



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr O Akinsete

**Respondent:** Ward Security Ltd

**Heard at: London Central (remotely by CVP)**  
**On: 25 August 2021**

**Before: Employment Judge Heath**

## **Representation**

Claimant: In person

Respondent: Ms H Whyman (solicitor)

# RESERVED JUDGMENT

The claimant's claim under Regulation 30 WTR is not well-founded and is dismissed.

# REASONS

## **Introduction**

1. By a claim form presented on 9 April 2021 the claimant claims that his employer refused to permit him to exercise his right to 5.5 days paid annual leave during the 2020 holiday year. ACAS received the Early Conciliation ("EC") notification on 1 March 2021 and issued the EC certificate on 16 March 2021.

## **The issues**

2. At the start of the hearing I clarified what I understood to be the issues with the parties. It was agreed that I must determine the following issues: -
  - 2.1. What was the claimant's entitlement to leave under regulations 13 and 13A of the Working Time Regulations 1998 ("WTR")?
  - 2.2. How much leave did the claimant accrue during the holiday year 2020?

- 2.3. Did the respondent refused to permit the claimant to exercise his right to take any of such leave?
- 2.4. If the claimant succeeds in his claim, what is his loss?
- 2.5. In respect of time limits, when was the exercise of the right to leave that should have been permitted?
- 2.6. Was the claimant's claim outside the time limit of three months set out in regulation 30(2) WTR?
- 2.7. If the claim was outside the time limit, was it reasonably practicable for the claimant to present his claim in time, and if not, did he present it within such further period as is reasonable?

### **Procedure**

3. The matter was listed for a Full Merits Hearing at 2 PM on 25 August 2021, with a time estimate of two hours. I was provided with a 208 page bundle, the claimant provided a witness statement and gave live evidence, as did Ms Caroline Cuthbert, the respondent HR Director, who provided a witness statement and a supplementary witness statement. Ms Whyman presented written submissions on behalf of the respondent which she supplemented orally, and the claimant made oral closing submissions.
4. Evidence and submissions concluded at around 4:40 PM, and so I reserved my decision.

### **Facts**

#### The claimant's employment

5. The respondent is a national company that provides numerous security services to businesses and the public. It employs around 1,100 members of staff. The claimant has been employed since 28 September 2015 as a security officer. Initially, he was a "static officer" which meant that he was assigned by the respondent to a particular location. As such, he would be given set annualised days of annual leave, in his case 5.6 weeks per year pro-rata inclusive of public and bank holidays. The respondent's holiday year was the calendar year.
6. Initially the claimant worked as a static officer, working 60 hour weeks at a set site. However, in October 2019 the claimant made a request for flexible working in order to accommodate his childcare commitments. It was not possible to accommodate this request at the site he was working at, and so the claimant was offered the alternative position as a London Relief Officer, which he accepted.
7. As a Relief Officer, he would not be allocated to a particular site but would cover holidays, periods of sickness and over-time and would be placed in a variety of sites. Relief officers are not guaranteed hours or set days of work. The claimant had no obligation to work shifts when offered to him, however, once he accepted a shift he was expected to work it. The claimant began working as a Relief Officer on 1 November 2019, and was issued with a new contract of employment.

8. As a Relief Officer the claimant accrued holiday on an hourly basis at 12.07% of the hours he worked. He would be paid for holiday at the rate of his average daily hours, which was usually around 12 hours per day.

The respondent's holiday rules and policies

9. The accrual rate referred to above was set out in the claimant's contract of employment, which also set out the following provisions:
- 9.1. *The Company's holiday year runs between 1 January and 31 December...*
- 9.2. *Holiday must be taken at times approved in accordance with the Company Annual Leave Policy.*
- 9.3. *The company operates a Holiday Ban. For operational needs from 18<sup>th</sup> December to 5<sup>th</sup> January inclusive.*
- 9.4. *Holiday must be taken in the holiday year of entitlement and cannot be carried forward to the following holiday year.*
- 9.5. *The Employee shall not carry forward any accrued but untaken holiday entitlement to a subsequent holiday year unless the Employee has been prevented from taking it in the relevant holiday year by one of the following: a period of sickness absence or statutory maternity leave, paternity, adoption or shared parental leave...*
- 9.6. *The Employee shall have no entitlement to any payment in lieu of accrued but untaken holiday except on termination of the Appointment.*
10. The Company Annual Leave Policy, referred to in the contract of employment, has the following provisions:

***Policy statement***

- 10.1. *All holiday must be taken during the holiday year in which it is accrued. You are not permitted to carry holiday into the next holiday year, and is prevented from doing so either by reason of sickness absence, parental leave, including maternity, paternity or shared parental leave.*
- 10.2. *There will ordinarily be a Holiday Ban. During the period of 18<sup>th</sup> December to 5<sup>th</sup> January annually and during this time you are not permitted to take annual leave.*

***Conditions for applying for annual leave***

- 10.3. *Holidays must be requested via the online Employee Portal clearly showing the required dates. Holiday requests will be authorised or declined and will be based on the operational and manning needs of the Business.*
- 10.4. *Holidays will be approved on a "first-come – first served" basis to ensure operational efficiency.*
- 10.5. *You must give at least 1 month notice of your intention to take annual leave.*

10.6. *To facilitate cover arrangements, leave requests must be taken throughout the course of the leave year, ensuring that the following amounts are taken in the corresponding periods:*

- *One week or a quarter of your leave entitlement (whichever is greater dependent on individual entitlements) to be used in the first quarter of the leave year - January to March.*
- *Two weeks or half of your leave entitlement (whichever is greater dependent on individual entitlements) to be used within the second and third quarters of the leave year - April to September.*
- *One week or a quarter of your leave entitlement (whichever is greater dependent on individual entitlements) to be used in the final quarter of the leave year - October to mid December (prior to 18 December or as notified above).*

10.7. *The above must be observed and should serve to eliminate the issues experienced in relation to employees failing to book leave and/or carrying excessive amounts of leave into the final quarter of the leave year.*

11. Prior to 2020, the vast majority of which the claimant had been working as a static officer, there had never been any issues with the claimant's leave.

#### How the policy operated

12. Employees would manage their holiday by an employee portal which was available online and/or via an app accessible on a mobile phone. The holiday policy was available on this portal and employees could manage their leave, see how much leave they had accrued and/or taken, apply to book annual leave and see whether their requests had been approved.

13. The claimant's requests for leave were overseen by Mr Tilbury, the London Scheduler. Mr Tilbury would do all the scheduling, shift rotas and holidays of relief staff in the London area. Mr Tilbury would keep in touch with relief staff on a regular basis to assess their ongoing availability for work and will have a broad overview of the requirements of the respondent's clients. When holidays are requested Mr Tilbury would look at the requirements of the business, the available manpower and possible alternative cover. If there is no manpower to cover holiday that a worker has applied for Mr Tilbury would inform the staff member that their application for holiday had not been approved. Again, from the staff member's perspective this process would be conducted via the employee portal.

14. As set out above, the worker could see from the employee portal how much holiday he or she had taken and how much he or she had accrued. For a Relief Officer the annual accrual would start on 1 January. However, the worker was not limited to taking such holiday as he or she had already accrued in that year. If they applied to take more than they had accrued in the year to date their holiday balance would show as a negative, but there would be nothing preventing them from booking the leave. Their holiday balance would show a positive balance when they accrued further holiday by working.

15. The respondent carries out welfare checks in respect of its staff. Ordinarily this would involve a manager carrying out a visit to the workers workplace and going through a list of questions with them. During 2020, during the Covid pandemic, these welfare checks were largely carried out over the telephone. The welfare checks would cover pro forma questions which included whether the employee understands how to book holiday and whether they know what their outstanding entitlement is.

The claimant's annual leave during 2020

16. The respondent's Annual Leave Policy clearly sets out that workers should spread out their holiday throughout the year.

16.1. The claimant booked two days holiday for the first quarter of 2020, when the policy would suggest he should have booked six.

16.2. In quarters two and three the claimant booked a total of seven days holiday, when the policy required him to take 12 days. Two of the seven days were not approved as there was no available cover and leave had been granted to other workers on a first-come first-served basis. The claimant was urged to submit a request for the following two weeks for the declined days. The claimant made a request to take the two days holiday on further dates in October, but cancelled them before they were actioned by the respondent.

16.3. In the fourth quarter the claimant attempted to book 26 holiday days.

16.3.1. On 17 July 2020 the claimant requested 11 days during the course of October and early November, which were all approved. One of these days was cancelled as the claimant agreed to cover a shift on short notice. He was not obliged to cover the shift, but he chose to.

16.3.2. On 7 October 2020 the claimant requested a further two days, but did not give one month's notice. The claimant's application was rejected as there was no available cover. The claimant failed to attend work on the days he applied for and this was recorded as unauthorised absence.

16.3.3. On 15 October 2020 the claimant requested two days in November again not giving one month's notice. Again, the request was rejected as there was no available cover, and it was suggested that the claimant rebook for the following two weeks.

16.3.4. On 25 October 2020 the claimant requested the 24 and 25 November 2020. This, marginally, did not give at least one month's notice and the requests were rejected. The claimant failed to attend work on these days and they were recorded as unauthorised absence.

16.3.5. On 25 October 2020 the claimant requested a day in November which did not give a month's notice, but cancelled his application on the same day. On the same day he requested 17 November, which did not give at least one month's notice. The request was declined as there was no available cover.

- 16.3.6. On 16 November 2020 the claimant requested 1 and 2 and 8 and 9 December which did not give at least one month's notice. The request was not actioned, but the claimant failed to attend work on these days and they were recorded as unauthorised absence.
- 16.3.7. On 24 November the claimant requested the 31 December 2020, which fell within the holiday band. Stop the claimant cancelled this request before it could be actioned.
17. In summary, in quarter four of 2020 the respondent approved 11 days holiday, one of which was cancelled with the claimant's consent. The respondent refused requests for seven days as the claimant gave insufficient notice and there was no available cover. The claimant cancelled requests for seven days holiday. The claimant failed to attend work on nine of the days in which he had requested holiday despite his requests not being approved or actioned by the respondent. These days were recorded as unauthorised absences.
18. On 8 April 2020 the claimant, as with all staff, was sent a staff communication which reminded him to ensure that he took his annual leave. He was reminded that he should take a quarter of his leave by April, half of it by September and the remainder prior to 18 December. He was urged to plan his leave effectively. On 12 June 2020 another update was sent in more-or-less identical terms. The respondent's IT systems show that the claimant opened at least one of these updates.
19. One issue that arose during the course of 2020 during the pandemic, was that there was less opportunity for both static and relief workers to work. For relief workers lack of hours meant lack of opportunity to accrue holiday. To address this issue the respondent made the offer in an email of 6 May 2020 to the claimant and other relief workers. Mr Tilyard wrote "*I have reviewed your hour April and can see that you did not complete your usual number, so if I could get it agreed with HR would you like to receive some of your holiday entitlement as an extra payment*". The claimant took up this offer that same day ("*Thank you for this opportunity. Yes please, and if it is possible I'll like to take the total, which is in excess of 74 hours*") and was paid for 36 hours. This payment was authorised by the respondent's London Director and identified as "pay queries" in the claimant's payslip. This offer was made on an exceptional basis as relief workers were not accruing holiday hours at a normal rate during the pandemic. Some employees took the payments, and some did not.
20. By the end of the 2020 calendar year the claimant had accrued 295.14 hours holiday, which it amounted to approximately 25 days. The claimant had not taken 92.31 of these hours during 2020, which amounted to around eight days. The claimant accrued 27 holiday hours during December, which could be carried over into January 2021 to be taken by 31 January 2021 according to the respondent's annual leave policy.
21. The claimant attempted to book 96 hours holiday in January 2021. This showed as a negative on his employee portal. He queried this with Ms Hall from Finance and Payroll, indicating that he had accrued 96 hours that was brought forward to 2021. Ms Hall told him that he had booked more hours than he had accrued and that is why it was showing on the portal as a negative.

22. The claimant took out a grievance over this issue on 25 January 2021, saying that he had been denied the opportunity of carrying his outstanding annual leave accrued before December 2020. He argued that he made every effort to book the leave and this was frustrated by the company and that he had 96 hours accrued and untaken.
23. The claimant's grievance was heard by Mr Glen, Operations Manager, on 29 January 2021. During the grievance hearing the claimant said that he was going to supply evidence to Mr Glen that he had booked 5.5 days leave and had those cancelled. He did not supply this evidence. An outcome given by letter of 18 February 2021. Mr Glen's finding was that the claimant had only taken two days annual leave by 24 January 2020, and nothing further until 21 September 2020. The claimant had only taken two days annual leave at a point when he should have taken three quarters of his annual leave. Mr Glen confirmed that the respondent did not stop any employee taking annual leave during 2020 due to the lockdown. He found that the reason that annual leave had not been taken correctly throughout the year was down to the claimant's own personal mismanagement and not following the annual leave policy. His grievance was dismissed, and he was given the right of an appeal, which he did not take.

### **The law**

24. Regulations 13 and 13A WTR set out the workers entitlement to a total of 5.6 days annual leave her leave year. By virtue of regulation 13(9) leave may only be taken in the leave year in respect of which it is due and may not be replaced by a payment in lieu except when the workers employment is terminated.
25. Regulation 15 WTR sets out that a worker may take leave on such days as he may elect by giving the appropriate notice which is "subject to any requirement imposed on him by his employer" by giving them a relevant counter notice. Regulation 15(5) sets out that any rights or obligations under regulation 15 may be varied or excluded by a relevant agreement.
26. As regards time limits, Regulation 30(1)(a)(i) of the WTR provides that a worker may present a complaint to an employment tribunal that the employer has refused to permit him to exercise any right he has under regulation 13 or 13(A) (among other rights). Under Regulation 30(2) the tribunal shall not consider complaints unless it is presented "*before the end of the period of three months... beginning with the date on which it is alleged that the exercise of the right should have been permitted... Within such further. 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 of three... months*". Regulation 30B provides for extension of time limit to facilitate conciliation before the institution of proceedings.
27. The Working Time (Coronavirus)(Amendment) Regulations 2020 allow for a carry-over of leave into the next two leave years where it was not reasonably practicable for a worker to take some or all of their leave "*as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society*". Government Guidance gives guidance on, among other things, considering whether it was not reasonably practicable for a worker to take leave as a result of the coronavirus pandemic. Examples of not being

practicable to take leave include such matters as needing to cover for co-workers, staff shortages, and whether a worker is classed as a “critical worker” working, for example in healthcare or at a supermarket. The guidance states “*If a worker is able to take leave, the standard rules for carrying over leave still apply*”.

28. Where a complaint under Regulation 30(1)(a) is well-proven the tribunal shall make a declaration, and may make an award of compensation in such amount as it considers just and equitable having regard to the employer’s default and the worker’s loss.

## **Conclusions**

29. The claimant’s entitlement to leave under regulations 13 and 13A in 2020 was 5.6 weeks, pro-rated. He accrued 295.14 hours, or 25 days. This was on the basis of the 12.07% rate of accrual under his contract of employment and the number of hours that he worked during that year.
30. The real question was whether the respondent refused to permit the claimant to exercise his right to take leave.
31. The claimant’s contract of employment made it clear that he could not carry over leave from one leave year to the next and that he was not entitled to payment in lieu of holiday except on termination. The holiday ban in December was referenced in the contract, as was the employer’s Annual Leave Policy.
32. The Annual Leave Policy reinforced the information in the contract and set out clear conditions for applying for annual leave, including: -
- 32.1. The fact that holidays are approved on a first-come-first-served basis;
  - 32.2. The need to book a month in advance of the proposed leave;
  - 32.3. The need to spread out leave throughout the leave year.
33. The contractual and policy position on annual leave was available to the claimant on the employee portal which he used to manage his leave. The claimant was also reminded of his need to book leave during welfare checks, and the need to manage his leave efficiently and book throughout the year was reinforced in the two all-staff updates he received in April and June. The portal, in particular, allowed the claimant readily to see how much leave he had accrued and how much he had taken at any point during the year.
34. I accept the respondent’s contention that it did all that was reasonably practicable to encourage the claimant to take his holiday entitlement. Moving from regular hours with set holiday entitlement to a system where holiday was accrued at a rate of 12.07% of hours worked, especially when hours were not set ones, would have complicated the claimant’s leave position. However, the respondent set up a system whereby he was regularly reminded of the need to manage his leave. It also had the IT, in the shape of the employee portal, to allow him to see how much holiday he accrued and how much he had taken.
35. I find that the reason that the claimant found himself in the position of having 5.5 days at the end of the year which he could not carry over, was that he had



not managed his leave efficiently. Despite the reminders to spread his leave out throughout the year, he found himself in the position of having to apply for a shade under two thirds of his annual holiday entitlement in the final quarter of the year, a quarter which itself has a holiday ban within it. The reason that some of the leave was not granted during this period was because the claimant had not given sufficient notice, and the respondent could not accommodate it because there was no available cover.

36. There has been no evidence to suggest that the coronavirus pandemic has meant that it was not reasonably practicable for the claimant to take his leave.
37. I have also considered the issue of the one-off payment in June. It appears that the respondent offered this payment to its relief staff on the basis that they had not been offered as many shifts as they had been and had not accordingly accrued as much holiday. This is the area of the claim that has troubled me the most. Regulation 13(9) WTR does not allow for the payment in lieu of holiday except when it is outstanding on termination. This was, or appears to be, an offer of a payment in lieu, and is against the grain of the EU and domestic legislation and case law which emphasises the need for rest from labour. The claimant accepted the offer enthusiastically (wanting even more hours) and was paid for 36 hours. This arrangement meant that the claimant did not exercise his right to take these 36 hours. But did the respondent refuse to permit the claimant to exercise his right to take these hours, to use the language of Regulation 30 WTR?
38. It is with a degree of unease that I find that the respondent did not “refuse” to “permit” the claimant to take these 36 hours. My unease is because 1) I have not been referred to or found any authority directly on this point, and 2) the respondent’s approach appears to be against Regulation 13(9) WTR. However, there was no refusal to give permission, rather an offer that was accepted in circumstances whether other colleagues declined.
39. If I am wrong on whether the respondent was liable under Regulation 30(1)(a)(i) WTR in respect of these 36 hours, I am more confident of what the claimant’s remedy would have been under Regulation 30(3)(b) WTR. I “may” have made an award of compensation of an amount such as I considered to be just and equitable having regard to the employer’s default and the worker’s loss. The employer’s default here probably came from a place of (possibly ill-judged) benevolence, and the claimant suffered no financial loss. I would have declined to have made an award of compensation had I found in the claimant’s favour.
40. In all the circumstances of the case I do not find that the claim is well-founded, and I dismiss the claim.
41. It follows that I do not need to consider whether the claim was brought in time.

Employment Judge **Heath**

Date 3 September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
03/09/2021.

FOR EMPLOYMENT TRIBUNALS