



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Elkins

**Respondent:** Carlisle Security Services Limited

**HELD AT:** Liverpool

**ON:** 5 September 2017

**BEFORE:** Employment Judge Franey  
(sitting alone)

## REPRESENTATION:

**Claimant:** Mr Mensah, Counsel

**Respondent:** Mr Keeble, Solicitor

# JUDGMENT

The complaint of an unlawful deduction from pay in relation to holiday pay fails and is dismissed.

# REASONS

## Introduction

1. By a claim form presented on 6 July 2017 the claimant complained of an unlawful deduction from his pay on 7 April 2017 when he was paid in respect of annual leave taken between 17 and 19 March 2017. The basis of his complaint was that he was entitled to 28 days of paid annual leave in each year, and that the three days in question had taken him up to 28 days in the leave year. He should have been [paid in full but had received only a part payment.

2. By its response form of 9 August 2017 the respondent resisted the complaint. It asserted that the claimant was entitled to 26.1 days of annual leave each year because of his weekly working pattern, and that there had been no underpayment.

## The Issues

3. We discussed the issues at the commencement of the hearing. The case turned on the claimant's entitlement to annual leave under his contract. The claimant said it was 28 days each year; the respondent 26.1 days.

4. It was accepted in submissions that had there been an underpayment the amount should be increased by 15% as a consequence of an unreasonable failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

### **Evidence**

5. The parties had agreed a bundle of documents which ran to 147 pages. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

6. The claimant gave evidence in person as did Paul Taylor, the respondent's Head of Compliance. Each of them had prepared a written witness statement and was questioned by the other party.

### **Relevant Legal Framework**

7. Protection against unlawful deductions from pay is provided by Part II of the Employment Rights Act 1996. Section 13 prohibits a deduction from wages unless it is authorised by statute or a relevant provision of the contract, or unless the worker has previously signified in writing his consent to the deduction. Section 13(3) provides:

**"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

8. Section 27(1) defines "wages" as including holiday pay.

9. The statutory right to paid annual leave is found in the Working Time Regulations 1998 ("WTR"). Regulation 13 provides a right to four weeks of paid annual leave. Regulation 13A provides a right to an additional 1.6 weeks of paid annual leave. Regulation 16 entitles a worker to be paid in respect of any period of annual leave pursuant to those regulations at the rate of a week's pay for each week of that leave. Regulation 13(9) provides that:

**"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, and**
- (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."**

10. Determining what amount is properly payable for the purposes of section 13(5) of the ERA can include consideration of sums due not only pursuant to legislation but also under the contract. A contract can consist of express and implied terms. A term can be implied as a consequence of custom and practice. The principles were reviewed by the Court of Appeal in **Park Cakes Ltd v Shumba & others [2013] IRLR 800**. At paragraph 36(e) Underhill LJ said:

**"As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood."**

## Relevant Findings of Fact

11. There was very little dispute between the parties as to the relevant primary facts and they can be briefly summarised.

### Contractual terms

12. The claimant was employed as a security officer by the respondent in November 2008. The following year he was given a statement of the main terms of his employment (pages 48-49). It provided for 24 days of annual leave each year, and for a leave year from 1 April to 31 March in the following year.

13. On 6 August 2015 the claimant signed a new contract of employment. It appeared at pages 50-60. Clause B2 referred to a staff handbook which was non contractual.

14. Clause F5 on page 55 dealt with entitlement to holiday and the material parts read as follows:

**“You are entitled to take 5.6 weeks as paid holiday in each calendar year (or as amended by the applicable law from time to time), which runs from 1 April to 31 March. You will be paid in accordance with Working Time Regulations 1998 for any working time taken as paid holiday. You will be paid in accordance with Working Time Regulations 1998 for holiday entitlement accrued but not taken by the date on which your employment ends but a deduction will be made in respect of paid holiday taken by such date in excess of entitlement. Paid holidays must be taken at times previously agreed with and convenient to Carlisle and the rights and obligations referred to in sub regulations 15(1)-(4) of the Working Time Regulations 1998 do not apply. Paid holiday entitlement unused at the end of any holiday year may not be carried forward and will be forfeited.”**

15. The non-contractual staff handbook appeared at pages 64-98. On page 69 holiday entitlement was described as follows:

**“Your holiday entitlement is 5.6 normal working weeks’ paid holiday in each holiday year (28 days if your normal working week is five days). This includes public holidays...For every hour worked you will earn/accrue 12.07% of that hour as holiday pay.”**

### In Practice

16. The claimant worked a shift pattern which rotated over three weeks. He would work seven 12 hour days and then have three days off. There would then be a further seven 12 hour days followed by four days off. In each period of 21 days he worked for fourteen days and had seven as non working days.

17. From 2008 until 2016 the company calculated holiday entitlement on the basis of 28 days per year. The claimant understood that he was entitled to 28 days per year. He was never told differently.

18. In 2016 the respondent introduced a new software programme to manage its shifts. It was called “Timegate”. The system worked out holiday and holiday pay. It calculated entitlement to holidays and holiday pay as 12.07% of each hour worked by the employee.

2017

19. In the leave year which began on 1 April 2016 the claimant had taken 25 days of annual leave by mid February 2017.

20. On 9 February 2017 (page 100) he emailed the Key Account Manager, Jeff Higham, asking how many days/hours' annual leave he had left in the year. The reply said:

**"I reckon, by the end of March you would've accrued a further 36 hrs, therefore approx. another three days' holiday to take. Please note, this is only an estimate!"**

21. This tallied with what the claimant expected. Three further days would take him to 28 days. He sent an email on 14 February 2017 (page 99) asking to book annual leave for 17, 18 and 19 March 2017. He had no indication that this leave would go beyond his entitlement for the year. He took the days as annual leave.

22. On 7 April 2017 the claimant received his salary as recorded in the payslip at page 46. He expected to be paid in full for 36 hours (three 12 hour days) of holiday taken in March. In fact he was paid for only 4.62 hours.

23. The claimant took this up immediately by email. He raised it on 12 April 2017 by email at page 101. He spoke to a colleague, Brian Day, on 13 April 2017 and formed the view that he was only being allowed 25 days in that leave year. He sent an email to that effect later that day (page 102). Having heard nothing further he raised a grievance by email of 13 April 2017 at page 103.

24. There was no immediate reply and the claimant chased it up on 25 April 2016. Later that day he received an email from the HR Adviser, Melanie Gilbert, which said, in summary, that his entitlement was to 5.6 weeks not 28 days each year, and that he had been overpaid. He averaged 56 hours each week over the rolling three week rota, and 5.6 weeks equated to 313.6 hours of annual leave, which at 12 hours per day amounted to 26.13 days. The email went on to refer to the ACAS guidelines for calculating holiday pay.

25. There was a further exchange of emails but the parties could not reach agreement on the position.

### **Submissions**

26. At the conclusion of the evidence each advocate made an oral submission.

27. For the respondent Mr Keeble submitted that the entitlement was plainly 5.6 weeks not 28 days, and that this had to be calculated as 12.07% of the hours actually worked, not the hours worked including notional holiday hours. There was no implied term that the claimant would get 28 days each year because the express contract was clear.

28. For the claimant Mr Mensah submitted that the claimant had been allowed 28 days of annual leave each year for eight years and therefore by reason of custom and practice this had become his entitlement. No-one had ever told him any differently. Two different figures had been given by the respondent for the number of hours carried over. The contract prohibited carrying over hours and therefore the claimant was entitled to be paid something even on the respondent's case.

## Discussion and Conclusions

29. The primary matter I had to determine was whether the claimant was entitled to 28 days of annual leave in the leave year in question, or to 5.6 weeks of annual leave. It seemed to me that whatever the position in earlier leave years, the signature of the new contract of employment on 6 August 2015 meant that his entitlement was absolutely clear. It was an express term of that contract that he was entitled to 5.6 weeks of annual leave, which would equate to 28 days only for an employee working five days in each week. That was entirely consistent with his entitlement under the regulations. It should be calculated in weeks not in days or hours.

30. I rejected the contention that custom and practice before or after the signature of that contract could override that express term. By signing the contract in August 2015 the claimant must be taken to have abandoned any contractual right to a different period of leave which he believed he might have had before that date. The fact that the respondent allowed him 28 days of annual leave in the leave year in which that contract was signed was not sufficient to amount to an implied term overriding the express term. Viewed objectively it did not show any intention to vary the express term.

31. An entitlement of 5.6 weeks would amount to 28 days for an employee working 5 days in each week, but on average over each the three week rota period the claimant worked only 4.67 days per week ( $14 \div 3$ ). Expressed in days, his entitlement to annual leave was  $5.6 \times 4.67 = 26.15$  days. He worked 12 hours on each working day, and his entitlement to annual leave expressed in hours was therefore  $26.15 \times 12 = 313.8$  hours per year.

32. By taking 28 days of annual leave in the leave year the claimant exceeded his entitlement of 26.15 days. He was therefore not entitled to payment for the whole of the three days in mid March. The premise on which the claim was brought was misconceived. The claimant failed to show that he had been paid less than the amount properly payable and therefore there had been no deduction from his pay.

33. The claim failed and was dismissed.

Employment Judge Franey

7 September 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 September 2017

FOR THE TRIBUNAL OFFICE