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EMPLOYMENT TRIBUNALS

Claimant: Mr P Young

Respondent: Driver Hire (Romford)

Heard at: East London Hearing Centre

On: Thursday 16 September 2019

Before: Employment Judge Jones

Representation

Claimant: In person (accompanied by Mr Farnfield, PSU)

Respondent: Mr R Pritchard (Director)

JUDGMENT

The judgment of the Employment Tribunal is that: -

1. The Respondent refused to permit the Claimant the statutory right to annual leave.
2. The Respondent failed to pay the Claimant in lieu of entitlement to annual leave.
3. The Respondent is ordered to pay the Claimant £788.62 gross as his holiday pay entitlement.

REASONS

1. The Claimant complained that during his first year of employment with the Respondent he did not appreciate that he was entitled to holiday pay. He did not take holiday that year. He subsequently found out about his right to take holidays and has taken holidays thereafter, for which he has been paid. The Claimant's complained that the Respondent failed to inform him of his right to take holidays during his first year of employment and that he has since not been allowed to take that annual leave or be paid for it.

2. The Respondent defended these proceedings. It was their case that their terms of engagement clearly stated the right to holidays and that the Claimant had forfeited his right to holiday pay for the period 14 July 2017 – 5 April 2018 as he failed to take it.

3. There was also a dispute between the parties as to the value of the leave that had not been taken during the Claimant's first year of employment. The Claimant claimed 143 hours while the Respondent stated that it was 103 hours 15 minutes. The Respondent's case was that the Claimant was paid at the rate of £7.50ph. The Claimant asked in his claim form to be paid at the National Living and Minimum Wage rate but it was not clear what rate that referred to. The National Minimum Wage between April 2017 and March 2018 was £7.50ph. The rate changed in March 2018 to £7.83ph.

4. The Tribunal apologises to the parties for the delay in the promulgation of these reasons. The Tribunal did give judgment on the day of the hearing. The delay was due to the judge's ill-health during 2019.

Law

5. The right to paid annual leave is enshrined in the Working Time Regulations 1998 (WTR). Those Regulations implemented into UK law, Article 7 of the Working Time Directive 2003/88/EC of the European Parliament and of the Council. Regulation 13 WTR states that a worker is entitled to 4 weeks annual leave in each leave year. Subsection 9 states that the leave to which a worker is entitled under this regulation may be taken in instalments, but (a) it may only be taken in the leave year in respect of which it is due and (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

6. This may be overridden where the employee is on long-term sickness, possibly where an employee is on maternity leave or where an employer has refused unlawfully to allow an employee to take their full entitlement.

7. Up until recently, the WTR did not give workers rights to carry forward untaken leave. In the absence of a contractual provision permitting carrying forward, basic leave not taken was simply lost.

8. There was further discussion and development on the effect of Regulation 9(a) WTR in the case of *King v Sash Windows Workshop Ltd: Claimant-214/16, ECLI:EU:C:2017:914*, [2018] IRLR 142, ECJ. In the earlier stages of this case it was held that the worker would not be allowed to carry forward leave where he had simply neglected to take his full entitlement during the leave year. When the case reached the European Court of Justice (ECJ) it was held that where it is a case of leave being untaken in the relevant year, not because the employee was unable to take it but because the employer refused to allow it (in that case because it maintained that the claimant was self-employed but he was later held to have been a worker), the employer is not allowed to benefit from this refusal and so any backdating of unpaid holiday pay can go back over the whole period of employment.

9. As *Harvey* states, this was taken one stage further in the case the Claimant relied on in this hearing of *Max-Planck-Gesellschaft zur Forderung der Wissenschaften e.V. v Shimizu* [2018] All ER (D) 30 (Nov). In that case the ECJ held that both Article 7 of the Directive and Article 31(2) of the Charter of Fundamental Rights preclude national legislation by which a worker who has not taken his full entitlement to leave during the leave year automatically loses the untaken part *'without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information'*. The ECJ's decision was that an employee may carry over untaken leave from a particular year unless the employer has *actively facilitated* the taking of leave in the sense of informing the employee of the right and that it could be lost, so that the failure to take it is due to a deliberate and informed choice by the employee. The court clarified that the employer should not have to force employees to exercise their right to take leave before the end of a leave year; but commented that the worker *'must be regarded as the weaker party'* and it is therefore *'important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker while the employer may, as a result thereof, take free of the need to fulfil its obligations by arguing that no application for paid leave was submitted by the worker'*. The employer is required to ensure that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so. The burden of proof is on the employer to show that it exercised due diligence in this respect. If the employer fails to show that it had done so, the employee can maintain a later claim for the untaken holiday, including on termination of the employment.

10. That decision did not put a limitation on when this outstanding holiday could be claimed. The court held that national courts must *disapply* any domestic legislation that prevents leave from being carried over in cases where the employer has not taken sufficient steps to ensure that leave is not lost inadvertently, even in cases where the employer is a private party and not an emanation of the state. Leave carried forward in this way and which has not been taken during the following leave year because of the employer's continuing failure to take sufficient steps to ensure that it is not lost, as above, is likely to be subject to the same considerations as to whether it can be carried forward again.

11. Regulation 30 WTR states that a worker may present a complaint to an employment tribunal that his employer has refused to permit him to exercise any right he has under Regulation 13. Subsection (3) states that where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the worker. The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to the employer's default and any loss sustained by the worker that is attributable to the matters complained of. Subsection (5) states that where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with Regulations 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds is due to him. Regulation 14(2) WTR confirms that where a worker's employment is terminated during the course of his leave year and at that time, the proportion of leave taken by a worker is less than the *proportion* of the leave year that has expired, the employer shall make him a payment in lieu of the remaining earned leave. Regulation 16(1) WTR provides for a worker to be paid at the

rate of a week's pay in respect of each week of leave to which he is entitled. Therefore, a worker is only entitled to be paid for accrued leave untaken at the termination of his employment.

Evidence

12. The Tribunal heard live evidence from the Claimant and from Mr Pritchard, one of the Respondent's Directors. The Respondent produced a bundle of documents. The Claimant produced a signed witness statement.

13. The Tribunal made the following findings of fact from the evidence produced at the hearing. The Tribunal has only made findings on those matters relevant to the issues in the case.

Findings of fact

14. The Claimant is employed by the Respondent as a driver. The Respondent is an agency specialising in the provision of drivers to its clients. The Claimant started working for the Respondent on 14 July 2017. This was his first employment with an agency and his evidence was that he was not aware on taking up this employment that he would be entitled to holiday pay.

15. The Respondent had a variety of arrangements with the drivers who are 'on the books'. Some work two days a week and others work for some months during the year and others work sporadically over the period of a year. It was Mr Pritchard's evidence that at the start of working with the Respondent the Claimant worked on a more adhoc basis although he could not say exactly what the regularity was. Lately, the Claimant had been working at the rate of about 5 – 6 days per week.

16. When drivers go to the Respondent's office to apply for work, Mr Pritchard's evidence was that he would greet them and then ask for details - such as what sort of driving work they have done in the past, whether they have points on their licence and to see their driving licence, ID and national insurance number. He would then offer the driver the opportunity to sit down in the office and go through the paperwork.

17. The Respondent has a table in the office with pencils and clipboards, where a driver could sit and complete the forms in the registration pack they would be given if they were interested in applying to work for it. The driver would complete the pack themselves and would hand the forms in to Mr Pritchard. They would be asked to complete a multiple-choice questionnaire and they would have to do a driving competency test.

18. The Respondent would copy the driver's identification documents. The driver would be asked if there were any injuries or other health matters that the Respondent needed to be aware of as it could relate to specific jobs such as moving furniture/beds etc.

19. The last part of the process would be for the driver to sign a document to agree

that they would be liable for parking tickets, the congestion charge and for any other fines such as for smoking in the vehicle, if they do not get authorisation from the customer in advance. The Respondent make a point of getting the prospective drivers to read and sign that document, among others.

20. If after that process the Respondent considers that it could use the driver, he would be given the Respondent's terms of engagement to read. The driver would be told that this is a PAYE contract. They would be told that they did not have to read the documents but were encouraged to do so.

21. The driver would be given a document that was about 8 pages long and entitled the '*Terms of Engagement for Temporary Workers*'. Mr Pritchard's evidence was that some prospective drivers become upset and tear up this document in front of him, once he explained to them that this is a temporary contract. That was because they would rather be employed on a full-time basis. The Respondent's franchise arrangements meant that they had to use this form.

22. The Terms of Engagement signed by the Claimant was in the hearing bundle. The Claimant confirmed his signature. He confirmed also that he did not read it fully on the day. He disputed that he was given a copy of the Respondent's Handbook at the time. It was his evidence that he had only recently seen a copy of the Handbook in conjunction with these proceedings. He confirmed that he took away a copy of the Terms of Engagement with him on the day he signed up to work with the Respondent.

23. The Respondent's Code of Conduct was kept in a pile on the desk where drivers register. The Claimant denied seeing it at the time. The Respondent stated that the practice was that the Code of Conduct book would be given to the driver with a Hi Visibility (Hi Vis) jacket after the complete the paperwork in the office. Once they completed 10 shifts the Respondent would send out a welcome pack, with another Hi Vis jacket, a letter and a certificate confirming that they had completed 10 shifts.

24. The relevant clauses in Terms of Engagement document which the Claimant signed were under the heading '*Statutory Leave*' as follows: -

"5.1 For the purposes of calculating entitlement to leave under this clause, the leave year commences on the date that the Temporary Worker starts an Assignment or a series of Assignments.

5.2 The Temporary Worker is entitled to be paid annual leave according to the statutory minimum as provided by the Working Time Regulations from time to time. The current statutory entitlement to paid annual leave is 5.6 weeks. All entitlement to leave must be taken during the course of the leave year in which it accrues and none may be carried forward to the next year.

5.4 Where a Temporary Worker wishes to take paid leave during the course of an Assignment s/he should notify the Employment Business of the dates of his/her intended absence giving notice of at least twice the length of the period of leave that s/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 the 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.

5.5 Entitlement to paid 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 to which the Temporary Worker is entitled in respect of such leave is calculated in accordance with and in proportion to the number of hours, which he has worked on Assignment.

5.6 In the course of any Assignment during the first leave year the Temporary Worker is entitled to request leave at the rate of one twelfth of the Temporary Worker's total holiday entitlement in each month of the leave year.

5.8 Where this contract is terminated by either party and a P45 is requested, the Temporary Worker shall be entitled to a payment in lieu of any untaken leave where the amount of leave untaken is less than the amount accrued in accordance with clause 5.4 above."

25. The Terms of Engagement were amended and new Terms issued on 5 July 2018. The new Terms had the clauses referred to above, but at section 6 rather than section 5. The wording was the same. The Claimant confirmed that he had not read the revised terms either. In the email attached to the new Terms when they were sent to him the Respondent stated that they were pretty much the same terms and that all that was required was for the Claimant to sign the second from last page and drop it back into the office when he was next passing by.

26. On page 5 of the Respondent's company Handbook under the heading 'Holidays and Sickness' it states as follows: -

"Whether directly engaged by your local Driver Hire office or employed by a third party contracting company whilst working for Driver Hire, your holiday entitlement is the same.

You are entitled to 5.6 weeks paid leave per year (including Bank Holidays), which equates to 28 days if you are working a 5 day week. This entitlement may not be carried forward to the next year.

If you only work for us on an occasional basis, entitlement to paid leave accrues on a pro-rata basis, in proportion to the amount of time you've worked for us during the year. Similarly the amount of holiday pay to which you are entitled is calculated on the same pro-rata basis.

Whenever you want to take a holiday, please let your local office know as soon as possible so we can make a note of the dates when you will be unavailable for work. If you are employed by a third party you must you must also tell them. The period of notice you give us must be at least twice the length of the holiday you want to take. So, if you want to take five days' leave, you should give us a minimum of ten days' notice. Timesheets for holiday payments must be submitted.

Where a Bank Holiday or other public holiday falls during an assignment and you do not work on that day, the public holiday may count as part of your paid annual leave entitlement if you request it in advance.”

27. The Claimant stated that he had not read the Code of Conduct and Guidelines Booklet before this hearing.

28. The Respondent confirmed that it did not have a conversation with the Claimant about his entitlement to holiday pay when he signed up with it or subsequently.

29. Another copy of the Terms of Engagement was emailed to the Claimant at his request on 5 July 2018. It was likely that he requested another copy of the document because he had become aware of his right to claim paid annual leave. The Claimant commenced his first period of annual leave with the Respondent on 21 October 2018.

30. The Claimant's attention was not drawn to clause 5.2 of the Terms document. He was not told that he would lose the leave accrued from the start of employment if he did not take it. By July 2018 he had been employed for a year. It is likely that this is when the Claimant became aware of his right to take paid annual leave. However, if he were to take his full year's entitlement then, he would not have had sufficient time left before the leave expired to be able to give the required notice. Clause 5.4 required him to give twice the length of the period of leave that he wished to take as notice. That would have been a requirement to give 56 days' notice (28 x 2) of 28 days leave. He would also not have had sufficient time within which he could take it or lose that year's entitlement.

31. Although, the contract stated that the leave year commenced on the date that the driver starts an assignment, the Respondent calculated the leave entitlement according to the tax year. The Response form referred to the Claimant's entitlement for that first year as calculated from 14 July 2017 to 5 April 2018.

32. The Respondent confirmed that the Claimant did not take any annual leave during his first year of employment. It was not the Respondent's case that he had drawn to his attention that he was entitled to annual leave. He was not informed, at any time and up to the end of May 2018, or at all in that first year, that he was about to lose his entitlement to annual leave if he did not take it.

33. On 4 March 2019, the Claimant contacted the Respondent to enquire of his entitlement to holiday pay for the year 2017/2018. After a chasing up email the Respondent replied to say that holiday pay was not transferable or able to be carried over to the following year.

34. The Claimant was sent another copy of the Terms of Engagement on 24 April 2019. The employment tribunal claim was issued on 5 June 2019. The Claimant has claimed and been allowed to take paid annual leave since July 2018 for the years 2018/2019 and 2019/2020. He went on holiday in October 2018.

35. The Claimant agreed that his pattern of work during his first year of employment with the Respondent was probably 3 – 4 days per week. He claimed a total of 143 hours as his outstanding holiday entitlement. His claim was for the period July 2017 – July 2018. The Respondent calculated the period as 14 July 2017 to 5 April 2018. It was the Respondent's case that the period in question was 105 hours. It was the Respondent's case that this was the correct way of calculating it as the Claimant's holiday entitlement for the following year had already been calculated from 6 April 2018 to 5 April 2019.

Decision

36. The Respondent's Terms of Engagement was the document which contained the relevant terms and conditions of the Claimant's employment. The Claimant had not read the whole document when he signed it. He relied on the Respondent to point out to him the relevant rights and responsibilities that applied.

37. The Claimant asked for a copy of the Terms in July 2018 and it is likely that he asked for them because he had found out about his right to paid holidays and wanted to know more about it. The Claimant claimed and was granted the right to take paid holidays in 2018 and went on holiday in October 2018.

38. The right to take the holiday which had accrued in the year that by then had passed (2017/2018); was more complex. The Respondent refused to allow him to do so. It was not clear when he first asked to be able to do so but it is likely that it was after July 2018.

39. The Respondent confirmed that apart from the provision of copies of the Terms of Engagement at the start of the contract in July 2017 and again, on the Claimant's request in July 2018, it had done nothing to bring the Claimant's right to paid annual leave to his attention. He had not been reminded – either by direct contact with Mr Pritchard, by a notice on the noticeboard or by a letter enclosed with the documents sent to the Claimant after completing 10 assignments – that he had a right to paid annual leave and that he might lose this if it was not claimed within a certain period of time. This was particularly relevant since the Respondent has a complicated notice period requirement that a worker needed to comply with in order to be allowed to take paid leave. Even if the Claimant had realised, when he got the copy of the Terms of Engagement in July 2018 that he could claim leave for his first year of employment, he would not have been able to give sufficient notice to be able to comply with the Respondent's notice requirements and still take the leave before the year expired.

40. The Respondent could not be said to have done all it could to ensure that the Claimant and his colleagues were in a position to exercise their right to paid annual leave. The burden of ensuring that he could actually exercise that right rested on the Claimant as the employee to read the Terms of Engagement, understand it or make time to contact the office to raise any queries on it, to work out when to give notice and to give that notice and take the leave all within the first year of employment. It was unlikely that an employee would do so before having completed their first 10 assignments as it was likely that it was at that time that an employee would begin to

feel secure in the employment relationship with the Respondent. Even if that was not so, it is clear that the Respondent did not encourage the Claimant to take annual leave and did not inform him, in good time, that if he did not take the leave it would be lost.

41. It is this Tribunal's Judgment that the Respondent has failed to prove that it has exercised due diligence in this respect or that it has actively facilitated the taking of leave so that it could be said that the Claimant's failure to do so during his first year of employment was due to his deliberate and informed choice.

42. The Claimant is entitled to carry forward the leave accrued in his first year of employment with the Respondent. Since the Respondent calculate leave up to 5 April every year, the entitlement is from 14 July 2017 to 5 April 2018. The Claimant's leave in 2018 was calculated from 6 April which means that he had already taken and been paid for leave accrued between 6 April and 13 July 2018. The Respondent may wish to amend the Terms of Engagement to reflect the fact that it calculates leave entitlement according to the financial year and not according to the worker's dates of employment, as stated in clause 5.1.

43. The Respondent has continued to refuse to allow the Claimant to take the leave. Although he was able to take leave for the financial years 2018 – 2019 and 2019 – 2020, he was not allowed to take the leave accrued between 2017 – 2018.

44. It is therefore this Tribunal's Judgment, applying the principle set out in the cases of *King* and *Max-Planck Gessellschaft zur Forderung der Wissenschaften e.V.* that the Claimant is entitled to carry that leave forward.

45. It is this Tribunal's Judgment that the Respondent refused to permit the Claimant the statutory right to annual leave.

46. The Respondent failed to pay the Claimant in lieu of entitlement to annual leave.

47. In this Tribunal's judgment, it is likely that the Claimant's calculation that he is owed 143 hours is based on the hours accrued between July 2017 and July 2018. As the Respondent actually calculates annual leave entitlement from 6 April to 5 April the following year, it is likely that the Claimant has already taken annual leave for the period 6 April to 13 July 2018. The Claimant is owed the annual leave accrued between 15 July 2017 and 4 April 2018.

Remedy

48. The Respondent is ordered to pay the Claimant 103 x £7.50 per hour for annual leave accrued from 14 July 2017 to 28 February and £7.83 for the hours worked in March; for leave accrued during the financial year April 2017 – April 2018 (it is likely that in its calculation, the Respondent added the increased minimum wage figure for March 2018). I was not told how many hours were calculated at the rate of £7.83.

49. The Tribunal adopts the Respondent's total of £788.62. The Respondent is

ordered to pay the Claimant the sum of £788.62 gross as his holiday pay entitlement for the leave year 6 April 2017 – 5 April 2018. As the Claimant did not start his employment until 14 July, the leave accrued in his first year of employment, between 14 July 2017 and 5 April 2018.

50. The Respondent is ordered to pay the Claimant the total sum of £788.62.

Employment Judge Jones

19 March 2020