



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4101597/2022**

**Hearing held at Dundee on 24 October 2022**

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**Employment Judge McFatridge**

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**Mr Kevin William Haughton**

**Claimant  
In person**

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**The Hemp Room Café Ltd (SC650756)**

**Respondent  
Not present and  
not represented**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The judgment of the Tribunal is that as at the termination of his employment the claimant was due the sum of One Thousand, Four Hundred and Ninety Six Pounds and Four Pence (£1496.04) in respect of annual leave accrued but untaken. The respondent shall pay to the claimant the sum of One Thousand, Four Hundred and Ninety Six Pounds and Four Pence (£1496.04) in respect of this.

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**REASONS**

1. The claimant submitted a claim to the Tribunal in which he claimed that he was due holiday pay from the respondent following the termination of his

E.T. Z4 (WR)

5 employment on 31 December 2021. The respondent submitted a response in which they denied the claim. A hearing was fixed but in advance of this the respondent wrote to the Tribunal indicating that they had ceased trading on 13 August 2022 and were in the process of becoming insolvent and would therefore not be participating in the final hearing. At the hearing the claimant was present. There was no representation on the part of the respondent. I took evidence from the claimant on oath. The claimant also referred to a bundle of documents which was lodged. I have referred to this in the judgment below as C1-10 C8. On the basis of the evidence and the productions I found the following facts relevant to the issue before the Tribunal to be proved.

### **Findings in fact**

2. The respondent is a limited company known as The Hemp Room Café Ltd (registration number SC650756). They traded as The Hemp Room Café, 15 44 Upper Craigs, Stirling. The respondent operated a café from 44 Upper Craigs, Stirling as well as a mail order business supplying CBD products in the Stirling area. The claimant commenced employment with the respondent as an Administrative Manager on or about 1 March 2020. The claimant's contract of employment was lodged (C7). Although this copy is 20 not signed it is a copy taken from the respondent's electronic records by the claimant.
3. The contract was a zero hours' contract and states that the claimant's 25 hours of work would vary but it was agreed at the outset that the claimant would initially work 34.25 hours per week. His role was day-to-day management of the office side of things dealing with finances and money, HR and occasional trips to the cash and carry in order to purchase stock.
4. As is well known the worldwide Covid pandemic broke out later in March 30 2020, from around 27 March 2020 the claimant was furloughed by the respondent under the government's Job Retention Scheme. Although the claimant's contract did not guarantee any minimum hours and was what is known as a zero hours' contract the terms of the furlough scheme meant that the claimant was paid 80% of his wage based on his normal pre-

pandemic working hours of 34.25 hours per week. The claimant continued to be furloughed and paid under the scheme from the end of March 2020 until the beginning of October 2021.

5. During this period, despite the fact that it was contrary to the terms of the Covid scheme, the claimant continued to do work for the respondent. He continued to carry out some administrative tasks. Mainly however he was involved in dealing with the respondent's online business.
6. The café was closed from around 27 March 2020 onwards. During this time the respondent advertised CBD products online and the claimant was heavily involved in processing these orders. He would physically obtain the product from stock and make up the order and also deal with deliveries. The claimant made deliveries to customers in the FK postal area which includes Stirling and surrounding areas. The claimant would carry out around 30 deliveries in an average week. Each delivery would take him around an hour. This was in addition to the administrative tasks he carried out. The claimant's evidence which I accepted was that during the whole of this period the claimant was in fact carrying out work for the respondent for 34.25 hours per week.
7. Although the respondent were able to reopen the café side of their business in July 2021 the claimant continued to be furloughed until the end of the furlough scheme on 30 September 2021. He also continued to work for the respondent carrying out the same tasks as before including deliveries of products ordered online.
8. In October 2021 the claimant agreed with the respondent that he would stop doing deliveries. The claimant has mobility issues and indicated to the respondent that these had got worse and he was no longer able to do deliveries but that he would continue to carry out administrative tasks. The claimant worked 40 hours during the month of October. The claimant's pay slip for this month was lodged (C3). He worked 24 hours per month during the month of November. His pay slip for this month was lodged (C4). During December he worked 15 hours for the respondent, his pay slip for that month was lodged (C5). This pay slip shows that in addition

to being paid for the 15 hours he worked the claimant was also paid 9 hours' holiday pay.

9. At the end of December 2021 a dispute arose between the claimant and the respondent. The claimant was dismissed by the respondent without notice. The respondent's position was that the claimant was guilty of gross misconduct but the claimant does not accept this. The claimant did not take any actual holiday during 2021.
10. In January 2022 the claimant received a further payment from the respondent in respect of holiday pay. The pay slip for this was lodged (C6). It shows the gross amount of the holiday pay paid as £224.25. The claimant is unaware as to how this was calculated.
11. The claimant was Company Secretary of the respondent company between January 2021 and 5 January 2022 when he resigned.

### **Matters arising from the evidence**

12. Although the claimant had not used the word Limited on his claim form the claimant readily accepted that the respondent was in fact the limited company referred to above. I noted that in the response the respondent's representative had in fact referred to the respondent as being a limited company albeit not in the correct part of the form. It was clear to me that the employer in this case was the respondent as shown above and given that the ET3 lodged confirmed that this was the case I did not consider that any further action required to be taken in order to correctly identify the respondent.
13. The claimant gave his evidence on oath and although the respondent were not represented I put to the claimant the various points raised by the respondent. The claimant was clear in his evidence that although he was being paid on the basis of the furlough scheme he had in fact continued to work. His evidence was that no independent record was kept of the hours he had worked but his clear position was that over this period he had worked 34.25 hours per week. I accepted this evidence. The claimant had set out his method of calculating holiday pay in a document lodged

with the Tribunal (C1). This essentially repeated the calculation he had made in his ET1. I accepted the claimant's evidence regarding the facts of the matter. I indicated to him that I would be making my own independent calculation of any sum due.

5 **Issues**

14. The sole claim being made by the claimant was a claim for holiday pay for the period from January to December 2021. The claimant had clarified this in correspondence to the Tribunal and indeed at the hearing.

**Discussion and decision**

10 15. The claimant set out his calculation of the amount due in document C1. He based his claim on section 6 of his contract of employment which deals with holiday. This states

15 "6.1 The Company's holiday year runs from 1 January to 31 December, in each holiday year you are entitled to a proportion of the basic annual holiday entitlement of 5.6 weeks inclusive of statutory and public holidays calculated in accordance with the number of hours/days actually worked.

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20 6.4 Upon termination of the Employment you will be entitled to a pro-rata payment in lieu of any unused holiday entitlement. The Company reserves the right to deduct payments of holidays taken in excess of holiday entitlement under this clause from the final payment of pay to be made to you."

25 It was the claimant's position that the total holiday pay for the year was £2300.90. This was based on working 34.25 hrs per week for the whole year. He was paid £108 in December towards holiday pay and £224.25 in January leaving a balance of £1968.65.

30 16. As I advised the claimant I considered that I required to make my own independent calculation of the amount of holiday pay due. I note that the claimant was not making a claim under the Working Time Regulations

which provides that holiday pay should be based on the amount of a week's pay as determined in sections 221-224 of the 1996 Act as amended by Regulation 16(3)(e). This would have provided that the holiday pay be calculated on the claimant's average pay for the 52 weeks prior to the termination of his employment. Instead he based his claim on section 6.1 and 6.4 of the contract as set out above. In my view however 6.1 of the contract essentially requires me to carry out the same exercise as I would have to carry out in terms of the Working Time Regulations.

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17. The claimant's holiday year ran from 1 January to 31 December. I accepted the claimant's evidence that he took no actual holiday during this period although it would appear that he was paid for 8 hours' holiday in December. The claimant is therefore entitled on termination of his employment to be paid for any paid leave accrued but untaken. Given that his effective date of termination (31 December) came at the end of a full holiday year then he is entitled to the full amount of 5.6 weeks' pay. The question is what is the multiplicand? I consider that the appropriate way to calculate this is to work out the claimant's average pay over the 52 weeks prior to this.

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18. The claimant was paid at the rate of £12 per hour. During the 39 weeks from 1 January to 30 September he worked 34.25 hours per week. Although the claimant appears to have been paid for this at the furlough rate I consider that he is entitled to his holiday pay based at the agreed contractual rate of £12 per hour. He is therefore due to be paid £411 per week for these weeks. During the remaining 13 weeks it would appear that he worked a total of 79 hours (from his pay slips). Over that period of 13 weeks he worked on average 6.08 hours per week (79/13) giving average weekly pay over this period of £72.93 per week. In order to work out his average for the whole year I calculate that the total wages he ought to have received for the year would be  $39 \times 411 + 13 \times 72.93 = £16,977 \div 52 = £326.48$  per week. This is the amount of a week's pay on which his entitlement to holiday pay is based. I therefore calculate that the claimant was due £1828.29 holiday pay for the whole year (£326.48 x 5.6). According to his pay slips the claimant has already received the sum of

£332.25 in respect of holiday pay and he is therefore due the balance of £1496.04 (1828.29 – 332.25).

19. Accordingly, I have issued judgment for this amount.

**Employment Judge: I McFatridge**

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**Date of Judgment: 25<sup>th</sup> October 2022**

**Date sent to parties: 1<sup>st</sup> November 2022**