



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Scott  
**Respondent:** Hulsteins UK Limited  
**Heard at:** Birmingham  
**On:** 12 May 2022  
**Before:** Employment Judge Flood

## Representation

**Claimant:** In person  
**Respondent:** Mr Axelson (Director)

# RESERVED JUDGMENT

1. The claimant's complaint of failure to pay accrued but untaken holiday pay succeeds. The respondent is ordered to pay to the claimant the sum of **£765** in respect of 8.5 days accrued holiday pay.
2. The sum payable under paragraphs 1 above is the gross amount to be paid and the claimant is to be responsible for any income tax and National Insurance Contributions thereon.

# REASONS

## Background

1. By a claim form submitted on 20 September 2021 (early conciliation having been between 29 July and 9 September 2021) the claimant brought a complaint of unpaid holiday pay. She was employed between 1 February 2018 and 31 May 2021 when she resigned. The claimant contends she is entitled to be paid the sum of £765 in respect of 8.5 days accrued but untaken. The respondent contends that the claimant is only entitled to be paid for 2.5 days accrued but untaken and has yet to pay any sums in respect of this to the claimant. What remained in dispute was whether the claimant had been permitted to carry over 4 days holiday from the previous holiday year and the basis for calculation of the claimant's accrued holiday entitlement.

2. I had before me a Bundle of Documents running to 79 pages. This contained a document headed "Response to ET3" which was taken into evidence as the witness statement of the claimant (page 67-74) and a witness statement of Mrs J Sermon (pages 76-78) both who attended to give evidence on the claimant's behalf and answered questions in cross examination and from the Tribunal. This bundle also included written statements by Mr S Maile and Mr D Mitchell, although they did not attend to give evidence so I have considered this when deciding what weight should be placed on their written evidence. Mr Axelson gave evidence on behalf of the respondent. He did not submit a written statement so I permitted evidence to be given by him answering Tribunal questions. He also answered questions in cross examination. I also had a written statement provided by Mr G Usher although he did not attend to give evidence so I have applied the same considerations as above to that statement.
3. After hearing evidence and submissions, I adjourned the hearing for a reserved decision.

### **The Issues**

4. How much holiday had the claimant accrued during the period of her employment? In particular:
  - 4.1. Was there an agreement that the claimant be permitted to carry over 4 days accrued but untaken holiday from the 2020 holiday year into the 2021 holiday year?
  - 4.2. If so, how should:
    - a. any such days carried over from 2020; and
    - b. public holidays for 2020be treated for the purposes of calculating accrued but untaken holiday upon termination of employment?
  - 4.3. How many days leave were taken as at the termination of employment?
  - 4.4. How much remains unpaid?

### **Relevant Facts**

5. The claimant was employed as Marketing Manager of the respondent from 1 February 2018 until 31 May 2021 when she resigned with immediate effect (page 50). The respondent had been owned by the claimant's father, Mr S Maile, until 2019. The statements and the bundle contained much evidence about the circumstances of the sale of the company, this was not relevant to the issues before me today.
6. The claimant's contract of employment was at pages 40-48 and contained the following relevant provisions on holiday:

*"The Company's Holiday year runs from 1<sup>st</sup> January to 31<sup>st</sup> December.*

*In addition to public holidays the Employee is entitled to 23 days holiday with pay in each holiday year."*

and

*“Holidays must be taken in the holiday year of entitlement and may not be carried forward to the following year.”*

and

*“Upon termination of employment, the Employee will be entitled to pay in lieu of any unused holiday entitlement or be required to pay to the Employer pay received for any holiday taken in excess of holiday entitlement. Any sums due may be deducted from any money owing to the Employee and the Employee irrevocably authorises the Employer to make such deductions.”*

7. The claimant was responsible as part of her role for the recording of holiday for the respondent's employees. There was some discussion in evidence about how thorough the claimant's record keeping had been but this is not a matter of direct relevance to the claims I had to determine. The claimant recorded holiday on a spreadsheet which was the document shown at page 49 of the Bundle. This listed employees and showed their annual allocation, how many days had been taken and how many were left. It also recorded sick days. Days taken were noted by being blacked out on a calendar. She said there was also a wall chart showing which employee was off each day, which appears to be accepted by the respondent. The claimant also said that holiday forms were completed, authorised by Mr S Maile and filed on a physical HR file which was kept on the premises. Mr Axelsson stated that no such HR file could be found when he attended the premises in September 2021 and I accepted that this was the case.

#### 2020 Holiday entitlement

8. The claimant said that during 2020 employees at the company were busy following its takeover. She stated that no profit was being made as free trial units were being sent out and payments were being made to another director for sales services but the products were still being manufactured. She said that because of this Mr S Maile agreed that 5 employees (including the claimant) who had not been able to take annual leave during 2020 would be allowed to carry over up to 5 days into the 2021 holiday year. She told the Tribunal that a letter had been prepared authorising this which was signed by Mr S Maile and that employees also signed this letter and it was placed in a physical HR folder. The witness statement of Mr S Maile that had been supplied confirmed that this had taken place and that it applied to those employees of the respondent that continued to work full time and had not been furloughed. He said that a holiday entitlement form had been signed which allowed the carry over of 5 days. The witness statement provided from Mr D Mitchell also confirmed that there was an agreement that holiday had been rolled over and that forms had been filled in and signed but that such holiday had to be taken by 21 April 2021. The claimant did not have a copy of the letter she said was issued and signed by her or any other employee that this applied to.
9. The respondent denied that such an agreement had been put in place and Mr Axelsson gave evidence and it was in Mr Usher's statement that the respondent

could find no trace of any signed agreements between the employees in question. The respondent acknowledged that there was a blank template on its system prepared by Mr S Maile which referred to the carrying forward of annual leave in to 2021. It also states that there is no evidence to show this was issued to any employee and other employees have not raised this matter with the respondent.

### Events in 2021

10. I have confined by findings of fact to the matters relevant to the issues set out above but there was clearly a period of change in 2021 culminating in the departure of Mr S Maile and the claimant at the end of May 2021. Mrs J Sermon started employment with the respondent on 1 January 2021 and recalls that a carry over of holidays had been in place and that some employees were “grumbling” about having to take their carried over holiday by the end of April, and would rather have been paid for these.
11. The claimant resigned on 31 May 2021 with immediate effect (page 50). Her resignation was accepted by the respondent on 3 June 2021 and a letter was sent to acknowledge this (page 51). This informed the claimant that she had accrued 13 days holiday and had taken 8 and would be paid for the accrued but untaken days on or around 30 June 2021. The claimant emailed the respondent’s HR representative, Ms M Bonas, to follow up on this on 1 July 2021 (page 59). Ms M Bonas responded on 2 July raising some queries about holiday entitlement and stating that there were no holiday authorisation forms on site to determine holiday taken. She asked for information as to where this could be found (page 57). The claimant replied later that day and stated that there was a file on the UK server under HR which had a holiday chart on this. She also stated that she had taken 3 days for 2021 and had carried over 4 days from the previous holiday year. Her e mail made reference to an agreement contained in the HR folder that allowed employees to carry over up to 5 days holiday from 2020. The reply from Ms Bonas (54-56) stated that no record could be found of an agreement to carry over holiday (although made reference to a blank template having been found) and asked the claimant to provide her signed copy. The claimant replied that she did not have a copy but copies had been retained in the HR folder and she was surprised that it had now not been able to be found (page 54). A further reply was sent by Ms Bonas referring to having found the holiday spreadsheet which recorded the claimant’s holiday as 27 days, and setting out her understanding of what had been accrued suggesting that the claimant either had taken more leave than had been accrued (if 27 days included bank holidays) or was owed 1.5 days (if it did not). The claimant’s reply on 27 July 2021 repeated her contention that an agreement to carry over 4 days was in place (page 52).
12. I find on the balance of probabilities that there was an agreement in place in writing between the respondent and the claimant that she would be permitted to carry over 4 days holiday from the 2020 holiday year into 2021. I find this because:
  - 12.1. I found the claimant’s evidence on this matter honest and straightforward and her account of what was agreed was plausible and credible.

- 12.2. Although I found Mr Axelsson an honest witness, he was unable to shed any light on what was agreed or not at the time as he was not directly involved. His evidence only related to what he was able to find in terms of evidence after the event.
- 12.3. The holiday spreadsheet that the respondent found on its system does show that the employees in question had more than their 23 days contractual holiday entitlement and importantly records that the claimant's entitlement for 2021 was 27 days. This is 4 days more than her contractual entitlement of 23 days and is entirely consistent with her contention that this had been agreed.
- 12.4. The respondent acknowledges that a template letter regarding holiday carry over was discovered on its system. I find that it is unlikely that such a letter would have been prepared had it not then been put to use.
- 12.5. The statements of Mr S Maile and Mr D Mitchell (although carrying less weight than the evidence of live witnesses) also support her contention that an agreement was in place.
- 12.6. The evidence of Mrs J Sermon about what happened in the early part of 2021 when employees who had carried over leave were being required to take it supported the claimant's evidence and was consistent with the other evidence before me.
- 12.7. The absence of any copies of the letter in question is concerning and I have considered the comments in written statements regarding the destruction of files by Mr Usher and the evidence given at the hearing of Mrs Sermon about lack of care with a HR folder. Whilst it is not necessary for me to make findings of fact on this and I am unable to do this with any degree of certainty, it is perhaps not entirely unlikely that files could go astray when a change of management such as the one described by all parties has taken place. I do not find the absence of documents in these particular circumstances to be sufficiently persuasive of a finding that they never existed.
- 12.8. The claimant consistently contended from just after her employment ended that there had been an agreement to carry over 4 days holiday as recorded in her contemporaneous e mails from the time just after her resignation.

### Relevant Law

13. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

***“13. Right not to suffer unauthorised deductions.***

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—*
- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*

(a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

(b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

14. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to **section 13**.

15. “Wages” are defined in **section 27 ERA** as follows:

(1) *In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—*

(a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,..”*

## Conclusions

16. The claimant contends that the respondent has failed to pay her the accrued but untaken holiday pay she is entitled to under the terms of her contract of employment upon termination of that contract of employment. Therefore as all claims are based on this contractual entitlement, it is not necessary to consider the provisions of the Working Time Regulations 1998 or related legislation. It is clear that the claimant’s contract of employment entitles her to 23 days holiday per year in addition to public holidays and that upon termination, she is entitled to be paid in lieu of any unused holiday entitlement (para 6 above). In order to determine what the claimant was entitled to be paid upon termination, the first question to answer is how much holiday had the claimant accrued during the period of her employment. This entails a process of pro rating annual leave for that particular year as at the date of termination of employment. The claimant was entitled to 23 days annual leave each year and so as at 31 May 2022, she had accrued 9.58 days annual leave for the 2021 holiday year (which should be rounded up to 10 days).

17. However in this particular claim, the claimant contended that she had also been allowed to carry over 4 days from her 2020 holiday entitlement to take in the 2021 holiday year. This was disputed but I have found as a fact that there was indeed an agreement that she be permitted to carry over 4 days accrued from 2020 into the 2021 holiday year, provided that such holidays were taken by the end of April 2021 (see para 12 above). Therefore although the claimant’s contract contained a provision which prevented the carry forward of holiday from one year to the next (para 6), this had been overridden on this occasion by an express written agreement that for this particular year, some holiday could be carried over. Therefore I conclude that the claimant had as at the termination of her employment accrued a total of 14 days holiday (made up of 4 days carried over from 2020 and 10 days accrued in the current holiday year).

18. The next question which was in dispute was whether when calculating the accrual of the claimant's holiday entitlement, the respondent is entitled to add the total number of public holidays for that holiday year, pro rate that number of days as at the date of termination and then deduct the number of days actually taken as bank holidays to date. In some situations, where a holiday entitlement is expressed as including public holidays, and employees may in certain cases, work on those public holidays and not be in a position to take the holiday when it fell, this may be an appropriate basis for calculation. However no such situation arose in the current case. The claimant's holiday entitlement of 23 days was expressed in the contract as 23 days in addition to public holidays. The public holidays were separate and employees were not required to work on such days and simply took public holidays and were paid for them as and when they fell. There is no basis in the contract of employment or otherwise for the respondent to add the number of public holidays to the overall holiday entitlement and pro rate the total of the two in this particular situation. In the claimant's case, she was entitled to take public holidays as they fell during the holiday year and to be paid as and when such days fell. Public holidays therefore played no part in working out how much holiday had been accrued by the claimant as at the termination of employment. As at the termination of her employment, the claimant had taken the 5 bank holidays that had fallen so far that holiday year and been paid for them. No further public holidays were due to be taken or paid to her as her employment had ended before the next public holiday fell due. The accrual calculation should not therefore include public holidays as the respondent suggested it should and no account should therefore be taken of public holidays when working out what was due to the claimant.
19. The next question to consider is how many days holiday were taken by the claimant out of the 14 days she had remaining as at the date of termination of employment. It is not in dispute that the claimant took 5.5 days holiday in 2021 (4 of which had been carried over from 2020 and were taken before the end of April 2021) and 1.5 days of which were from her 2021 holiday entitlement. The claimant therefore had 8.5 days of annual leave accrued as at the termination of her employment. The claimant worked 6 hour days at the respondent at a rate of £15 per hour (evidence unchallenged of the claimant) and so on that basis, the claimant is entitled to be paid the sum of £765 gross in respect of accrued but untaken holiday pay. As no sums have been paid to the claimant at all (even for the days the respondent accepts were owing), these sums should be paid without further delay.

**Employment Judge Flood**  
26 May 2022

JUDGMENT AND WRITTEN REASONS SENT TO THE PARTIES ON