



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Garrett

**Respondent:** British Fencing Association

**Heard at:** London Central

**On:** 18 September 2019

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

## Representation

Claimant: In person

Respondent: Ms G Usher CEO

# JUDGMENT

The Claimant's claims for notice pay and for holiday pay succeed. The holiday would have been taken during the balance of his notice period. The Claimant is therefore entitled to the sum in the schedule of loss of £1,424.66 plus pension contribution of £85.48 making £1510.14.

## REASONS

### The Claim

1. By a claim received on 3 March 2019 the Claimant claimed against his former employer the Respondent in respect of holiday pay, arrears of pay and other payments. In the supporting text he identified unpaid wages for 13 days from the date when payment ceased to the end of his employment contract on 6 December 2018. He claimed to be given time off in lieu "TOIL" in relation to 13.5 days and 7 days unpaid holiday. Based on his annual salary of £40,000 he claimed a total of 33.5 days equating to £5,317.46 plus appropriate pension contribution.

## **The Response**

2. The Respondent resisted the Claim. The response recorded that the claimant had worked for the Respondent from 4 April 2016 to 23 November 2018. It was contended that the claimant had agreed early termination of his employment taking into account annual leave booked and annual leave outstanding. The Respondent contended that the Claimant had accrued 22.4 days holiday in the year to 23 November and had taken 20 and was entitled to a further 2.4 days accrued on termination and offered to make payment of this sum. It was not paid at the time of the hearing. In relation to TOIL the Respondent disputed that there was any contractual entitlement to TOIL and disputed the time off claimed and the Claimant's dates in relation to attendances on which his Claim was based.

## **The Issues**

3. I identified the following issues at the outset of the hearing.

i Was an earlier date for the conclusion of the Claimant's employment agreed? did it finish as he contended on 6 December 2018 or on 23 November 2018 as the Respondent asserted?

ii It being accepted that there is no express contractual term for TOIL what term should be implied? Was there a custom and practice for TOIL to be granted? Was the Claimant entailed on termination of employment to require credit for the balance of TOIL said by him to be due?

iii What was the Claimant's accrued holiday not taken on termination of employment? Was he entitled to carry forward days due at the end of 2017 beyond the date of 31 March 2018 when the Respondent contended they became forfeit if not taken?

## **The Evidence**

4 I heard evidence from the Claimant orally and in a written statement. I heard from Ms Usher for the Respondent. I also heard from Mr Stephen Kemp, GB Programmes and Coaching Development Manager. I made the following relevant findings of fact. I have limited the recorded findings to those required for the decision.

5. The Claimant began employment with the respondent on 6 April 2016. The contract runs to some 13 pages and is a detailed document.

6. The contract provides for termination on both sides of three months after probation has been completed, as in the Claimant's case. the contract provides that if there is agreement of an early release date the employee would only be paid up to that date. There is provision for garden leave but only at the insistence of the employer.

7. At Clause 7 the contract deals with hours of work. Normal hours are specified as 9:00 am to 5:00 pm Monday to Friday. There is a lunch break of one hour. It is

stated: “ Overtime is not paid in relation to any additional hours worked.”

8. There was testimony in relation to TOIL from Mrs Usher to the effect that if employees were required to work at weekends or go abroad they were not expected to return to the office directly but to manage their own time to take a day or an afternoon off if required.

9. Holidays are dealt with at clause 9 where the entitlement is 25 days. The year is 1 January to 31 December. Annual leave not taken is forfeited unless a special agreement is reached.

10. Although there is an Employee Handbook in addition the Claimant disputes receiving it and it is not expressly incorporated in the terms agreed. It appears clear however from an email exchange about compassionate leave that the handbook was referred to the Claimant. Under Clause 3.1 the Handbook expressly states: “ *We do not pay overtime for any additional hours worked.*” At 3.4 it states: “ *Any untaken holiday entitlement carried forward must be taken by the 31st of March of the following year.*” At Clause 7 under Notice Periods it states: “ *At your request, we may waive the requirement to work some or all of the required period of notice. In such circumstances, salary will not be payable for the portion of the notice period which is not worked. If you do not provide the required period of notice, or leave before your notice period expires you will only be paid up to the last day you worked. Holiday entitlement will only accrue up to this date. We may require you to take some or all of any outstanding accrued holiday entitlement during your notice period; but also, if you have already booked some holiday during your notice period, then we may require that you do not take holiday already booked in your notice period. Although it had previously been authorised, but work out your complete notice period. Alternatively, if we agree that you take the authorised holiday we may require you to extend your notice period by the same amount so that you work the full notice period.*”

11. The Claimant was due to take 3 days leave over Christmas New Year 2017/2018. This leave was cancelled and he was told he had 3.5 days to carry into the following year. He was told he could carry this forward but not informed that it had to be taken by 31 March 2018, which is a provision to be found in the handbook but not in the contract. The Respondent contends this is forfeit. It is difficult to see how the Respondent can be contractually entailed to forfeit the leave when it had been expressly approved for carry forward without limitation.

12. In relation to TOIL the Claimant operated a diary in Outlook. He marked days which he had taken as TOIL from time to time but did not keep any running balance or set out clearly what he considered his entitlement was for agreement at any time. He has candidly accepted that at the time of his resignation up to the intervention of ACAS to conciliate the dispute underlying this case he had not considered he was entitled to TOIL. He has now presented the Respondent with a list of dates going back almost a year on which he states he became entitled to TOIL and dates on which he states he took some of his entitlement.

13. The Respondent indicates great difficulty in challenging this detail which the Claimant has accumulated over a year. Mrs Usher confirmed in her evidence that there was no contractual entitlement to TOIL. She is correct in that. She said that

she left it to her senior managers to use discretion and to manage their working lives themselves. Indeed she is critical of the Claimant for going further than she considered acceptable in his use of facility for working from home when he was in fact abroad.

14 In relation to the date of termination the evidence of Mrs Usher is that the Claimant notified 6 December 2018 as his leaving date. When the Claimant told her he was leaving and it was not worth returning after that she understood he had sufficient holiday to do this. He left on 6 November 2018 and she understood he was working from home to the 9 November. The Claimant met with Mr Kemp to agree the details of his departure. He said the date of 6 November was fixed for “gifts and goodbyes” with the Claimant working from home to 9 November and then going on leave. Mr Kemp said he understood from his perspective that the employment would leave at the end of the Claimant’s annual leave entitlement. It is not suggested that the effective date was computed or notified to the claimant either by Mr Kemp or Mrs Usher.

15. Mrs Usher later calculated the Claimant’s accrued holiday after deducting the 3.5 days carry forward, which she disallowed, was 10 days and this took him to the 23 November 2018. She accordingly paid him to that date. She did not explain this computation to the Claimant by email or invite his agreement. There was however no agreement that he should cease to be on the payroll on 23 November. The holiday computation is dependent on the forfeiture of 3.5 days. The Respondent now accepts he had a further 2.4 days and he believed he had 3.5 or carry forward. That would have taken him to 3 December 2018 only as the Claimant put it a few days before his notice expired on 6 December.

16. Since the Claimant left the Respondent the Respondent has calculated that at 23 November 2018 the Claimant was entitled to 2.4 days accrued holiday entitlement untaken and has offered payment in this respect.

17. If the Claimant’s employment continued to 6 December 2018 his holiday entitlement for the year would be  $345/365 \times 25$ , That is 23.63 days. Rounded up that makes 24. With 3.5 carried forward the total is 27.5. This accords with the Claimant’s claim that he was due 7 days.

18. Those are the findings of fact

## **The Law**

19. The Extension of Jurisdiction Order gives to the Tribunal jurisdiction in relation to breach of contract claims in employment. In so far as there are express terms in the contract these are to be followed subject to any terms implied. Implication can be as a result of business necessity, or by reason of custom and practice, being the two routes relevant to this case. If the innocent bystander would have indicated the term is obvious it can be implied. That is not the case here. Section 23 of the Employment Rights Act 1996 allows complaints to the Tribunal in relation to deductions from and by extension non-payment of wages. The Working Time Regulations 1998 provide for payment of accrued holiday remuneration on

termination of employment.

16. No submissions of law were made and no provisions of were engaged which require specific discussion in this part of the judgment. .

## **Conclusion**

17. Dealing with the TOIL claim first I accept the argument of the Respondent that this is outside the Claimant's contract. It is not possible to imply a term that deals with this arrangement. If extra hours were undertaken overtime was expressly by the contract not to paid but the employee was allowed informally to take some time off in substitution. That does not involve an employee running an account over a year and then on termination requiring the balance either in time or payment. The strength of that conclusion is supported by the fact that the Claimant did not make any claim in this respect when he considered he had been underpaid on leaving the Respondent. It is wholly unrealistic to expect the parties to go back over a year to discover what time was taken and what extra work was done. That claim therefore fails.

19. In relation to annual leave I do not consider the Respondent was entitled to forfeit the Claimants holiday carried forward with their agreement to 2018. Although this may be justified by a provision in the handbook it is not apparent this was ever imported into the contractual arrangements or was intended to have contractual force. Curtailment of his holiday in December 2018 at short notice had led to this balance accruing in his favour. He was not told nor is there a contractual provision for this to be forfeited. He is therefore entitled to 3.5 days holiday.

20. Finally in relation to the date of termination, the Claimant gave the notice required. There was never agreement to vary it. The Respondent unilaterally chose a date of termination based on an incorrect finish date. The Respondent terminated payment having miscalculated the holiday accrued at 23 November 2018. Notice was given to 6 December 2018 and the obligation to pay continues on the respondent to that date. The Claimant is entitled to be paid to 6 December 2018. The fact that he candidly accepts that he started his new employment on 4 December 2018 is nothing to the point. The Respondent could have required him to work if it wished.

21. Turning to the financial consequences, the Claimant is entitled to be paid to 6 December 2018. The Respondent would have been allowed him him to take his annual leave in the period from 23 November to 6 December as he anticipated when he gave notice. The Claimant is therefore entitled to the sum in the schedule of loss of £1,424.66 plus pension contribution of £85.48 making £1510.14.

Employment Judge Hildebrand

Date 21 September 2019

JUDGMENT SENT TO THE PARTIES ON

25/09/2019

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FOR THE TRIBUNAL OFFICE

**Note**

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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