



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr P Jackson

Carbon 60 Limited

**Heard at:** London South Employment Tribunal    **On:** 20 August 2019

**Before:** Employment Judge Hyams-Parish (sitting alone)

**Representation:**

**For the Claimant:** Mr Jackson (representing himself)

**For the Respondent:** Mr Ludlow (Counsel)

## RESERVED JUDGMENT

1. **The claim of unlawful deduction from wages (unpaid holiday pay) is well-founded and succeeds.**
2. **The Respondent is ordered to pay the Claimant the sum of £7414.72**

## REASONS

### Claim

1. By a claim form presented to the Tribunal on 7 April 2019, the Claimant brings a complaint of unlawful deduction from wages.
2. The Claimant claims that he has not been paid for 23.5 days' holiday which accrued, and was taken by the Claimant, in 2018. The total claim is for £7,414.72, using the Claimant's day rate of £315.52.
3. There was agreement between the parties at the outset of the hearing as to the number of days' holiday being claimed (23.5 days) and the total sum due to the Claimant, if successful, being the total claim referred to at

paragraph 2.

**Legal Issues**

4. It became clear during discussion with the parties, before the case started, that what this case boiled down to was whether the Claimant had in fact taken holiday for which he was now seeking payment.
5. The Respondent's case is that the Claimant did not take the holiday that had accrued in 2018 and therefore, in accordance with his contract with the Respondent, the Claimant had lost the holiday because he had not exercised his right to use it.
6. The Claimant, on the other hand, maintained that the Respondent was conflating two separate issues; the taking of holiday, which must be by the end of the holiday year, or it will be lost; and seeking payment for holiday that has been taken, for which the Claimant says there was no deadline stipulated by the Respondent. He maintained that his case fell into the latter category.

**Legal Framework**

7. The law on holiday entitlement is set out in the Working Time Regulations 1998 which states as follows:

***13.— Entitlement to annual leave***

***(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.***

***13A.— Entitlement to additional annual leave***

***(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).***

***(2) The period of additional leave to which a worker is entitled under paragraph (1) is—***

.....

***(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.***

***16.— Payment in respect of periods of leave***

***(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.***

8. The law on unlawful deduction from wages is set out in section 13 of the Employment Rights Act 1996 which says as follows:

***13.— Right not to suffer unauthorised deductions.***

**(1) An employer shall not make a deduction from wages of a worker employed by him unless—**

**(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**

**(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**

**23.— Complaints to employment tribunals**

**(1) A worker may present a complaint to an employment tribunal**

**(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**

**(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),**

**(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or**

**(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).**

**(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—**

**(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or**

**(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.**

**(3) Where a complaint is brought under this section in respect of(a) a series of deductions or payments, or**

**(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,**

**the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.**

**Evidence**

9. The Tribunal heard evidence from the Claimant and Ms Hannah Bennett on

behalf of the Respondent. Ms Bennett is employed by the Respondent as a payroll manager.

10. The Tribunal was referred to documents in a hearing bundle extending to 141 pages. References in square brackets in this judgment are to page numbers in the hearing bundle.

### **Findings of fact**

11. The Claimant was engaged under a contract with the Respondent as a temporary worker to provide services to the British Council. The Claimant signed a contract with the Respondent [31] on 9 February 2017. The subject of holiday was covered at clause 5 of the contract and stated as follows:

*For the purposes of calculating entitlement to paid annual leave pursuant to WTR under this clause, the leave year commences on 1 January each year and ends on 31 December.*

*Under the WTR the Temporary Worker is entitled to a 28 days' paid leave per year. All entitlement to leave should be taken during the course of the leave year in which it accrues, however any untaken holiday can be carried over to the next holiday year but must be requested and taken within the first six weeks of that holiday year. Any holiday which has been carried over but has not been taken during the six-week period will be lost. Holidays requested and taken within the initial six weeks of the following holiday year will be taken from any brought forward holidays first (if any exist) and then from holidays accrued in the current holiday year. Under AWR, on completion of the Qualifying Period, the Temporary Worker may be entitled to paid and/or unpaid annual leave in addition to the Temporary Worker's entitlement to paid annual leave under WTR. If this is the case, any such entitlement(s) and the date from which any such entitlement will commence and how payments of such entitlement(s) accrue will be set out in the Assignment confirmation or any variation to the same.*

*Where a Temporary Worker wishes to take paid leave during the course of an Assignment, he should notify the Employment Business of the dates of his intended absence giving notice of at least twice the length of the period of leave that he wishes to take. In certain circumstances the Employment Business may give counter notice to the Temporary Worker to postpone or reduce the amount of leave that a Temporary Worker wishes to take and in such circumstances the Employment Business will inform the Temporary Worker in writing giving at least the same length of notice as the period of leave that has been requested.*

*Entitlement to payment for leave accrues in proportion to the amount of time worked continuously by the Temporary Worker on Assignment during the leave year. The amount of payment which the Temporary Worker will receive in respect of periods of annual leave taken during the course of an Assignment will be calculated in accordance with and paid in proportion to the number of hours which the Temporary Worker has worked on Assignment.*

*In the course of any Assignment during the first leave year the Temporary Worker is entitled to request leave at the rate of 1/12 of the Temporary Workers total holiday entitlement in each month of the*

*holiday year.*

***Where a Bank Holiday or other public holiday falls during an Assignment the Employment Business may at its discretion request the Temporary Worker upon giving one weeks' notice to take a Bank holiday or other public holiday as part of his paid annual leave entitlement.***

***The Temporary Worker shall be entitled to a payment in lieu of any untaken leave where the amount of leave taken is less than the amount accrued in accordance with clause 5.4 above.***

***None of the provisions of this clause regarding statutory entitlement to paid leave shall affect the Temporary Worker's status as a self-employed worker***

12. The Tribunal finds that the practice operated by the Respondent in relation to holiday for the Claimant was not consistent with the above contractual provisions.
13. By an email from Donna Pickwick (who worked in payroll) to the Claimant dated 13 February 2017 [34(d)], the Claimant was informed about the system for completing timesheets. There was also a paragraph headed "holiday" in the same email which said as follows:

***Holiday is accrued at 0.53 days per week that you work. This works out as 28 days per year, including bank holidays. The holiday rate is calculated by averaging qualifying pay for the preceding 12 weeks, excluding any weeks not worked. Your holiday rate is not static and will vary depending on the hours worked on the timesheets processed prior to the request. Our holiday year runs from January to December.***

***There is a 6 week grace period after December where you can carry over holiday pay from the prior year, any holiday carried over must be used in the 6 weeks grace period. Holiday must be taken on days you do not work and you must request holiday by contacting us and letting us know the dates you wish to take as holiday.***

***On the CNET sheet you need to put zero hours against the days you take as leave or if you are taking the full week as holiday then you put that timesheet though has not worked. Please refer to the attached guide for this.***

14. The Tribunal finds that the Claimant accrued holiday throughout the year depending on how many days he worked. He, therefore, did not know how much his total holiday entitlement would be until the end of the year when it was clear how many days he had worked. What the Claimant did was take time off throughout the year as holiday and record it on his timesheets, as requested by the email from Ms Pickwick. He would then make a claim for holiday pay at the end of the year when it was clear how many days he was entitled to be paid for.
15. This is supported by documentary evidence in the bundle which demonstrates what the Claimant did in 2018. In 2018 the Claimant took 40.5 days' holiday. However, by the end of the year it became clear that in terms

of receiving paid holiday, he was only entitled to 23.5 of the 40.5 days as *paid holiday* because that is all that he had accrued.

16. The Tribunal finds that the practice, clearly accepted by the Respondent, is that the Claimant would essentially “cash in” the holiday at a time of his choosing, but normally at the end of the year, and inform the Respondent which of the days off he would like treated as paid holiday depending on how many days he had accrued.
17. This is also what happened in 2017, when on 9 November 2017 the Claimant was informed of the number of days’ holiday he had accrued up to that point based on the number of days he had provided services as a Temporary Worker. He was informed by payroll that he had accrued 18 days and he then he told payroll which of those days he had taken off he wanted to be treated as paid holiday.
18. In respect of the 2018 holiday year, the Claimant sent an email to payroll on 10 December 2018 at 08:42 [49] saying:

*Hi Amy*

*Could you also advise how many holiday days I have available to take*

*Thanks*

*Peter*

19. He received a response to that email at 12:23 on the same day saying:

*Hi Peter*

*You have 22.5 days holiday pay accrued. Please let me know what dates (weekdays) you would like processed as holiday pay*

20. The Tribunal notes the second sentence of the above email at paragraph 19 which is evidence of the accepted practice described by the Claimant described at paragraph 16 above.
21. Following the above email exchange on 10 December, the Claimant did not follow up the payment request for the holiday pay he was seeking, until February 2019, at which point the payroll department informed the Claimant that as he had not used his holiday, it had been lost. The Claimant disputed this assertion, saying that the holiday had been taken and what he was seeking was payment for the 23.5 of the 40.5 days he was entitled to be paid for as holiday.

### **Submissions**

22. The Tribunal heard submissions from the parties which it took into account in reaching its decision. In his submission, Counsel for the Respondent submitted that some of the days’ payment which the Claimant was claiming

were out of time.

**Conclusions**

- 23. The Tribunal concludes that the Claimant had taken his holiday and that he was therefore entitled to payment for the 23.5 days paid holiday that had accrued. It finds that the “use it or lose it” principle applied to the taking of holiday and not for the payment of holiday that had been taken. The Tribunal concludes that there was no deadline, either in a contract or in its policies, for seeking payment for holidays taken. The Tribunal finds that whatever was in the agreement with the Claimant or in their policies, a system had been in place for the Claimant which was applied to the Claimant in 2017 and 2018 and to that extent the agreement the parties signed up to when the Claimant started providing services for the Respondent was varied by consent, by virtue of the practice that had operated and been accepted.
- 24. The Tribunal considers the non-payment to be an unlawful deduction. It does not consider it to be a series of deductions. The total sum became due when the Claimant asked to be paid for it, which was between the period between December 2018 and February 2019. In either case, the Tribunal concludes that there is no issue of the Claimant being time-barred from claiming this amount.
- 25. The Tribunal finds that the claim of unlawful deductions from wages is well-founded and succeeds and orders the Respondent to pay the Claimant the sum of £7,414.72

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**Employment Judge Hyams-Parish**  
**27 August 2019**