



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104609/2022

Final Hearing Held in Dundee by CVP on 2 November 2022 at 10.00am

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Employment Judge Russell Bradley

Nikolay Nikolov

Claimant
In person

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Craigatin House & Courtyard Limited

Respondent
Represented by:
Ms L Fordyce,
Director of the
respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent is ordered to pay to the claimant the sum of **ONE THOUSAND AND EIGHTY FIVE POUNDS (£1085.00) STERLING** in terms of Regulation 30(5) of the Working Time Regulations 1998 under deduction of any amounts for which it lawfully requires to account to HMRC in respect of any tax or national insurance due on that sum.

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REASONS

Introduction

1. On 20 August 2022 the claimant presented an ET1. It indicated that he was owed holiday pay. The claim was resisted. On 24 August, parties were given notice of this hearing.

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2. For the hearing the respondent had prepared and lodged an indexed bundle containing 12 numbered pages, albeit it contained more. The claimant confirmed that he had received a copy shortly before the start of the hearing. He was content to proceed.
- 5 3. The claimant said that he had emailed to the tribunal on 24 October his documents. He forwarded it to me via the clerk before hearing evidence. The respondent had a copy.
4. Before hearing evidence we discussed a number of matters.
5. The claimant agreed that his only claim was for holiday pay, and in particular what he said had accrued to him but had not been taken as paid
10 leave prior to the end of his contract of employment, in July 2022. I had sought this clarity as at box 8.2 of the ET1 form, his narrative alleged that the respondent had not paid him his "*last days of working and*" the holidays he had earned. The claimant clarified that the amount sought in his ET1
15 form (£1148.40, which coincided exactly with an amount shown on the ET3 form) was derived from correspondence which had passed between the parties prior to 20 August.
6. Ms Fordyce confirmed that; the correct name of the respondent is
20 Craigatin House & Courtyard Limited; she is one of two directors; and she was accompanied at this hearing by the other, John Watters. She advised that her method of calculating the £1148.40 (applying 12% to total earnings for the calendar year 2022) was taken from the UK Government website on holiday pay.
7. After discussion it was possible to agree; the claimant's start date of 21
25 September 2021; his effective date of termination (following resignation) on 4 July 2022; his hourly rate of pay of £10; and the fact that his weekly hours varied between about 30 and 42. It appeared that he began work at 7.30am. His work normally ended about 2.30pm. He was paid weekly.
8. Unfortunately, neither party had lodged any of the correspondence
30 referred to in their forms. As things turned out, their absence did not impede my decision on the claim.

9. Ms Fordyce was unable to confirm what was the respondent's leave year. I explained that absent that material, in the circumstances and taking account of regulation 13(3) of the Working Time Regulations 1998, the claimant's leave year began on the date his employment began, thus on 21 September. She explained that she understood that his statutory entitlement was 5.6 weeks (or 28 days) per year. However, under reference to page 7 of the respondent's indexed papers, its position was that the claimant's annual entitlement far exceeded that amount; indeed, she said, it was 77 days. She explained that the respondent's position was that (again under reference to page 7) the respondent required its staff to take all paid leave on a number of fixed days. They included two large periods one in each of November (about 30 days) and January (about 30 days) during which time the respondent's business closed.
10. The ET3 form included the assertion that contrary to what had been agreed as his notice period when he resigned (17 days) he had worked only 3 of them. Similarly, in some of the respondent's paperwork there was reference to the provision of accommodation to the claimant during his employment. Ms Fordyce agreed that neither issue was relevant to a decision on the claim.
11. On the paperwork and the discussion, the issue became; how many days of paid leave (if any) had accrued to the claimant by 4 July and which he had neither taken nor been paid in lieu of them?

Issues

12. The issues for determination were:-
- a. Has the respondent failed to pay the claimant the whole or any part of an amount due to him under Regulation 14(2) of the Working Time Regulations 1998?
 - b. If so, how much should the respondent be ordered to pay under Regulation 30(5) of the Regulations?

Evidence

13. I heard evidence from the claimant and from Ms Fordyce. Both referred to the documents which they respectively had lodged. I took account of them.

Findings in Fact

14. From the tribunal papers, the discussion prior to hearing evidence and the evidence itself I found the following facts admitted or proved.
15. The claimant is Nicolay Nikolov.
- 5 16. The respondent is Craigatin House & Courtyard Limited. It has two directors. One of them is Lynne Fordyce. The other is John Watters. Together they run the guesthouse, Craigatin House & Courtyard. It has 14 letting rooms. It operates as a bed and breakfast house. It does not serve evening meals. It does not have a licence to sell alcohol. Both
10 Ms Fordyce and Mr Watters work in the business. Together they take two days off per month. On those days, the premises are closed. On those days, the staff are not expected to be at work. The respondent has traded since about 31 May 2019. At the time of the claimant's employment, the respondent employed about four staff.
- 15 17. In about early September 2021 the respondent advertised via indeed.com to recruit staff. The claimant applied. At the time, he was employed elsewhere.
18. The claimant was interviewed by Ms Fordyce and Mr Watters together following his application. He was asked about his CV. He was told some
20 basic information about the role. He was told that the respondent closed in the months of November and January, for part of the Christmas period and for two days per month. He was told that he was expected to take holidays in those periods. The job was as a general assistant. Shortly thereafter, the respondent emailed the claimant to offer him the job. The claimant
25 gave one week's notice to his previous employer. On 21 September the claimant's employment with the respondent began.
19. The claimant's principal duties were to take breakfast orders from guests, serve breakfasts, clear up afterwards and cleaning the guests' rooms. Normal working hours began at 7.30am. A normal working day ended
30 about 2.30pm. By 23 May, the respondent paid the claimant based on those hours of work.

20. The claimant was paid weekly, each Monday. Ms Fordyce handed to him wages slips, usually in an envelope.
21. The claimant did not issue to the claimant a contract of employment or a statement of his main terms and conditions of employment. Ms Fordyce was aware of the respondent's obligation to have done so.
22. In October the claimant received 4 wage slips dated 4, 11 18 and 25 respectively. The narrative of each says, "*Taxable Pay*". The gross pay for each week differed.
23. The respondent closes its business in the month of November each year. It was closed in November 2021. That closed period extended to 6 December (see page 7 of the respondent's bundle). The claimant was not required to work in that whole period. He was issued a payslip and paid on each of 1, 8, 15, 22 and 29 November and 6 December. On each payslip the narrative was "*Taxable Pay*". On 15 and 22 November he was paid the same amount, £228.30. On 29 November and 6 December he was paid £150.00. On the other dates the amounts varied. For part of the month of November the claimant travelled to and from Bulgaria. The respondent's PAYE system does not permit a "*holiday pay*" option of the various narratives available. It is thus not possible, using that system, for wage slips to show "*holiday pay*."
24. Sometime shortly after his return in December 2021 the respondent issued to the claimant a handwritten note. The respondent did not keep a photocopy of it. The respondent did not keep a copy of any covering letter to the claimant issued with it. The respondent did not obtain from the claimant any receipt from him for it. It recorded the days from 21 September 2021 onwards on which the premises would be closed. Its heading included the words "*Holiday Dates*." It advised the claimant that the premises would be closed between 22 and 31 December 2021. It further advised that it would be closed on the following dates:-
- a. 2 January to 11 February 2022 inclusive
 - b. 16 and 17 March
 - c. 13 and 14 April
 - d. 25 and 25 May and

e. 15 and 16 June

25. The premises were closed on each of those days. The claimant was not required to attend work on any of them. For part of that time he again travelled to Bulgaria. He was aware, by mid-December, that the premises would be closed in the month of January. At the same time, he was aware that he would be paid. He was aware that that time off was regarded by the respondent as paid leave. The claimant believed that he was being paid in that period as an incentive in order to persuade him (and his colleagues) to return to work when the premises re-opened.
26. Each of the wage slips dated 3, 10, 17, 24 and 31 January and 7 and 14 February narrate "*Taxable Pay*". Each shows gross pay of £315.00. The payslips dated 21 March and 18 April show the same narrative and gross pay. The payslips dated 30 May and 20 June have the same narrative. They show gross pay of £420.00.
27. The claimant gave notice to terminate the contract. His agreed effective date of termination was 4 July. A payslip was issued to him dated 4 July. It showed gross pay of £420.00 as his Taxable pay.
28. None of the wage slips for the period 4 October 2021 to 4 July 2022 showed any pay as being "*Holiday Pay*."
29. Following the end of his employment the claimant wrote to the respondent via the Citizens' Advice Bureau. It is likely that the letter raised the issue of holiday pay. The respondent replied.

Comment on the evidence

30. The first wage slip produced by the claimant was dated 4 October 2021. It was thus not clear how much was paid to him in September.
31. The claimant's evidence was candid but in some respects not entirely reliable. He was not able to recall all of what was said at his interview, or when it was relative to his start date. He openly accepted in answer to several questions that he could not recall what had been said or what had occurred. It was unfortunate that neither of the letters from and to the claimant (via the CAB) were produced by either party.

32. In very large measure Ms Fordyce's evidence was credible and reliable. It was to her credit that she accepted the respondent's error in its failure to issue a written statement of employment terms. On one important disputed area, I did not accept her evidence. I deal with it below.

5 Submissions

33. The claimant made a very short submission. He relied on his evidence. He sought a fair outcome, no more or less than that to which he was entitled.

34. Ms Fordyce also made a short submission. She argued that in the
10 circumstances the claimant had been paid for far more leave than that to which he was entitled, that entitlement being 5.6 weeks in a year.

The Law

35. Regulation 13(1) of the Working Time Regulations 1998 provides that
15 "*Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.*" Paragraph (5) deals with proportioning the entitlement when a worker starts work part way through a leave year. Regulation 13(b)(ii) provides that if the worker's employment began after 1 October 1998 and there are no provisions of a relevant agreement which specify the beginning of the leave year, then the leave year begins on the date on
20 which the employment began.

36. Regulation 13A provides for an entitlement to additional annual leave. For present purposes it is sufficient to note that 13A(2)(e) provides that in any leave year beginning after 1 April 2009 that additional leave is 1.6 weeks.

37. Regulation 14 is headed "*Compensation related to entitlement to leave*".
25 Paragraphs (1) to (4) provide

"(1) Paragraphs (1) to (4) of this regulation apply 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
30 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.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.”

38. Regulation 16(1) sets out that “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.”

39. Regulation 15(1) provides, “(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).” Regulation 15(2)(a) provides, “(2) A worker's employer may require the worker—(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A.” Regulation 15(3) provides, “(3) A

notice under paragraph (1) or (2)–(a) may relate to all or part of the leave to which a worker is entitled in a leave year; (b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and (c) shall be given to the employer or, as the case may be, the worker before the relevant date.” Regulation 4(a) provides, “The relevant date, for the purposes of paragraph (3), is the date–(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates.”

40. Regulation 15A(1) provides, “During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13 or regulation 13A is limited to the amount which is deemed to have accrued in his case at that time under paragraph (2) or (2A), as modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.” Regulation 15(2) is not relevant in the circumstances. 2A provides that “ ... leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and regulation 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.”

Discussion and decision

41. The claimant's employment ended before he had worked for a year. His contract ended before the end of his first year of employment.

42. The issue in this case turns on when the respondent issued to the claimant a notice which complied with Regulation 15. There is no dispute that the claimant received one. I accepted that, albeit in hand writing, its content was (subject to dates referable to the claimant's employment from 2021 to 2022) materially the same as page 7 of the respondent's bundle.

43. Ms Fordyce accepted in discussions with her that; the respondent requires its staff to take all leave on the particular days which it specifies; two of those periods are relatively lengthy (about 30 days each); it ordinarily

specifies those days by issuing a written notice; but that even if I agreed with the respondent's written position in its ET3 form (that its notice was issued at interview, sometime after 1 September), the period from November into December 2021 could not be "*paid leave*" for the purposes of the Regulations because the notice had not been issued the necessary period in advance. Given the length of that period (5 weeks) it would, to comply with Regulation 15(4)(a), have had to have been issued 70 days before 1 November, in other words by 23 August. Even on the respondent's written case, it had not.

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10 44. For the purposes of determining any period of accrued, untaken and unpaid leave as at 4 July 2022 the key issue is; when was the hand written document issued? I have accepted the claimant's evidence that he did not receive it until his return to work in December 2021. That being so, and again applying Regulation 15(4)(a), it had not been issued sufficiently early for the period 2 January to 11 February 2022 to be regarded as a period of paid leave. That period was of 40 days. To comply with Regulation 15(4)(a) it would therefore have had to have been issued to the claimant 80 days prior to 2 January, in other words by 14 October. Ms Fordyce's evidence was that she issued it at the end of September. The claimant's evidence was that he did not receive it until the beginning of December. In deciding this factual dispute I took into account; that the respondent's evidence differed from what it said in its ET3 form (that it was issued at interview); that no copy was kept, despite the "*system*" for staff receiving a copy having been in place for some time; that the respondent was not able to vouch in any other contemporaneous way the date it relied on; that it was open to the respondent to have handwritten on any payslip that pay was "*holiday pay*" when that was its understanding, but did not; and the claimant's evidence that had he been provided with the dates in writing earlier he would not have accepted the job. Separately, I believed the claimant when he said that he was first given a copy on his return after 6 December. The effect is therefore that while the claimant was paid in the period 2 January to 11 February 2022 that was not a period of paid leave for the purposes of the Regulations.

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35 45. The claimant's holiday year began on 21 September 2021. On the 21st of each month he accrued one-twelfth of 5.6 weeks, or one-twelfth of 28

days, or 2.33 days. By 21 June he had accrued ten-twelfths of 28 days, or 23.33 days. That falls to be rounded up to 23.5 days. Since 21 September and as per the respondent's notice, he had taken paid leave of 8 days (March 16 and 17; April 13 and 14; May 25 and 26; and June 15 and 16).
5 By 4 July he had thus taken 8 days of his entitlement of 23.5 days. By 4 July he had accrued (untaken and unpaid) 15.5 days. The respondent has not paid him for them. The respondent had thus failed to pay the claimant the amount due to him under Regulation 14(2).

10 46. By 4 July, the claimant was being paid consistently £420.00 per week. His rate of pay (albeit not shown on any payslip) was £10.00 per hour. He was therefore working 42 hours per week. The respondent's evidence was that he was paid for working between 7.30am and 2.30pm, i.e. 7 hours per day. His gross pay per day was therefore £70.00. He is thus entitled to £1085.00 in respect of the 15.5 days accrued and untaken as at 4 July,
15 subject to deductions for income tax and national insurance contributions. My judgment reflects the fact that those deductions should be made.

47. The claim succeeds to the extent of the net version of £1085.00. The net amount is what is ordered to be paid.

Employment Judge: R Bradley

20 **Date of Judgment 7th November 2022**

Date sent to parties 10th November 2022

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