



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4102103/2023**

**Final Hearing held at Glasgow remotely by Cloud Video Platform on  
13 June 2023**

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**Employment Judge A Kemp**

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**Miss Lauren Irving**

**Claimant  
Represented by:  
Ms Janice Reid,  
Representative**

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**Ms Anna Walden, trading as Bombshell**

**Respondent  
No appearance or  
representation**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**1. The designation of the respondent is amended to Ms Anna Walden, trading as Bombshell Beauty Boutique.**

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**2. The claims against the respondent for unlawful deduction from wages in respect of accrued entitlement to annual leave succeeds, and the claimant is awarded the sum of SIX HUNDRED AND FORTY NINE POUNDS THIRTY TWO PENCE (£649.32) payable to her by the respondent.**

## REASONS

### Introduction

1. This was a Final Hearing of a claim for holiday pay made by the claimant against a respondent designed as Serenity. The claimant has been represented by Dumfries and Galloway Citizens Advice Service, initially by Mr Bertram and at the hearing by Ms Janice Reid. The respondent had not entered appearance in the case, and did not appear at this Hearing. Notice of the same had been given. The designation of the respondent is addressed further below.
2. There are two claims that can in law be made for holiday pay being (i) accrued holiday pay under the Working Time Regulations 1998 (“the Regulations”) and (ii) for unlawful deduction from wages under Part II of the Employment Rights Act 1996.

### The issues

3. The issues before the Tribunal were:
  - (i) Did the claimant have an entitlement at termination of her employment to pay for annual leave?
  - (ii) Were there unlawful deductions from the claimant’s wages as to holiday pay?
  - (iii) If the claim succeeds in whole or part to what remedy is the claimant entitled?

### The evidence

4. The claimant gave evidence herself, and spoke to a Bundle of Documents that had been prepared. She answered questions clearly and candidly.

### The facts

5. The claimant is Miss Lauren Irving.
6. On 1 December 2017 she commenced employment with Ms Maria Noble who traded as Serenity Holistic Beauty and Nails at 6 Brooke Street, Dumfries DG1 2JL. She did so under a contract of employment issued in

5 writing. The claimant worked 16 hours per week, over three days per week, being five hours on each of Mondays and Tuesdays and six hours on Thursdays. She was paid the national living wage, which for the period after 6 April 2022 was at the rate of £9.50 per hour. The contract provided that the entitlement to holidays was for the holiday year starting on 1 January and ending on 31 December each year. It made reference to the Working Time Regulations.

7. In mid-November 2021 the claimant and her colleague received a letter from Ms Noble stating that she would be selling the business to Ms Anna Walden, that Ms Noble would be paying wages until 31 December 2021, and that Ms Walden had assured her that “she is keeping you working as things are now.”

8. Ms Walden took over the business on or around 1 January 2022. The claimant and her colleague continued to work at it, on the same basis as previously. From 1 January 2022 Ms Walden employed the claimant and her colleague. Ms Walden continued to use the same trading name of Serenity Holistic Beauty and Nails, and traded from the same premises at 6 Brooke Street, Dumfries DG1 2JL. The claimant continued to work 16 hours per week on the same days and for the same hours as she had done. She continued to be paid at the national minimum wage.

9. The claimant took a week’s holiday in February 2022. She did not take any other holidays during the calendar year 2022.

10. The claimant went off sick on 16 March 2022. She passed fit notes from her General Practitioner to Ms Walden. Ms Walden did not pay her for sick pay. The claimant consulted Dumfries and Galloway Citizens Advice Service for assistance, but understood that she had done so after the time-limit for pursuing a claim for that had passed.

11. At that time the claimant was resident at a Women’s Aid facility with her two young children, and was attending court hearings involving her former husband. Towards the end of the year she considered that as the court hearings were concluding she could be fit enough to attend work. She messaged Ms Walden on 30 November 2022 about sick pay and holiday pay. She did not receive a reply. She sent reminders on 5 and 8 December

2022. On 8 December 2022 Ms Walden replied stating that she was seeking legal advice.

- 5 12. On 30 December 2022 the claimant resigned her employment with immediate effect. Her employment terminated on that date. The claimant had been off sick continuously for the period from 16 March 2022 to that date, and had sent Ms Walden fit notes from her GP to certify that.
13. After termination Ms Walden paid the sum of £142.50 to the claimant, stating that it was a gesture of goodwill.
- 10 14. The claimant commenced Early Conciliation as against "Serenity" on 23 January 2023 and the Certificate was issued on 6 March 2023.
- 15 15. The Claim Form was presented by the claimant to the Tribunal on 9 March 2023. It designed the respondent as "Serenity".
16. On 19 April 2023 the claimant's representative emailed the Tribunal with a copy to Ms Walden applying to amend the name of the respondent to "Bombshell Beauty Boutique" attaching a posting on social media to confirm that change of trading name, which change had been with effect from 14 March 2023.
- 20 17. On 21 April 2023 Ms Walden emailed the claimant's representative with regard to correspondence sent to the Tribunal. The Tribunal replied to Ms Walden on 25 April 2023 referring to the possibility of sending a Response Form and application for extension under Rule 20. There was no reply to the same.

### **The Law**

- 25 18. Wages are defined in section 27 of the Employment Rights Act 1996, and include "any sums payable to the worker in connection with his employment, including.....holiday pay...."
- 30 19. There are provisions under section 23(2) of the Employment Rights Act 1996, by which the claim must be commenced within three months of the date of payment of wages. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and

provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

20. There is a right to holiday pay arising from the Working Time Regulations 1998 ("the Regulations"). The Regulations give effect to the Working Time Directive 2003/288/EC ("the Directive"). The Directive is part of retained law under the European Union (Withdrawal) Act 2018. The Regulations require to be construed purposively in accordance with the Directive, and as interpreted by the case law of the Court of Justice of the European Union ("CJEU"). The position was considered by the Court of Appeal in ***NHS Leeds v Larner [2012] IRLR 825***, and has been considered by subsequent cases both in the UK and CJEU. For present purposes the effect of the authorities is that the right to annual leave continues to accrue during a period of absence on account of sickness.

21. The Regulations state that there is an entitlement to annual leave in Regulations 13 and 13A, which total 5.6 weeks per annum. Compensation related to annual leave is provided for in Regulation 14 for those cases where employment terminates during the course of a leave year. The ability to enforce the rights under the Regulations is conferred in Regulation 30.

## Discussion

22. I was entirely satisfied that the claimant gave credible and reliable evidence. I accepted all that she said. I was also satisfied that the claim was within the jurisdiction of the Tribunal.

23. It was I considered clear that there had been a transfer of undertaking, being a relevant transfer under Regulation 3, of the Transfer of Undertakings (Protection of Employment) Regulations 2006. There was at the least the transfer of an economic entity which retained its identity under Regulation 3(1)(a) from the facts set out above. The effect of that transfer under Regulation 4 was that the contract of employment held with

Ms Noble was transferred to Ms Walden as the transferee. That was also borne out by the fact that the same hours and days continued after the transfer.

24. The Claim Form had initially been addressed to "Serenity". The claimant's representative had applied to amend that to the new trading name by email on 19 April 2023, but that had not been addressed prior to this Hearing. The application had been intimated to Ms Walden who had responded, but not to oppose the application. Having heard the evidence however it appeared to me, from that oral and written evidence, that the legal entity which was the transferee under the Regulations was Ms Walden. Ms Walden initially retained the same trading name as Ms Noble had used, but latterly changed it. But the legal entity as employer of the claimant was Ms Walden, as a sole trader, from the evidence before me.

25. Rule 34 permits a Tribunal to add, substitute or remove a party where it appears that there are issues between that person and any of the existing parties, which it is in the interests of justice to have determined in the proceedings. That Rule is considered having regard to Rule 2 which contains the overriding objective. I considered that it was in accordance with those provisions to substitute Ms Anna Walden, using the current trading name, for the respondent. Should Ms Walden consider that there has been any injustice by doing so, she can seek a reconsideration of this Judgment under Rule 71.

26. I then considered whether the claimant had demonstrated an entitlement to holidays for 2022, which had not been paid, which fell either as an unlawful deduction from wages or a breach of Regulation 14 of the Regulations or both. I was satisfied that she had. The entitlement to holidays continues to accrue whilst a person is off sick. The holiday year was the calendar year. The full entitlement was to 5.6 weeks. One week had been taken. The balance is 4.6 weeks. The period to termination was one day less than the full year. That reduces the entitlement very slightly. Ms Walden paid £142.50 to the claimant as a gesture of goodwill. I considered that that payment required to be taken into account as potentially discharging in full or part the entitlement. I accepted the

claimant's evidence that she had taken one week of paid annual leave in the holiday year. I also accepted her evidence that she had sent fit notes for the full period of her absence, and had remained in employment until she resigned with immediate effect on 30 December 2022.

5 27. I calculate that the entitlement accrued during the period of employment is 5.6 weeks x 16 hours per week = 89.6 hours, reduced by 1/365 for the one day short of the full year, which reduces it to 89.35 hours. One week or 16 hours was taken, reducing the total to 83.35 hours. The payment made was £142.50 which is the equivalent at the national living wage at the time of 15 hours. The balance is 68.35 hours. I consider accordingly that the respondent has not paid all the holiday pay that accrued during the holiday year, and that there has been an unlawful deduction from wages, and breach of Regulation 14, as a result. The balance due calculated at the national living wage of £9.50 per hour is the sum of 10 15 £649.32.

28. The claimant also sought payment for two bank holidays, one for the Queen's platinum jubilee, and the other for the Queen's funeral. Those were not however days that as a matter of law employers were required to provide paid holidays. I did not consider that I could make an award for those days accordingly. 20

### Conclusion

29. I substitute the name of Ms Anna Walden trading as Bombshell Beauty Boutique for that of the respondent, find in favour of the claimant on the merits of the claim, and make the award set out above. 25

**Employment Judge: A Kemp**  
**Date of Judgment: 15 June 2023**  
**Entered in register: 16 June 2023**  
30 **and copied to parties**

