Case No: 2207655/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr I Stuart**

Respondent: **Network Rail Infrastructure Limited**

Heard at: **Birmingham** **On: 13 April 2018**

Before: **Employment Judge Battisby (sitting alone)**

Representation
Claimant: Mr T. Perry, Counsel
Respondent: Ms. L Harris, Counsel

JUDGMENT

The Judgment of the Tribunal is that the claims for unpaid leave are not well-founded and are dismissed.

REASONS

1. This is a claim for payment of statutory unpaid leave accrued but not taken in 2016 and 2017 up to the date of termination of employment on 13 September 2017. The Claimant claims holiday pay for 20 days in 2016 ("the 2016 claim") and 21 days in 2017 ("the 2017 claim").

The Issues

2. The issues were defined following discussion with counsel and there were two main questions to be resolved: firstly, was the Claimant entitled to carry forward his statutory leave from 2016 and this turned on whether he was on sick leave; and secondly, was any statutory leave due at termination either included or required to be included or taken during the notice period. It was agreed the claim had been brought in time and that the Tribunal had jurisdiction.

The Evidence

3. I heard evidence from the Claimant himself and, for the Respondent, from Mr Christopher Lee, employed by the Respondent as an Industrial Relations Specialist. I received a signed witness statement by Ms Lindsay Bedford

on behalf of the Respondent, but she did not give her evidence in person. There was also a bundle of documents running to 55 pages. Hereafter, all page references in brackets refer to this bundle.

<u>The Facts</u>

4. There was no real dispute on the facts save as to what was said at the termination meeting on 21 June 2017 regarding the taking of unused annual leave and as to the interpretation of the occupational health reports and the Claimant's condition and fitness for work.

5. In view of the limited amount of time available on the day of the Hearing, in giving my oral Judgment, I restricted by findings of fact to those disputed areas and gave my reasons for arriving at the judgment given. I shall now set out the full facts and will intersperse within those my findings made in the disputed areas on the balance of probabilities.

6. The Claimant was originally employed by what was then known as British Rail on 07 July 1986. His employment transferred to the Respondent (formerly known as Railtrack) following a TUPE transfer. The Respondent owns, operates, develops and maintains railway infrastructure for passenger and freight train operators in Great Britain. It operates tracks, signals, tunnels, bridges, viaducts, level crossings and stations.

7. Most recently, the Claimant worked as a team leader on track maintenance and was based in Rugby. As he worked trackside, his role was fairly manual in nature and included heavy lifting and working nightshifts. The Claimant was contracted to work 35 hours per week and was paid £33,995.00 per annum. His annual leave period ran from 01 January – 31 December each year. Apparently, it was not possible to find the Claimant's original contract of employment, but there was produced a template statement and terms of employment. ("the Contract") [28-38]. The Claimant accepted those were the terms which applied to him and I find there was such an agreement in writing between the Respondent and Claimant up to the termination of his employment. In relation to holidays, the Contract stipulated an entitlement in the Claimant's case to 32 days annual leave per year plus 3 stipulated Bank Holidays [29]. The Contract (clause 6) also provided that: "Upon termination of your employment, the Company reserves the right to require you to take any unused holiday entitlement during your notice period, even if booked to be taken after the notice period" [29].

8. From about February 2013 onwards, the Claimant experienced ill health problems of a chronic nature. These included heart disease, diabetes, kidney disease, gout and high blood pressure. He was considered to be obese. He was prescribed mediation including insulin. No contemporaneous documents were produced; however, it is not in dispute, from about April 2013, the Respondent took the decision after receiving a report from its occupational health advisors, that the Claimant should be "stood off" rather than applying the usual sick pay arrangement. Under the contract (clause 14), the Claimant

would have been entitled to a maximum of 26 weeks full pay and then 26 weeks half pay [31]. However, he never received any sick pay as he was "stood-off".

9. The stood-off provision [39-40] was collectively agreed in the 1950's and formed part of the Blue Book National Agreement between the Respondent and the RMT Trade Union. It applies where an employee is unable, or not allowed to perform their substantive role, but is certified by the Respondent's Medical Officer as being fit to perform another role with the Respondent, with or without adjustments, but where that other role is not available or vacant at the time of such certification. In those circumstances, the stood-off provision provides that the employee will be "stood-off" for a period of up to two years [39-40]. Employees with at least ten years' service at the point where the stood-off provision is applied are entitled to be paid their full basic rate of pay for the two-year period and this becomes their contractual pay whilst stood-off. Normally, at the end of the two years stood-off period, if a suitable vacancy can still not be identified, the employee's employment will be terminated in accordance with the Respondent's ill-health severance procedure. However, the Respondent did not intend that the term "ill-health" in this context meant that the employee was unfit for any work within the Respondent, just that he was permanently unfit for his normal substantive role. The purpose of the stood-off provision was to provide an employee having such lengthy service with the benefit of that time to find an alternative role. It was clearly substantially more generous than the contractual sick pay scheme.

10. At the time the stood-off provision was agreed, British Rail had around 250,000 employees. This included employees working in locations such as railway stations. When the stood-off provision was applied historically, many employees who could not return to their previous role for health reasons, were often redeployed into stations and other roles. Where such a role was not available at that time, but an employee would have been fit to do such a role, they would have been "stood-off" pending a suitable role becoming available. The Respondent now employs around 40,000 staff and only employs staff to work in 18 managed stations. The vast majority of railway stations are now operated by an external provider as part of a rail franchise. Accordingly, the number of roles available in the Respondent's organisation are now significantly lower than they were when the "stood-off" provision was agreed. This means it is often difficult to identify a role within the Respondent's structure for an operational employee who is not fit to return to their substantive role and so it is sometimes the case that an employee who has been "stood-off" will remain at home until a suitable alternative role becomes available.

11. It is a pre-requisite of the provision that an employee must be fit for "restricted duties", meaning that the employee is fit to undertake the duties of an alternative role with the Respondent (with or without adjustments) whether or not a particular role is available.

12. Whilst stood-off, the employee is entitled to apply for and take, annual leave in the normal way as if he was still present in the workplace.

13. The Blue Book also contains a provision relating to the ill health severance procedure stating that all untaken holiday is to be taken within the notice period [38b].

14. The Respondent is currently in the process of seeking to renegotiate the stood-off provision with the Union, but it clearly applied to the Claimant up to the point of the termination of his employment.

15. Accordingly, from about April 2013 up to the termination of his employment in June 2017, the Claimant was "stood-off" and in receipt of his normal basic salary. He believes that he was cast aside and largely forgotten about, which seems likely and might explain why there does not appear to have been any review of the Claimant's position after two years in April 2015 and the situation allowed to continue until 2017.

16. After April 2013 the Claimant never requested annual leave, as he did not go on any holidays or seek to book any holidays during the entire period other than three days annual leave that he took straight after been "stood-off". Those days had already been booked. The Claimant explained that he normally relied upon monies received from working overtime to pay for his holidays and the rest of his basic income went on supporting his family and other pressing financial commitments. As he was not working any overtime, he could not afford to go on holiday and I accept his evidence on this.

17. The Claimant recalled attending various occupational health and medical appointments whilst he was "stood-off", but only six letters about these have been produced, five from OH Assist and one from Northampton General Hospital, dating between 14 January 2016 and the final undated one in 2017 [40a-j]. It is clear from these reports, that he was not fit at any time to return to his normal trackside duties. His weight seems to have been the main issue and this was of such concern that surgery was eventually scheduled to take place in June 2017 for the fitting of a gastric sleeve. He had real mobility issues and needed to take daily medication to control his various conditions and to perform blood-sugar tests several times per day for his diabetes. His general fitness and stamina all suffered. At one point, he suffered a nasty abscess. He had problems showering and with personal hygiene. Whilst the occupational health reports indicated he was fit for "restricted duties" nothing was ever offered.

18. I do not doubt that the Claimant wanted to return to work if at all possible, but it was clearly found not to be realistic both from the point of view of the limited opportunities and his numerous chronic medical conditions.

19. On 19 May 2017 a welfare meeting took place between the Claimant and his manager, Steve Gray. Lindsay Bedford attended as the human resources representative and notetaker and Paul Rikkus attended as the Claimant's union representative. Notes were made [41-42]. It was reiterated that, on the basis of the latest occupational health report [40i-40j], the Claimant was still unfit for trackside duties. Other options were discussed but it was confirmed there were no other available roles. At this point the Claimant was awaiting the aforesaid surgery. It was agreed the Claimant could continue to seek out

and apply for other positions and that Ms. Bedford would obtain a quote for ill health severance.

20. There followed an "ill health first stage meeting" to discuss the Claimants "ill health" and possible severance terms on 08 June 2017 involving the same people. The ill health quotation was produced [43a]. The Claimant queried the lump sum amount of £13,019.81 set out in the quotation believing it should have been more. He also raised a query about his untaken annual leave for the previous four years and a note from Mr Rikkus was produced setting out the Claimant's claim for untaken holidays from 2013 to date [43b]. It was agreed there would be a second stage meeting. This took place on 21 June with the same people. A note was again taken [44]. At the start of the meeting, the note records that Mr Gray "stated that this meeting was the final meeting and IS would be placed on twelve weeks' notice, and that his annual leave was to be taken within his notice period". The Claimant accepts the first part, but disputes having been told to take his annual leave during the notice period. In her witness statement, Ms. Bedford states she is "adamant that Mr Gray did tell Mr Stuart that his annual leave was to be taken within his notice period and that is why I took a note of the same". Whilst less weight is to be attached to her statement than if she had been present to deal with cross examination on behalf of the Claimant, I find it sufficient to corroborate the contemporaneous note, but it is regrettable that the termination letter of 27 June 2017 [45-47] did not make this clear. The fact that the Claimant's contract specifically reserved the right to the Respondent to require the Claimant to take any unused holiday entitlement during his notice period makes it highly unlikely that this would not have been made a requirement of the Claimant given that he had been enquiring about holidays at the previous meeting. I do not believe it is a case of the Claimant lying about this, but he has simply forgotten or overlooked it when being said. I accept the note as an accurate record of the meeting and it went on to set out the Respondent's refusal to countenance the payment for historical untaken holidays prior to 2017 and its reasons.

21. The termination letter sent subsequently by Mr Gray, which I have mentioned above dated 27 June 2017, referred to the meeting on 21 June 2017 and its outcome, namely that the employment would terminate due to capability under the ill health severance procedure. It confirmed the termination date as being 13 September 2017, which is twelve weeks following the meeting.

22. The Claimant appealed the decision and was invited to an appeal hearing which took place on 07 August 2017. The appeal was conducted by Dan Molloy with Matt Skelton as notetaker. A note was prepared [51-52]. The Claimant's union representative was on holiday, but he confirmed that he was willing to proceed without a representative. The Claimant explained that his appeal was over the amount of the severance pay which was lower than envisaged, and that no annual leave payment had been included as part of the severance payment. He said his union representative had calculated he was entitled to 147 leave days [43b]. This was over a period from 2013 to the date of termination. Mr Molloy confirmed the outcome of the appeal in a letter dated 14 August 2017 [53]. He determined, that because the Claimant had been paid in full for 4 years and had provided no fit notes, he was not entitled to arrears of holiday pay due to not having been off sick. He reiterated that

the Claimant had had the opportunity of taking holiday during the “stood-off” period, but he had not exercised it.

23. After completing early conciliation through ACAS, the date of the certificate being 09 November 2017, the Claimant presented his claim on 09 November 2017. By the time of the Hearing his claim was clarified. In terms of annual leave, he claimed 20 days statutory leave for 2016 and 21 days calculated on a pro-rata basis for 2017, a total of 41 days with a value of £5,360.75.

Submissions and the Law

24. Both counsel very helpfully set out their submissions in writing and presented them orally at the conclusion of the evidence. I will not repeat them here. There is no dispute on the law to be applied.

25. The relevant statutory provisions are the Working Time Regulations 1998 and, in particular, Regulations 2,13, 14,15,16 and 30.

26. Regulation 13(9) provides [basic] leave may only be taken in the leave year in which it falls due and may not be replaced by a payment in lieu. This Regulation has been interpreted in various cases to provide a modification where the worker is unable to take leave because of sickness, so that leave may in such circumstances be carried forward to the following leave year. On this point I was referred in submissions to:

- ***Stringer v HMRC*** [2009] IRLR 214
- ***NHS v Larner*** [2012] IRLR 825
- ***Sood Enterprises v Healy*** [2013] IRLR 865
- ***Plumb v Duncan Print Group Ltd*** [2015] IRLR 711
- ***Industrial & Commercial Maintenance Ltd v Briffa*** UKEAT/0215/08

27. It is now clear that workers on sick leave cannot be compelled to take annual leave. They may do so or carry it forward for up to 18 months. They need not show they were too ill to take leave. If they are unable or unwilling to take leave during a period of sickness, they may carry it forward and need not give notice of intention to take leave. The right to annual leave accrues during the period of sick leave and untaken leave may be carried forward or claimed as holiday pay on termination. An employer can, however, by making a relevant agreement as defined by Regulation 2, require its employees to take any untaken leave during the period of notice, and this would operate to vary or exclude the obligation to give the employee notice to take leave under Regulation 15.

Conclusions

28. My conclusions as far as the 2016 claim is concerned turn on whether the Claimant was on sick leave and entitled to carry forward annual leave accrued in that year to 2017, or whether the effect of the stood off procedure was to give him some status other than that of an employee on sick leave and so disentitle him from making such a claim.

29. The stood off procedure was agreed between British Rail, the Respondent's predecessor, and the Rail Unions back in the 1950's and has continued in place ever since. This was obviously long before the European Directives and latest jurisprudence were given effect and applied in UK law. The procedure is currently being renegotiated. It was very generous to employees of relatively longstanding service and, in the Claimant's case, made even more generous because he received the payments for 4½ years rather than the usual 2 years and, had he been on normal sick leave, he would only have received 26 weeks full pay and 26 weeks half pay; also, he received a special termination payment because he was a sick departing employee. I can therefore understand why the Respondents oppose this claim, not only because they believe their interpretation of the law is correct, but also because they feel that the Claimant has been well-treated and paid. However, I need to leave aside such sentiments and interpret the position according to the law as it stands in the form of the relevant statutory provisions as interpreted by the case law referred to.

30. I am driven to conclude that the Claimant was on effective sick leave by any normal standards continuously from 2013 until his employment was terminated. He was unfit to do his job and only fit for restricted duties. But for the stood off procedure, he would have been classified as on sick leave. The fact the Respondent chose by agreement with the unions to treat such employees as in the Claimant's position more advantageously, does not alter the fact that he was unfit to perform his job and on effective sick leave. Accordingly, the cases make it clear he was entitled to roll over his statutory leave entitlement. The fact that he was certified as fit for some restricted duties is irrelevant and, in my judgment, he could not do the job for which he was employed due to his health problems. Undoubtedly those problems affected his day-to-day living and activities. Whilst he might have been able to rest at home and do some limited activities like walking the dog, I doubt he would have been able to go and enjoy a holiday away from home, or engage in any substantial leisure or recreational pursuits. Accordingly, I find he was by law entitled to roll over the claimed 20 days annual statutory leave due in 2016 to 2017.

31. This means that, on termination, the Claimant was entitled to the 20 days untaken leave plus, and I believe it is not in dispute, the 21 days (pro-rata 5.6 weeks) statutory annual leave in 2017 - a total of 41 days. I have found he was told to take his annual leave due during the notice period. Not enough notice was given to him to comply with Regulation 15 of the Working Time Regulations. However, the Respondents rely on both the Contract and the Blue Book Workplace Agreement to exclude this requirement. I find each of these amounts to a "relevant agreement" under Regulation 2 of the WTR.

32. When giving 12 weeks' notice on 21 June 2017, and relying on the provision in the Contract (see paragraph 7 above), I find that the Respondents did require him to take his unused holiday entitlement during the notice period and that it could have been taken even if it was booked to take place after the notice period, but the Claimant did not do so. I find the words "upon termination of your employment" refer to the time of giving the notice of termination.

33. Under the Blue Book I find that the words "where contractual notice is given" (see paragraph 13 above) refer simply to the number of weeks' notice required by the Contract. In the meeting on 21 June, the Claimant was given 12 weeks' notice as due under the Contract and so by virtue of the Blue Book Agreement, annual leave was regarded as being taken within the period of notice.

34. The Claimant was due 41 days annual leave as at the date of termination and the notice period given was 60 days; therefore, his period of notice was enough to incorporate the statutory leave to which he was due. Accordingly, as he did not work during, and was paid for, the notice period, both the 2016 and 2017 claims fail.

Employment Judge Battisby
4 June 2018