



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Ms Victoria Coldwell

**Respondent:**  
The Body Doctor  
Ltd

**Heard at:** Leeds **On:** 18 October 2019

**Before:** Employment Judge R S Drake

**Representation:**

Claimant: In Person  
Respondent: Ms A D'Souza (Paralegal)

## JUDGMENT

1. In these two claims, which were heard together because they concerned related evidence and facts, the Claimant has not established that she was entitled to unpaid wages (Claim number 1801310/2019) or to unpaid holiday pay (Claim number 1805215/2019) and therefore both her claims fail and are dismissed.

### REASONS

#### Issues

2. At the start of the hearing and bearing in mind the Claimant was not legally represented, I took time and care to isolate the issues with input from and consent of the parties. The relevant chronology was agreed as follows: -

2.1 The Claimant's employment began with the Respondent's corporate predecessors on 14 October 2012 but was subsequently transferred to the current Respondents, and the terms of her current employment are those which are set out in a contract document signed by her dated 16 April 2018;

2.2 The claimant was instructed by her manager Mr Aden Bradley on the 24 October 2018 to go home to change her footwear because Mr Bradley considered that the shoes she was wearing were unsafe. He told her she could return if she wore the right footwear or could produce medical

evidence to justify use of the shoes she chose to wear. Ultimately, she did not do so, and she made 3 attempts to obtain medical certification satisfactory to the respondents.

2.3 In the course of obtaining medical certification became apparent to the respondents that the cause of a foot problem the claimant was not fit to work and indeed her absence was justified by backdating her medical certificates 224 October 2018 and they expired 29 January 2019.

2.4 Wages were paid between 24 October 2018 and 29 January 2019 at Statutory Sick Pay ("SSP") rate and thus a total of £1,146.47, whereas she asserts she was entitled to receive sick pay at Contract rate, and thus the sum of £2,302.02 leaving an outstanding balance of £1,155.55.

2.5 After 29 January 2019 the Claimant did not in fact return to work, but the Respondents continued to pay her at SSP rate up to 18 May 2019, from which date she has remained absent and therefore unpaid. Her employment is thus continuing albeit without pay.

2.6 The Respondent's assert their holiday year runs from 1 January to 31 December each year – a calendar year. The parties agreed the Claimant is entitled to 22 days paid holiday during each holiday year. They also agree that during 2018 the Claimant took 20 days holiday but that the Respondents agreed to carry over 2 days holiday entitlement into 2019. As yet the Claimant's employment is continuing, and the holiday year has not yet concluded. The parties agree that the Claimant has not taken any holiday during the current year. Thus, the Respondents argue that any holiday pay entitlement to accrued holiday and pay due for 2018 has already been met and there has been as yet no further accrual for the year 2019. Thus, there can't be any accrual until the current year is ended or until the employment terminates or is terminated.

3 The issues were thus to be regarded as agreed. They were: -

- 3.1 Could the claimant establish that the terms of her contract to sick pay at contract rate as distinct from SSP rate?
- 3.2 If so, could the Claimant establish what shortfall (if any) in payment of sick pay had she sustained, and thus how was it to be calculated?
- 3.3 Could the Claimant establish that the fact she was required to remain absent from work in order to obtain medical certification, being the cause of her absence initially, had any bearing in law in interpreting her entitlement to sick pay, and the method of its calculation? In other words, as the requirement to be absent and the apparent delay in obtaining medical justification for absence was triggered by the Respondent, did this have any legal effect on the Claimant's entitlement?

- 3.4 Could the Claimant establish that she had not been paid her full entitlement to holiday pay during 2018, and similarly had she claimed but not been paid her entitlement for the year 2019, and if so, what was the value of her entitlement?

### **Facts**

- 4 The issues identified above adequately reflect the principle facts I found in this case, but there were further significant facts as determined below which I based upon the oral and written testimonies of the Claimant and her partner Mr Jason Lodge and the Respondents’ witnesses Ms Susan Grant their MD and Mr Aden Bradley their Production Manager.

4.1 Although they were not included in the documents put before me, I allowed the Claimant to read from her Employment Contracts which immediately preceded and immediately followed the transfer of her employment to the Respondents. I find that the most recent Contract before me dated 26 April 2018 does not show any material changes to the definition of sick pay rights or the basis of calculating sick pay entitlement.

4.2 Under the heading” Incapacity for Work” the following describes in simple terms the basis of the claimant’s entitlement to sick pay  
“If you are unable to attend work due to illness or injury, and you satisfy the relevant requirements, you will receive SSP. We do not offer any contractual sick pay (my emphases). If you are unable to attend work for any reason you must follow the reporting procedures detailed in your employee Handbook.”

4.3 Under the heading “Annual Leave” the following describes in simple terms the basis of the Claimant’s entitlement to holiday  
“Our holiday runs from one January and ends on 31 December each year.”  
It does not specify any right to carry over untaken entitlement but I found the Respondents agreed to do so in this case and thus to allow carry over of two days by the Claimant.

4.4 The initial cause of the Claimant’s absence was a specific instruction from Mr Bradley, but this trigger was overtaken by the specific content of the Claimant’s medical certificates from her doctor which backdated her entitlement to be treated as absent for health reasons to the start date of her absence because initially caused by management instructions.

### **The Law and its Application**

- 5 The Claimant’s withheld pay complaint is framed under Section 13 of the Employment Rights Act 1996 (“ERA”) which provides as follows: -

“(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 workers contract, or –
- (b) the worker has previously signified in writing her agreement or consent to the making of the deduction ...”

6. The Claimant must first establish non-payment to her of sick pay at Contract rate amounts to a deduction. This requires analysis of her contract. I find that it is clear from the express words used the contract can only be objectively interpreted as expressing a right to sick pay at SSP rate an expressly not at contract rate. Thus, the Claimant has not established and indeed cannot on any reasonable interpretation of her contract establish that there has been any form of material unlawful deduction as covered by section 13 which therefore doesn't apply so as to provide her with a remedy. The Claimant has signed her contract, so even if she were to have established there had been a deduction, on any objective reading or interpretation of her contract, she accepted that she could not be paid at contract rate and that had she been paid at contract, she would have become liable for re-imburement and any deduction to recover this would have come within Section 13(1)(b) which would have applied. This finding answers issues 3.1 and 3.2 above.

7 Further, I find there is nothing in section 13 which gives the Claimant any enhanced right not to face a deduction simply because the reason for her absence was initially caused by the Respondents instruction. Were such an eventuality to be regarded as a lawful basis for conferring an enhanced right, it would have been written into the statute, which is not the case as seen from the above quoted passage. The Claimant seems to suggest that she was treated unreasonably when told to absent himself from work and when there was some subsequent delay in agreeing that she was entitled to be absent for health reasons. However, I find there is no provision in the statute conferring rights in respect of section 13 entitlements to be qualified or enhanced by expectations as to reasonableness. This answers issue 3.3 identified above. The only issue here is interpretation of her contract as I have interpreted it above. Her claim under this head must fail and is dismissed.

8 The provisions of the Working Time Regulations 1998 (“WTR”) as they apply in this case are relatively simple. Under regulation 13 “ ... a worker is entitled to annual leave to be regulated by statutory instruments and further orders in force from time to time.... “

At the time in question in this case the claimant was entitled to 22 days holiday in each holiday year.

Under regulations 16 “ ... a worker is entitled to be paid in respect of any period of annual leave to which she is entitled under regulation 13 ... “

That is not in dispute in this case. However as a matter of general application of the law, it must be common ground that a right can only accrue during a current year and become due at the point in time when

either the contract of employment has been brought to an end, or the holiday year has ended, whichever is the earlier.

- 9 In this case the Claimant has conceded that she was paid all of her entitlement for 2018 but for 2 days which the Respondents have agreed to carry over. It is also common ground that she has not yet applied for nor been denied any holidays for the year 2019. Therefore, though there may have been accrual of holiday entitlement, no payment therefor has become due, nor can it become due until employment comes to an end or 31 December has passed and she has not been paid. This answers issue 3.4 identified above. Therefore, the Claimant's claim under this head is by definition premature. It therefore fails and must be dismissed

Employment Judge R S Drake

Date 18/10/2019

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or 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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