

THE INDUSTRIAL TRIBUNALS

CASE REF: 14923/19

CLAIMANT: Abad Ali

RESPONDENTS: 1. India Taste Limited
2. Tariq Masood

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's holiday pay claim is well founded and first-named respondent shall pay the claimant **£944.54 gross** in respect thereof.

When proceedings began the first-named respondent was in breach of its duty to provide the claimant with a written statement of employment particulars in respect of which the tribunal makes an award of **£362.92**.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Bell

Members: Mr I Atcheson
Mr I Carroll

APPEARANCES:

The claimant attended in person. Mr Imran Janjua was present to interpret the proceedings for the claimant.

Mr Tariq Masood appeared in person. Mr Imran Janjua also interpreted the proceedings for the second-named respondent.

1. The claimant in his claim complained he had not received holiday pay for his work as a chef between 26 February 2018 and 21 April 2019, a P60, P45 and payslips for March and April 2019.
2. In his response the second named respondent contended that the correct respondent was India Taste Limited, a limited company, which had employed the claimant between 7 May 2018 and 22 March 2019, for whom he named himself as the contact. Basic hours and earnings set out in the claimant's claim were agreed and no intention to resist the claimant's claims confirmed. At a Case Management Preliminary Hearing on 4 February 2020, India Taste Limited (of which the second named respondent is a director) was joined as a respondent to the proceedings and response already lodged accepted on its behalf.

3. At a Case Management Preliminary Hearing on 5 November 2021 dispute was confirmed between the parties as to whether the second named respondent was the claimant's employer or the second named respondent and claimant both employed by the first named respondent. The claimant was advised the tribunal could not provide him with a P45 or P60 and the remaining issue for determination was one of any outstanding holiday pay and for the claimant to prove. The second named respondent stated he was illiterate and that he would require assistance in understanding any documentation at hearing.
4. At substantive hearing the interpreter present to interpret proceedings at the request of the claimant also interpreted for the respondent and assistance was furthermore provided by the tribunal to the second named respondent where required by reading out documentation to ensure he understood it.
5. The claim, response, oral testimony of the claimant and the second named respondent and documentation presented by both parties were taken into consideration.

ISSUES

6. The issues for determination by the tribunal were:-
 - a. Who was the claimant employed by?
 - b. Is the claimant entitled to holiday pay?
 - Is the claimant due payment for paid holiday entitlement accrued due to termination of employment?
 - Does statutory holiday entitlement *carry over*?
- Otherwise
- Has the claimant suffered an unlawful deduction/ series of unlawful deductions from wages in relation to payment due for holidays taken?

RELEVANT LAW

7. The Working Time Regulations (Northern Ireland) 2016 provide workers a total of 5.6 weeks minimum statutory paid holiday entitlement per leave year and the right to receive payment for untaken leave accrued where employment is terminated during the course of the leave year. Provision is made under:-
 - Regulation 15, for 4 weeks paid holiday entitlement [derived from European Law (the Working Time Directive)], which may only be taken in the leave year for which it is due, and which cannot be replaced by a payment in lieu save upon termination; and for the workers' leave year to begin on the date on which the employment begins and each subsequent anniversary of that date in the absence of a relevant agreement.
 - Regulation 16, for an additional 1.6 weeks [under national law] (subject to an aggregate maximum of 28 days per leave year), which cannot be replaced by

a payment in lieu save on termination, and which may be carried over to the following year where there is a relevant agreement to do so.

- Regulation 17, to receive payment for untaken leave accrued where the worker's employment is terminated during the course of his leave year.
 - Regulation 20, for payment at the rate of a week's pay for each week of leave entitlement under the Regulations.
 - Regulation 43, to seek redress through an industrial tribunal for a refusal by his employer to permit the worker to exercise rights including those under Regulation 15 or 16, or failure to pay the whole or any part of any amount due to the worker under regulation 17(2) (subject to time limits therein for presentation of a complaint) and for an industrial tribunal to award compensation if the complaint is found to be well-founded.
8. Article 45 of The Employment Rights (Northern Ireland) Order 1996 provides a worker the right not to suffer an unauthorised deduction from wages and for a deficiency in the total amount of wages paid against that properly payable to be treated as a deduction.
 9. Workers who are denied holiday pay can bring a claim under the Working Time Regulations or as an unauthorised deduction from wages claim (***HMRC v Stringer [2009] IRLR 677***), the appropriate remedy for either is the holiday pay properly due which has not been paid.
 10. The general rule under UK wide working time legislation is that statutory paid holiday entitlement does not *carry over* at the end of a leave year. Case law has however established that unused statutory holiday (in relation to the 4 week minimum derived from European Law) should be allowed to be carried in certain circumstances and subject to certain limitations.
 11. In ***HMRC v Stringer [2009] IRLR 677*** the European Court of Justice (ECJ) ruled national legislation cannot allow that the right to take paid leave is extinguished at the end of the year if the worker does not work because of sickness and worker is entitled to get an allowance in lieu if employment is terminated.
 12. In ***King v The Sash Window Workshop and another [2017] C-214/16, ECLI:EU:C:2017:914*** the Court of Appeal in England and Wales noted that in preventing annual leave being carried over national legislation did not necessarily ensure *an effective remedy* for breach of worker's leave entitlement under European legislation and referred to the Court of Justice of the European Union (CJEU) questions upon interpretation and the right to an effective remedy. The CJEU recognised national provisions were not precluded from fixing a carry-over period after which the right to paid annual leave could be lost where the worker had been unfit for work for several years but considered the carrying over and accumulation of paid annual leave rights could not be precluded where they were not exercised because the employer refused to remunerate that leave. Mr King ultimately was found entitled to compensation *for untaken holiday* throughout his employment relationship in circumstances where he had been mischaracterised as self-employed.

13. In ***Smith v Pimlico Plumbers Ltd [2022] EWCA Civ 70*** the Court of Appeal in England and Wales held that the right to payment for unpaid leave extends to workers *who have taken their leave but not been paid for it* and unless the employer has given the worker the opportunity to take paid annual leave, encouraged them to do so, and informed them that the right would be lost at the end of the leave year, does not lapse but carries over and accumulates until the termination of the contract, at which point the worker is entitled to a payment for all the unpaid leave and a claim for payment made within three months of termination will be in time.
14. Thus the minimum 4 week paid leave entitlement derived from European Law should be permitted to carry over in circumstances such as a worker unable to take their statutory holiday leave in the year of accrual due to maternity leave, or sick leave (subject to time limits for use thereafter), or where the worker did not have an effective opportunity to take *paid* annual leave - with the burden upon the employer to show provision to the worker of sufficient information about their entitlement and its potential loss at the end of the leave year.
15. Disagreeing with the EAT's approach in ***Fulton and another v Bear Scotland Ltd (2016) UKEATS/0010/16 T*** (where it held claims for arrears of holiday pay will be out of time if there has been a break of more than three months between successive underpayments) the Northern Ireland Court of Appeal in ***Chief Constable of the Police Service of Northern Ireland (PSNI) v Agnew (Alexander) and Others [2019] NICA 32*** considered this would lead to unfair outcomes and found that whether there is a series of unlawful deductions is question of fact to be decided in each individual case; a series is not ended, as a matter of law, by a gap of more than three months between unlawful deductions nor is it ended by a lawful payment.
16. Under Article 33 ERO where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment as provided therein.
17. Article 27 of The Employment (Northern Ireland) Order 2003, in proceedings before an industrial tribunal in respect of specified jurisdictions which include unauthorised deductions and payments, if the tribunal makes an award to the employee in respect of the claim, and when the proceedings were begun the employer was in breach of his duty to the employee under Article 33 ERO, the tribunal shall increase the award by the minimum amount equal to two week's pay to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount equal to four week's pay instead. The tribunal's duty does not apply if there are exceptional circumstances which would make an award or increase unjust or inequitable.

FINDINGS OF FACT

The tribunal finds the following relevant facts on a balance of probabilities:-

18. The second-named respondent is director of India Taste Limited.
19. The claimant following introduction via a friend to the second named respondent began to work with him as a chef on 26 February 2018. No discussion took place between the claimant and second named respondent as to the correct identity of the claimant's employer. No statement of particulars of employment was provided to the

claimant and only document obtained by the claimant was a letter which the second named respondent signed to confirm the claimant was *'an employee with Taste of India since 26/02/2018. Furthermore the company will provide free residence to the employee during the period of job.'*

20. Payslips thereafter issued to the claimant bore the name *'India Taste Limited'*. The claimant confirmed the payslips produced by the second named respondent at hearing for payments made to the claimant for months ending September and October 2018 were similar to others he had received during his employment. The claimant's payslips for months ending 30 Sep 2018 and 31 Oct 2018 were each for pay of £829.64 gross, being £814.32 net.
21. The second-named respondent also received monthly employee payslips entitled *'India Taste Limited'*.
22. The claimant in his originating claim identified his basic working hours as 25 hours per week and usual pay as £814.32 net per month.
23. The claimant's employment terminated on 21 April 2019.
24. The claimant contended in his evidence that his working hours and consequently pay had increased significantly from around September 2018 following the departure of another staff member whereas the second named respondent contended the respondent business was not open for the hours the claimant suggested he had worked. The tribunal find on balance most credible and probable supported by the claimant's originating claim, the respondent's response and payslips for months ending September and October 2018 produced at hearing that the claimant's normal pay at termination of employment was £829.64 gross being £814.32 net per month , which is approximately £191.46 gross per week.
25. No payment was made to the claimant for statutory paid holiday entitlement during or after termination of his employment by either respondent for either leave taken or untaken.
26. There is no evidence before the tribunal that either respondent gave the claimant the opportunity to take paid annual leave, encouraged him to do so, or informed him that the right to it would be lost at the end of his leave year.
27. The tribunal is not persuaded there was a relevant agreement between the claimant and either respondent permitting the claimant's additional 1.6 weeks paid entitlement under Regulation 16 to carry over from one holiday year into the next.
28. There is no evidence before the tribunal of exceptional circumstances relating to the first named respondent's compliance with the duty under Article 33 ERO to give to the claimant a written statement of particulars of employment.
29. The claimant presented his claim to the office of the tribunals on 9 July 2019, within three months of termination of his employment.

CONCLUSIONS

Who was the claimant employed by?

30. The tribunal find on balance supported by payslips produced that the claimant was employed by India Taste Limited, the first named respondent.

Is the claimant due payment for paid holiday entitlement accrued due to termination of employment? Does statutory entitlement 'carry over'?

31. The tribunal is satisfied the claimant did not receive payment for any holiday leave, either taken or untaken, throughout his employment. Neither respondent has met the burden of showing the claimant's 4 week minimum entitlement under Regulation 15, derived from European law, lapses. The tribunal is not persuaded that there was a relevant agreement whereby the claimant's additional 1.6 weeks paid entitlement under Regulation 16 carries over from his first holiday year into the second. The tribunal is on balance satisfied that claimant is due payment under Regulation 17 for 4 weeks paid holiday entitlement carried over from his first holiday year accumulated with minimum statutory paid entitlement accrued up to termination of his employment, as follows:-

Holiday Year 1, 26 February 2018 to 25 February 2019

4 weeks @ £191.46 gross per week = £ 765.84

Holiday Year 2, 26 February 2019 to 21 April 2019

Say, 2 /12 months x 5.6 weeks @ £191.46 gross = £ 178.70

Total gross holiday pay due **£ 944.54**

32. It is furthermore apparent that at the time proceedings were begun the first named respondent was in breach of its duty under Article 33 ERO to give to the employee a written statement of particulars of employment and in the absence of evidence of exceptional circumstances which would make an award or increase unjust or inequitable the tribunal makes an increased award under Article 27 of The Employment (Northern Ireland) Order 2003 equal to two week's pay (at £191.46 gross) being **£362.92**.
33. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 3 March 2022, Belfast.

This judgment was entered in the register and issued to the parties on: