

THE INDUSTRIAL TRIBUNALS

CASE REF: 16052/18

CLAIMANT: Elena Tincheva

RESPONDENTS:

1. Cream The Coffee Shop
2. Gary Myles
3. Glen Pavis
4. G & G (NI) Ltd

DECISION

The decision of the tribunal is that the claimant was subjected to less favourable treatment by G & G (NI) Ltd contrary to the Part time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 and is awarded compensation in the sum of £485.46.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Wilson

Members: Mrs E Gilmartin
Mr A White

APPEARANCES:

The claimant appeared in person and conducted her own case.

The respondent was represented by Mr Glen Edward Pavis.

BACKGROUND

1. The claimant lodged Industrial Tribunal proceedings against the above named respondents. It was agreed at the outset of the hearing that she was employed by G & G (NI) Ltd. Her pay was lodged to her bank account by G & G (NI) Ltd. Glen Pavis and Gary Myles (Dickson) are directors of G & G (NI) Ltd. Cream the Coffee Shop Ltd was dissolved on 22 August 2014.
2. The first, second and third named respondents are dismissed from these proceedings by agreement.

THE CLAIM

3. The claimant claims unpaid holiday pay in the sum of £485.46. She claims she was denied holiday pay by reason of the fact that she was a part time worker and that this amounted to unlawful discrimination contrary to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000. In addition, she claims that she was not provided with a main statement of terms and conditions, that she did not always receive her pay slips and that she did not receive her P45.

SOURCES OF EVIDENCE

4. The tribunal considered the claim form, the response, the oral evidence of the claimant and supporting documents provided by her to include bank statements and a copy letter to Gary Myles dated 11 September 2018. For the respondent the Tribunal considered the oral evidence of Mr Glen Pavis and of Mr Gary Myles Dickson and supporting documents to include a wall planner provided by them.

THE LAW

5. The Part Time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 (the Regulations) provide at regulation 5:-

“5.— (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker:-

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if:-

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

...

(7) Where an industrial tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable:-

- (a) *making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;*
 - (b) *ordering the employer to pay compensation to the complainant;*
 - (c) *recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.*
- (9) *Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances (subject to paragraph (8)) having regard to:-*
- (a) *the infringement to which the complaint relates, and*
 - (b) *any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle except where it is inappropriate to do so.*
- (10) *The loss shall be taken to include:-*
- (a) *any expenses reasonably incurred by the complainant in consequence of the infringement; and*
 - (b) *loss of any benefit which he might reasonably be expected to have had but for the infringement.*
- (11) *Compensation in respect of treating a worker in a manner which infringes the right conferred on him by regulation 5 shall not include compensation for injury to feelings.*
- (12) *In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland.*
- (13) *Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.”*

6. A part time worker for the purposes of these regulations is defined at regulation 2(2) as follows:-

“A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker’s employer under the same type of contract, is not identifiable as a full-time worker”.

7. It is the claimant’s case that she was denied holiday pay by the respondent for holidays taken during the period from January 2017 to September 2018 because from January 2017 onwards, she worked only one day per week. Furthermore, she claims that she did not take holidays that she would otherwise be entitled to during this period, because she knew that any leave taken would be unpaid and she could not afford to take unpaid leave.

FINDINGS OF FACT

8. The claimant commenced employment as a waitress with the respondent in its coffee shop (Cream Café) at Unit 1-3 Hanwood Park, Old Dundonald Road, Belfast on 9 of May 2016. Initially she worked 5 days per week which she describes in her oral evidence as being full time. In January 2017 she applied successfully to reduce her hours and from that time onwards she worked one seven-hour day, usually on Saturday. No issues arise relative to her employment until she reduced her hours in January 2017.
9. The claimant applied to take 18 March 2017 as a holiday. She complied with all the requirements of the respondent in terms of her application and her application for leave was approved.
10. Her next pay day was on 24 March 2017 and on receiving her pay, she realised that she had received no payment in respect of the holiday taken on 18 March.
11. She raised the question of unpaid holiday pay with Gary Pavis and it is her case that he told her that she was not entitled to paid holidays because she only worked one day a week, had no contract and only employees with contracts were entitled to holiday pay. It is the respondent’s case that the claimant did not receive payment as she had taken the day off without authorisation.
12. The claimant next applied successfully for holidays on 8 and 15 July 2017. Her subsequent pay did not include any pay for the days taken. It is her case that when she raised this with Gary Pavis she was told that she was not being paid holiday pay because she did not have a contract. This is denied by the respondent.
13. She did not apply again for holidays until August 2018 and it is her case that this was because she knew she would not receive payment and she could not afford to take unpaid leave. In August 2018 she applied to Gary Myles Dickson for two weeks holidays to be taken in September 2018. She was moving to a new house at that time and needed time off. She contends that was told by Mr Myles Dickson that she would not receive holiday pay despite her being entitled to it and it is her case that the reason given was that she was not flexible and furthermore if she were paid holiday pay other members of staff who worked longer hours would be upset. This is denied by the respondent.

14. The claimant gave one week's notice to terminate her employment and her last day of employment was the 8 September 2018. It is her case that her sole reason for leaving her employment with the respondent was that she was not receiving holiday pay.
15. The respondent disputes the claimant's claim. The tribunal heard from Glen Pavis whose evidence was that the claimant received paid annual leave in 2017 on 11 and 12 February, 15 April, 27 May, 17 June and 1 and 2 July. It is his case that the claimant took unauthorised leave on the 18 March and on 8 and 15 July 2017 and so received no payment for those dates. This was also confirmed by Gary Myles Dickson in his oral evidence. Mr Myles Dickson went on to say that holidays were not approved in July because that was a busy time of the year.
16. It is the evidence of Gary Myles Dickson that the claimant was not spoken to or reprimanded regarding taking unauthorised leave at busy times.
17. There is a direct conflict of evidence between the parties. The claimant contends that she received no holiday pay from January 2017 when she reduced her hours and was told variously that she was not entitled to holiday pay because she had "no contract", "only worked one day per week" and was "not flexible". It is her evidence that whilst working full time she was paid her holiday entitlement. The respondent contends that the claimant used up all her leave in 2017 and produced a wall planner to the tribunal to support his evidence that the dates mentioned in paragraph 15 above were taken as paid annual leave.
18. The claimant claims that she did not receive pay slips unless she specifically requested them. The tribunal accept this to be the case based upon text messages furnished to the tribunal.
19. The tribunal carefully assessed and evaluated the evidence of the parties and prefer the evidence of the claimant on the issue of holiday pay for the following reasons: -
 - (i) The claimant's evidence is consistent with the claim as detailed in her IT1;
 - (ii) Her oral evidence was straightforward, compelling and entirely consistent with her IT1;
 - (iii) She produced supporting documentation to include a copy of a letter forwarded to the respondent which is consistent with her IT1 and her oral evidence;
 - (iv) Her oral evidence remained consistent and unwavering when tested under cross examination;
 - (v) She produced bank statements which supported her claim that she had not received holiday pay;
 - (vi) In relation to her claim in so far as it related to pay slips she produced an exchange of text to support her contention that she did not receive pay slips unless she specifically requested them;

- (vii) The respondent contends that the claimant took paid annual leave on 7 specified dates in 2017, yet this is not mentioned in the response to the IT1. The tribunal consider this to be particularly significant;
- (viii) A wall planner for 2017 was produced by the respondent identifying dates taken as leave. However, this was a wipe clean planner and the tribunal was not satisfied as to when the entries were made;
- (ix) In circumstances where this is a claim in which holiday pay is key, it is difficult to understand why the existence of the planner, or the dates allegedly taken was not mentioned in the response;
- (x) The claimant's evidence is that Gary Myles Dickson told her that she was not entitled to holiday pay because she was "not flexible". Mr Myles Dickson agreed that he mentioned that she was "not flexible" but sought to explain this in the context of greater flexibility in accepting extra hours would increase her holiday entitlement;
- (xi) Glen Pavis was at some pains to emphasise to the tribunal the importance of managing staff annual leave particularly at busy periods. This is reasonable and understandable and accepted to be the case. It was his contention and that of Gary Myles Dickson that the claimant took unauthorised leave at busy periods i.e. March 18 and July 8 and 15. However, it was also their evidence that the claimant was not spoken to, let alone reprimanded regarding taking leave without permission at busy times. The tribunal struggle to accept this explanation in the context of the respondents' robust evidence of the importance of sufficient staff being available to cover shifts in the coffee shop and particularly so at busy periods.

20. Having preferred the claimant's evidence for reasons outlined in the previous paragraph, the tribunal find that she was not paid for holidays taken once she reduced her hours in January 2017 and there was no objective justification for this. This is in contrast to the situation described in her evidence and which is accepted, that she was paid her holiday entitlement when she worked full time. The tribunal accepts her evidence that she did not take her holiday entitlement following her move to part time working because she could not afford to take unpaid leave. Further the tribunal accept her evidence that she did not receive written terms and conditions of employment and that there was a delay on the part of the respondent in giving her P45.

21. The tribunal is satisfied that the claimant was deprived of her holiday entitlement once she reduced her hours in January 2017. The tribunal accept (for reasons given above) that her version of her conversations with Glen Pavis and Gary Myles Dickson is accurate and that she was denied holiday pay because she was a part time worker working only one day a week. The tribunal is therefore satisfied on the balance of probabilities that the claimant was subjected to less favourable treatment in contravention of the Regulations. Further the tribunal is satisfied that she was denied holiday pay from January 2017 onwards in contravention of the Regulation 15 of the Working Time Regulations (Northern Ireland) 2016.

22. In accordance Regulations 5 (7) to (12) of the Regulations the tribunal order the Respondent to pay the sum of £485.46 to the claimant being the amount calculated by her as being due in respect to her holiday entitlement between January 2017 and her resignation in September 2018. The tribunal is mindful that, although workers are only entitled to paid leave taken during the leave year under the Working Time Regulations (Northern Ireland) 2008 (which the claimant is in any event entitled to) this is not the case relative to a claim under the Regulations.
23. The tribunal is satisfied that it is just and equitable to award the sum of £485.46 to the claimant as it represents the loss sustained by the claimant by reason of the infringement of her rights under the Regulations. The tribunal has no power to award compensation in respect of injury to feelings and there is no evidence of any other loss sustained. The claimant started work immediately following her resignation with no diminution in pay.
24. The tribunal is satisfied for the reasons given above that the claimant did not receive her pay slips in accordance with her rights under Article 40 of the Employment Rights (Northern Ireland) Order 1996 and declare this to be the case.
25. The tribunal is also satisfied that the claimant did not receive her P45 in a timely manner but is satisfied that it has been received by her. In finding this to be the case the tribunal accept her evidence that if posted to her old address it would have been given to her by the new occupier of the property who was a friend of hers and it was not received by her at her new address. The tribunal note a copy of a letter dated the 11 September 2018 which although not clearly legible is sufficiently legible to confirm the claimant's evidence that she requested pay slips and her P45 from the respondents on that date (11 September 2018).
26. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 27 March 2019, Belfast.

Date decision recorded in register and issued to parties: