EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: Kinseed Limited

Heard at:	**Watford (by CVP)**	**On:**	**18 August 2022**

Before: Employment Judge Carney

Representation
Claimant: In person
Respondent: Ms Sarah-Jane Wood (litigation consultant)

RESERVED JUDGMENT

1. The claimant's complaint that there was an unlawful deduction from wages in respect of accrued holiday pay is not well founded. The claimant's claim therefore fails.
2. The respondent's counter claim for breach of contract is dismissed on withdrawal.

REASONS

Introduction

1. This is a claim for unpaid holiday pay. ACAS was notified under the early conciliation procedure on 23 June 2021 and issued the certificate on 6 July 2021. The ET1 was presented to the tribunal on 10 August 2021 and the tribunal received the ET3 defending the claim on 1 October 2021.

Claims and issues

2. The claimant has brought a claim for unlawful deductions from wages in respect of holiday pay for holiday that had accrued and not been taken on termination of employment.
3. The respondent confirmed that it was not pursuing a counter-claim for breach of contract against the claimant.
4. It was agreed at the start of the hearing that the issues to be determined were:
   4.1. what paid leave the claimant had taken during the two holiday years in which he was employed;
   4.2. whether any untaken holiday days were carried over from the first to the second holiday year; and

  4.3. how many holiday days (if any) had accrued but not been taken and were unpaid on termination of employment.

Procedure, documents and evidence heard

5. The tribunal heard evidence from the claimant. The tribunal heard from the following witnesses on behalf of the respondent: Mr Piyush Laad (employee of the respondent); Mr Joshua Knight (director of the respondent); and Dr Harpal Bhusate (director of the respondent).

6. The respondent had prepared a tribunal bundle of approximately 380 pages. The claimant sought to add an additional bundle with pages numbered 381 to 1600. As the claimant had only provided his witness statement to the respondent on 17 August 2022, the respondent also made an application to add two additional pages to the bundle and a supplementary witness statement for Dr Bhusate.

7. The respondent submitted that the claimant had disclosed his documents to the respondent late, in breach of the tribunal's order and that the claimant's additional bundle was largely not relevant to the issues to be determined. It believed only about 10 pages were relevant. The respondent's representative said that they had requested the claimant provide them with relevant documents to be included in the bundle, which he had not done. The respondent objected to irrelevant documents being included in the bundle.

8. The tribunal could not read the claimant's additional bundle in the time available to determine the relevance of individual documents. It asked the claimant to refer to relevant documents during his evidence or cross-examination, for the tribunal to consider and make a determination on a case-by-case basis. Various documents from his bundle were referred to by the claimant, as set out below, and were admitted by the tribunal on the grounds of relevance.

9. The claimant had previously made an application for an anonymity order pursuant to rule 50 of the Employment Tribunal Rules of Procedure 2013, which the tribunal had said would be determined during this hearing. The claimant said that he had been granted asylum in the UK from Iran on grounds of a well-founded fear of persecution because of his conversion to Christianity and political opinions. He showed the tribunal the letter from the home office determining his asylum claim. He submitted that the respondent provided software to the NHS, which would be viewed in Iran as a branch of the UK state. He also showed the tribunal photos of the prime minister, Boris Johnson, visiting the respondent's premises which were on the respondent's website. The prime minister's visit had also been publicised on the respondent's social media and LinkedIn pages. The claimant alleged that if it were known in Iran that he was doing work for the NHS and of the prime minister's visit to the respondent, he would be deemed by the Iranian government and the IRGC (the Islamic Revolutionary Guard Corps, an Iranian military agency or secret police that targets domestic enemies) as working for the UK prime minister or the British state and that this would be viewed as a hostile action or sabotage against Iran. He submitted that there was a real risk that the IRGC or Iranian government might kidnap his family (all of whom other than his wife and daughter live in Iran) and abuse them to put pressure on the claimant to return to Iran, where he would face adverse consequences. He pointed to Iran's poor human rights record and history of such actions. And he submitted that his rights under Article 8 of the European Convention on Human Rights (ECHR) (right to respect for private and family life) were engaged. He therefore requested that his name be anonymized in publicly accessible tribunal documents.

10. The respondent conceded in the hearing that the claimant had raised serious concerns about threats to his family's safety and it therefore would not oppose the application for the claimant to be anonymized. But having heard about the seriousness of the issue, the respondent's witnesses were concerned about being associated with the claimant and the respondent requested that all parties to the hearing be anonymized.

11. In considering these applications, the tribunal considered the need for and importance of "open justice" – the common law principle that justice should not only be done but should be seen to be done – and the right to a "fair and public hearing" under Article 6 ECHR. It also considered the convention right to freedom of expression (Article 10 ECHR). And it balanced them against the claimant's and the respondent's rights under Article 8 ECHR (right to a private and family life). The tribunal considered that the threat to the claimant's family in Iran was a credible and serious one. The tribunal understood the anxiety of the respondent's witnesses but did not consider that there was a serious threat to them, as they were not in this country pursuant to a claim for asylum from Iran and did not have family in Iran. The tribunal was not provided with any evidence for and therefore found that there was no credible risk to participants in these proceedings currently living in the UK, other than indirectly to the claimant through his family in Iran.

12. The tribunal therefore found that the impact on open justice of anonymizing the claimant's identity was outweighed by the Article 8 rights of the claimant and his family. As the respondent had conceded the request for the order, the tribunal did not have to weigh up the respondent's Article 6 and Article 10 EHRC rights.

13. The tribunal has therefore made an order under rule 50 of the Tribunal Rules, restricting the public disclosure of the claimant's name but not that of the respondent or any of the respondent's witnesses. It considers this necessary in the interests of justice and in order to protect the Article 8 convention rights of the claimant. This order applies only in respect of these proceedings. The claimant must make another application for an anonymity order in respect of any other proceedings he pursues against the respondent.

Fact findings

14. The respondent is a small technology company that creates cloud-based software, mostly used in the healthcare and social care sectors.

15. The claimant was employed by the respondent as a software developer from 2 April 2020 until his employment terminated on 14 May 2021. Initially he was employed part-time, working from 8am to 1pm Monday to Friday. From 1 May 2020 he started full-time employment and was contracted to work 40 hours per week, Monday to Friday on a flexible schedule.

16. All page references are to the bundles. (The claimant's bundle numbering follows on from that of the respondent.) Facts were agreed, unless otherwise indicated.

17. The respondent's holiday year runs from 1 April to 31 March and therefore the claimant had effectively worked one full holiday year in the first year of his employment (2 April 2020 – 31 March 2021). The claimant's employment terminated part-way through the next holiday year. In the second holiday year, the claimant worked from 1 April 2021 to 14 May 2021. Holiday entitlement for a full holiday year was 28 days and the claimant was entitled to 3.4 holiday days in respect of the holiday year in which his employment terminated. The claimant's rate of pay for one holiday day was £146.15.

18. The respondent had a system for receiving and authorising holiday requests using SharePoint. SharePoint is a Microsoft software product that enables website-based collaboration, which effectively acted as the respondent's

company intranet. To book holiday, an employee would go onto SharePoint and find a menu marked "take time off". Employees requested leave by clicking on a tab "book new leave", which would ask for start and end dates to be included. When the employee had done this and hit "send", it would send an automated email to the employee and his or her manager. The manager would approve or reject the request. The status of the request would then be updated on SharePoint and an automated email message would be sent to the employee confirming the decision. SharePoint would show approved requests and also what leave had been taken in the past.

19. Both parties agreed that the claimant rarely used the SharePoint system to request leave and that on the two occasions he did so, he made mistakes and requested the wrong holiday dates.

20. The claimant used the SharePoint system to request holiday around the anticipated birth of his child, not having sufficient service to have a right to statutory paternity leave. He accidentally requested 46 days leave (page 96)

21. The claimant had also used the SharePoint system to request holiday for Persian New Year, which fell in March 2021 but by accident the request was raised for February 2021.

22. The claimant's mistakes were due to the fact that the SharePoint system used an American date system (which puts the month first and then the day) rather than the usual British system. For example, the 23 February 2021 would be noted as 23/02/2021 in the British style but as 02/23/2021 in the American style. The claimant was also hampered in using the SharePoint system because English is not his first language.

23. Instead of using SharePoint, the claimant would request holiday days by speaking to his line manager. Because his holiday dates were not going through the SharePoint system, Dr Bhusate started keeping an excel spreadsheet to keep a log of his leave (page 121 of the bundle). As Dr Bhusate conceded in the hearing, that spreadsheet is not completely accurate. This is discussed in more detail below.

24. Lacking a good paper trail of the claimant's holidays, the position regarding what holiday the claimant took was extremely confusing and both the claimant and the respondent failed to present a completely consistent picture.

25. The claimant said in his witness statement (dated 16 August 2022) that he "only had 2 weeks off at best". By the end of the hearing on 18 August 2022, he had conceded that he had had 5 days holiday in November, 5 days in December, another day on 31 March 2021 (paragraph 53 of his witness statement) and that bank holidays were also taken as holiday by everyone at the respondent. This is more than the 2 weeks he initially claimed.

26. A further change of position by the claimant is that, in his ET1 claim form he said he had taken one day's leave on 7 August 2020. Whereas in his witness statement (at paragraph 47) the claimant said he had requested it as holiday but that the respondent recorded it as sick on their spreadsheet (page 121) and that in any event he claims he actually worked that day.

27. Another change by the claimant is that in his ET1 he says he asked to take holiday on 18 and 19 March 2021 for Persian New Year. In his witness statement (paragraph 52) the claimant says he asked for 22, 23 and 24 March as holiday for Persian New Year (which are the days Dr Bhusate's spreadsheet records him as taking as holiday).

28. The respondent's changes of position include the fact that on Dr Bhusate's spreadsheet of days she claims the claimant took as holiday (which is on page 121), she recorded 13 April 2020 twice (once as a bank holiday, once as a half day's holiday). She also failed to record 5 April 2021 (Easter Monday) as a holiday on the spreadsheet, despite later saying in evidence that all

public holidays were taken by all employees. In her first witness statement (paragraph 21) Dr Bhusate claims the claimant took 3 days holiday in February 2021 but this is not recorded in the spreadsheet she refers to in the same witness statement. Instead, Dr Bhusate's spreadsheet records 22, 23 and 24 March 2021 as holiday taken by the claimant. She initially backed up the claim for February holiday by referring to the claimant's SharePoint application for leave (p. 106). This was the application for leave for Persian New Year which the claimant admits was completed wrongly. He said in the hearing that the actual application for leave should have been for 22, 23 and 24 March 2021 and that this was verbally agreed by his manager but that he was subsequently asked to work on those days and did so.

29. The respondent also recorded on the spreadsheet "holiday days" taken by the claimant, which Dr Bhusate conceded in the hearing were actually days when he was on paid suspension and not holiday (e.g. 13 and 14 May 2022).

30. Dr Bhusate's spreadsheet does not record the week's holiday in November 2021 that the claimant says he took. The claimant, on the other hand, does not seem to have kept a record of the dates of this holiday either. He concedes he took five days, but in his witness statement he says the holiday could have been October or November 2020 (paragraph 9).

31. The claimant invited me to find that the mistakes Dr Bhusate made in her spreadsheet throws doubt on the respondent's honesty and credibility and proves that the respondent was fabricating evidence. I do not make those findings. I find that both the claimant and Dr Bhusate made mistakes in their pleaded claims, or witness statements, which they later corrected in oral evidence before the tribunal. The claimant was not sure of the exact dates of his own holiday (e.g. the October/November 2020 holiday). The reason for the mistakes and lack of clarity about holiday dates is the claimant's failure to use the respondent's usual procedure (using the SharePoint system) to book holiday.

32. I find that Dr Bhusate's spreadsheet is not completely accurate, nor is it completely inaccurate.

Disputed holiday

33. The claimant requested 2 weeks' holiday around the birth of his daughter on 19 September 2020 (having accidentally requested 46 days through SharePoint).

34. Dr Bhusate said that the claimant was on holiday on Friday 18 September, when the claimant's wife went into hospital. Dr Bhusate said in evidence she has a message from the claimant saying he was about to go into the labour ward at 3pm on 18 September. The tribunal did not see that message, which was not included in the bundle. The claimant's evidence was that he worked all day on Friday 18 September and took his wife into hospital around 5pm. I prefer his evidence to that of Dr Bhusate on this point, as he is likely to have a good recollection of such a memorable day.

35. Dr Bhusate said that she spoke to the claimant after he returned from the hospital and told him to take the next week off, which he did. The claimant's evidence is that he worked the two weeks following the birth, despite having originally asked to have those weeks as holiday.

36. Mr Laad and Mr Knight were both sure that the claimant did not work in the week following the birth (Monday 21 September – Friday 25 September). Mr Laad did not remember the claimant being at the "stand ups", (morning meetings) that week. The claimant suggested I should not accept Mr Laad's account on this point, as he was not at that time an employee of the respondent but employed by a sister company and he only joined the respondent's employment on 10 December 2020. Mr Laad's evidence was

that he was working on the same project and so attended the respondent's "stand ups" at that time. I accept that Mr Laad was in a position to give evidence about who was at those meetings, as he himself attended them. And I accept his evidence and that of Mr Knight.

37. There is an email from Dr Bhusate to the claimant dated Monday 21 September 2020 saying "hello daddy welcome back pls share your address we want to send a gift for your little princess". The claimant says that this means he was back at work but Dr Bhusate says that she meant "welcome back from the hospital", not welcome back to work and I accept her evidence about what she intended when she wrote her message.

38. The claimant has not adduced any evidence of work he did in the week beginning 21 September 2020.

39. The claimant included a message to him from Mathew Hiley dated 23 September 2020 in his bundle which asked him how his wife and baby were and "why are you still working so hard? Aren't you going to take some time off" (page 1125). The claimant says this shows he was at work on this date. There is no answer included from the claimant in the bundle. Mr Hiley did not give evidence and it is unclear what he meant by his messages, for example, was he speaking generally about the need for the claimant to take time off, or about that particular day or week? I therefore find that this message does not add anything to the evidence about whether the claimant was at work on that day.

40. There is a Teams message to the claimant from Jass Sondi (one of the respondent's employees) dated 23 September 2020 in which she said that Dr Bhusate had asked her to forward her apple ID to the claimant (page 1560). There follows a conversation in which Ms Sondi asked the claimant to help her get access to the app he was developing for the respondent, which he did. There is a further message from Ms Sondi dated 25 September 2020, in which Ms Sondi says, " Hello [A], if you have a moment I just need to give you my feedback. Please can we have a chat when you have a moment. Only if you're free." Ms Sondi then says she will call in 30 minutes (pp. 1575 – 1578).

41. There is a Microsoft Teams chat started by Dr Bhusate and addressed to the claimant and Mr Laad which started on 25 September 2020. Mr Laad replied on 25 September but the claimant did not reply until Monday 28 September. The Claimant sent messages to the chat on Monday 28 and Wednesday 30 September.

42. I find that the respondent and its employees had poor boundaries around work and holidays, because of urgent work deadlines. For example, there are emails from Dr Bhusate sent at the weekend (e.g. p. 531). I find that Ms Sondi needed the information from the claimant to access the app and so contacted him, even though he was on holiday. I find that Ms Sondi knew the claimant was on holiday when she sent her messages, which is why she emphasized that she would only talk to him if he were free. And I accept Mr Knight and Mr Laad's evidence that the claimant was not at the work meetings. I note that the claimant had requested that time as holiday and I find it implausible that he would not be given holiday in the week after his daughter's birth.

43. I therefore find on the balance of probabilities that the claimant had 21 to 25 September 2020 as holiday.

44. At the end of the hearing the respondent conceded that the claimant worked on 29 September, as well as working half days on Monday 28 and Wednesday 30 September. I find that the claimant worked 28, 29 and 30 September.

45. Dr Bhusate's evidence was that all employees take "Christmas week" as holiday. The claimant accepts he had holiday at Christmas. In 2021,

Christmas day fell on a Friday (which was a public holiday) and the Boxing day holiday was therefore moved to Monday 28 December. New Year's Day was Friday of that week. I find the most plausible account of the holiday the claimant took at Christmas 2020, is that he had six days – Christmas day on the Friday 25 December and then the whole of the following week which was book-ended by two bank holidays (which week would be the "Christmas week" Dr Bhusate says all employees took). These are dates Dr Bhusate recorded the claimant taking as holiday in her spreadsheet.

46. The claimant said he verbally requested 22, 23 and 24 March 2021 as holiday for Persian New Year, following a mistake in his Sharepoint application when he inadvertently requested dates in February. He says these dates were verbally approved. He claims that Dr Bhusate then requested he work on those days, which he did. Dr Bhusate denies asking him to work on those days and says he took those days as holiday, as requested. The claimant has not adduced any evidence of work he did on those days (e.g. emails, Microsoft Teams messages, or an account of the work he performed on those dates), unlike for other disputed dates, when he has such evidence. I therefore accept that he was on holiday on those dates.

47. In summary, I find that for the holiday year 1 April 2020 to 31 March 2021, the claimant took a total of 25 days holiday on the following days:

    47.1. 10 April 2020 (Good Friday bank holiday)
    47.2. 13 April 2020 (Easter Monday bank holiday)
    47.3. 8 May 2020 (Early May bank holiday)
    47.4. 25 May 2020 (Late May bank holiday)
    47.5. 31 August 2020 (Summer bank holiday)
    47.6. Monday 21 September – Friday 25 September 2020 (following the birth of the claimant's child)
    47.7. 5 days in November 2020, as conceded by the claimant.
    47.8. Friday 25 December 2020 (Christmas day)
    47.9. Monday 28 December 2020 (deferred Boxing day holiday)
    47.10. Tuesday 29, Wednesday 30 and Thursday 31 December 2020.
    47.11. Friday 1 January 2021 (New Year's day holiday)
    47.12. 22, 23 and 24 March 2021 (Persian New Year)
    47.13. 31 March 2021, as conceded by the claimant

48. The respondent submitted that the claimant took various other days as holiday. But given their poor record-keeping and confused pleadings of dates, they are not able to establish which days. I find that the claimant did not take holidays on any other days.

49. The claimant did not complain about his holiday entitlement, about not being permitted to take holiday or about not having an effective opportunity to take holiday until after his employment had terminated. In his resignation email dated 17 April 2021 (after the end of the first holiday year) the claimant thanked Dr Bhusate for her "continued support during the past year". The matter of outstanding holiday pay is raised by the claimant after relations between the parties had soured following the claimant giving notice.

50. I accept Dr Bhusate's evidence that all employees had public holidays off. I therefore find that for the holiday year commencing 1 April 2021, until his termination date, the claimant took the following holiday:

    50.1. 2 April 2021 (Good Friday bank holiday)
    50.2. 5 April 2021 (Easter Monday bank holiday)
    50.3. 3 May 2021 (Early May bank holiday).

51. There was no right to carry over accrued but untaken holiday from one holiday year to another in a "relevant agreement". The claimant denied receiving the written statement of terms of employment until he was sent it

when his employment was about to terminate. He also denied seeing the Staff Handbook, which was on the respondent's Sharepoint site. In any event, neither document provided that there was a right to carry over holiday from one holiday year to another. The staff handbook said explicitly that there was no right to carry over holiday.

52. The claimant was paid £146.15 in lieu of one day's accrued holiday when his employment terminated, as evidenced in his final payslip (page 128).

Law

53. The law that the tribunal had to consider to determine this claim is contained in the Working Time Regulations 1998 (WTR) and the Employment Rights Act 1996 (ERA)

WTR

54. Regulations 13 and 13A WTR together provide that a worker is entitled to 5.6 weeks holiday a year (subject to a maximum of 28 days). They also provide that a worker is not entitled to carry forward unused leave from one holiday year to the next, unless provided for in a "relevant agreement" (Regulation 13(9)(a) and 13A(7) WTR).

55. However, the European Court of Justice has held that a worker must be permitted to carry over unused leave from one holiday year to another if the employer did not give the worker an effective opportunity to take annual leave (*Kreuziger v Land Berlin Case C-619/16, ECJ*; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ*).

ERA

56. The right not to suffer unlawful deductions from wages is contained in section 13 ERA. Section 13(3) provides that: Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Conclusions

57. The claimant had accrued and not taken 3 days holiday by the end of his first holiday year (i.e. by 31 March 2021). As there was no right in a relevant agreement or in the WTR to carry that holiday over into the next holiday year, the question arises whether the claimant had an effective opportunity to take holiday, as set out in the *Kreuziger* case. If he did have an effective opportunity to take it but had not done so, that right to holiday did not carry forward into the new holiday year.

58. I find that the claimant did have an effective opportunity to take holiday in that holiday year. He requested holiday throughout the year and it was granted. He did take holiday. He made no complaint about not being able to take holiday or being prevented from taking holiday until after the termination of his employment, after relations with the respondent had soured.

59. The claimant had also accrued and not taken 0.4 days holiday in respect of his second holiday year on termination of employment. He was paid one day's pay in lieu of accrued holiday on termination. Therefore the final wages paid to him accounted for his accrued holiday pay and there was no unlawful deduction from his wages.

60. The claimant's claim is dismissed.

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Employment Judge **Carney**

Date: 24 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15 September 2022

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FOR EMPLOYMENT TRIBUNALS