EMPLOYMENT TRIBUNALS

Claimant: **Mr A White**

Respondent: **Swissport GB Limited**

Heard at: **Bristol** **On:** **13 December 2019**

Before: **Employment Judge Mulvaney**

Representation
Claimant: **In Person**
Respondent: **Mr Muldoon, Station Manager**

JUDGMENT

1. The claimant's complaint that he has been denied his full statutory holiday entitlement of 5.6 weeks did not succeed and is dismissed.

2. The claimant's complaint in respect of sick pay is dismissed, there being no evidence that the claimant suffered a loss during the period covered by the claim.

REASONS

1. The claimant brought a claim on 31 May 2019 that the respondent was failing to provide him with his statutory holiday entitlement and that its contractual calculation of payments for sickness absence was wrong.

2. The respondent is a Company providing ground handling services at airports. It employs 8,501 people in the UK and 400 people at the claimant's place of work at Bristol airport.

3. I heard evidence from the claimant and also from Mr Muldoon, Station Manager at the respondent's Bristol operation.

4. The claimant is employed by the respondent as a Ramp Team Leader and he commenced his employment with the respondent on 13th March 2017. His employment is continuing.

5. The claimant's contract of employment provides at Clause 10.

> *"The normal hours of work applicable to this role will average up to 37.5 hours per week when calculated over the duration of your roster cycle. This equates to 1,970 hours per annum calculated as 37.5 hours x 52 weeks. However, the actual hours of work each week and days of attendance will vary in accordance with rosters which will be provided to you in advance and as early as possible prior to the commencement of each roster cycle."*

6. The contract of employment provided that in order to meet the respondent's operational requirements the claimant must be prepared to work shift patterns of variable lengths and variable start and finish times. The claimant was paid monthly a fixed amount based on average working hours of 37.5 hours per week.

7. The provisions relating to annual leave were provided in the contract at Clause 13.

> *"13.1 Holiday entitlement will be allocated in hours; for the purposes of Section 13 all calculations are based on a full-time equivalent contract and will be pro rata to the actual contractual hours stated in Section 10.1.*
>
> *13.2 The company's holiday year is from 1st January – 31st December.*
>
> *13.3 Holiday pay is calculated at basic rate of pay as detailed in Clause 9.1 above.*
>
> *13.4 Details of annual holiday entitlement (inclusive of all designated public holidays) for full-time employees are provided within the table below. A pro rata entitlement will be given to all part-time staff, based on these full-time equivalent entitlements."*

Service prior to 1st January each year	Hours Leave entitlement in any full leave year (based on standard full-time hours below) 37.5 hours/week
Less than two years	210 hours
Over two years	217.5 hours
Over three years	225 hours

8. The claimant's annual holiday entitlement for the period relating to this claim was expressed in hours as 210 hours for the full leave year, that is the equivalent 37.5 hours per week multiplied by 5.6 weeks.

9. The claimant is a shift worker, working on an eight-week roster cycle; on a five day on, three day off roster pattern. The claimant's normal hours of work when calculated over an eight-week roster cycle averaged 37.5 hours per week (page 70 of the bundle shows an example eight-week roster). The claimant's annual hours equated to 37.5 x 52 making the total of 1,950 hours referred to in Clause 10 of his contract.

10. The claimant's individual shifts varied in length from six hours to twelve hours. The record of the claimant's annual leave taken since the beginning of his employment was included in the bundle at pages 67, 68 and 69. The claimant's annual entitlement was set out at the top of the record. The date(s) of leave taken were listed on the left of the record and, working to the right, the following were listed: the number of shifts covered by the leave dates; the number of hours reflected by those shifts; and on the far right was shown the running total after deduction of the relevant shift hours for the leave days taken.

11. The respondent deducted from the claimant's holiday entitlement the number of hours that the claimant had been rostered to work on the day that he had taken his leave. The length in hours of the claimant's shifts often exceeded the daily average for a 37.5 hour per week contract. At the end of the year in 2018, the claimant had exhausted his holiday entitlement as calculated in hours, apart from 11 hours carried over, but he contended that he had taken less than the statutory 5.6 weeks statutory entitlement, based on a 28 day equivalent. In 2018 the record showed that claimant had only taken 25 days' leave, counting the total number of shifts recorded on his leave record. The claimant contended that the respondent, in calculating holiday entitlement in this way was denying him his statutory entitlement to 5.6 weeks' leave per annum, which he contended was the equivalent of 28 days.

12. The leave records included in the bundle at pages 67 – 69 were not provided to the claimant in the course of the year and had only been provided to him as part of this Tribunal claim. It was therefore not possible for him to calculate during the leave year what holiday entitlement had been taken and what holiday entitlement remained at any point in the year, since the number of hours to be deducted in respect of each leave day booked would not necessarily be known in advance.

13. The claimant had raised a complaint about his holiday entitlement with the respondent in a grievance which the respondent had not upheld. The claimant had then appealed the outcome of the grievance. In response to the grievance appeal the respondent set out its calculation of the claimant's holiday entitlement. Mr Muldoon who signed the response to the claimant's appeal in a letter dated 18th June 2019 explained as follows (p 63-66 bundle):

> *"As you are aware, you work a five on three off shift pattern which is made up of shifts that last a varied number of hours per shift.*

Therefore, when you are off on leave from a shift totalling six hours for example, you would receive six hours paid holiday.

During the meeting you explained that you disagreed with this and that you had reviewed different advice on a government website. I then made reference to the government website, which I used the following link to review the legal amount of leave that an employer has to offer. Enclosed within the letter is a copy of the output produced by the calculator, this factors in contractual hours per week and roster patterns.

In this example, the 5 and 3 pattern that you currently work is reflected as number of days worked per week. Below is how this is worked out:

Over an 8 week cycle you work 35 days.

52 weeks divided by that 8 week cycle, gives you 6.5 cycles of the roster in a 52 week period. 6.5 cycles of 35 working days is 227.5 working days in a year.

Therefore, average days worked in a calendar week is 4.375.

https://www.gov.uk/calculate-your-holiday-entitlement

Using the 4.375 days within the holiday calculator, it equates to a holiday entitlement of 210 hours which is the rate that you receive."

14. The claimant also complained that the respondent by calculating sickness entitlement in a similar way to annual leave, based on shift hours that would have been worked, was making wrongful deductions. He claimed that sickness absence should be based on a standard 7.5 hour day. The example given by the claimant of the application by the respondent of its contractual provisions relating to sickness absence post-dated the date of his claim to the Employment Tribunal. As the claimant made no specific complaint of a deduction made for sickness absence for a date prior to the date of submission of his claim I make no finding on this part of his claim.

Conclusions

15. In reaching my conclusions I considered all the evidence that I heard and the documents to which I was referred and which I considered relevant. I also had regard to the submissions of the parties.

16. The issue to be decided was whether under the statutory framework relating to holidays, the entitlement to annual leave, expressed in weeks in the legislation, can be converted to hours and applied by an employer in such a way as to mean that an employee receives less than the 5.6 weeks or the equivalent number of days of his annual leave entitlement under the Working Time Regulations 1998 (WTR).

17. Neither party was represented at the hearing and so no in-depth legal arguments in support of their respective positions were put forward. The claimant simply contended that as holiday entitlement was expressed as a period of 5.6 weeks, which was the equivalent of 28 days for a full-time employee, that should be what he was allowed by the respondent. The respondent contended that the claimant received 5.6 weeks annual leave calculated in hours and that therefore satisfied the claimant's entitlement to leave under the WTR.

18. The entitlement to annual leave is set out in Section 13 and 13A of the WTR and provides that:

> *"Subject to paragraph 5 a worker is entitled to 4 weeks annual leave in each leave year."*

Section 13(a)(1) WTR provides for an additional 1.6 weeks for leave years occurring from 2009, making the 5.6 weeks total that applies in this case.

19. There is no further definition of leave provided in the WTR or in the EU Working Time Directive (2003/88). Commentary on holiday entitlement in the IDS brief 4.35 states "for workers who do not fall into a simple five-day week working pattern, and whose daily and/or weekly hours vary, the calculation of the worker's annual leave entitlement is more complicated". It then refers to the Government's online calculator, which was also referred to by the respondent in response to the claimant's grievance appeal.

20. The Department for Business Energy and Industrial Strategy has published Guidance on How to Calculate Holiday Entitlement for Different Types of Workers. It is guidance only and does not have legal force. It is intended to assist with the calculation of holiday entitlement for those employees or workers who do not work fixed hours per week. It has a section on shift workers but states: *"where shifts are not of equal length, the sections on shift workers below will not apply. In this case it may be more appropriate to calculate leave in hours based on the methodology laid out under Hours Worked per Week."* The section on Hours per week/Compressed Hours states as follows:

> ***"Hours per week/compressed hours***
> *Where workers work a fixed number of hours each week but not the same number of hours each day, the legislation does not state exactly how to incorporate the 28-day statutory cap. In our view it is appropriate to incorporate the cap as 28 days of the average working day.*
>
> *Therefore, statutory leave entitlement should be calculated in days, and then multiplied by the average length of the working day.*
>
> ***Statutory Leave** = annual entitlement in days x average working day in hours*
> ***Entitlement in days** is the lower of:*
> *28 days; or*
> *5.6 x days worked per week*
> ***The average working day** is defined as:*
> *average working day = hours worked per week ÷ days worked per week"*

21. In order to calculate statutory leave following the method provided in the Guidance, it is necessary first to calculate the leave entitlement in days and then the average working day in hours.

22. The claimant does not work a fixed number of hours each week, but he does work a set number of hours over eight weeks from which it is possible to calculate the average number of days that he works per week. This is calculated based on his eight-week shift pattern cycle during which he works 35 days. In 52 weeks the eight-week cycle repeats 6.5 times, giving an annual total of 227.5 days worked (6.5 x 35). This produces an average of 4.375 days worked per week (227.5 divided by 52).

23. Following the Guidance, the claimant's annual leave entitlement in days will be the lower of: 28 days; or 5.6 (weeks) x days worked per week. Multiplying the average number of days worked per week (4.375) by 5.6 comes to 24.5 days per year. This figure being lower than 28 days, the claimant's 5.6 weeks holiday equates to 24.5 days per year, not 28 days as he contended.

24. The next step is to calculate the average working day in hours. The average number of hours per day worked by the claimant can be calculated by dividing the 1,970 hours worked per year (set out in clause 10 of his contract) by 227.5 which is the number of days worked per year. This produces an average working day of 8.6 hours. To calculate the number of hours' holiday entitlement, 8.6 hours is multiplied by 24.5 (5.6 weeks holiday entitlement expressed in days as calculated at para 23 above). This produces the figure of 210 hours.

25. Having considered the Government Guidance, I understand that the respondent's calculation of holiday entitlement of 2010 hours is correct using the methodology contained in the Guidance, which, although not having legal force, bases its calculations on the statutory wording and the basic entitlement of workers to 5.6 weeks' holiday. The 5.6 weeks' allowance applies to part time workers as well as to full time workers, whereas the number of days equivalent varies according to days worked per week. The leave entitlement of a part-time worker working 3 days per week would be 5.6 weeks or 17 days. In this case the claimant's average number of days worked per week is less than five, leading to the calculation of his number of days equivalent of 24.5. However, as his average hours of work are not fixed and frequently exceed 7.5 it is necessary to base the calculation of his leave entitlement on hours rather than on days to achieve a fair result.

26. I am satisfied that the claimant's 5.6 week annual leave entitlement based on his average days worked per week of 4.375 is the equivalent of 24.5 days and not 28 days per year. I conclude that it is correct to translate the number of days' leave entitlement into hours given the claimant's irregular working pattern and that the 210 hours allowed by the respondent is correct and lawful.

27. In 2017 the claimant started his employment on 13 March 2017, part way through the holiday year which ran from 1st January – 31st December. The claimant contended that he should have been entitled to 4.7 weeks holiday for that period of the year, which the claimant contended equated to 23.5

days based on a 28-day entitlement, which is incorrect. Using the Government's online calculator, I concluded that the claimant was entitled to 178 hours leave for that part year, 8 hours more than was allowed by the respondent.

28. In 2018, the claimant worked a full year and so was entitled to 5.6 weeks holiday (24.5 days or 210 hours). He took 199 hours and carried over 11 hours.

29. In 2019, the leave year has yet to finish, this hearing taking place on the 13 December 2019. Assuming that the claimant works the full year, his entitlement would again be 5.6 weeks (24.5 days or 210 hours).

30. On the basis of the claimant's average days worked per week and average hours worked per day, I am satisfied that the claimant received his full entitlement of 5.6 weeks holiday per year in 2018 and that the respondent was complying with its obligations under the WTR. Although the leave entitlement for 2017 was miscalculated, the claim in respect of that period is out of time, there having been no continuing default in entitlement calculation.

31. The calculation of holiday entitlement for workers on variable contracts is complex. I sympathise with the claimant who understandably has concluded that as a full-time worker (as described in his contract) he should be entitled to 28 days holiday, but, for the reasons given above, I have concluded that the claimant's claim that the respondent was failing to provide him with his statutory holiday entitlement of 5.6 weeks is not well-founded and is dismissed.

32. Notwithstanding my judgment on the claim relating to holiday entitlement in this case, I am concerned about the lack of information provided to the claimant about his holiday entitlement in any given year.

33. In a case decided by the CJU, ***Kreuziger v Land Berlin C-619/16 ECJ***, a case concerning the rights of workers to carry over annual leave, the European Court held that as workers are always the weaker party in the employment relationship, employers should not discourage workers from taking annual leave and should go further:

    - *"Inform workers of their entitlement to paid leave.*
    - *Give them accurate information about their entitlement including if that is the case, that they cannot carry untaken holiday forward into the next holiday year.*
    - *Do so in good time for them to take the relevant holiday.*
    - *Tell them when their entitlement to it expires.*
    - *Encourage them to take it."*

34. The system applied by the respondent in this case makes it impossible for an employee to accurately calculate their holiday entitlement in numbers of days,

which is how leave would normally be booked. The length of each shift is decided by the respondent at some point in advance of the eight-week rolling roster. If an employee wished to book leave in advance of being informed of their shifts for the period in question, they would not know the amount of leave that would be deducted from their entitlement. I accepted the claimant's evidence that he had only been provided with the holiday records shown at pages 67 – 69 for the purpose of this hearing. In the absence of that information being provided to him on a regular basis he would not have known his running total; how much of his holiday entitlement remained; and the impact of any pre-booked holiday on his remaining entitlement at any given time. The respondent should take steps to ensure that this information is provided to its employees on a regular basis.

Employment Judge Mulvaney

Date: 24 January 2020

Judgment sent to parties: 28 January 2020

FOR THE TRIBUNAL OFFICE