



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr A Osborne
(2) Mr L Osborne

Respondents: Milton and Stirling Limited

Heard at: Remotely by CVP **On:** 26 April 2021

Before: Employment Judge Holmes

REPRESENTATION:

Claimants: Mr A Osborne
Respondent: No attendance or representation

JUDGMENT

It is the judgment of the Tribunal that:

1. Case No. 2419883/2020 : Mr A Osborne

1. The claimant was dismissed in breach of contract , and is entitled to notice pay. The claimant was entitled to one week's notice, at a gross rate of £538.46 per week. The Tribunal makes an award of **£538.46**, as damages for breach of contract, which sum the respondent is ordered to pay him. This is gross sum, and the respondent must account to HMRC for any tax and national insurance payments due upon it.
2. The claimant's complaint of failure to pay to the claimant an amount due to the claimant under regulation 14 (2) or regulation 16 (1) of the Working Time Regulations 1998 is well-founded and the first respondent shall pay to the claimant the sum of **£2035.34** in respect of 18.9 days' untaken but accrued holiday (holiday pay) at the rate of £107.69 per day. This is a gross sum, and the respondent should account to HMRC for tax and national insurance (if any) due upon it.
3. The claimant lacks two years' qualifying service to present a claim for a redundancy payment, and this claim is dismissed.

2. Case No. 2419884/202 ; Mr L Osborne

4. The claimant was dismissed in breach of contract , and is entitled to notice pay. The claimant was entitled to one week's notice, at a gross rate of £221.15 per week. The Tribunal makes an award of **£221.15**, as damages for breach of contract, which sum the respondent is ordered to pay him. This is gross sum, and the respondent must account to HMRC for any tax and national insurance payments due upon it.
5. The claimant's complaint of failure to pay to the claimant an amount due to the claimant under regulation 14 (2) or regulation 16 (1) of the Working Time Regulations 1998 is well-founded and the first respondent shall pay to the claimant the sum of **£654.60** in respect of 14.8 days' untaken but accrued holiday (holiday pay) at the rate of £44.23 per day. This is a gross sum, and the respondent should account to HMRC for tax and national insurance (if any) due upon it.
6. At the time of the bringing of the claims the respondent had failed to provide to the claimant a written statement of particulars of employment, as required by s.1 of the Employment Rights Act 1996. The Tribunal accordingly, in accordance with s.38 of the Employment Act 2002 , makes an additional award of 4 weeks pay, at the weekly rate of £221.15, a total of **£884.60**.
7. The claimant lacks two years' qualifying service to present a claim for a redundancy payment, and this claim is dismissed.

REASONS

1. The code V in the header indicates that this was a CVP hearing, held because the Tribunal considered that the issues could be determined without the need for an in person hearing. Neither party objected to that . Mr A Osborne appeared for both claimants. The respondent did not participate and was not represented.

The absence of the respondent and its applications to postpone

2. Mr John Lindsay, Managing Director of the respondent had, by email to the Tribunal on 23 April 2021 made an application for a postponement , in order that the respondent could seek legal advice, and be represented. That application , which was objected to by the claimants was refused. By a further email at 14.09 on the day of the hearing, Mr Lindsay sent a further email. In it he says he "will not be available" for the hearing. He goes on to claim that when he had made his application there was "zero correspondence back for another few days". He said he had not made an application for a postponement before, and was asking for it a make sure the business was fully supported when the matter goes ahead given the seriousness of the claims. He apologised for bringing in a solicitor later than he should have, but

again made reference to requesting (presumably a postponement) “numerous times”, and how getting a solicitor was “imperative”.

3. The Employment Judge sought the claimants’ views from Mr Osborne, He was most anxious that the matter proceed.

4. As this appeared to be a renewed application for a postponement (indeed the respondent had been told that it could be renewed at the hearing), the Employment Judge considered it further. Here was no explanation why Mr Lindsay had not participated in the hearing, at least to pursue the application. Whilst he had apologised for leaving it late to involve a solicitor, he had not explained why he had left if so late. Further, his suggestion that he had made this request numerous times is not borne out by the Tribunal file. Further, these are simple claims. Each claimant has claimed notice pay and holiday pay. The defence in each case is a simple factual one. The respondent contends that the claimants were in fact given verbal notice, worked it and were paid for it. In respect of the holiday pay claims, the defence is simply that both of the claimants had taken and been paid for their entitlement. These are simple factual disputes, which do not require any legal expertise. Nor are the allegations, as the respondent contends, particularly serious, when compared, for example with discrimination allegations. Had Mr Lindsay bothered to participate in the hearing these matters could have been explained to him, and, even without the formalities of witness statements, and other preparation, the claims could easily have been heard as disputed claims. The Employment Judge accordingly rejected any further application for a postponement , and proceeded to hear the claims.

The claims.

5. By claim forms presented to the Tribunal on 14 December 2020 the claimants, who are father and son, brought claims for notice pay, and for holiday pay , arising from their period of employment with the respondent between January and September 2020.

6. Responses to both claims were received. The respondent firstly claimed that the claimants had been given notice, worked it, and were paid up until its expiration. In response to the claims for holiday pay, the respondent contended that the claimants had taken all their entitlement, and had outstanding untaken holiday at the date of termination.

7. Mr Osborne provided the Tribunal with documents supporting the claimants’ claims, and confirmed that they had not been given notice as the respondent contends. He produced, in particular, a text message from Mr Lindsay on 29 September 2020, at 16.48 , in which he said, in response to Mr A Osborne asking him when he and others would get their P45s and what was happening to the holiday pay also:

“Hi mate, I have chased these up with payroll again today, with regards to holiday pay this will be run in next month’s pay, we had only decided to close down the

operation yesterday mate hence we haven't got the P45s or anything else sorted yet."

8. That rather undermines any contention that the respondent had given verbal notice some two weeks previously as alleged in the responses. It also is inconsistent with any contention that the claimants had already exhausted their holiday entitlement. In any event, as the respondent has not adduced any evidence (apart from one alleged letter of dismissal dated 14 September 2020 to Ben Williams, another employee who was dismissed, and who has successfully brought his own claim), and has not attended or participated, the Tribunal has accepted the claimants' case, and finds that they were both dismissed without notice, and had not taken, and not been paid for, all of their outstanding holiday entitlement at the time of their dismissals. Their claims succeed.

The awards to be made.

i) The first claimant Anthony Osborne.

9. The Employment Judge went through this claimant's claims. He did in fact have a contract of employment, which he had not provided to the Tribunal, but which he had with him. This established that he had no greater notice entitlement than the one week statutory notice provided by s.86 of the Employment Rights Act 1996.

10. He confirmed that he had not received any earnings or state benefits during the week of his notice period, so no mitigation of that loss fell to be deducted from the award.

11. In terms of one week's pay, this claimant's salary was £28,000 per annum, which is £538.46 per week. That will be the award of the Tribunal as damages for breach of contract. As this is a gross sum, it will be subject to deductions for tax and national insurance.

12. Turning to the claim for holiday pay, the claimant started his employment on 15 January 2020, and it was terminated on 28 September 2020. He worked a 5 day week. The contract of employment, however, provides that the Leave Year runs from "January to December". That must mean from 1 January to 31 December. The claimant accordingly started part way through the Leave Year, and finished part way through the Leave Year. He therefore had accrued an entitlement to 20.9 days holiday. He had taken two days leaving him with an unused entitlement on termination of 18.9 days.

13. Whilst in the claim form the claimant had used the figure of £88.20 as his daily rate of pay, this cannot be right. £28,000 per annum, is £538.46 per week, which for a 5 day week produces a figure of £107.69. 18.9 days therefore equates to £2035.34. This is the sum which the Tribunal awards for pay in lieu of untaken holiday. This too is a gross sum, and the respondent should account to HMRC for tax and national insurance due upon it.

14. Finally, whilst this claimant had, in box 9.2 of the claim form sought a further sum of £1000 for “expenses and repaying moneys borrowed and stress and anxiety”, the Employment Judge explained how the latter could not be awarded in purely money claims such as these, and whilst it was possible to claim any consequential losses arising from late or non – payment of wages (such as bank charges and the like), in the absence of specific claims, properly evidenced , of actual costs incurred, these could not be awarded. The claimant accepted this, and sought no further award.

ii)The second claimant Anthony Osborne.

9. The Employment Judge went through this claimant’s claims. He did not have a contract of employment, or statement of terms of employment.

10. The first claimant confirmed that he had not received any earnings or state benefits during the week of his notice period, so no mitigation of that loss fell to be deducted from the award.

11. In terms of one week’s pay, this claimant’s salary was £11,500 per annum, which is £221.15 per week. That will be the award of the Tribunal as damages for breach of contract. As this is a gross sum, it will be subject to deductions for tax and national insurance.

12. Turning to the claim for holiday pay, the claimant started his employment on 28 January 2020, and it was terminated on 28 September 2020. He too worked a 5 day week. As he has no contract of employment, however, the Leave Year runs from the start of his employment. This claimant accordingly left part way through the Leave Year. He therefore had accrued an entitlement to 18.8 days holiday. He had taken four days leaving him with an unused entitlement on termination of 14.8 days.

13. Whilst in claiming this entitlement the claimant had used a different daily rate, this cannot be right. £11,500 per annum, is £211.15 per week, which for a 5 day week produces a daily figure of £44.23. 14.8 days therefore equates to £654.60. This is the sum which the Tribunal awards for pay in lieu of untaken holiday. This too is a gross sum, and the respondent should account to HMRC for tax and national insurance due upon it.

14. Finally, whilst this claimant had, in box 9.2 of the claim form sought a further sum of £500 for the emotional distress and anxiety caused, the Employment Judge’s comments in para. 14 above apply to this head of claim as well. The first claimant accepted this, and sought no further award.

Additional award.

15. The Employment Judge did enquire of the first claimant whether the second claimant too had been provided with a contract of employment, or some form of written statement of particulars of employment. Failure to do so requires (the wording is mandatory) an additional award under s.38 of the Employment Act 2002 to be

made. The second claimant, however, had not been provided with a contract of employment, nor any written statement of particulars of his employment.

16. The Tribunal is accordingly required to make an additional award of either two or four weeks' pay. As there has been no mitigation advanced by the respondent, nor any documents produced at all by it, the Employment Judge considers that the higher award should be made. The Tribunal makes an additional award of four weeks pay at £221.15, £884.60.

The claims for redundancy payments.

17. Whilst both claimants had made claims for redundancy payments, the first claimant accepted that they could not do so, and these claims are dismissed.

Employment Judge Holmes
Dated: 26 April 2021

JUDGMENT SENT TO THE PARTIES ON

4 May 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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

Tribunal case number: **2419883/2020**

Name of case: **Mr A Osborne** v **Milton and Stirling Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **4 May 2021**

"the calculation day" is: **5 May 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding discrimination or equal pay awards* or sums representing costs or expenses) if they remain wholly or partly unpaid after 42 days.

3. The 42 days run from the date on which the Tribunal's judgment is recorded as having been sent to the parties and is known as "the relevant judgment day". The date from which interest starts to accrue is the day immediately following the expiry of the 42 days period called "the calculation day". The dates of both the relevant judgment day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request a reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

* The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 prescribes the provisions for interest on awards made in discrimination and equal pay cases.