For the Employment Tribunal Office