



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103346/2019**

**Hearing Held at Dundee on 21 June 2019**

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**Employment Judge A Kemp**

**Mr J Garland**

**Claimant  
In person**

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**Waldo Retail Limited**

**Respondent  
Represented by:  
Mr K Gibson  
Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. There was no failure to pay holiday pay due to the claimant by the respondent, whether under the Working Time Regulations 1998 or as an unlawful deduction from hearings.

2. The Tribunal does not have jurisdiction to consider the claim in respect of failure to pay employer pension contributions, or for the remaining element of the claim.

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3. The Claim is therefore dismissed.

## REASONS

### Introduction

1. The claimant pursues a claim for unpaid holiday pay, and breach of contract in respect of a failure to pay employer pension contributions, and what was described as a claim for two weeks' notice as a goodwill gesture for his inconvenience. The claims are denied by the respondent. The claim was initially directed to Waldo Retail Limited t/a Tartan Coffee. The Response Form was submitted for Tartan Coffee House. On 11 May 2018 the claimant emailed the Tribunal asking about the correct identity of the respondent as different trading names were provided on payslips. The Tribunal asked the respondent for comments but it did not reply. By email of 23 May 2019 the Tribunal added Waldo Retail Limited as a respondent. At the commencement of the hearing it was confirmed that the respondent was Waldo Retail Limited, which is a limited company, and I have directed that that name be used in the heading of the case, with that entity being the respondent. The trading name need not be provided.
2. During submissions in the claim, I suggested that I would defer a decision for two weeks to give the parties an opportunity to seek to resolve the issue of pension contributions, given that the respondent accepted that it had not established the necessary auto-enrolled pension scheme for the claimant when due, and had offered to do so subject to the claimant making his own contributions which he said he could not afford as a lump sum. The respondent's solicitors sent an email to the Tribunal on 5 July 2019 stating that a sum had been paid to the pension provider, as referred to below.

### 25 Issues

3. The Tribunal identified the following issues:
- (i) Was there any failure to pay holidays due to the claimant?

- (ii) Is the failure to pay sums due for employer contribution to pension under the Pensions Act 2008 within the jurisdiction of the tribunal?
- (iii) What if any remedy should be given to the claimant for the notice pay he seeks?

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### **Evidence**

4. The Tribunal heard evidence from the claimant himself, and from Ms Karen Morton a Director of the respondent. Documents were spoken to from a single bundle the parties had prepared. Not all documents produced were spoken to in evidence.

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### **Facts**

5. The Tribunal found the following facts to have been established:
6. The Claimant is Mr Jamie Garland
7. He was employed by the respondent from 14 October 2017 as a Head Chef.
8. The respondent operates a café on Perth Road, Dundee, known as Tartan Coffee House, and a second café. It is a limited company, managed by Ms Karen Morton and Mr Noel Kemlo who are the shareholders.
9. The claimant was employed under a written contract of employment with the respondent. It had provision for holidays in clause 8 the material terms of which were that (i) the company's holiday year is from 1<sup>st</sup> January to 31<sup>st</sup> December (ii) the holiday entitlement was to 28 days each year (iii) there was a system the claimant had to follow for obtaining prior approval for holiday plans (iv) he was required to use all of his holiday entitlement by the last day of each holiday year and, unless there are exceptional circumstances, you may not carry your holiday entitlement forward into the next holiday year.

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10. The contract had a provision for notice which required the claimant to give four weeks' notice if he wished to resign.
11. On 1 February 2018 the claimant ought to have been enrolled in a pension under the auto-enrolment provisions of the Pensions Act 2008, that being the respondent's staging date under that Act, and the claimant being a qualifying employee. The respondent failed to do so, in breach of its duties under that Act. During the period of the claimant's employment the respondent did not make any employer pension contributions.
12. In 2018 the claimant took 19 days' holiday. To do so the claimant completed a holiday form with the respondent to seek approval, or spoke to Ms Morton about the holiday requested and she completed the form in his presence.
13. During 2018 the respondent commenced plans to change the holiday year for its staff to the period from 1 April to 31 March, but did not issue any amended terms of contract to the claimant.
14. The respondent had a number of staff available to cover the work of the claimant had he requested holidays in the last quarter of 2018.
15. The claimant did not request the nine remaining days of holidays in the last quarter of 2018.
16. On 22 January 2019 the respondent wrote two letters to the claimant, one regarding disciplinary action and the other for a fact finding meeting.
17. On 24 January 2019 the claimant wrote to the respondent to give two weeks' notice of termination of employment. He said that it was not an easy decision to make, that he appreciated the support over the course of his employment, and valued the experience and knowledge he had gained. He stated that it had been a pleasure working with the respondent. He made no mention of any agreement to carry forward unused holiday entitlement from 2018.
18. His letter was written after discussions with Mr Noel Kemlo, which led to an agreement that he leave on less notice than the four weeks stipulated in the contract.

**Claimant's submission**

19. The claimant represented himself and made a very brief submission that he had missed out on time with his children, and had tried his best at work. He did not think that there was any problem before he resigned. He had raised the issue of his pension entitlement and felt forced out afterwards. He sought what he was entitled to.

**Respondent's submission**

20. The following is a summary of Mr Gibson's submission. He submitted that there was no contractual basis to carry forward holidays into the next leave year, and that the contract had not been amended from the calendar year as the leave year. The claimant asserted an agreement to do so, but that was denied by Ms Morton and her evidence should be preferred. The claimant had argued initially that there was no cover for holidays for him, but when the evidence was presented latterly accepted that there was.
21. The claimant accepted that there had been an agreement to have two weeks' notice, less than the contractual period, and he did not understand the basis of the claimant's claim.
22. In respect of pension, he accepted that the respondent was in breach of its duties under the 2008 Act but that payment of the employer pension contribution to a third party could not fall within section 13 of the Employment Rights Act 1996 as it was not payable to the employee. That was confirmed in the **Somerset** case which is referred to below. There was nothing in the 2008 to confer jurisdiction on the Tribunal.
23. He invited me to dismiss the Claim.

**The law**

24. The right to holiday pay is provided for in the Working Time Regulations 1998. They are made under the European Communities Act 1972. They give effect to EC Directive 93/104/EC. They require to be construed purposively. Regulation 13 provides for the entitlement to annual leave, and Regulation

13(9) states that “it may only be taken in the leave year in respect of which it is due”. Regulation 14 provides for compensation for untaken leave accrued in the year of termination of employment. The Regulations provide in effect that holidays are an entitlement, which the employee requires to seek, rather than a duty on the employer which requires the employer to ensure that the employee takes them.

25. The definition of wages in section 27 of the Employment Rights Act 1996 states that the term “means any sums payable to the worker in connection with his employment”. There is a right not to suffer unauthorised deductions from wages under section 13, and a right to claim to a tribunal under section 23.

26. The Pensions Act 2008 made provision for employees who qualify to be automatically enrolled by the employer in a pension scheme. It is generally referred to as “auto-enrolment.” The material provision is section 3. The duty commences on a staging date, which differs from employer to employer.

## **Discussion**

### *Holiday Pay*

27. The heart of the case is whether or not there was an agreement between the claimant and Ms Morton that holidays for 2018 could be taken in the period up to April 2019. The claimant has in support the agreed facts (i) that other staff were having the holiday year changed to April (ii) the employer was in breach of its auto-enrolment provisions and (iii) the holiday request forms were not always completed by him, but had in part been completed in the hand of Ms Morton. In general, the management of holidays was rather loose, with documentation being supplied which was not comprehensive on the system to apply for holidays.

28. The respondent has in support of its position (i) the lack of any written evidence to support the claim, and it not being mentioned in the letter of resignation (ii) the claimant now accepting that there were staff available who could have covered for him had he sought holidays in the latter part of 2018

contrary to the position he had taken earlier (iii) the terms of the claimant's contract of employment which were not changed and (iv) the onus of proof falling on the claimant.

5 29. Deciding such a conflict in the evidence has been difficult. Both the claimant and Ms Morton gave evidence clearly and candidly, and there was nothing I could discern in their respective demeanours that may be a reliable guide as to which of them was the more credible and reliable.

10 30. Having considered matters overall, I have concluded that the respondent's position is more likely to be accurate. In the Claim Form it is alleged that the claimant "couldn't take any time in December". He now accepts that that is wrong. He could have taken that time, and other staff would have covered his absence. That was the fundamental reason why he said that he sought to carry forward holidays – that he could not take them as there was no one to cover.

15 31. His Claim Form also states that other staff had the holiday year changed to April "but I never got the option". That not having the option is contrary to the suggestion that there was an agreement that he could do so.

20 32. Overall, the claimant's position both in evidence and submission was at least in part to the effect that it was unfair that he could not carry forward unused holidays as he had not taken them when the café was busy. The difficulty with that argument is that the law is to the effect that holidays cannot be carried forward to the next holiday year (save in cases such as maternity or illness). The starting point therefore is that the claimant loses holidays not taken in 2018. It may be that some employees do not seek holidays at a particular  
25 time because they know that the employer is busy, but if they do so, the holidays are lost. That is as they are an entitlement, not a requirement. Whilst the contract had a qualification to the provision that holidays had to be taken in the holiday year if there were "exceptional circumstances" there was no evidence of there being exceptional circumstances.

33. If there is an agreement to carry them forward, it is the onus of the claimant to prove that. There is nothing in writing to evidence the agreement the claimant says was reached, and it is in this case absent from the one material written document from the claimant being his letter of resignation written after discussion with Mr Kemlo. The letter was more than mere intimation of termination of employment. It could have referred to accrued holiday pay, but its omission from that letter is I consider an important part of the evaluation of the evidence.
34. This is not to ignore the contrary evidence. The fact that the respondent was completely in breach of its duties in respect of auto-enrolment was a particular concern.
35. Considering the weight evidence overall however I concluded that the claimant had not proved that there was an agreement to carry forward leave, that the evidence of Ms Morton was to be preferred, that there was no agreement that untaken holidays from 2018 could be taken in the period up to 1 April 2019 and that accordingly his claim for holiday pay fails.

### *Pension*

36. The second aspect of his claim was in relation to pension contributions. It is certainly the case that the respondent failed in its duty to set up a qualifying pension and pay the contributions into that. I do not consider that there can be any claim for unlawful deduction from wages, however as those contributions are payable to the pension provider, and not to the employee. In the case of **Somerset County Council v Chambers UKEAT/0417/12** it was held that the Tribunal had no jurisdiction to consider such an issue, as the payment did not fall within section 27. That is binding on me, and in any event is I consider clearly correct.
37. I did consider whether the issue could be treated as one of breach of contract, but the contract of employment made no reference to pension provision and the issue is one of statutory duty under the 2008 Act, I consider. I am not



aware of any provision in the Act conferring jurisdiction on the Tribunal, or imposing a relevant term into the contract.

38. I was informed by email sent after the conclusion of evidence that the respondent had paid a sum into NEST as the pension provider. In the event  
5 that the claimant is not content with that it is an issue that he may be able to raise either with the Pensions Regulator, or by way of action in court. I consider however that the Tribunal does not have jurisdiction to consider this part of the claim made and that claim is dismissed.

#### *Notice*

10 39. Finally, there was a claim for two weeks' notice pay. It was put forward as a "gesture of goodwill". It was not clear what that was based upon, and in evidence the claimant accepted that he had had discussions with Mr Kemlo about his leaving so that he could start new employment before the end of the four week period of notice he required to give. That suited both parties. It  
15 was confirmed in the letter of resignation.

40. There is in that situation no basis on which I can make any award, as there was no breach of contract by the respondent.

41. There is I consider no relevant claim in law, and it is dismissed.

#### **Conclusion**

20 42. In light of the findings I have made, I must dismiss the Claim.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Alexander Kemp**  
**09 July 2019**  
**09 July 2019**