



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 20/1/2022

Claimant: Ms F Bor

Respondent: Mr Austen Koles-Boudreaux

Before: Employment Judge Mr J S Burns

Representation

Claimant: In person

Respondent: In person

JUDGMENT

The Respondent is liable to pay the Claimant the sum of £1211.76 holiday pay, which figure is the amount gross of tax and NI. The Respondent must calculate and pay the Claimant the amount due (net of any tax and NI deductible under the PAYE scheme) by 3/2/22.

REASONS

1. This was a claim for holiday pay. I heard evidence from the Claimant and the Respondent and then from the Respondent's wife, Mrs L Koles Boudreaux, and was referred to some documents attached to the Grounds of Resistance and shown some text messages between the parties.

A summary of some relevant law pertaining to holiday pay

2. Under the Working Time Regulations, it is possible to get pay in lieu of untaken holidays when employment is terminated, but only in respect of the leave year in which the employment is terminated.
3. In earlier leave years the "*use it or lose it*" principle means that a worker has no statutory right to carry forward leave from one holiday year to the next in most ordinary circumstances. There is a temporary relaxation to this principle where it was '*not reasonably practicable*' for the worker to take some or all of their Reg 13 leave in the relevant leave year as a result of the effects of COVID-19, allowing reg 13 leave to be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due: The Working Time (Coronavirus) (Amendment) Regulations 2020 SI 2020/365. Also, exceptionally, an employee who has been unable to take holidays because she has been on long term sick leave or because the employer has prevented her taking leave, or for some other reason beyond her control must be allowed to carry forward those holidays to a later leave year and must be paid in lieu if her employment is terminated before it has been taken.
4. Subject to anything which may be expressly agreed, employees can be required to take their statutory annual leave during times when they would not be working anyway, provided that the appropriate notice is given by the employer.

Findings of fact and conclusions

5. The Respondent employed the Claimant as a nanny for his children from 23/11/2019 to 14/8/2021.
6. At first the Claimant worked 40 hours over a four-day week but from 7/2/2020 she increased to working 50 hours over a 5 day week (Tuesday to Saturdays).
7. When working 5 days a week she earned at a salary of £3282 gross and £2329 net per month which equates to £151.47 per day gross.
8. She had an employment contract which provided that (i) the leave would start each year on 23/11 (ii) she would be entitled to 5.6 weeks paid holiday per year plus (unusually) paid bank holidays (iii) that *“the employer will specify 50% of the holiday and the employee may request the dates for the remainder”* and (iv) *“holiday not taken in the year it is earned may not be carried forward to the next year. No payment will be made by the employer in lieu of any untaken holiday at the end of a holiday year”*
9. The first leave year was 23/11/2019 - 22/11/2020. During this time the Claimant took 5 paid public holidays, but under the terms of her contract these did not count towards her agreed holiday allowance. Her additional holiday entitlement was 26 days.
10. The Claimant took two days paid holiday in March and April 2020. The Respondent and his family went away to Croatia for a pre-planned two-week holiday from 8/8-23/8/2020. It is accepted that they told the Claimant in advance about this and told her to take these two weeks (ten days) as holiday, and that she did so.
11. However, while away the Respondent and his family decided to delay their return to the UK until about 6/9/2020. They told the Claimant about this but did not expressly tell her to continue taking her holiday during the period of extended absence. On return the Respondent and his family then had to go into quarantine and the Claimant was able to resume her normal nanny duties only on 18/9/2020. However, during the quarantine, the Claimant helped the Respondent with light duties such as dealing with laundry.
12. Thus, when the first leave year expired on 22/11/2020, of her 26 days entitlement, the Claimant had taken 12 days holiday, namely two in March and April and ten (11-15 August holiday 18-22 August), these August days being those preceded by notice by the Respondent directing the Claimant to take those as holiday.
13. Although the Claimant was paid and did not have much work to do from 22/8/2020 until 18/9/2020, none of these days count as holiday firstly because the Respondent did not give the Claimant notice that she should take them as such, secondly because, even if he had purported to do so, he did not have the right under the contract to specify more than 50% of the holidays to which the Claimant was entitled and thirdly because, although she did not do much work, she did some.
14. Hence the Claimant had 14 holidays outstanding at the end of the first leave year.
15. It was suggested by the Claimant that in September/October 2020, after the Respondent's return from Croatia, and while the Claimant was helping bath the Respondent's children, she asked Mrs Koles-Boudreaux for permission to take a holiday, but that Mrs Koles-Boudreaux said that this was impossible, because all the holidays had already been taken during her family's absence in Croatia. Mrs Koles -Boudreaux denied that this conversation had taken place, and insisted that if she had been asked she would have allowed the Claimant to go on holiday. The Claimant was unable to produce any text or documentary evidence to support her version of events, despite the fact that many other text messages have been produced to prove other points. I consider it likely that if the Claimant had made a definite request for leave she would have done so by text rather than just informally referring to the matter while bathing the children, and furthermore that if she had been refused, she would have made some protest or at least noted the matter at the time, especially as she was well-aware that she was unable to carry forward unused leave from one year to the next. On balance I am not persuaded that any

such request by her was made, or refused by the Respondent or by Mrs Koles-Boudreaux on his behalf. I therefore do not find that the Respondent prevented the Claimant from taking leave.

16. There is no evidence to show that it was not reasonably practicable because of the Covid 19 pandemic for the Claimant to take holidays of her own in the first leave year.
 17. The “*use it or lose it*” principle (also stated in the contract) therefore applies and the Claimant is not entitled to carry forward her outstanding leave for the first holiday year.
 18. The second holiday year started on 22/11/2020 and was cut short by the end of the Claimant’s employment on 12/8/21. During that period, she accrued an entitlement to twenty paid holidays (in addition to paid public holidays).
 19. Apart from her paid public holidays, I find that she was given advance notice by the Respondent to take and did take a total of twenty days off work namely 22-24/12/20; 13-16/4/21; 28/5/21- 5/6/21 and 31/7/21-9/8/21. In addition, she took two days holiday which she chose on 13 and 14/8/21, when she was sadly bereaved.
 20. The terms of the employment contract permitted the Respondent to specify 50% of the Claimant’s holidays only. Hence in the circumstances the Respondent was entitled to specify only ten days out of the twenty to which the Claimant was entitled. Hence the additional ten which the Respondent specified, but which the Claimant had not asked for, do not count as holidays under her contract, despite the fact that she did not work and was paid during them.
 21. The result is that the Claimant is deemed to have received only twelve out of twenty of her holidays due to her under her contract, for the second (part) leave year, and she is entitled to payment in lieu for the balance of eight holidays which were outstanding when her employment ended.
22. $8 \times \text{£}151.47 \text{ per day} = \text{£}1211.76 \text{ gross.}$

J S Burns Employment Judge
London Central
20/1/22
For Secretary of the Tribunals
Date sent to parties: 20/01/2022
