



EMPLOYMENT TRIBUNALS

Claimant: Mr J Dickson

Respondent: Urban & Provincial Limited

Heard at: London Central (remotely by CVP)

On: 27 August 2021

Before: Employment Judge Heath

Representation

Claimant: In person

Respondent: Ms C Goodman (Counsel)

JUDGMENT having been sent to the parties on **27 August 2021** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By an ET1 presented on 5 July 2021, the claimant claims holiday pay accrued in the holiday year prior to the holiday year in which his contract of employment was terminated. He says he should have been permitted to carry forward his leave under the Working Time (Coronavirus) (Amendment) Regulations 2020.

The Facts

2. The respondent is a small mixed-use property development and investment company. Mr Luke Osborne is one of its directors the claimant was employed by the respondent as a Land Buyer on 11 September 2019.
3. Clause 7 of the claimant's contract of employment, under the heading **Holiday**, contained the following provisions: -

7.1 You will be entitled to 25 days' paid holiday in each holiday year, which runs from 1 January to 31 December, plus bank and public holidays. This includes your statutory basic and additional

holiday under the Working Time Regulations 1998. Your statutory basic holiday is taken first, then statutory additional holiday, then any additional contractual holiday.

...

7.4 You must take all of your holiday during the holiday year in which it accrues and carrying forward holiday is not permitted unless either agreed in advance by your Manager or where the law allows holiday to be carried forward.

...

7.7 When your employment ends, you will be paid in lieu of any accrued but untaken holiday for that holiday year. In some cases the law allows untaken holiday to be carried forward from a previous year where you have been unable to take it due to long-term absence, in which case the payment in lieu may also include untaken holiday carried forward from the holiday year prior to the last holiday year.

4. On 1 April 2020 the claimant was furloughed because of lack of work due to the pandemic. He was paid 80% of his salary under the terms of the Coronavirus Job Retention Scheme (“CJRS”) and the respondent topped up the remaining 20% of his salary.
5. During the course of his. On furlough he at one point wanted to go abroad with his fiancée, who was working. They had to cancel their holiday because of speculation around travel restrictions to Greece at that time.
6. The claimant remained on furlough for the rest of 2020 and into the New Year. There was sporadic communication between him and Mr Osborne. He took no annual leave during the 2020 calendar year.
7. On 14 May 2020 the claimant resigned giving one month’s notice. He received his final payslip on 26 May 2020 and noticed that no holiday pay for either 2020 or 2021 had been included. He raised this with the respondent, pointing out that he was entitled to holiday pay in lieu and stating that “carried leave is still subject to the usual rules around payment in lieu”.
8. On 2 July 2020, Mr Osborne emailed the claimant confirming that his entitlement was only for 13.5 days. He was sent amended payslip reflecting the holiday pay for 2021 and was paid for it.
9. The claimant claimed his full holiday entitlement from 2020 which he says should be carried over. This amounts to £3846.

The Law

10. Regulations 13 and 13A Working Time Regulations 1998 (“WTR”) set out the workers entitlement to a total of 5.6 days annual leave per 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.

11. Regulation 14 WTR provides that on termination of employment an employer may make a payment in lieu of leave in respect of accrued but untaken leave in the leave year in which the termination of employment takes place. The payment is essentially in respect of the proportion of the leave year which has expired less leave actually taken.
12. 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”.
13. Paragraph 7 of the Explanatory Memorandum of these regulations set out the policy background. Paragraph 7.3 sets out:-

“Many businesses are face increasing demand due to the coronavirus situation. Businesses also have reduced workforces as staff fall ill, are required to self-isolate or need to provide care for dependents who are ill or self-isolating. These businesses may be forced to either deny their healthy staff holiday or ask them not to take it, or risk compromising their operations. In this situation, the exemption will ensure that businesses are able to continue operations at a crucial time, without either breaching the WTR or their staff risking losing their holiday. Staff who have carried forward their holiday into the next leave year will then be able to take the holiday once it is viable for them to do so”.

14. Government Guidance on **Holiday entitlement and pay during coronavirus (COVID-19)** gives guidance on the position of furloughed workers stating:-

“Worker who are on furlough are unlikely to need to carry forward statutory annual leave, as they will be able to take it during the furlough (in most cases at least – see Taking holiday on assessing whether a furloughed worker can take holiday). However, to do so they must be paid the correct holiday pay which is likely to be the higher than the rate of pay that will be covered by the government grants, with the employer making up the difference – see Holiday pay. If, due to the impact of coronavirus on operations, the employer is unable to fund the difference, it is likely that this would make it not reasonably practicable for the worker to take their leave, enabling the worker to carry their annual leave forwards”.

15. In ***Sally v Southern Health and Social Services Board (1991) ICR 771*** it was held that there was an implied term of the contract of employment for the employer in the circumstances of that case to draw to the attention of the claimant employees a valuable right contingent upon

his acting as required to obtain the benefit. The implication of such a term is appropriate “*if the category of contractual relationship in which the implication will arise is defined with sufficient precision*” (Lord Bridge at 781G). Lord Bridge went on to define such a relationship as “*the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention*”. Subsequent authorities have further suggested that *Scally* is a narrow decision based on its own facts (see *Harvey* at All [187.01]).

Conclusions

16. Here the claimant was not prevented from taking annual leave, but could have taken it at any time. Guidance makes clear that the Working Time (Coronavirus)(Amendment) Regulations 2020 are directed at workers who by reason of the pandemic (for example relating to business delivery) have not been able to be released, and to ensure that they are not missing out on their annual leave.
17. This was not a type of case where it is appropriate to imply a *Scally* term into the contract as it does not fall into the circumstances outlined by Lord Bridge. Also, if the employer had drawn the claimant’s attention in 2020 to the fact that he had not taken his annual leave, the claimant would not have been in any different position. Had he chosen to take his leave he would have been paid at his contractual full rate of pay. Had he not chosen to take it he would have been paid 80% furlough pay topped up to his contractual full rate of pay. In either case he would have not been required to do any work.
18. This is neither a situation where carry forward of annual leave is permitted under clause 7.4 of the contract, or by operation of law. The claimant’s claim is not upheld and is dismissed.

Costs

19. On Friday 20 August 2021 the Respondent’s solicitor emailed the claimant Mr Osborne’s witness statement. She wrote in this email:-

“Whilst writing, I am instructed by the Respondent to put you on notice that if you continue with this claim and are unsuccessful, the Respondent will apply for a costs award against you under Rule 76 of the Employment Tribunals Rules of Procedure on the basis that your claim had no reasonable prospect of success and that you have acted unreasonably in pursuing your claim.”

We have set out in the ET3 and now in witness and documentary evidence why the Respondent does not believe that you are entitled to holiday pay in respect of your 2020 holiday entitlement and this evidence is, in our view, incontrovertible.

The Respondent has instructed Counsel to represent it at the hearing, at a cost of £650 plus VAT. Additional legal fees will be incurred before the hearing providing Instructions to Counsel. Fees instructing Counsel will be incurred from 10 am on Monday 23 August. You would therefore need to confirm in writing to the Tribunal that you are irrevocably withdrawing your claim and asking that the hearing be vacated, copying us into that correspondence, no later than 10 am on Monday 23 August in order to avoid a costs application against you.

We suggest that you take legal advice on your situation if necessary.”

20. The claimant continued to pursue his claim despite this warning. Ms Goodman submitted that the claimant had not reasonable prospects of succeeding in his claim. Although the amendments to the law on carry over of leave were reasonably new, they were publicly available, and the claimant was given a clear warning. Pursuing the claim after such warning made his pursuit of the claim unreasonable. She sought costs in the sum of £1475 plus VAT. Alternative the sum of £770, being costs incurred since the warning.
21. The claimant believed that under clause 7.4 he would succeed as he thought the carry over was allowed by law, that is to say the Working Time (Coronavirus) (Amendment) Regulations 2020. He spoke to ACAS and they saw merit in his claim and he was not looking to waste people’s time. He thought the costs warning was an attempt to deter him from pursuing a reasonable claim. He felt the level of costs was unreasonable.
22. I consider that the claimant did not act unreasonably in bringing or conducting the claim, and do not consider that the claim had no reasonable prospect of success. The claimant’s manager had not agreed carry over of leave in advance, but the claimant has some justification in believing that he had not been able to take his leave because of the coronavirus pandemic, which, to the lay-person might seem to be what the regulations cover. As a lay-person he would not have been expected to digest the fine detail of the Explanatory Memorandum of the regulations or look at the Guidance (which, in any event, does not have the force of law). I would further not have expected him to be aware of case law such as *Scally*. This would not have looked like an inherently hopeless case to the claimant, and it was not unreasonable for him to have brought and pursued it.

Employment Judge **Heath**

5 November 2021_____

REASONS SENT TO THE PARTIES ON

05/11/2021.

FOR THE TRIBUNAL OFFICE