



EMPLOYMENT TRIBUNALS

Claimant: Mr Edward Stiles

Respondent: Just Perfect Catering Ltd

Heard at: Cardiff **On:** 23 September 2016

Before: Employment Judge P Cadney

Representation:

Claimant: Mr S Birch

Respondent: Mr D Stewart

JUDGMENT

The judgment of the tribunal is as follows:

1. The claimant's claim for unpaid holiday pay is dismissed.

REASONS

1. The case came before Regional Employment Judge Clark on 12 August and he adjourned the case in circumstances which I will set out. He has set out in great detail the background, both contractual and statutory to the claimant's claim for unpaid holiday pay, which it is not necessary for me to repeat.
2. However, in broad outline, the claimant's claim is that he was employed from 3 March 2015 until 19 February of 2016. He gave notice in November 2015 and for the whole of his notice period he was off sick and in receipt of

statutory sick pay. It is not in dispute that the respondent has a holiday year which corresponds with the calendar year (1 January to 31 December) and that under both the terms of the contract and under the relevant statutory provisions, that there is no right to carry over any untaken holiday from one holiday year to the next. Accordingly, on the face of it, if there was any untaken holiday in 2015, the right to it was lost and there would be no amount owing in respect of it to the claimant.

3. It is not in dispute that there was untaken holiday and it is not in dispute that the amount represented by it, if owed, is in the sum of £676.92. When the matter came before Regional Employment Judge Clark, it emerged that there was in fact, a factual dispute on which the resolution of the case turned, which was that the claimant asserted that he had in early December 2015 requested to be allowed to take the untaken holiday; that there was apparent agreement to that by someone who at the time was identified as Joanne and that accordingly, either there had been a variation to his contract, such as to allow him to carry over that the untaken holiday or that this would amount to exceptional circumstances within Clause 7.6 of the contract. The respondent was unaware that this was the way that the claimant put his case and accordingly, the case was adjourned to allow the respondent to call that evidence.
4. As a result, the case has come before me this morning and I have heard on behalf of the claimant from the claimant himself and Mr Stephen Birch and on behalf of the respondent from Ms Joanna Wright. The dispute is essentially as set out by Regional Employment Judge Clark. The witness statements from the claimant and from Mr Birch are in substance identical and they relate that in early December 2015 the claimant made a call which was answered by Miss Wright and it is described in this way in Mr Birch's Witness Statement: "*The call was short. Mr Styles asked if he could take his 12 days' holiday in December 2015 as he is finding it hard financially. The line went quiet for a few moments; Joanne then came back on the telephone and stated that any holiday accrued would show in the final salary.*"
5. Of course on a literal interpretation of what Ms Wright said, that would be no more than setting out the contractual position which is, if there was any untaken accrued holiday for 2016 that would be paid in the final salary. However, and although this is not quite the way the claimant puts it before me, the claimant's case in essence, is that given the circumstances of that conversation, which on the claimant's case was that he was specifically, asking to be allowed to take his holiday in December 2015 during the period of his sickness absence that the answer that was given by Ms Wright that any holiday accrued would show in the final salary must mean one of two things: either, she had agreed specifically to that and therefore there is an amount of untaken holiday for which he has not been paid and which is therefore owing, or alternatively, she had agreed that he could simply carry over any untaken

holiday and it would be paid in his final salary payment of February. Although technically legally different, in reality they amount to the same thing and accordingly, by which ever route, the claimant's case is that there is an agreement which effectively supersedes the contractual position that he would be paid for that untaken 2015 holiday.

6. The respondent has called Ms Wright and her evidence is to the opposite effect. She has no recollection of any such telephone call and her evidence is that she was responsible for general office administration and that she would not have had the authority either to agree to any holiday request from any employee, which would have been referred to Mr Steve Kalicinski or the authority to agree a variation to the claimant's contract to allow him to carry over any holiday entitlement. Accordingly, the respondent's case is that there is no such agreement as the claimant asserts. In addition, the respondent relies on an exchange of e mails starting on 9 March 2016 when the claimant e mailed Ms Wright in the following terms.

"Hi Jo

Thank you for my P45 I received recently, I have a query about my holiday pay entitlement. I started in March 2015 and will be entitled to roughly 21 holiday days up to 31 December and roughly 3 half days for 1 January 2016 to the end of my contract. I took only 11 days' holiday; Eamon gives the dates, so I have 10 remaining in 2015 plus the 3 days for 2016. I was paid for 30 hours' holiday and my final pay equivalent to under 4 days' holiday pay. Could you please look into this and tell me why I am only paid partly what I am entitled to."

That was followed up on 17 March by the claimant saying –

"Hi Jo

I sent an e mail last week which is below and I have not yet had a reply or acknowledgment to the e mail. Could you please get back to me about my query?"

And that generated a reply from Ms Wright on 1 April saying –

"Hi Ted

Sorry for the late response to your pay query. I have looked into your query and taken into account your concern. You were paid 30 hours holiday for 2016 which you had accumulated. However, your 2015 holidays are not carried over to 2016 if they are not taken. So unfortunately, if you did not take them they are not carried over to the next year."

The respondent submits that it is clear from this, that certainly, as at 9 March the claimant was not asserting that there was any agreement that he had either been allowed to take his holiday in December or that he had been allowed to carry over and that it is significant that there was no reply contradicting what was asserted by Ms Wright in her 1 April e mail.

7. That is the evidence before me upon which I have to decide whether the agreement was made as asserted by the claimant in which case he is owed the sums claimed or whether on the balance of probabilities, I am not satisfied that such an agreement was made, in which case he is not.
8. The case would be relatively easy, if I were of the view that any of the witnesses I had heard from was deliberately lying to me, that is to say either Mr Stiles and Mr Birch had concocted the evidence to remedy a fatal flaw in the claim, or that Ms Wright had lied to cover up the fact that she had made an agreement with Mr Stiles that exceeded her authority but which bound the respondent. However, unfortunately in one sense, the case is more complicated as I do not believe that to be the case. Having heard from Mr Stiles and Mr Birch and Ms Wright, I have absolutely no doubt, that each of them is giving honest evidence of what they believed occurred. That makes it more difficult in the sense that it follows that somebody's recollection is at fault and I have to decide either, whether Ms Wright has simply failed to recall conversation in the terms which the claimant sets out or alternatively, whether there was either no such call or whether there was a call which in retrospect the claimant and Mr Birch misremembering and which does not have the contractual significance which they are seeking to place on it.
9. As I say, I have no doubt that all of the witnesses who gave evidence were giving evidence honestly and therefore I have to try and reach a conclusion on some rational basis. It appears to me that the respondent is correct, that it is curious that if there was an agreement as asserted by the claimant that there is no mention of it in the e mail of 9 March and no response to Ms Wright's e mail of 1 April setting out what the claimant says was a specific agreement reached in December. As that is effectively the only documentary evidence before me which will allow me to make a decision as between a number of honest witnesses, I have decided on the balance of the probabilities that the claimant has not satisfied me that a conversation such as that he asserts, took place and accordingly, the claimant's case must be dismissed.



Employment Judge P Cadney

Dated: 6 October 2016

ORDER SENT TO THE PARTIES ON

17 October 2016



FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS

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NOTES

- (1) Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.00.
- (2) Further, if this Order is not complied with, the Tribunal, under Rules 37(1) (c) and 76(2), may (a) make an Order for costs or preparation time against the defaulting party, or (b) strike out the whole or part of the claim, or, as the case may be, the response, and, where appropriate, direct that the respondent be debarred from responding to the claim altogether.
- (3) You may make an application under Rule 29 for this Order to be varied or revoked.

