



EMPLOYMENT TRIBUNALS

Claimant: Miss S Brown

Respondent: Spectrum Healthcare Domiciliary Care Limited

Heard at: Cardiff Employment Tribunal

On: 31 January 2022

Before: Employment Judge E Macdonald

Representation

Claimant: Miss Brown (in person)

Respondent: Ms Jayne Nichols

JUDGMENT having been sent to the parties on **4 February 2022** 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

The hearing

1. The hearing was listed to determine the Claimant's claim for holiday pay pursuant to Regulation 30 Working Time Regulations 1998.
2. Ms Brown attended in person, accompanied by her mother who was present for support but not acting as a representative. For the Respondent, Mr Evan Phillips (Deputy Manager) and Ms Jane Nichols (Finance Manager) attended. I was referred to a bundle of documentation prepared by the Claimant, one copy of which had not been received by the Respondent but it was agreed at the outset that the hearing would proceed on the basis of the papers as prepared by the Claimant. During the course of the hearing no reference was made to papers other than those in the bundle.
3. I noted at the outset that there was reference to a potential claim relating to pension. That is the subject of a separate claim and there is no amendment application to consider in respect of pension. There was however an amendment application disclosed by the Claimant's witness statement to take into account the fact of on-going deductions in relation to holiday pay running up to and including the date on which the Claimant's employment with the

Respondent terminated, that date being 17 December 2020. I was told that there was a termination payment made at the end of the contract but also that the payslips which showed that payment appeared in the bundle. I was also told by the Respondent that the Respondent has had legal assistance throughout proceedings.

4. At the outset of the hearing I clarified the issues as being:
 - a. How much was the Claimant's leave entitlement?
 - b. What does the contract of employment provide for in respect of leave entitlement?
 - c. When does the leave year run from and to?
 - d. How much holiday had been taken?
 - e. How far back can the claim go?
 - f. Whether or not the Claimant had been prevented from carrying forward leave due to coronavirus
 - g. The amount of a week's pay and
 - h. Whether a written statement of employment particulars had been provided and, if not, whether an adjustment to any award would need to be made pursuant to s 38 Employment Act 2002.
5. The Respondent had not prepared a witness statement but it was agreed at the outset of the hearing that we would treat the Respondent's response as amounting to its witness evidence.
6. I heard evidence from Ms Brown who confirmed the truth of her statement and was asked a limited number of questions by Ms Nichols and by myself. I also heard evidence from Ms Nichols who confirmed the truth of the contents of the Response and had appended her signature to that document.
7. I made the following findings of fact on the balance of probabilities.

Facts

8. The Claimant, Ms Brown, was employed as a healthcare assistant from 20 December 2019 through to 17 December 2021.
9. There is no dispute between the parties that the Claimant did, on occasion, take annual leave. There is also no dispute between the parties that, in light of the COVID-19 pandemic, the Claimant was entitled to carry over accrued but untaken annual leave into following leave years.
10. Ms Nichols explained, and I accept, that following the implementation of the relevant legislation employees were offered a choice between taking a payment, and carrying forward annual leave. Some employees chose to take a payment. Ms Nichols said – and was not challenged on this point – that Ms Brown was paid in lieu of the untaken leave.
11. I find that it was not reasonably practicable for the Claimant to have taken forward accrued but untaken annual leave in the relevant leave year (specifically 20/21) and I also find that the Respondent agreed that leave could be taken forward.

12. I find that a) carry forward of annual leave had been expressly authorised by the Respondent, and in any event b) it was not reasonably practicable for the Claimant to have taken annual leave in the year in which it accrued due to COVID-19.
13. The leave year ran from 1 April to 31 March each year. That much is common ground between the parties.
14. I find that the Handbook was signed for. I have seen a copy of the Terms of Engagement. Ms Brown accepted in evidence that this amounted to a written statement of terms and conditions. However, I accept that Ms Brown's evidence that she was not given a copy of this document until the proceedings began.
15. However, I find that it is likely that the document would have been available for inspection.

Law

16. Under the Working Time Regulations 1998 ("**WTR 1998**") a worker is entitled to 5.6 weeks' annual leave in each leave year: Regulations 13 and 13A WTR 1998. Regulation 30 WTR 1998 provides for a complaint to an employment tribunal that the employer has failed to pay the worker the whole or any part of any amount due under Regulations 14(2) or 16(1) WTR 1998.
17. A part-time worker is entitled to 28 days' leave calculated *pro rata* – but this can still be expressed as 5.6 weeks.
18. Regulation 13(10) WTR 1998 provides as follows:
 - (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).
 - (11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.
19. The calculation of a 'week's pay' is governed by the formula in s 224 ERA 1996. That explains that the amount of a weeks' pay (prior to 6 April 2020) is the amount of average weekly remuneration in the period of twelve weeks ending with the calculation date. After 6 April 2020, this becomes a period of 52 weeks.
20. I note for completeness Regulation 14 which provides that where the proportion of leave taken by a worker in a leave year is less than the proportion of the leave year which has expired, the employer shall make a payment in lieu in accordance with Reg 14(3)(b).
21. For a claim under Regulation 14, the calculation date is the date of termination (by reference to Regulation 16).
22. Section 38 Employment Act 2002 provides that if, in proceedings to which Schedule 5 of the 2002 Act relates, there has been a failure to provide a written statement of employment particulars (in accordance with s 1 Employment Rights Act 1996), then the Tribunal must increase the total award by an amount

equivalent to two weeks' pay and may increase the total award by an amount equivalent to four weeks' pay.

23. A claim under Regulation 30 WTR 1998 is a claim listed in Schedule 5 of the 2002 Act.

Reasons

24. The dispute between the parties is fundamentally one about the amount of pay to which the Claimant is entitled in respect of her total holiday entitlement. Her employment has now ended, and so she is entitled to be paid for accrued but untaken annual leave.

25. It is common ground between the parties that the Claimant took some leave, albeit not all of the leave to which she was entitled. It is common ground that the Claimant received some pay in respect of that leave, albeit that the Claimant says that this was paid at an undervalue.

26. The Claimant's untaken leave from 2020-2021 was carried forward both by operation of Reg 13(10)-Reg 13(11) and/or in the alternative with the consent of the Respondent.

27. The question then becomes: did the Claimant receive less on termination than the amount to which she was entitled? This can be answered by considering a) how much (in financial terms) was the entitlement on termination, and b) how much had she in fact been paid in respect of holiday pay during employment?

28. The Claimant's total accrued entitlement amounted to 5.6 weeks in each leave year: Regulations 13 and 13A WTR 1998. The Claimant at the date of termination had been in employment for a period of 2 years less 3 days. As at the calculation date (i.e. the termination date) the Claimant's average weekly pay was £477.

29. The Claimant's total entitlement was therefore £5,342.40.

30. The Claimant received the following sums: £179.14 in August 2020; £295.71 in October 2020; and £661.45 in March 2020, a total of £1,136.30

31. In respect of the period 5 April 2021 – the termination of the Claimant's employment, the Claimant received £168.80 in April 2021; £123.12 in June 2021; £281.86 in August 2021; £193.54 in October 2021; and £267.77 in January 2022: a total of £1,035.09

32. The Claimant had therefore received £2,171.39 in respect of holiday, as against a total entitlement of £5,342.40. The difference between these two figures is the amount to which the Claimant is entitled: a shortfall of £3,171.01.

33. As to the failure to provide a written statement of terms and conditions, this is a matter which I must consider. I consider that there was a failure to provide a written statement of terms and conditions in accordance with s 1 Employment Rights Act 1996, given the facts as found above. However I also consider that the failure was innocent, and that it would not be just and equitable to make the higher award.

34. The total award is therefore increased by a sum equivalent to 2 weeks' pay, in the total of £954.

Case No: 1601096/2021

Employment Judge **E Macdonald**

Date **4 April 2022**

REASONS SENT TO THE PARTIES ON 21 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche