



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr D Rowberry (1)  
Mrs D Rowberry (2)

**Respondent:** K2 Services Ltd

**Heard at:** Birmingham                      **On:** 16 July 2019

**Before:** Employment Judge Miller

## **Representation**

**Claimants:** In person  
**Respondent:** Ms S Newton, General Manager

# JUDGMENT

1. The judgment of the Employment Tribunal is as follows:
2. The Claimants' claims for holiday pay succeed.
3. The Respondent shall pay the 1<sup>st</sup> Claimant (Mr Rowberry) the gross sum of £731.96 in respect of holiday pay for 7.7 weeks at £95.06 per week.
4. The Respondent shall pay the 2<sup>nd</sup> Claimant (Mrs Rowberry) the gross sum of £353.17 in respect of holiday pay for 3.7 weeks at £95.45 per week.

# REASONS

## **Introduction**

1. This case is about whether the claimants are entitled to be paid holiday pay for untaken holiday on the termination of their employment and, if so, how much.
2. The claimants both worked for the respondent, K2 Services Ltd, and they are husband and wife. Mr Rowberry started working for the respondent in 2010 and Mrs Rowberry started working for the respondent in 2013. Both claimants were employed as security operatives on what they described as

zero-hour contracts. It was not disputed that both claimants were workers and that their claims fall within the ambit of the Working Time Regulations 1998.

3. The respondent is a limited company providing security services to events including football matches.

### **The issues**

4. The claimants' employment with the respondent ended in 2018. The only question before the tribunal was identified by employment judge Harding in the preliminary hearing on 18 April 2019. That is, how much holiday pay is each claimant entitled to be paid on the termination of their employment (regulation 14 of the Working Time Regulations 1998)?

### **The Hearing**

5. The claimants each represented themselves at the hearing and the respondent was represented by Ms Newton.
6. Ms Newton had provided a witness statement which she confirmed and I read. The claimants also provided a witness statement. However, the claimants' statement was prepared by both claimants together and it was not possible to determine which claimant was giving evidence about what issues in that statement. I heard oral evidence from Mr and Mrs Rowberry individually as well as Ms Newton for the respondent. I have had regard to the written statement of the claimants in so far as it is relevant but I have given it appropriate weight.
7. Each party provided a bundle of documents. These bundles were not the same, but they both contained relevant payslips. The bundles also included p60s, p45s and some correspondence. It also included some correspondence with ACAS and to the extent that that is without prejudice, I have not taken it into account.
8. The respondent provided some spreadsheets and printouts from its "Sage" accounting system with a breakdown of the hours worked and wages paid for each of the claimants.
9. The hearing was listed for 3 hours and I explained to the parties that they could have a break if necessary. I explained the process for the hearing, confirmed that the issues to be decided were agreed and adjourned for 15 minutes to read the statements.
10. All witnesses were asked questions by way of cross-examination and I asked further questions.
11. Based on this evidence, I made the findings of fact set out below.

## Findings of fact

### The contracts of employment

12. The claimants were engaged by the respondent on zero-hour contracts. That is, they worked for the respondent as event security on an “as needed basis”. There was no dispute about this. The respondent provided documents referred to and labelled as contracts of employment in respect of each claimant. Both contracts were identical as to terms so references in these reasons to “the contract” are references to each contract as it applies to the relevant claimant unless I say otherwise.
13. Clause 4 of the contract on which the respondent sought to rely says, as far as is relevant, “The specific hours are job and client dependent. Due to the nature of the work you will be expected to work week-ends and unsociable hours as required”. This contract was said by the respondent to apply to both Mr and Mrs Rowberry. Although Mr Rowberry said that he had never signed a copy of this contract, he did not say that the terms did not apply to him and the respondent clearly considered that Mr and Mrs Rowberry were each engaged under this form of contract.
14. I therefore find as a fact that both claimants worked under a contract which included the term that the respondent would offer a claimant work if it wished and that a claimant could take that work if it wished. However, the respondent was not obliged to offer work and the claimants were not obliged to accept any work that was offered.

### The working week

15. The parties agreed in the claim and response forms respectively that the claimants’ employments both ended on 29 August 2018. When questioned by Ms Newton, each claimant agreed that the last shifts they worked were around the May bank holiday in 2018. This accords with the pay records which identify that the last payment of wages made by the respondent to each employee was on 12 June 2018. In both cases, this was for work done in the week commencing Sunday 27 May 2018. Ms Newton explained, and Mrs Rowberry agreed, that wages were paid on the second Tuesday following the Sunday at the end of a working week.
16. Ms Newton explained that the working week runs from 7am Sunday to 7am Sunday and this was not disputed. I find, therefore, that the claimants’ working weeks ended on a Sunday at 7am.

### The termination date

17. It is necessary to decide when the claimants’ employment terminated. It is agreed that the last work was undertaken in May 2018 and the respondent’s records identify that both claimants worked at the Bower festival on 28 May 2018. I find that this was the last date either claimant did any work for the

respondent. However, the contract between the parties continued until it was brought to an end. The nature of the contracts is such that they continue between periods of work and they therefore continued past the date of the last engagement on 28 May 2018.

18. The terms of the contracts on which the respondent relies clearly envisage that the contracts can be ended on notice (clause 10). It was clear that no formal written notice was given. Mrs Rowberry gave evidence that she had tried to contact the respondent after 28 May 2018 to find out if she and her husband were still employed by the respondent. Her evidence was that she did not initially receive a reply to those enquiries and this was not contradicted by Ms Newton.
19. Mr and Mrs Rowberry both then gave evidence that the fact of the termination of their contracts was communicated in the following way. Mr Rowberry's mother visited a shop where the ex-wife of Mr Roberts (the Operations Manager for the respondent) worked. Mr Roberts' ex-wife told Mr Rowberry's mother that Mr and Mrs Rowberry no longer worked for the respondent.
20. Mrs Newton was unable to comment on this version of events and Mr Roberts, although present in the tribunal, did not give evidence. However, I accept this evidence. It was given consistently by Mr and Mrs Rowberry and was consistent with surrounding events. On 29 August 2018, Mrs Rowberry emailed Ms Newton in the following terms

“Sorry for having to come direct to you but I have tried ringing, emailing messaging Frank even sent messages via Dave Till asking him to get in touch but he choses to play ignorant to both myself and Dave, And will not let us know what is going on. as it seems we are no longer needed as we have had no calls or texts for work please can you arrange for our P45,s To be sent out to us so we can sort out our Tax codes, with the tax office, and I can let the job centre know I am not receiving any work from K2”

21. Ms Newton responded by providing P45s for both claimants. This was the first occasion on which the respondent informed either claimant that their services were no longer required and I therefore find that the claimants had notice of the termination of their respective contracts on 29 August 2018.

### **Annual leave**

22. Ms Newton said, and it was not disputed by the claimants, that the leave year ran from 1<sup>st</sup> January to 31 December.
23. Both Mr and Mrs Rowberry gave evidence that they were not aware that they were entitled to paid annual leave as “zero-hour” workers and that the respondent had not provided them with any information about their entitlements. Mrs Rowberry said that she had taken paid leave when

working in the office, but not as a security operative. Mrs Rowberry said that it was different for zero-hour workers. Mr Rowberry said that he took holidays in between assignments but did not get holiday pay and had never been offered any. Ms Newton said that information was provided during the recruitment process but that she did not provide it personally so was not able to confirm when the claimants were so advised.

24. Ms Newton also put to Mrs Rowberry in cross examination that, as she had worked in the office, she ought to have known about the HR processes. Mrs Rowberry's evidence was that she had limited knowledge and that no zero-hour workers had ever presented her with a leave request. In fact, Ms Newton spent some time cross examining Mrs Rowberry on the basis that she knew she was entitled to annual leave and could therefore have informed her husband.

25. I find that the respondent did not inform Mr Rowberry of his right to take paid holiday at all, and that although Mrs Rowberry was able to take paid holiday when working in the office, she did not know that that was also the case when she became a security operative. Both claimants believed that zero-hour contract workers were not entitled to paid holidays. Both claimants' evidence was very clear and insistent on this point and Mrs Rowberry's evidence that she believed the position had changed when she moved from the office to zero hours was convincing. Given her previous role, the most likely reason she would not have applied for paid leave on changing roles was because she believed the position was different for zero-hour workers.

26. Ms Newton's evidence, conversely, was vague. When asked about the detail of providing this information, Ms Newton was unable to answer and instead discussed other more general matters. She appeared reluctant to directly answer questions about what information was provided to the claimants about their entitlement to holiday pay. I therefore preferred the evidence of the claimants on this point and find that the respondent did not take any steps to inform the claimants about their entitlement to paid holiday. The claimants had a belief that they were not entitled to paid holiday and the respondent took no steps to correct this wrong belief. I also find as a fact that the respondent was aware that the claimants did not know that they were entitled to paid annual leave.

### **A week's pay**

27. It was agreed by both parties that the claimants' payslips were accurate as to hours worked and pay received. Ms Newton explained that the date on the pay slips related to the date of payment, not the date worked. This explanation accorded with the spreadsheet provided and I accept this explanation.

### **Other matters**

28. I have not made any findings of fact about the circumstances leading up to the termination of the claimants' contracts as it is not necessary to do so to determine the issue set out above.

### The law

29. The relevant legal principles are as follows.

30. Entitlement to holiday pay is covered by the Working Time Regulations 1998. Regulations 13 and 13A together provide that a worker is entitled to 5.6 weeks paid holiday in any leave year. Regulation 13 reflects the right to 4 weeks paid holiday from the European Working Time Directive and regulation 13A provides for an additional 1.6 weeks. Regulation 14 provides that a worker is entitled to be paid for any untaken leave if their employment ends during a leave year. The amount of leave is calculated as follows:

[(the total amount of leave to which a worker is entitled in a year (5.6 weeks)) multiplied by the proportion of the leave year that had gone by the time the worker finished work] less the amount of leave already taken in the final leave year.

31. The amount of holiday pay a worker is entitled to is governed by regulation 16 of the Working Time Regulations 1998 and sections 221 – 224 of the Employment Rights Act 1996. These provisions provide that in cases where a worker does not have normal working hours, a week's pay is the average week's pay of the 12 weeks leading up to the holiday. Any weeks when pay was zero are discounted so that the calculation is, effectively, the average of the last 12 payslips. See also *Brazel v The Harpur Trust* UKEAT/0102/17, [2018] ICR D10.

32. These provisions were considered in *NHS Leeds v Larner* [2012] IRLR 825 in the context of an employee who had been unable to take annual leave because they had been absent from work through ill-health. Lord Justice Mummery said:

*"90. First, in relation to the carrying forward of unused annual leave, reg. 13(9) would be construed to read as follows –*

*'Leave to which a worker is entitled under this regulation may be taken in instalments, but –*

*(a) it may only be taken in the leave year in respect of which it is due, save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave.'*

*91 Secondly, in relation to payment on termination of employment, reg. 14 would be read and interpreted to include the following insertion:*

*'(5) Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under regulation 16 for the period of untaken leave.'*

33. This principle was applied to the circumstances of a private sector employee by the EAT in *Plumb v Duncan Print Group Ltd* [2015] IRLR 711.

34. In the recent case of *Sebastian W. Kreuziger v Land Berlin* C-619/16, the CJEU held:

*“that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, in so far as it entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, that worker loses — automatically and without prior verification of whether the employer had in fact enabled him, in particular through the provision of sufficient information, to exercise his right to leave prior to the termination of that relationship — the days of paid annual leave to which he was entitled under EU law on the date of the termination of that relationship, and, accordingly, his right to an allowance in lieu of paid annual leave not taken”.*

35. The effect of these cases is, in my judgment, that the well-known principles established in *Leeds v Lerner*, and confirmed in *Plumb v Duncan Print Group Ltd* as applying to all workers, are equally applicable to circumstances where a worker has not taken paid annual leave under regulation 13 of the Working Time Regulations 1998 where the employer has failed to enable the taking of paid leave in particular through the failure to provide sufficient information to enable the worker to avail themselves of the right. Particularly, workers are entitled to carry forward such untaken leave for a period and, if their employment ends before they have the opportunity to take the leave, they are entitled under regulation 14 to a payment in lieu. Regulation 13 provides for an entitlement to 4 weeks paid holiday. These cases do not apply to the additional 1.6 weeks' leave under regulation 13A of the Working Time Regulations.

## **Discussion and analysis**

### **Holiday pay for 2018**

36. It was not disputed that the claimants were entitled to holiday pay in respect of 2018. The only question was how much was owed. The calculation is set out under paragraph 30 above and for each claimant it is as below. The figures are taken from the final 12 payslips for each employee which were agreed as accurate. As no holiday was taken the appropriate date for calculating average pay is the date on which the payment became due. I

have found that the contracts were terminated on 29 August 2018 and this is the appropriate date.

**Mrs Rowberry**

37. Average weekly wage

Date of payslip	Amount
12/6/18	72
5/6/18	63.57
29/5/18	102.64
22/5/18	173.14
15/5/18	39.15
8/5/18	42.5
1/5/18	85
24/4/18	63.75
17/4/18	139
27/3/18	166.50
20/3/18	126.89
6/3/18	71.25
Weekly average pay	95.45

38. Percentage of leave year that had elapsed at the date of termination:  $240 \text{ days} / 365 \text{ days} \times 100 = 66\%$  (1<sup>st</sup> January 2018 to 29 August 2018).

39. Annual leave taken in 2018: 0 days

40. Entitlement to annual leave: 5.6 weeks.

41. Number of weeks untaken leave on termination of employment:  $(5.6 \times 66\%) - 0 = 3.7$  weeks.

42. Amount of unpaid holiday pay:  $3.7 \text{ weeks} \times \text{£}95.45 = \text{£}353.17$



**Mr Rowberry**

43. Average weekly wage

Date of payslip	Amount
12/6/18	72
5/6/18	63.57
29/5/18	102.64
22/5/18	164.88
15/5/18	39.15
8/5/18	40
1/5/18	80
24/4/18	60
17/4/18	171.11
27/3/18	187.57
20/3/18	131.85
13/3/18	28
Weekly average	95.06

44. Percentage of leave year that had elapsed at the date of termination:  $240 \text{ days} / 365 \text{ days} \times 100 = 66\%$  (1<sup>st</sup> January 2018 to 29 August 2018).

45. Annual leave taken in 2018: 0 days

46. Entitlement to annual leave: 5.6 weeks.

47. Number of weeks untaken leave on termination of employment:  $(5.6 \times 66\%) - 0 = 3.7$  weeks.

48. Amount of unpaid holiday pay:  $3.7 \text{ weeks} \times \text{£}95.06 = \text{£}351.72$

**Holiday pay for 2017**

49. Mrs Rowberry did not claim for any holiday pay for 2017. Mr Rowberry said that he had not taken any holiday and had not known that he could take any holiday. As set out above, I accept that this is the case. Applying the recent case of *Sebastian W. Kreuziger v Land Berlin* C-619/16, my decision is that Mr Rowberry was unable to take paid annual leave in the leave year 2017 because the respondent did not tell him that he could do so, that the respondent was aware that Mr Rowberry did not know he could take annual leave and that it took no steps to disabuse him of that misunderstanding. Ms Newton spent some time cross examining Mrs Rowberry on the basis that she knew she was entitled to annual leave and could therefore have informed her husband. If the respondent did not positively encourage this misunderstanding, it certainly benefitted from it.

50. The test set out in *Kreuziger* is satisfied and Mr Rowberry was entitled to carry forward from 2017, four weeks untaken regulation 13 leave. As he did

not have the opportunity to take that leave, he was entitled to be paid in lieu for it. As explained above, this principle does not apply to the additional 1.6 weeks leave under regulation 13A of the Working Time Regulations.

51. The calculation of the amount of holiday pay owed to Mr Rowberry for 2017 is: 4 (weeks untaken holiday) x £95.06 (average weekly pay) = £380.24.

### **Conclusion**

52. For the reasons given above, my decision is that the claimants' claims both succeed.

53. Mrs Rowberry is entitled to pay in lieu of untaken holiday for the leave year 1 January 2018 – 31 December 2018 of £353.17.

54. Mr Rowberry is entitled to pay in lieu of untaken holiday for the leave year 1 January 2018 – 31 December 2018 of £351.72.

55. Mr Rowberry is entitled to pay in lieu of untaken holiday for the leave year 1 January 2017 – 31 December 2017 of £380.24

**Employment Judge Miller  
19/07/2019**