



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Khetani  
**Respondent:** Bryen Langley Limited  
**Heard at:** Ashford  
**On:** 26<sup>th</sup> January 2020  
**Before:** Employment Judge Pritchard

## Representation

**Claimant:** Miss S Patel  
**Respondent:** Mr D Wrighton, director

# REASONS

1. These written reasons for the judgment dated 17 January 2020 are provided as requested by the Respondent by email dated 18 February 2020.
2. By way of an ET1 claim form presented on 3 August 2019 the Claimant claimed holiday pay. The Claimant's claim set out in his ET1 was unclear. However, Miss Patel, the Claimant's niece assisting him with his claim, explained what was being claimed. She referred the Tribunal to calculations set out in papers within a bundle. The Claimant was claiming holiday pay as follows:
  - 2.1. In the 2016 leave year, the Claimant claims 10 days holiday pay;
  - 2.2. In the 2017 leave year, the Claimant claims 2 days holiday pay;
  - 2.3. In the 2018 leave year, the Claimant claims 7 days holiday pay.
3. In its ET3 response form the Respondent resisted the claim and stated that it wished to make an employer's contract claim. At the commencement of the hearing Mr Wrighton informed the Tribunal that the Respondent did not wish to pursue an employer's contract claim. That claim was accordingly dismissed.

## The issues

4. The issues before the Tribunal were:
  - 4.1. What was the Respondent's leave year?
  - 4.2. What was the Claimant's entitlement to leave in the leave year?

- 4.3. Has the Claimant been paid in respect of his entitlement? If not, how much should have been paid?
5. However, it became clear during the hearing that the Tribunal would have to consider whether the Claimant presented his claim within the statutory time limit. If he had not done so, the Tribunal would not have jurisdiction to consider the claim.

### **Findings of fact**

6. The Respondent is in the construction industry with approximately 150 employees. The Claimant is employed as a carpenter working full time.
7. The Respondent's leave year is the calendar year. It is common ground that the Claimant's contract of employment provides for a paid leave entitlement of 28 days in each leave year. This is consistent with the Claimant's entitlement under the Working Time Regulations 1998. Employees routinely complete a holiday request form which it then considered and authorised as appropriate.
8. The Claimant's allegation is that Mr Tony Murphy of the Respondent had informed the Claimant that he was not entitled to any further leave in the leave years referred to above.
9. It remained unclear whether the Claimant was saying he actually took leave on those days he was not permitted to take leave (such that an entitlement to pay might arise); or whether did not take that leave and continued to work and be paid (such that he might be entitled to compensation by reason of the denial of the right).
10. The Claimant did not request annual leave in 2019 was because the parties, seeking to resolve their differences, anticipated entering into a settlement agreement within which the claim for holiday pay would be compromised (and the Claimant's employment terminated). In the event, the agreement was not concluded and the Claimant remains employed by the Respondent. Nevertheless, as a gesture of goodwill, as the Respondent puts it, the Respondent permitted the Claimant to carry over the entirety of his holiday entitlement for 2019 to 2020. The Tribunal was told that he would therefore be granted a total of 56 days leave in 2020.
11. Thus, in the 2019 leave year up to 3 August 2019, when the Claimant presented his ET1 Claim Form, he neither requested nor took any annual leave. In 2019, therefore, the Claimant suffered neither a denial of the right to take leave (he never requested it), nor a failure to pay for leave (because he did not take any leave and continued to be paid for working).

### **Applicable law**

12. Under Regulation 30 of the Working Time Regulations 1998, A claim that an employer has failed to permit an employee to exercise his right to annual leave or failed to pay him for such leave must be brought before the end of the period of three months beginning on the date on which:
- 12.1. it is alleged that the exercise of the right should have been permitted;  
as the case may be

- 12.2. the payment should have been made;
- 12.3. or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period. Time limits are extended under the ACAS Early Conciliation procedure.
13. A claim for holiday pay (but not a claim for the denial of the right to take annual leave) can also be brought under the unlawful deductions provisions of the Employment Rights Act 1996. Section 23(2) provides that a Tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date of the payment of wages from which the deduction was made.
14. Under section 23(3), where a complaint is brought in respect of a series of deductions, the reference in subsection (2) to the deduction or payment are to the last deduction or payment in the series or the last of the payments received. (The Tribunal notes here that a series of deductions is not broken by a gap of more than 3 months: Chief Constable of the Police Service of Northern Ireland v Agnew [2019] NICA 32 but that ruling does not affect this case).
15. The Tribunal may consider a complaint brought outside these time limits where it is satisfied that it was not reasonably practicable for the complaint to have been presented within the time limit and the claim was presented within such further period as the Tribunal considers reasonable. Again, the time limits are extended under the ACAS Early Conciliation procedure.
16. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of “reasonable feasibility” (in other words somewhere between the physical possibility and pure reasonableness).
17. In Adsa Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: “the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done”.
18. Under section 23(4) a Tribunal cannot consider so much of a complaint of unlawful deductions where the date of payment of wages from which the deduction was made was before the period of two years ending with the date of the presentation of the complaint.

## Conclusion

19. Time started running for limitation purposes at the end of 2018. Therefore, the Claimant had until 31 March 2019 to contact ACAS within the primary time limit. However, the Claimant did not contact ACAS until 16 June 2019 (an

Early Conciliation Certificate being issued on 15 July 2019). His claim was presented outside the primary time limit.

20. There was nothing to suggest, and nothing said to suggest, that it was not reasonably feasible for the Claimant to have commenced proceedings within the primary time limit. He had spoken to his union and to ACAS. It would have been entirely reasonable for him to have contacted ACAS within the three month time limit.

21. For these reasons, the Claimant's claim was dismissed because it was presented outside the statutory time limit.

Note

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Employment Judge Pritchard

Date: 26 February 2020