



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss T Cummins

**Respondents:** Able UK Limited

**Heard at:** Newcastle (by video link)

**On:** 4 November 2020

**Before:** Employment Judge S Shore

## Appearances

For the claimant: In Person

For the respondent: Mrs K Hawdon

## JUDGMENT

1. The claimant's claim that the respondent failed to pay her part of an amount of holiday pay due to her under regulation 14(2) of the Working Time Regulations 1998 on the termination of her employment is not well-founded. The respondent acted lawfully in deducting four days' holiday pay from her final payment.

## REASONS

### Introduction

1. The claimant was employed as a Commercial Assistant by the respondent from 11 November 2019 to 18 June 2020, which was the effective date of termination of her employment following her resignation. The claimant's ET1 was presented on 2 September 2020.
2. The claimant presented a claim that the respondent failed to pay her part of an amount of holiday pay due to her under regulation 14(2) of the Working Time Regulations 1998 on the termination of her employment. When calculating the accrued holiday untaken and unpaid due to the claimant at the end of her employment, the respondent says it discovered that she had taken and had been paid for four more days holiday in the preceding holiday year than she was entitled to. It therefore deducted four days' pay from her final payment of salary on 30 June 2020.

3. Standard case management orders were issued by the Tribunal, but on 13 October 2020 Employment Judge Johnson made further orders that overrode the previous orders. There was no requirement for either party to file an agreed file of documents for the use of the Tribunal. This caused some difficulties that were the fault of neither party.
4. I produced a draft list of issues, which were agreed by the parties' representatives:
  - 4.1. What was the claimant's leave year?
  - 4.2. How much of the leave year had passed when the claimant's employment ended?
  - 4.3. How much leave had accrued for the year by that date?
  - 4.4. How much paid leave had the claimant taken in the year?
  - 4.5. Were any days carried over/taken in excess from previous holiday years?
  - 4.6. How many days remain unpaid and/or owing?
  - 4.7. What is the relevant daily rate of pay?

**Law**

5. The facts in this case were mostly agreed, so there was little law to determine, but the relevant law in this case is mostly contained in regulations 13 and 14 of the Working Time Regulations 1998:

***Entitlement to annual leave***

**13.—***(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).*

*(2) The period of leave to which a worker is entitled under paragraph (1) is—*

*(a) in any leave year beginning on or before 23rd November 1998, three weeks;*

*(b) in any leave year beginning after 23rd November 1998 but before 23rd November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23rd November 1998 which has elapsed at the start of that leave year; and*

*(c) in any leave year beginning after 23rd November 1999, four weeks.*

*(3) A worker's leave year, for the purposes of this regulation, begins—*

*(a) on such date during the calendar year as may be provided for in a relevant agreement; or*

*(b) where there are no provisions of a relevant agreement which apply—*

*(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or*

*(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.*

*(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture) except where, in the case of a worker partly employed in agriculture, a relevant agreement so provides.*

*(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.*

*(6) Where by virtue of paragraph (2)(b) or (5) the period of leave to which a worker is entitled is or includes a proportion of a week, the proportion shall be determined in days and any fraction of a day shall be treated as a whole day.*

*(7) The entitlement conferred by paragraph (1) does not arise until a worker has been continuously employed for thirteen weeks.*

*(8) For the purposes of paragraph (7), a worker has been continuously employed for thirteen weeks if his relations with his employer have been governed by a contract during the whole or part of each of those weeks.*

*(9) 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.*

### **Compensation related to entitlement to leave**

**14.—***(1) This regulation applies where—*

*(a) a worker's employment is terminated during the course of his leave year, and*

*(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.*

*(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

*(3) The payment due under paragraph (2) shall be—*

*(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*

*(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

$$(A \times B) - C$$

*where—*

*A is the period of leave to which the worker is entitled under regulation 13(1);*

*B is the proportion of the worker's leave year which expired before the termination date, and*

*C is the period of leave taken by the worker between the start of the leave year and the termination date.*

*(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.*

### **Housekeeping**

6. Both parties produced witness statements. The claimant produced her own witness statement and statements from former colleagues David McLaren and Lesley-Ann Ingledew. I read all the statements before the hearing and found that large parts of the claimant's witness statement and all of Mr McLaren's statement (which was accepted as being background information) did not address the issues that I had to decide in the case. I discussed this with the claimant and she agreed that Mr McLaren did not need to give evidence and her own witness statement should be edited so as to remove paragraphs that were not relevant.
7. The only witness for the respondent was Karen Jewers, who had attached a number of documents to her statement. Some parts of her statement were not relevant to the issues I had to decide, so were edited out.
8. Miss Cummins said she had submitted all her documents to the Tribunal and the respondent. No bundle had been produced. I adjourned the hearing to enable me to obtain copies of the claimant's documents, which included her contract of employment, the respondent's staff handbook, copies of holiday

requests made by her and an exchange of emails concerning the deduction made by the respondent. Most of the facts in the case were not in dispute.

9. At the end of the evidence, I heard closing submissions from Miss Cummins. Mrs Hawdon submitted that the respondent's documents and evidence spoke for themselves.
10. I then adjourned to make my decision and delivered it to the parties. Both parties requested written reasons.

### **Findings of Fact**

11. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over another. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made.
12. It was never disputed that the claimant was employed by the respondent as a Commercial Assistant from 11 November 2019 to 18 June 2020. The respondent submitted that her annual salary of £25,000 equated to an average daily rate of £96.15. That figure was higher than the one produced by the claimant, so she was happy to accept the higher figure.
13. It was not in dispute that the claimant entered into a contract of employment dated 11 November 2019 with the respondent. Clause 8.3 of that contract provided that:

*Employees must use at least 3 days, but possibly up to 8 days (depending upon when Christmas falls) of their holidays at Christmas and this is to be taken between Christmas Eve and the Friday following New Year's Day during which period the offices may be closed. Christmas closure dates will be notified in advance.*
14. The claimant confirmed that she was aware of the clause. She did not dispute that her pro rata entitlement to holiday pay as Christmas 2019 approached was 3 days. She actually took and was paid for 7 days, so on the face of it, she was overpaid by four days.
15. The overpayment was not noticed by the respondent at the time. It was not noticed when the claimant's P60 was being prepared in April 2020 or at any other time prior to the end of her employment.
16. It was not disputed that the claimant resigned on 15 June 2020 and that her employment ended on 18 June 2020, when she left the respondent's premises for the last time. The claimant was in breach of her contract by failing to work her proper contractual notice, but that is not a relevant matter for this case.
17. Mrs Jewers was the person who worked out payroll for the respondent. I find that her evidence that she checked the holiday history of all employees who were leaving after a short period of service was credible. The claimant challenged the respondent's evidence, but I find no reason why I should disbelieve it. Additionally, it does not matter for the purposes of this hearing why

the check on the claimant's holidays was made. I also find that her evidence that the decision to pay the claimant for four days' holiday to which she was not entitled was credible. I make that finding because her evidence was more credible on the reason for the payment than the claimant's.

18. The claimant's case was that she "concluded that I was paid the four days shortfall in accrual as a discretionary payment, as I had been paid in previous companies in similar circumstances." She also accepted that there had been no express or implied communication from her line manager that indicated to her that the four days were to be given to her as a discretionary payment. I therefore have no hesitation in finding that the claimant has not met the standard of proof (the balance of probabilities) to show that she was entitled to the four days' pay paid to her in December 2019.
19. It was not disputed that the claimant accrued 10 days' holiday in 2020 to the date that her employment ended. It was agreed that she took half a day in holiday. It was agreed that her net accrued entitlement for the holiday year 2020 was 9.5 days.
20. I find that Mrs Jewers had the authority to compile the payroll for the respondent, as she said she had and was not really challenged on the point. She was asked if the claimant's line manager, who is the respondent's COO had to approve the payroll before it was finalised and said that he agreed it. That seems to be credible. Whether he had to approve it or not is, with respect to the claimant, irrelevant to the issues I have to decide.
21. I find that Mrs Jewers drew up the June 2020 payroll towards the end of that month. I am critical of the failure of the respondent to advise the claimant is writing that she was to have four days' pay deducted from her holiday entitlement. To have done so may have lessened the upset suffered by the claimant and is good practice.
22. It was not disputed that clause 7 of the claimant's contract of employment authorised the respondent to make deductions from her pay "including but not limited to overpayment of the Salary or any overtaken holiday entitlement." That authority is not limited by time.
23. The claimant cites the experience of Mrs Ingledew in support of her case. Mrs Ingledew gave unchallenged evidence that in 2019, she was aware that she had taken two days' more paid leave than that to which she was entitled as Christmas approached. She approached her line manager and was told that she had to work two days over the Christmas break to make up for the overpaid holiday. She agreed to do this. I find that Mrs Ingledew's evidence does not materially support the claimant's claim. Her circumstances were different. She had realised that she had been overpaid and was prepared (even if she wasn't happy) to work the additional two days. There was no suggestion by her that the days would be gifted to her. I find that the claimant's passivity when she knew she had been overpaid weakens her case. If she knew she had been overpaid because of a mistake by Mrs Jewers, she should have reported this to her employer. She did not. She had no reasonable expectation that the four days would be gifted to her because previous employers had acted in that way.

24. The claimant also cites clause 8.1 of her contract, which forbids holiday entitlement being carried forward without the express written approval of her line manager, and clause 9.7 of the company handbook, which says pretty much the same thing. I find, however, that a ban on carrying holiday forward without written consent is not analogous to a prohibition on recouping overpayment of holiday pay in one year from salary paid in a following year.
25. The claimant raised a grievance that the respondent failed to engage with in any meaningful way. However, nothing in those exchanges affects my decision.
26. I find that the claimant's case is not made out on the basis she put forward that she was not paid her full entitlement to holiday pay in respect of the holiday year 2020. She was paid the total due to her, but four days' pay was deducted as an underpayment.
27. I do not find that the fact that claimant submitted a holiday request in 2020 that did not record the holiday deficit in 2019 is determinative of her claim.

### **Assessment and Conclusions**

28. I make the following findings on the issues by applying our findings of fact and the law:
  - 26.1. The claimant's leave year began at the end of the Christmas shutdown.
  - 26.2. 24 weeks of the leave year had passed when the claimant's employment ended.
  - 26.3. 10.5 days' leave had accrued for the year by that date.
  - 26.4. The claimant had taken 0.5 days' holiday in the year?
  - 26.5. I find that the claimant had taken and been paid for four days' holiday in 2019 to which she was not entitled. I find that the respondent had the authority to deduct the overpayment from her final salary payment in June 2020 and did so.
  - 26.6. No days remain unpaid and/or owing.
  - 26.7. The relevant daily rate of pay is not relevant as I had found that the claimant was not underpaid holiday pay on the termination of her employment.

Employment Judge Shore  
4 November 2020