



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr V Philbert**

**v The Secretary of State for Justice**

**Heard at:** Watford

**On:** 19 December 2019

**Before:** Employment Judge R Lewis (sitting alone)

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr T Kirk, Counsel

## **RESERVED JUDGMENT**

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

## **REASONS**

1. This was the hearing of a claim presented on 26 August 2018. Day A was 11 July and Day B was 22 August. It came before Employment Judge McNeill QC on 19 November 2018 and it was then listed to be heard in February 2019 at a time estimate of 3 hours. In due course the hearing was extended to a full day and postponed to the above date.
2. The papers before the tribunal consisted of an agreed bundle in excess of 100 pages. The parties had exchanged witness statements. The claimant was the only witness on his own behalf. The respondent called three witnesses. In order of giving evidence they were:
  - Ms Josey Fadlin, Senior Probation Officer, who had been the claimant's line manager from 7 November 2016 until 8 December 2017;
  - Ms Jill Dervish, Senior Probation Officer who had been the claimant's line manager from March 2018; and

- Mr Russell Swaby, Interim Head of HR: his evidence was about procedures and systems.
3. All witnesses adopted their statements on oath and were cross examined. Mr Kirk cross examined the claimant for about fifty minutes; the claimant had no questions for Ms Dervish or Mr Swaby, and cross-examined Ms Fadlin for no more than ten minutes.
  4. There were closing submissions, supplemented by a clear and helpful skeleton from Mr Kirk. Mr Kirk had produced a bundle of authorities, as well as a printout of an extract from Harvey, CI/241-243.
  5. This case was conducted and presented with moderation, respect and courtesy on both sides. I record the thanks of the tribunal to all of those involved at this hearing.

### **Defining the issue**

6. The issue was broadly that of holiday pay. In the course of the hearing, that issue was more closely defined, to be following:
  - 6.1 Has the respondent refused to permit the claimant to exercise his statutory right to annual leave in his holiday year 2017-2018;
  - 6.2 If so, how many days holiday entitlement has the claimant lost;
  - 6.3 And if so, to what remedy is the claimant entitled.
7. At the start of the hearing, the claimant confirmed that at the time of presenting the claim and indeed at time of this hearing, he remains employed by the respondent (his continuity of service goes back over 25 years). The tribunal cannot therefore hear a breach of contract claim.
8. The claimant also confirmed that at all material times he has been paid in full, so that he does not bring a claim of unlawful deductions, ie a claim that he took holiday for which he was not properly paid. He agreed that there was no occasion upon which he asked for permission to take annual leave and was refused it.
9. The matter which the claimant put before the tribunal is that he has been unable to carry forward untaken holiday from the year 2017-2018. The claimant's original schedule of loss was for a loss of 35 days; he agreed to discount 13 days (which he had been allowed to carry forward from 2017/18), reducing the value of the claim to 22 days.

### **Background fact find**

10. There was little factual dispute in this case and I found as follows as to the background.

- 10.1 The claimant's continuity of service in the probation service dates since 1993.
- 10.2 He was suspended pending disciplinary investigation on 1 March 2017 (38). There was no issue before this tribunal as to the reasons or their merits.
- 10.3 He took one week of agreed annual leave at the end of that month (March 2017).
- 10.4 A disciplinary enquiry concluded with a warning, such that his suspension came to an end on 23 January 2018 (54);
- 10.5 There was a period of delay before he came back to work, due to discussion of the practicalities of the claimant's return;
- 10.6 On 12 February the claimant was signed off work by a GP, initially until 25 March 2018 and thereafter until May 2018 (56). His actual return to work was later in 2018.
- 10.7 The claimant was initially subject to a Leave Policy (82) which provided that in limited circumstances leave could be carried over from one year to another, with up to 5 days allowed at the discretion of the first line manager and between 6 and 12 days at the discretion of a second line manager. The claimant's entitlement was 33 days (87) and the leave year ran from 1 April to 31 March.
- 10.8 With effect from 1 September 2017, and following a bilateral process, a new Leave Policy was introduced, which applied to the claimant from 1 March 2018 (97). Its carry over provision (107) was for a maximum of 9 days from one year to the next. The annual leave year ran from 1 March to 28 / 29 February.

### **Communications about leave**

- 11 It was necessary to consider the information flow involving the claimant about his leave rights at the time of suspension. I fully accept that the claimant was distressed to be suspended, and that he found a 10-month suspension period a challenge. At the time of his suspension, he had over 23 years' service, and was a union member.
- 12 The letter of suspension was sent on 1 March 2017 (ie when the first leave policy was in force) and used template wording. It said (38),

“This suspension does not affect any rights you or the organisation may have.. You should apply to take annual leave in the normal way to the above named person. You will not be permitted to carry over any excess periods of annual leave as a result of your period of suspension and the normal rules on carry over will apply.”

- 13 The claimant and Ms Fadlin arranged a keeping in touch arrangement during suspension, which was that they would try to speak or email every week. Ms Fadlin's evidence was that that was "roughly" what they did. I accept that the bundle did not contain a complete record of their interaction.
- 14 On 12 June 2017 Ms Fadlin sent the claimant a link to corporate news. The claimant said that there was a telephone conversation in which he said that he had been unable to open the link. Ms Fadlin had no recollection of this.
- 15 I accept that the claimant was sent the link. I find that even if he were unable to open it, he knew that he could obtain access to the respondent's corporate news or policies by using a procedure which he had arranged in another context with Ms Fadlin, namely attending the respondent's Enfield office by appointment.
- 16 At the same time, the claimant asked about collection of his annual leave record (44-46) which he arranged.
- 17 On 28 July 2017 Ms Fadlin emailed the claimant to explain that she had been out of contact when he had recently telephoned. She wrote (50): "I trust all is well. I am aware we are in the summer holiday period, can you please let me know if you intend to take any leave". The claimant did not reply.
- 18 On 30 May 2018 the claimant wrote to Ms Dervish (59) to ask about leave outstanding from previous years. He wrote,

"As a result of my suspension from work on 1 March 2017, I was not able to take any leave for reasons including, having to be available during the period of going through various... procedures, ie grievance, disciplinary and appeal. Furthermore, the associated sickness absence I have had due to work related stress has also made it impossible to take leave. In light of this could you please let me know how much of my annual leave entitlement I have outstanding as of today."
- 19 Ms Dervish replied on 14 June (62), giving permission for carry over of 9 untaken days from 2017-2018. It will be recalled that this is the maximum carry over allowed under the policy which had come in to force on 1 March 2018. In addition, she allowed the claimant to carry over 4 days leave accrued between the date of his reinstatement (stated to be 23 January 2018) and the end of the 2017-2018 leave year (during much of which he had been off sick), hence a carry forward total of 13 days.
- 20 I accept that the claimant was shocked and upset by Ms Dervish's letter, and that between its receipt, and Day A, he sought advice, and tried to resolve the issue which he felt had arisen.
- 21 There was limited discussion at this hearing about the claimant's reasons for not having taken leave during 2017-2018. The claimant readily accepted Mr Kirk's calculation, which was that of 225 working days in that year, the

claimant had attended formal meetings with the respondent on only 7, and he accepted that that left many days on which he could have taken leave.

- 22 In reply, the claimant repeatedly made a powerful emotive point. It was that leave is a time for enjoyment, and that throughout his suspension he was unable to take leave because (expressing the same point in a number of different ways) he was not in the right frame of mind, he would not enjoy it, he did not feel like it, and he would not benefit from it.
- 23 The emotive strength of that point is not difficult to see. The question is how it translates into the language of a claim under the Working Time Regulations 1998 (WTR).

### **Legal framework**

- 24 It was agreed that this is a claim for statutory annual leave only, ie a claim under the provisions of WTR.

- 25 Regulation 30 provides so far as material:

“(1) A worker may present a complaint to an Employment Tribunal that his employer has refused to permit him to exercise any right he has under Regulation 13(1).

- 26 Regulation 13(1) provides so far as material:

“A worker is entitled to four weeks annual leave in each leave year.”

- 27 Regulation 13A(2) provides for additional leave of 1.6 weeks. The combined total is 28 days.

- 28 The limitation provision is that in accordance with regulation 30(2) a complaint shall not be considered unless it is presented:

“before the end of the period of three months... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than 1 day, the date on which it should have been permitted to begin) of, as the case may be, the payment should have been made; (3) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

### **Limitation**

- 29 The first question for the tribunal was that the respondent denied that the tribunal had jurisdiction to hear the claim on the basis that it was time barred. That in turn required determination of the date applicable in this case under Regulation 30(2)(a): in other words, from when did time run?

- 30 The claimant's point was straightforward. During his period of suspension, he did not have access or full access to the workplace or its IT systems.

Although the link sent to him by Ms Fadlin would have informed him that a new annual leave policy had been introduced, he was unable to open it; and he had not asked about it because he had no reason to. It was not until he heard from Ms Dervish in June 2018 that the leave year had changed, that he considered the point.

- 31 The claimant submitted that once he realised that the leave year had changed, and once he had heard from Ms Fadlin that he was only permitted to carry forward 9 or 13 days, and not the 33 that he had envisaged, time began to run.
- 32 Mr Kirk submitted that time ran either from the end of the claimant's suspension on 24 January 2018 or, at the latest, 28 February 2018 which was the last day of the leave year.
- 33 I agree in principle with Mr Kirk that within the ambit of Regulation 30(2)(a) the date "that the exercise of the right should have been permitted" must be 28 February 2018, because that is the date upon which any right to carry forward leave expired. Once the claimant entered into a new leave year, his right to carry forward more days than he was permitted (13) was forfeit.
- 34 At that time, the claimant was signed off with a stress related medical certificate. He had in fact not been in the workplace for a year, and there were practical difficulties about his return. I accept the reality that annual leave was one of his concerns, but was not his only or main concern.
- 35 I also accept that the claimant did not in fact know of the change of the leave year, or the change of carry over policy, until alerted to it by Ms Dervish in mid-June 2018. I add that I am far from convinced that there was a substantial difference between the two policies or that this was at the time a point of great importance. The change in policy details seems to me much less important than the communication from Ms Dervish on 14 June, which informed the claimant in plain terms that his carry forward was limited to 13 days. I accept that that triggered a line of enquiry in the claimant's mind, which led to him contacting ACAS on Day A (11 July).
- 36 In my judgement, it was not reasonably practicable for the claim to have been presented by 27 May 2018 because the claimant by then had no reason to believe that he had a claim to bring. I accept that the claimant was on notice of the facts underpinning his claim on about 14 June 2018, and I extend time to the period between that date and presentation of the claim (allowing for early conciliation) which I consider to be reasonable. I find therefore that the tribunal has jurisdiction to consider the claim.

### **Discussion of the claim**

- 37 I record the tribunal's gratitude to Mr Kirk for a thorough and fair-minded presentation, in which he drew to the attention of the tribunal the possibility that the claimant, although unaware of it, might be assisted by European law authority.

38 A significant moment in the case had been when the claimant had the opportunity to cross examine. He told the tribunal that he had very few questions for Ms Fadlin because she was not responsible for any detriment which he had experienced. He had no questions at all for the other two witnesses. That was candid and thoughtful. The claimant struggled at this hearing to identify any default by the respondent. At its highest, he referred to aspects of the second Leave Policy in which managers are encouraged to ensure that direct reports take their annual leave. The policy which came in to force in 2018 states for example (102):

“Managers have a responsibility ... To take any necessary steps to ensure employees take their annual leave entitlement within their leave year. If leave is outstanding at the end of the leave year, confirm the amount of leave that may be carried over to the next leave year.”

39 The next paragraph reads,

“Employees have responsibility to ensure they take their full annual leave entitlement each year.”

40 I accept that, put at its highest, the comment may be made that Ms Fadlin did not, during the period of the claimant’s suspension, remind him of the risk of losing untaken annual leave. However, that may be counsel of perfection, with hindsight: the risk was plainly alluded to in the letter of suspension, and I cannot disregard the fact that the claimant had very long service and experience of the respondent; that he was a union member; and that he appeared fluent and articulate in everything he wrote at the time.

41 I do not accept that a ‘refusal’ of the claimant’s annual leave has been shown in the facts before me. The word ‘refusal’ implies an action or decision which expresses denial. In the obvious case, a worker might ask to take the week of 21 July as annual leave and be told that the request is refused. In this case, the claimant made no request, because at the time he did not feel like it; and when the time came when he was ready to feel like taking annual leave, it had gone. I simply cannot read that factual matrix as falling within the framework of Regulation 30.

42 Mr Kirk submitted with reference to Regulations 13(9) and 13(7)(a) that the claimant could have the benefit of exceptions if he did not have the opportunity to take annual leave eg because of sickness. He referred to HMRC v Stringer [2009] ICR 932 and Kreuziger v Land Berlin (C-619-16).

43 In particular, Mr Kirk referred to paragraphs 42 and 45 of Kreuziger and submitted that the claimant in fact had had the opportunity to exercise his right to take leave. He relied upon the letter of suspension; the undisputed evidence that the claimant had taken one weeks leave at the end of March 2017, indicating that he knew the procedures to be followed and that they were efficacious; the reminder sent by Ms Fadlin in July 2017 (50), the very small number of days committed to meetings during a very long period of

absence from the workplace; and the absence of any evidence of enquiry in detail by the claimant as to the policy and his position.

- 44 Mr Kirk reminded me that the question for the tribunal was whether the claimant had been denied the opportunity to exercise his right to take leave. In a case where he had the opportunity, but was not in the right frame of mind to do so, the tribunal could provide no remedy.
- 45 I agree with the broad thrust of that submission. I can find no evidence that the respondent actively refused any specific opportunity to take leave, or that it said or did anything to the claimant which rendered the exercise of the right to leave impossible in practice.
- 46 I reach this decision with greater sympathy for the claimant than the language of this judgment may indicate. I fully accept that at a time of enormous stress he was not in a frame of mind to take holiday which he felt he would enjoy. That however is not the test and the claim fails.

---

Employment Judge R Lewis

Date: .....07.01.20.....

Sent to the parties on: .....15.01.20.....

.....  
For the Tribunal Office