



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Day

Respondent: A.N.I. Healthcare Services Ltd

Heard at: Nottingham

On: 5 July 2022

Before: Employment Judge Varnam

Representation

Claimant: In person

Respondent: Mr J Singh, director

RESERVED JUDGMENT

1. The Respondent failed to pay the Claimant the gross sum of £997.92 due upon termination of employment in respect of accrued but untaken annual leave.
2. The Respondent is accordingly ordered to pay the gross sum of £997.92 to the Claimant.

REASONS

Introduction

1. By an ET1 issued on 5 December 2021, the Claimant brought claims of unlawful deductions from wages, a failure to pay notice pay, and a failure to pay holiday pay. On 12 January 2022, the Claimant sent the Tribunal a document headed 'Witness Statement', which was in reality a schedule of loss. This claimed:
 - (1) Seven weeks' pay as loss of wages.
 - (2) Seven weeks' unpaid pension contributions.
 - (3) Seven weeks' holiday pay.
 - (4) An uplift of 25% to any compensation, pursuant to section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**, on the grounds that the Respondent had unreasonably failed to comply

with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

- (5) Four weeks' pay, pursuant to section 38 of the **Employment Act 2002**, on the grounds that the Respondent had allegedly failed to provide the Claimant with a statement of the main terms and conditions of her employment.
2. By its ET3 received at the Tribunal on 3 February 2022, the Respondent disputed the claims, save that it admitted that 44 hours' holiday pay was owed.
3. The Respondent also sought to bring a counterclaim, alleging that the Claimant was indebted to it in the sum of £1,348.02, which was a sum said to have been expended because the Claimant had resigned her employment without notice. Unfortunately, when the ET3 was received the Tribunal does not appear to have noticed that there was a counterclaim, and the usual processes prescribed by rules 23 to 25 of the Employment Tribunal Rules of Procedure were not followed.
4. At the hearing, the Claimant represented herself, with some assistance and support from her daughter. The Respondent was represented by its director, Mr Jeevan Singh. The Claimant and her daughter were in person at the Tribunal, while Mr Singh attended via videolink, having unfortunately tested positive for Covid-19 on the morning of the hearing. It was nonetheless possible to have a fair hearing, with both parties participating fully. Towards the very end of the hearing, when the Claimant was finishing her submissions and I was discussing the next steps, some difficulties began to affect Mr Singh's internet connection, and the image of him on the screen in the hearing room froze. However, he could still see and hear me and the Claimant, and we could still hear him. I do not consider that the fairness of the hearing was in any way affected by this minor technological mishap.
5. At the beginning of the hearing, I spent some time discussing the issues with the parties, and we were able to narrow the matters quite considerably. The Claimant confirmed that the sole matter that she wished to pursue was her claim for holiday pay. She did not wish to pursue her claim for unlawful deductions from wages in respect of sums said not to have been paid to her during a period of suspension, as she accepted that these had now been paid in full. She also did not seek to pursue her claims for an uplift or for a payment under section 38 of the **Employment Act 2002**.
6. I discussed the Respondent's proposed counterclaim with Mr Singh. It appeared to me that the Respondent's counterclaim was really an attempt to invoke a right to set off by way of a defence to the Claimant's claim, based on contractual provisions that I will detail below. The Respondent did not appear to me to be asserting that it had a claim against the Claimant which would do more than reduce or extinguish the Claimant's claim. Mr Singh agreed with this, which meant that I was able to deal with the 'counterclaim' as part of a set-off defence to the Claimant's claim, without needing to concern myself with the fact that the Tribunal had not given the Claimant notice of a counterclaim, and the fact that there was

therefore no response to the counterclaim. I add at this point that, given the conclusions that I have reached below, a counterclaim would in any event have failed.

7. The Claimant's remaining claim was for annual leave which had been accrued but not taken upon the termination of her employment, pursuant to regulation 14 of the **Working Time Regulations 1998**. There were disputes between the parties as to the amount of holiday that the Claimant had outstanding when her employment ended on 3 September 2021. The Claimant said that she had accrued 112 hours' annual leave for 2021, and that additionally she was entitled to carry over 96 hours' annual leave from 2020. She accordingly sought a payment in respect of 208 hours' pay, which she calculated as coming to a total of £1,837.92 gross. The Respondent, by contrast, said that the Claimant was not entitled to carry over annual leave from 2020 into 2021, and that the total amount of annual leave that the Claimant had accrued but not taken in 2021 was 44 hours (which, at the Claimant's hourly pay of £8.91, would equate to £392.04 gross). The Respondent, as noted above, also sought to advance a set-off argument.
8. Based on my discussions with the parties, I determined that the key issues for me to decide were:
 - (1) Was the Claimant entitled to carry over annual leave entitlement accrued during 2020 into 2021?
 - (2) If so, how much annual leave had the Claimant accrued during 2020 and carried over into 2021?
 - (3) How much annual leave did the Claimant accrue during 2021?
 - (4) Had the Claimant taken any annual leave during 2021, so as to reduce her outstanding entitlement?
 - (5) Having regard to the foregoing matters, how much accrued but untaken annual leave did the Claimant have upon the termination of her employment? It was common ground that she had not been paid any sum in respect of accrued but untaken annual leave.
 - (6) Was the Respondent entitled to a set-off, either reducing or extinguishing the Claimant's claim, by reason of the fact that she did not work her notice period?
 - (7) Taking all of the previous issues into account, what sum (if any) is owed to the Claimant by the Respondent?
9. I heard evidence and submissions from the Claimant, and from Mr Singh on behalf of the Respondent. I find that both witnesses were doing their best to assist the Tribunal, and I am grateful to them for their assistance.
10. I also considered various documents that the parties had provided to the Tribunal, and I refer to the relevant documents below. There were

some documents that each party had provided to the Tribunal but had not copied to the other party. However, these documents were limited in number, and where they were relevant I was able to ameliorate any disadvantage by explaining to the parties what the document contained.

11. The hearing began shortly after 2pm. After I had spent some time addressing the various preliminary/'housekeeping' matters set out above, the Claimant gave evidence from 2.36pm until just before 3.18pm. Mr Singh then gave evidence from 3.18pm until 4.03pm. By the time I had heard brief closing submissions from Mr Singh and the Claimant, it was 4.14pm, and rather than rush to deliver judgment in person, I considered that it was fairer to both parties to reserve my decision. It has taken longer than expected for me to finalise this decision and arrange for its delivery to the parties, and I apologise to them for that.
12. I now turn to set out the findings of fact that I have made.

Findings of Fact

13. The Respondent operates a care home in Bleasby, Nottinghamshire. The Claimant was employed by the Respondent from 21 November 2014, working as a kitchen assistant, although she explained to me that, particularly in 2020 during the Covid-19 pandemic, she also undertook duties such as cleaning. She was paid the national minimum wage, which, at the time that her employment ended, was £8.91 per hour.
14. Mr Singh purchased the Respondent in around late 2019. He has other business interests, including at least one other care home operated by a different company, and was not involved in the day-to-day running of the care home, albeit that he kept a close eye on matters, and those who were involved in the day-to-day running of the home reported back to Mr Singh about matters of importance. Responsibility for the day-to-day running of the home rested with Ms Kalvinder Khelie (known as Kal), who was the Respondent's operations manager at the time. I have seen a short statement from Ms Khelie, but this had not been provided to the Claimant, and I have not heard live evidence from Ms Khelie. I accordingly gave Ms Khelie's statement very little weight in my deliberations. Reference was also made to another manager or administrator, named Gemma.
15. There was some disagreement between the parties as to the arrangements under which the Claimant worked. It was agreed that the Claimant was not provided with a written statement of her terms and conditions of employment by the Respondent's former owners. This unfortunate omission perhaps led to some confusion on Mr Singh's part as to the Claimant's status. He told me that his understanding was that the Claimant was bank staff, with no fixed hours.
16. The Claimant, by contrast, told me that she worked fixed hours. These underwent some changes over time. Initially, she worked thirty hours per week, working two twelve-hour shifts and one six-hour shift. At some point, her hours increased to thirty-six hours per week – three twelve-hour shifts. By the end of her employment, she was working two twelve-hour shifts one week, and three twelve-hour shifts the next week – so twenty-four

hours one week, and thirty-six hours the next, averaging at thirty hours per week.

17. I accept the Claimant's evidence in this regard, for the following reasons:

- (1) The question of the Claimant's working hours was within her own direct knowledge. By contrast, as I have already explained, Mr Singh was not involved in the day-to-day running of the care home. As a busy man with a number of business irons in the fire, it is unlikely that he would have a detailed knowledge of the working arrangements of every one of his companies' employees.
- (2) During 2021, the Respondent provided the Claimant with two different statements of main terms of employment – one in February and one in June. These have clearly been professionally prepared, by the Respondent's advisors, Peninsula. They both contain the following text:

HOURS OF WORK

Your normal hours of work are not variable. However, your working pattern may vary...

The documents then go on to set out the hours that the Claimant 'will be required to work'. In the February document, these are said to be thirty-six, and in the June document, thirty. But in any case, what both documents reflect is an employee with fixed and invariable working hours. It is correct to point out, as Mr Singh did, that these documents are not signed. The Claimant did not sign the first because it contained errors as to her start date, and the second (which also contained at least one error, as set out below) came to the Claimant while she was on sick leave, and so was not immediately attended to. But the Respondent and/or its professional advisors produced these documents, and as the advisors could not know what the Claimant's working arrangements were, the information about the hours, and the fact that they were fixed, could only have come from the Respondent.

- (3) The June 2021 statement also contained a statement that the Claimant was entitled to 168 hours' paid annual leave per year. This is clearly reached by multiplying the 5.6 weeks' annual leave to which all workers are entitled by thirty. It is again supportive of the view that the Claimant was working either a thirty-hour week, or at least an average thirty-hour week (consisting of alternating twenty-four and thirty-six hour weeks, as described above).
- (4) The counterclaim section of the Respondent's ET3 contains the following text:

As per [the Claimant's] contract it states that if she does not work the required period of notice we have the right to deduct this from any money due to the employee. As a result we had to cover a total of 120 hours over 4 weeks with agency staff...

The quoted words, and the subsequent claim for the costs of covering 120 hours' work over four weeks using agency staff, implicitly proceed on the basis that the Claimant was required to work a fixed 30 hours per week.

18. The Claimant was entitled to 5.6 weeks' paid annual leave per year, which was often calculated in hours, as 168 hours per year. The leave year ran from January 1 to December 31 each year. While the June 2021 statement of terms and conditions suggested that the leave year ran from April to March each year, both the Claimant and Mr Singh told me that this was incorrect, and that the leave year was the same as the calendar year.
19. It was the Claimant's evidence, which I accept, that the Respondent's previous owners would sometimes allow annual leave to be carried over from one leave year to the next. However, the Claimant did not discuss this with Mr Singh or Ms Khelie after Mr Singh purchased the Respondent.
20. The evidence filed by the Respondent included a copy of a notice, said to have been displayed at the care home from around October 2020. This reads as follows:

Dear All Staff

We are now in October the year is coming to an end and our holiday runs Jan to Dec, if you have any holiday left please can you book it as soon as possible. Any holiday not taken will be lost and not transferred to next year.

Thank you

Kal

'Kal' is Ms Khelie.

21. This notice was provided to the Tribunal and the Claimant by e-mail, as a Word document. Immediately before the start of the hearing, the Claimant handed up a copy of the properties dialog box for this document. This had been printed off for the Claimant by her husband. It appeared to show that the document was created on 19 April 2022, the same date that it was sent to the Tribunal and the Claimant (and well after October 2020). However, the document had not been provided to Mr Singh, who had therefore had no opportunity to respond to it. Moreover, sometimes the properties dialog box can be misleading – for example, my personal experience is that sometimes if a document is e-mailed, and then saved by the recipient of the e-mail, that can affect the creation date shown in the dialog box. In the circumstances, I am not willing to make a finding that the document was indeed created on 19 April 2022. In any event, this document is essentially irrelevant to the decisions I have to make, because it does no more than state the general legal position.
22. During 2020, the Claimant took a total of seventy-two hours' paid annual leave. The last of these periods was three days' (thirty-six hours') leave, concluding on 1 December 2020. On the basis that the Claimant

was entitled to 168 hours' leave per year, this left her with ninety-six hours' untaken leave as at the start of December 2020.

23. It was the evidence of both the Claimant and Mr Singh that there were commonly restrictions on the taking of holiday during December and January, particularly around Christmas and New Year. This was because these were times when the demand for staff was particularly high. I accept the Claimant's evidence that, as a result of the impact of Covid-19 combined with staff departures, the demand for staff was particularly high in late 2020 and early 2021.
24. After returning from leave in early December 2020, the Claimant realised that she had a substantial period of leave outstanding, and that it was unlikely that she would be able to take all of that prior to the end of the leave year on 31 December.
25. The Claimant therefore spoke to Ms Kimberley Hall, a senior care worker. The Claimant told Ms Hall that she had substantial untaken annual leave. Ms Hall told the Claimant that leave could not be taken at that point, as the Respondent was too short-staffed. However, Ms Hall went on to say that Ms Khelie said that leave could be carried over to the next year, so the Claimant was not to worry.
26. The Claimant took Ms Hall at her word, and did not check the position with Ms Khelie herself, or with any of the Respondent's other managers, or with Mr Singh.
27. Mr Singh was emphatic in his evidence that Ms Hall did not have authority to make arrangements in respect of leave. He told me that the Respondent's policy was clearly against any carrying-over of leave. In her statement, Ms Khelie also said that she had made clear to the Claimant that leave could not be carried over, although as I have said, that statement was not provided to the Claimant and Ms Khelie did not attend the Tribunal to give oral evidence, so I accord extremely limited weight to what the statement says. In her evidence, the Claimant accepted that ordinarily Ms Hall would not be the person with whom she would make arrangements in respect of her holidays.
28. Around the end of 2020 and beginning of 2021 a dispute arose between the Claimant and another employee. I have seen some documentary evidence concerning this, but both the Claimant and Mr Singh refrained from exploring the circumstances of the dispute in detail in oral evidence. They were right to do so, as the dispute was not directly relevant to the matters in issue.
29. The dispute does, however, provide some background to the matters which I must resolve. From 31 December 2020 until 16 January 2021, the Claimant was suspended from work. She then returned to work, but was signed off sick from 23 February 2021. She remained off sick until the end of her employment.

30. In the meantime, there were a series of grievances and appeals raised by the Claimant. These were not resolved to her satisfaction, and she resigned on 3 September 2021.
31. As I have said, the Claimant's sole claim is for a payment in lieu of accrued but untaken annual leave. Her claim is in two parts:
- (1) First, she claims a payment in lieu of the annual leave accrued but not taken during 2020. As I have explained, this amounts to 96 hours. The Claimant's case is that Ms Hall gave her permission to carry this over into 2021.
 - (2) Second, she claims a payment in lieu of annual leave accrued but not taken during 2021. She calculates this at 112 hours. This is based on the fact that she was employed for just over eight months of the year (i.e. two-thirds of the year), and two-thirds of her annual leave entitlement of 168 hours is 112 hours. The Claimant says, and I accept, that she took no annual leave during 2021, largely because she was signed off sick for most of the year.

The Claimant accordingly contends for a payment equivalent to 208 hours' pay.

32. The Respondent's position is as follows:
- (1) The Claimant was not entitled to carry over any annual leave from 2020 into 2021.
 - (2) So far as 2021 itself is concerned, the Respondent's position, set out in its ET3, is that the Claimant was entitled to a payment in lieu of accrued but untaken annual leave, but that this should be limited to 44 hours. In his evidence, Mr Singh was unable to explain how this figure was reached. As best I could discern, it appears that the Respondent probably operates some form of system for calculating the annual leave entitlement of employees' who do not have fixed hours based on an averaging of the hours that they have actually worked. As Mr Singh erroneously believed the Claimant to be bank staff, he has probably calculated her leave entitlement based on such a system, and, given the Claimant's lengthy sickness absence, she has been treated as accruing only very limited leave entitlement. But this conclusion is largely speculative, because the Respondent put forward no evidence to explain the 44 hours' leave figure.
33. When the Claimant resigned, she either did not give notice, or did not work during her notice period. It appears that her notice period was four weeks, although the documentary evidence is not altogether consistent on this point (the June 2021 statement of terms and conditions suggests two weeks). The Respondent's case was that, in the weeks following the Claimant's resignation, the Respondent's managers regularly telephoned her in an attempt to ascertain whether she was coming into work. The Claimant denied that any such calls were made. I accept her evidence on this point, for the following reasons:

- (1) This was a matter within the Claimant's direct knowledge. By contrast, Mr Singh accepted in evidence that he did not himself telephone the Claimant to ask her if she was coming into work, and that he had not personally witnessed anyone else doing so.
- (2) It would be extremely surprising if, in the weeks following 3 September 2021, the Respondent had been rostering the Claimant to work shifts, or telephoning her to ascertain if she was available to do so. This is because the Claimant had been signed off sick since 23 February 2021, and had not worked since then. In the circumstances, I regard as implausible the suggestion that, after more than six months of the Claimant not working, the Respondent suddenly began expecting her to turn up for work.
34. It was also the Respondent's case that it incurred costs totalling £1,348.02 in using agency workers to cover the Claimant's shifts during the four weeks following her resignation. However, no evidence was put before me to substantiate this figure. At the conclusion of the hearing, Mr Singh fairly conceded that, in light of the lack of evidence, he could not rely on the £1,348.02 figure.
35. The significance of the Respondent's assertions concerning the Claimant's failure to attend for work/give notice, and the alleged costs of this, is found in a clause on the last page of its employee handbook. This provides as follows:

B) TERMINATING EMPLOYMENT WITHOUT GIVING NOTICE

If you terminate your employment without giving or working the required period of notice, as indicated in your individual statement of main terms of employment, you will have an amount equal to any additional cost of covering your duties during the notice period not worked deducted from any termination pay due to you. This is an express written term of your contract of employment. You will also forfeit any contractual accrued holiday pay due to you over and above your statutory holiday pay, if you fail to give or work the required period of notice.

This is the clause upon which the Respondent sought to rely in respect of its counterclaim, and in respect of which it still seeks to rely to reduce or extinguish the Claimant's claim. I will need to consider what the effect of this clause is, in light of the evidence that I have heard.

Relevant Law

Entitlement to paid annual leave

36. The combined effect of regulations 13 and 13A of the **Working Time Regulations 1998** is that a worker, such as the Claimant, is entitled to 5.6 weeks' paid annual leave per year.
37. This is a minimum entitlement. An employee's contract of employment may provide for a greater amount of paid annual leave.

Payments in lieu of accrued but untaken annual leave

38. Pursuant to regulation 14 of the **Working Time Regulations**, a worker whose employment is terminated during their leave year is entitled to receive a payment in lieu of any paid annual leave that they have accrued, on a *pro rata* basis, during their leave year, but have not taken. Such a payment in lieu is calculated on the basis that the worker receives one day's pay for each day of accrued but untaken annual leave.

Carrying over annual leave

39. The starting point is that annual leave must be taken in the leave year in which it is accrued, and may not be carried over into the next leave year: see regulation 13(9)(a) of the **Working Time Regulations**.

40. However, annual leave may be carried over from one leave year into the next, in various circumstances. Those circumstances in which annual leave may be carried over, which may be relevant to this case, are:

- (1) Annual leave may be carried over if the employer agrees to this.
- (2) Where, in any leave year, it was not reasonably practicable for a worker to take some or all of her leave due to the impact of the coronavirus, regulation 13(10) of the **Working Time Regulations** permits that annual leave to be carried over for a maximum of two leave years. The 'impact of the coronavirus' for the purposes of regulation 13(10) is defined broadly, and encompasses the impact on the worker herself, the impact on the employer, and the impact on the wider economy or society.

Calculating holiday pay

41. Pursuant to regulation 16 of the **Working Time Regulations**, the amount payable to a worker for each week of annual leave is calculated in accordance with sections 221 to 224 of the **Employment Rights Act 1996**.

42. Section 221(2) of the **Employment Rights Act** provides that, where a worker's remuneration (whether by the day, by the hour, or by some other period) does not vary according to the amount of work done during normal working hours, then the amount of a week's pay (including a week's holiday pay) will be the amount that the worker would be paid if they worked their normal working hours during a week.

43. However, section 221(2) is subject to section 222 of the **Employment Rights Act**. Section 222 applies where a worker's days of work or times of working vary from week-to-week, so that the pay for each week varies according to the days or times worked during that week. In those circumstances, the combined effect of sections 222(2) and 222(3) of the **Employment Rights Act** and regulation 16(3)(e) of the **Working Time Regulations** is that the amount of a week's pay is to be achieved by averaging the amount that the worker earned over the 52 weeks preceding (in a case such as this) the end of the Claimant's employment.

44. It is important, however, to have regard to section 223 of the **Employment Rights Act**. This provides that, for the purposes of calculating a week's pay for the purposes of section 222, weeks in which the worker did not work shall be disregarded, and earlier weeks shall instead be considered for the purposes of calculating average weekly pay. This provision may be particularly relevant in this case, because it means that where a worker has been off sick for a whole week, that week is disregarded for the purposes of calculating their average holiday entitlement, and an earlier week, in which they did work, is taken into account instead.

Authority of agents

45. One of the issues in this case is whether Kimberley Hall was authorised to permit the Claimant to carry over holiday. As I will set out below, in my view it is also appropriate to consider whether Kimberley Hall was authorised to communicate messages about holiday pay from the Respondent's management to the Claimant. In both cases, it is important to understand the law relating to the authority of agents (which is what Ms Hall was, for these purposes).

46. The key legal principles on the authority of agents, which I will apply, are as follows:

- (1) Where, as here, it is disputed that an agent had authority, the burden is on the person asserting that there was authority to prove this on the balance of probabilities. So here it was for the Claimant to prove that Ms Hall had authority for her actions, not for the Respondent to prove that she did not: see ***Bowstead & Reynolds on Agency***, 22nd edition, 3-007.
- (2) Authority may be actual, in the sense that a person (Ms Hall) was actually authorised by the Respondent to perform certain actions on its behalf. If a person who has actually been authorised to do something does that thing, then their principal (here, the Respondent) will be bound by what the agent has agreed: see ***Bowstead & Reynolds***, 3-003.
- (3) Authority may alternatively be apparent, if the Respondent held Ms Hall out to third parties (such as the Claimant) as having authority to perform certain acts on its behalf. This is, in this case, closely connected with the concept of usual authority, which may arise where a person is placed in a position which would ordinarily carry with it the power to perform acts on the Respondent's behalf: see ***Bowstead & Reynolds***, 3-004 and 3-005.

Analysis and Conclusions

47. At paragraph 8 above, I identified seven issues that needed to be resolved in this case. These turn on the application of the legal principles set out

above to the facts that I have found. I will deal with each issue in turn, before giving my overall conclusion.

First issue: Was the Claimant entitled to carry over annual leave entitlement accrued during 2020 into 2021?

48. As a general rule, annual leave cannot be carried over from one leave year into the next. As such, it is for the Claimant to show that in this case the Respondent did permit her to carry over annual leave from 2020 into 2021.
49. I accept that Kimberley Hall told the Claimant that Ms Khelie had said that employees would be permitted to carry over holiday from 2020 to 2021. The question, however, is whether that statement by Ms Hall was sufficient to bind the Respondent. I have set out above some key principles of the law of agency, and in legal terms the question is whether Ms Hall was acting within the scope of her authority from the Respondent when she told the Claimant that holiday could be carried over.
50. I do not consider that the Claimant has shown that Ms Hall had authority to herself permit the Claimant to carry over annual leave from one year to the next. I accept Mr Singh's evidence that Ms Hall had no actual authority to grant such permission. I also do not consider that Ms Hall had apparent authority to herself make decisions about the carrying-over of annual leave. As the Claimant herself accepted, she would not normally speak to Ms Hall about matters connected with holiday arrangements. While Ms Hall did, as senior care worker, have a position of seniority, it was not a managerial or administrative position of the type whose holder would usually have authority to deal with holiday arrangements. As such, to the extent that the Claimant may contend that Ms Hall herself granted the Claimant permission to carry over holiday, I find that Ms Hall had neither actual nor apparent authority to do this, and any grant of the right to carry over by Ms Hall would not bind the Respondent.
51. However, Ms Hall did not say that she was herself granting the Claimant the right to carry over holiday. Rather, she said that Ms Khelie had said that holiday could be carried over. As a matter of law, a person who does not have authority to make arrangements themselves may nonetheless have authority to communicate the fact that a person who does have authority has made such arrangements. For example, in the commercial case of ***First Energy (UK) Ltd v Hungarian International Bank Ltd*** [1993] BCC 533, a manager who did not himself have authority to enter into a contract was found to have had authority to communicate a decision made by someone who did have authority. In that case, the company was bound by the manager's communication of agreement to a contract, even though the company's head office had in fact not agreed to the contract.
52. In my view, therefore, the real question in this case is whether Ms Hall had actual or apparent authority to communicate decisions about holiday on behalf of Ms Khelie. If she did have such authority, then in my view the

Respondent will be bound by what she communicated, whether or not Ms Khelie had in fact said that annual leave entitlement could be carried over.

53. I did not have evidence that Ms Hall had actual authority to communicate Ms Khelie's decisions. Did she have apparent authority to communicate decisions about holiday? I have concluded, not without some hesitation, that it has not been shown that she did. In reaching this conclusion, I have regard to two things in particular. First, the burden of proving apparent authority to communicate decisions about holiday rests with the Claimant. It is therefore for the Claimant to satisfy me that Ms Hall did have apparent authority to communicate decisions about holiday. I was given little in the way of positive evidence to show that such apparent authority existed. I did not consider that the mere fact that Ms Hall was employed as a senior care worker was in itself enough to show that she had apparent authority to convey messages about holiday pay. Second, the Claimant's evidence tended to suggest that she was aware that Ms Hall did not ordinarily have such authority. In particular, at one point in her evidence Mr Singh put to the Claimant that a senior carer (such as Ms Hall) had no authority to discuss holiday pay or hours, and that only Ms Khelie, the care coordinator, or administrative staff would even discuss such matters. The Claimant's answer (as noted by me) was '*normally I can understand, but a lot of staff were off sick*'. In my view, this supports the conclusion that there was nothing about the position that Ms Hall was entrusted with that would amount to the Respondent holding Ms Hall out as having authority to communicate decisions about holiday.
54. Accordingly, my finding is that the Respondent is not bound by any commitment to carry-over holiday pay given by Ms Hall.
55. I also considered whether the Claimant might be able to rely on regulation 13(10) of the **Working Time Regulations**, by contending that it was not reasonably practicable for her to take annual leave as a result of the impact of Covid-19, and that as such she was entitled to carry-over her annual leave entitlement. I have concluded, however, that she cannot rely on this provision. The evidence that I heard did not establish that it was not reasonably practicable for the Claimant to take her 2020 annual leave during the 2020 leave year because of the impact of Covid-19. At most, it established that the Respondent was under particular staffing pressures at the very end of 2020, and that these rendered it harder for the Claimant to take annual leave, but in my view this was not sufficient to show that the Claimant could not reasonably have taken her 2020 leave during 2020. The staffing difficulties appear to have arisen only towards the very end of the year, and did not prevent or restrict the Claimant's ability to take holiday during the rest of 2020. Moreover, it was not clear to me on the evidence that the staffing difficulties were a result of the impact of Covid-19, or whether there were other underlying issues.
56. I add that the evidence did not show that the Respondent ever positively refused to allow the Claimant to take annual leave, even in December 2020. The Claimant simply did not seek to take annual leave, having

regard to the long-established policy of the Respondent to limit annual leave around Christmas and New Year. Where the Respondent did not actually tell the Claimant that she could not take annual leave, it is particularly hard for the Claimant to establish that it was not reasonably practicable to take annual leave because of the impact of Covid-19 on the Respondent's business.

57. For the reasons set out above, I find that the Claimant was not entitled to carry over leave from 2020 into 2021.

Second Issue: If the Claimant was entitled to carry over leave from 2020 into 2021, how much annual leave had the Claimant accrued during 2020 and carried over into 2021?

58. This issue is now irrelevant, given my findings on the first issue. If it had been relevant, I would have accepted the Claimant's evidence that she had a right to 168 hours' annual leave per year, and had taken 72 hours' leave, such that the amount carried over would have been 96 hours.

Third Issue: How much annual leave did the Claimant accrue during 2021?

59. At paragraphs 36 and 37 above I drew attention to the potential difference between statutory annual leave entitlement under the **Working Time Regulations**, and a worker's contractual annual leave entitlement. The latter may sometimes exceed the former, and that can result in a difference between the sums due contractually and those due under statute.

60. Here, the two statements of terms and conditions provided to the Claimant during 2021 both contain provisions as to annual leave which might exceed the Claimant's statutory entitlement. In particular, the January 2021 statement provided that the Claimant was entitled to twenty-eight days' annual leave per annum. Since the Claimant's daily shift amounted to twelve hours, this contractual provision could equate to an annual entitlement to 336 hours' paid annual leave. This is double the amount provided for in the July 2021 statement of terms and conditions, and is also double the amount reached by multiplying the 5.6 weeks' statutory annual leave entitlement by 30 hours. Most pertinently, it is double the figure for annual leave that the Claimant herself has used in quantifying her claim. I accordingly conclude that the provision of twenty-eight days' annual leave in the January 2021 statement – which was not signed by either party – was an error, and does not reflect the contractual position.

61. The July 2021 statement provides that the Claimant is entitled to 168 hours' paid annual leave per week. Again, this has the potential to exceed the Claimant's statutory entitlement. It would do so, for example, if the Claimant's annual leave entitlement were to be calculated on the basis that she had worked fewer than thirty hours per average week.

62. The July 2021 statement is unsigned by both parties, and contains what were agreed to be errors in relation to annual leave (for example,

both parties agreed that it was incorrect in providing for an April to March leave year). I conclude that it is not determinative in relation to the Claimant's annual leave entitlement.

63. My overall conclusion is that the Claimant was entitled to the statutory minimum annual leave entitlement, namely 5.6 weeks' paid leave per year. Neither party advanced any evidence of any particular contractual agreement, beyond the two statements of terms and conditions, which, as I have set out, are both unsigned and in some respects erroneous. I accordingly calculate the Claimant's annual leave entitlement solely on the basis of her statutory entitlement set out in regulations 13 and 13A of the **Working Time Regulations**. As is set out below, however, I ultimately find that the Claimant's statutory entitlement to 5.6 weeks' paid annual leave is exactly the same as an entitlement to 168 hours' paid annual leave.
64. The Claimant was clearly entitled to 5.6 weeks' paid annual leave per year, and she had accrued two-thirds of that when she resigned. However, it is necessary to work out what that means in terms of hours accrued (particularly as both parties have expressed their positions in terms of the number of hours' leave accrued).
65. Putting the Claimant's annual 5.6 weeks' leave entitlement into hours involves working out what amounts to a week's pay, applying the legal principles set out at paragraphs 41 to 44 above. In particular, it is necessary to work out whether these principles mean that the Claimant's working week should be treated as being thirty hours, or whether some lesser figure should be applied.
66. I have come to the conclusion that, in calculating how many hours' leave the Claimant was entitled to, I should treat her working week as having been thirty hours. I have come to this conclusion for the following reasons:
- (1) Applying the principles set out at paragraph 43 above, I consider that I should calculate the Claimant's weekly pay (and also her weekly hours) on the basis that her hours, and therefore her pay, varied from week-to-week. I adopt this approach, because her hours and pay did vary from one week to the next. In some weeks, she worked thirty-six hours (and earned thirty-six hours' pay) and in other weeks she worked twenty-four hours (and earned twenty-four hours' pay).
 - (2) It follows that in calculating the Claimant's weekly hours for the purposes of working out how many hours' leave she had accrued, I should adopt the approach set out in section 222 of the **Employment Rights Act** – namely, averaging her pay over the course of the last fifty-two weeks of her employment.
 - (3) However, in performing this exercise, I should disregard weeks in which the Claimant did not work. It follows that I disregard weeks in which the Claimant was signed off sick (and hence I disregard the entire period from 23 February 2021 until the Claimant's resignation) and that I also disregard weeks in which the Claimant was suspended.

I focus only on the last fifty-two weeks in which the Claimant actually worked.

- (4) Adopting this approach, it follows that the Claimant's average working week must have been thirty hours. I find, accepting the Claimant's evidence, that her working pattern of twenty-four hours one week and thirty-six hours the next was consistent, and this yields a thirty-hour average. Indeed, as the Claimant did for a period work thirty-six hours every week, her average over fifty-two weeks might have been more than thirty hours. But I heard no evidence to tell me that this was so, and the Claimant herself limited her claim to one based on thirty hours per week.
- (5) In my view, the Respondent has probably erred in its approach to calculating the Claimant's annual leave entitlement. Most probably, it has acted correctly in averaging the Claimant's hours, but has erred in failing to disregard hours in which the Claimant did not work. I consider that it is most likely to be this that led it to advance what I find to be the erroneous figure of 44 hours as being the Claimant's accrued annual leave entitlement during 2021.
67. The Claimant's annual leave entitlement, in hourly terms, during 2021 is accordingly to be calculated on the basis that she worked thirty hours' per week. The mathematics is simple. The Claimant's annual entitlement would be:

$$5.6 \text{ weeks} \times 30 \text{ hours} = 168 \text{ hours}$$

The Claimant in fact worked two-thirds of the year, and two-thirds of 168 is 112. I accordingly accept the Claimant's calculation that she had accrued 112 hours' paid annual leave during 2021.

Fourth issue: Had the Claimant taken any annual leave during 2021, so as to reduce her outstanding entitlement?

68. I accept the Claimant's evidence that she took no annual leave during 2021. While Mr Singh expressed some surprise at this, it is easily explicable when one considers that the Claimant was signed off sick for over six months of the approximately eight months that she worked, and was also suspended for a period. Moreover, the Respondent advanced no evidence of any occasions when the Claimant had taken paid annual leave during 2021, and it would have been easy for the Respondent to produce this evidence (in the form of holiday or payroll records) if it existed. It follows that the Claimant's accrued entitlement to 112 hours' paid annual leave has not been reduced in any way.

Fifth issue: Having regard to the foregoing matters, how much accrued but untaken annual leave did the Claimant have upon the termination of her employment?

69. As noted above, the Claimant had an outstanding entitlement to 112 hours' paid annual leave upon termination of her employment.

Sixth issue: Was the Respondent entitled to a set-off, either reducing or extinguishing the Claimant's claim, by reason of the fact that she did not work her notice period?

70. The Respondent relies on the provisions of its employee handbook, which, as I have already observed, says the following:

B) TERMINATING EMPLOYMENT WITHOUT GIVING NOTICE

If you terminate your employment without giving or working the required period of notice, as indicated in your individual statement of main terms of employment, you will have an amount equal to any additional cost of covering your duties during the notice period not worked deducted from any termination pay due to you. This is an express written term of your contract of employment. You will also forfeit any contractual accrued holiday pay due to you over and above your statutory holiday pay, if you fail to give or work the required period of notice.

The Respondent's position is that the Claimant resigned, and did not work her notice period. It was, it says, accordingly entitled to deduct the sum of £1,348.02 from the Claimant's final pay. It relies in particular on the first sentence of the quoted clause.

71. I reject this argument, for the following reasons:

- (1) I accept that the Claimant resigned, and that she did not give (or, at the very least) did not work, her notice period.
- (2) I do not find that this caused the Respondent loss. The Claimant had been signed off sick for more than six months when she resigned. The Respondent could have had no realistic expectation that after this lengthy period signed off sick, the Claimant would suddenly become well enough to work, and I have rejected the suggestion that the Respondent's staff telephoned the Claimant and asked her to return to work during her notice period. Any need that the Respondent had to cover the Claimant's shifts was nothing to do with her resignation or with any wilful refusal to work, but was entirely caused by her illness. It follows that there can have been no 'additional cost of covering [the Claimant's] duties during the notice period', since such costs would have been incurred in any event.
- (3) Moreover, the Respondent has failed to prove its alleged losses. It put no evidence before me to substantiate the £1,348.02 figure (or, indeed, any other figure), and in his closing submissions Mr Singh rightly conceded that the Respondent could not rely on that figure, given the lack of evidence. So I have nothing to show that the Respondent incurred any sum in covering for the Claimant's absence during her notice period.
- (4) Even if I had been satisfied that the Claimant's failure to work her notice period had caused the Respondent additional expense, and even if I had been satisfied that that sum had been proved, I would have found that the provision for recoupment contained within the first

sentence of the quoted clause was not engaged. This provision refers to deductions being made from any 'termination pay' due to the Claimant. However, this case is not concerned with a termination payment, but rather with a payment in lieu of accrued but untaken annual leave. There is a specific provision dealing with this (the last sentence of the quoted clause). The first sentence of the quoted clause has no application to such a payment in lieu.

72. I turn to consider the final sentence of the quoted clause, which is, in my view, the provision applicable to this situation. I repeat it once again:

You will also forfeit any contractual accrued holiday pay due to you over and above your statutory holiday pay, if you fail to give or work the required period of notice.

73. As I have set out above, the calculation of the Claimant's outstanding entitlement to 112 hours' accrued but untaken annual leave is entirely based on her statutory entitlement. The sentence that I have quoted expressly protects the Claimant's statutory annual leave entitlement from deductions, and only provides for the contractual entitlement to be forfeit insofar as it exceeds her statutory entitlement. But there is no contractual entitlement exceeding the statutory entitlement, and as such nothing falls to be forfeited.

74. For the reasons set out above, an argument that the Respondent is entitled to withhold some or all of the payment in lieu of accrued but untaken annual leave entitlement fails. I add that, if I had approached these arguments as giving rise to a counterclaim rather than merely a set-off argument, that counterclaim would have failed and been dismissed for the same reasons that the set-off argument fails.

Seventh issue: Taking all of the previous issues into account, what sum (if any) is owed to the Claimant by the Respondent?

75. I have found that the Claimant had an accrued but outstanding annual leave entitlement of 112 hours. She was paid the gross sum of £8.91 per hour, so the calculation is:

$$112 \text{ hours} \times \text{£}8.91 = \text{£}997.92$$

No sum in respect of accrued but untaken annual leave was in fact paid to the Claimant. Nor, I find, did any sum fall to be deducted from the accrued annual leave payment for any other reason.

Overall conclusion

76. It follows that the Claimant is entitled to a gross payment of £997.92 in respect of accrued but untaken annual leave, and that is what I order the Respondent to pay to the Claimant.

Employment Judge **Varnam**

19 July 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 August 2022

FOR EMPLOYMENT TRIBUNALS