



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Buslowska  
**Respondent:** Integrated Cleaning Management Ltd

**Heard at:** London South on: 26 July 2018

**Before:** EMPLOYMENT JUDGE CORRIGAN  
Sitting Alone

## Representation

**Claimant:** In Person (with Polish Interpreter, Ms Magdalena Parker)  
**Respondent:** No appearance

## REASONS FOR JUDGMENT

*Reasons provided at the Respondent's request.*

1. By her claim dated 17 October 2017 the Claimant claimed accrued holiday pay outstanding upon termination of employment.
2. The issues were set out in the Case Management Order dated 25 June 2018.
3. The Respondent did not attend the hearing but I had regard to the letter from the Respondent dated 24 July 2018, the Respondent's written submissions and the written witness statement of Tomasz Orłowski.
4. The Claimant gave oral evidence on her own behalf. Ms Theresa Malinowska (employee of the Respondent at the time the Claimant was employed) also gave evidence on behalf of the Claimant. There was a bundle of documents.
5. The Claimant had not prepared a written statement for either herself or her witness, save for a brief email to the Respondent in June 2018 setting out her dates of employment and that she had not received holiday pay or written terms and conditions. The Claimant was not sure she had received the Tribunal Order and had not understood the requirement in relation to witness statements. I accepted she was dealing with the proceedings in a second language and allowed her and her witness to give oral evidence.

6. Based on the evidence heard and the documents before me I found the following facts:

**Facts**

7. The Claimant began working for the Respondent on 2 November 2016.
8. The Claimant did not receive written particulars of employment from the Respondent. I accepted her evidence that the first time she saw them was in the bundle of documents for these proceedings. The Respondent's own documents show that although there was an attempt to email these to the Claimant, they were not delivered (pages 34-37). The Respondent's own position is that page 34 shows that an offer letter and contract were sent to an email address provided by the Claimant and that "reasonable and sufficient endeavours" were made. The Respondent itself therefore does not rely on the offer and contract actually having been received by the Claimant. It is clear from page 34 that it was not delivered.
9. It was not essential to determine the case, but it was noted during the hearing that the Claimant had supplied the correct email address (page 38) but it appears that it had initially been recorded incorrectly with the part of the address containing the Claimant's name spelled "Buslowski" rather than "Buslowska" (third entry page 38). It is not possible to ascertain whether this was the reason for the non-delivery of the email sent on 16 November 2016 but it appears to be a possible explanation. In any event the email was not received and the Respondent made no other effort to provide the documents another way.
10. I also accepted the Claimant's evidence that she had not received or signed the handbook at page 38a, no-one had told her about a handbook and the only documents she had accessed online were payslips.
11. It was accepted by both parties that the Claimant had not taken any paid leave throughout her employment. I accepted the Claimant's evidence, supported by the evidence of Ms Malinowska, that when she asked to take leave on more than one occasion the Claimant's manager Mr Tomasz Orłowski had told her that holidays were not paid.
12. There is no dispute that the Claimant took no paid annual leave whilst working for the Respondent.

**Relevant law**

13. Regulation 13 Working Time Regulations 1998 states:

**"(3) A worker's leave year...begins-**

**(a) on such date during the calendar year as may be provided for in a relevant agreement; or**

**(b) where there are no provisions of a relevant agreement which apply\_**

...

**(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date...**

**(9) Leave to which a worker is entitled ...**

**(a) ..may only be taken in the leave year in respect of which it is due...**

14. The maximum entitlement under statute is 28 days per annum (regulations 13 and 13A).
15. "Relevant agreement" is defined in regulation 2 as a workforce agreement, a contractual collective agreement or "any other agreement in writing which is legally enforceable as between the worker and ...employer".
16. Regulation 16 provides that statutory annual leave should be paid and regulation 14 provides that where an employee's contract terminates during the leave year the employee is entitled to a payment for accrued but untaken leave.
17. In *King v The Sash Window Workshop Ltd* [2017] EUECJ C-214/16 the European Court of Justice decided that national provisions or practices are precluded that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive [leave years] because his employer refused to remunerate that leave.

The Court re-emphasized the importance of the right to paid annual leave and observed that

**"a worker faced with circumstances liable to give rise to uncertainty during the leave period as to the remuneration owed to [her], would not be able to fully benefit from that leave.**

**Similarly, such circumstances are liable to dissuade the worker from taking [her] annual leave. In that regard, it must be noted that any practice or omission of an employer that may potentially deter a worker from taking [her] annual leave is equally incompatible with the purpose of the right to paid annual leave.**

**..., an employer that does not allow a worker to exercise [her] right to paid annual leave must bear the consequences....if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that directive."**

## Conclusions

***Did the Claimant's leave year run from 2 November 2016 (the Claimant's start date) or 1 April 2017? Was there a "relevant agreement" which specified the leave year ran from 1 April each year (as per regulation 13 (3) (a))?***

18. The Respondent relies on the leave year within the written particulars which it tried to email to the Claimant but which she did not receive. However there must be an agreement in writing between the employee and employer. I am satisfied the Claimant did not get any agreement in writing due to non-delivery of the email. It is implicit in the Respondent's case that there was no agreement in writing actually given to the Claimant. The Respondent relies on having made reasonable efforts to send, not on the Claimant's receipt of the written particulars. In fact, the Respondent made minimal efforts to give the Claimant her written particulars. It does appear that the failure to deliver the email may have been due to a typo in the Claimant's email address on the Respondent's part. In any event, knowing the email had not been delivered, the Respondent made no further efforts to provide the Claimant with the particulars.

19. Moreover, the Respondent seeks to say the relevant agreement is incorporated on a company wide scale as an implied term through custom and practice as shown by the handbook at page 38a. However an implied term is insufficient. Regulations 2 and 13 require a written agreement. I have accepted the Claimant did not know about and had not seen the Company Handbook. The Respondent did not have a relevant agreement in place with the Claimant in respect of the Respondent's normal leave year and therefore the Claimant's leave year ran from her start date 2 November 2016.

***Did the Claimant have accrued and untaken leave form the current leave year outstanding upon termination of her employment?***

20. The Claimant was employed for 168 days by the Respondent. She had therefore accrued 13 days' paid leave (which she did not take) ( $168/365 \times 28$ ). The Respondent accepts and has paid for one day of accrued leave, which leaves 12 days' outstanding. Her accrued holiday pay is therefore £630 ( $£52.50 \times 12$ , based on 7 hour days at £7.50 per hour).

***At the date of the Claimant's claim had the Respondent provided the Claimant with written particulars of employment? If not, what increase to her award is just and equitable?***

21. It follows from the above that the Claimant was not given her written particulars of employment. This did disadvantage her. Her manager was informing her that she would not be paid for holidays and in the absence of her written particulars the Claimant could not take her leave because she

believed him. The Respondent relies on the fact it made an attempt to email the written particulars to the Claimant but the Respondent was on notice that the Claimant did not receive that email and no further attempts were made to provide the Claimant with written particulars. It is therefore just and equitable to increase the award by the maximum of 4 weeks' pay (£1260).

22. It was not necessary to consider the application of *King v The Sash Window Workshop Ltd* and whether the Claimant, if her leave year ran from April, could have carried untaken leave over to the new leave year. However my view is that I would have decided that issue in the Claimant's favour as she was deterred/discouraged from taking her annual leave because her manager had told her it was unpaid.

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Employment Judge Corrigan  
26 November 2018