



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101060/2020 and 4101061/2020**

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**Held via Cloud Video Platform (CVP) on 26 November 2020**

**Employment Judge P O'Donnell**

10 **Ms M Craig**

**First Claimant  
In Person**

**Mr K J Prentice**

**Second Claimant**

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**Glasgow City Council**

**Respondent  
Represented by:  
Ms Moffett -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that it does not have jurisdiction under Regulation 30 of the Working Time Regulations 1998 to hear the Claimants' claims and those claims are dismissed.

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### **REASONS**

#### **Introduction**

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1. The Claimants have brought complaints that the Respondent have breached their rights in terms of Regulations 13 of the Working Time Regulations 1998 (WTR). In particular, they argue that they should have been permitted to carry over unused annual leave from 2019 to 2020. The Respondent resists the claims.
2. The hearing on 26 November 2020 was held remotely by way of Cloud Video Platform (CVP). The witness evidence concluded at the end of the day and there was not sufficient time for submissions.

3. There was, therefore, a discussion as to how the deal with submissions with the Tribunal suggesting that there could either be a further hearing listed by way of CVP or that written submissions could be lodged. The Claimants indicated a preference for written submissions and Ms Moffet did not raise any objection albeit she had not been able to confirm her instructions.
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4. The Tribunal considered that submissions should be made by way of written submissions and set the following timetable for these to be lodged:-
- i. At 4pm on 10 December 2020, the parties are to lodge with the Tribunal (and copied to the other side) their written submissions.
  - 10 ii. At 4pm on 17 December 2020, the parties are to lodge with the Tribunal (and copied to the other side) their response to each other's written submissions.
5. The Tribunal indicated that one issue on which it particularly wished to be addressed by the parties was the issue in terms of Regulation 30(1)(a) WTR as to the basis on which it was said that the Respondent refused (or did not refuse, as the case may be) to permit the Claimants to exercise their rights under Regulations 13.
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### **Case Management issues**

6. At the outset of the hearing, the Claimant, Ms Craig, raised the issue that the other Claimant, Mr Prentice, was a witness for her in another Employment Tribunal case against the Respondent. This other case was part-heard and Mr Prentice remained on oath in the context of that case. The Tribunal enquired with parties as to whether it was anticipated that any of the evidence which Mr Prentice would give at this hearing would overlap with evidence in the other case or be related to it. Both sides indicated that it was not anticipated that this would occur and the issues in this case were discrete to it. In these circumstances, the Tribunal indicated that it saw no difficulty in Mr Prentice giving evidence but that if an issue arose then parties should raise this.
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7. Ms Craig raised two other matters which she described as preliminary issues. First, she complained about the length of time it had taken for the hearing in this case to be listed. The Tribunal noted that she was not making any application and considered that it was not appropriate to comment on this.
- 5 Second, she stated that no witness statements had been ordered in this case as had been done in other cases being pursued by her and Mr Prentice. The Tribunal explained that the default position in Scottish court procedure is for oral evidence to be led but that the Tribunal had the power to order witness statements to be used where it considered it appropriate. Again, no
- 10 application was being made to the Tribunal and so the Tribunal did not consider it appropriate to comment further.

### Evidence

8. The Tribunal heard evidence from the following witnesses:-
- a. The Claimants.
  - 15 b. Denise Hamilton – the Respondent’s City Centre Manager for Neighbourhoods and Suitability who conducted return to work meetings with the Claimants and corresponded with them on their return to work.
  - c. Mary Anne Walsh – an assistant HR Manager with the Respondent
  - 20 who was present at the meetings with Ms Hamilton and who also corresponded with the Claimants.
9. There was an agreed bundle of documents prepared by the parties.
10. The relevant facts in this case were not fundamentally in dispute and so the Tribunal did not require to resolve any significant dispute of fact or come to a
- 25 view on the reliability or credibility of the witnesses.
11. The Tribunal did hear evidence in relation to a number of matters which, ultimately, it considered to not be relevant to issues it required to determine. In particular, the Tribunal heard evidence about the internal processes of the Respondent, for example, previous occasions on which the Claimants had

5 been allowed to carry over leave from one year to the next, whether decisions were made by the persons with the authority to do so, who were the authors of particular letters sent to the Claimants and whether there were “exceptional circumstances” which would justify allowing the Claimants to carry over leave in the context of the Respondent’s policies. The Tribunal considered that these matters were not relevant to the issues to be determined in relation to whether the Respondent had breached the Claimants’ rights under the WTR.

### Findings in fact

12. The Tribunal made the following relevant findings in fact.
- 10 13. Mr Prentice is employed as a technical officer by the Respondent. He was 30 years’ service with the council and remains employed at the present date.
14. Ms Craig is also employed as a technical officer. She has 23 years’ service with the Respondent and remains employed at the present date.
- 15 15. The Respondent’s conditions of service for staff includes provisions dealing with annual leave and the relevant extract was produced at pp37-39. The provisions relevant to this case are:-
  - a. The leave year runs from 1 January to 31 December.
  - b. Employees have until 31 January of the next leave year to take any leave from the previous year.
  - 20 c. Any leave not taken by 31 January of the next year will normally be lost.
  - d. There is a discretion for the Head of Service to extend the leave period beyond this date or to make a payment in lieu of outstanding leave in exceptional circumstances.
  - 25 e. Where an employee has been absent from work for a continuous period of more than 13 weeks in any leave year (or any period which straddles two leave years) then their annual leave can be reduced in proportion to the period of time they were absent over 13 weeks. This

is subject to maintaining the minimum amount of leave to which the employee is entitled under WTR.

16. Both Claimants were absent from work on sick leave from 11 February 2019 and both returned to work on 11 November 2019.
- 5 17. On their return to work, both Claimants attended a return to work with Denise Hamilton at which Mary Anne Walsh was also in attendance. There was a meeting held for each Claimant and they represented each other at the respective meetings.
18. At the meetings, the Claimants signed a certificate confirming that they were  
10 fit to return to work (pp44 & 45). They were also informed that their leave entitlement would be reduced given the period of their absence.
19. The details of the reduction in annual leave were confirmed to the Claimants by letters dated 14 November 2019 (pp 46 & 47). The remaining entitlement was divided into a period of annual leave and a number of days in lieu of  
15 public holidays which fell during the Claimants' absence. The letter went on to state that the annual leave required to be used by 31 January 2020 or it would be forfeited.
20. The amount of leave to which each Claimant was entitled was expressed differently; Ms Craig was given a number of days; Mr Prentice was given the  
20 entitlement in hours as he worked compressed hours with no fixed working pattern and so it was easier for his leave to be given in hours. However, it was not in dispute that the total leave to be taken (that is, annual leave and days in lieu of public holidays) equated to 23.5 days for each Claimant.
21. Ms Craig took 8 days of her revised entitlement leaving her with a balance of  
25 15.5 days. Mr Prentice took 8.5 days of his revised entitlement leaving him with a balance of 15 days. It was not in dispute that neither of the Claimants made any further request to the Respondent to take any of their remaining balance before the deadline of 31 January 2020.

22. Both Claimants were on a phased return to work which ended on 6 December 2019. In this period, they returned on reduced days, gradually increasing the number of days each week until they returned to their normal hours.
23. On 28 November 2019, Ms Hamilton sent an email to each of the Claimants in identical terms (pp49 & 50) which included a reference to both them having significant periods of annual leave left to take and asking them to confirm their intentions as to how they wished to use this leave.
24. On 4 December 2019, Ms Hamilton emailed Ms Craig and copied Mr Prentice into the email (p53). At the end of the email, she asked for details of how the Claimants proposed to take their outstanding leave (both annual leave and public holidays) before the deadline of 31 January 2020.
25. The Claimants had submitted a joint request to the Respondent's Chief Executive for them to be allowed to carry forward their annual leave entitlement beyond 31 January 2020 (p52). This was refused by letters dated 12 December 2019 (pp 59 & 60).

### **Claimant's submissions**

26. The Claimants made the following submissions.
27. Under Regulation 13 WTR, they had a right to receive 20 days annual leave in the 2019 holiday year that ran from 1 January to 31 December 2019.
28. They accepted that Regulation 13(9) states that leave must be taken in the year in which it is due but made reference to the case of *Larner v NHS Leeds* [2012] IRLR 825 as authority for the proposition that workers were entitled to carry leave over into a subsequent holiday year where the worker was prevented from taking leave due to sickness. It was submitted that the Respondent had an obligation to comply with this authority and, by informing the Claimants that they had to use the balance of their 2019 leave by 31 January 2020, the Respondent had refused to permit the Claimant to exercise their rights under Regulation 13.

29. The Claimants went on to set out the words which the Court of Appeal in Larner said should be read into Regulation 13(9) to give effect to the principle of carry-over.

30. The submissions then turn to Regulation 13A WTR and, in particular, Regulation 13A(7). It was submitted that the Respondent's conditions of service amount to a relevant agreement for the purposes of Regulation 13A(7).

31. The Claimants go on to make submissions about what they say are defects in the Respondent's decision not to exercise their discretion to allow the Claimants to carry over their holiday past 31 January 2020. They then set out the reasons why they did not take the 2019 holidays in the period from their return to work in November 2019 to 31 January 2020. The Tribunal takes note of these submissions but has not set them out in detail; the question of whether the Respondent had correctly exercised their contractual discretion is irrelevant to the issue of whether the Claimant's statutory rights had been breached; similarly, the reasons why the Claimants did not take their leave in the period allowed by the Respondent has, ultimately, no bearing in the context of the Tribunal's decision below.

32. In response to the submissions from the Respondents, the Claimants challenged certain of the facts which the Respondent suggested the Tribunal should make. Much of the rebuttal by the Claimants related to the exercise of the Respondent's discretion and whether those making decisions had the power to do so. As stated above, the Tribunal did not consider this relevant to the issues to be determined so has not set these out in detail.

### **Respondent's submissions**

33. The following submissions were made on behalf of the Respondent.

34. The submissions begin by setting out the facts which the Respondent suggests the Tribunal finds from the evidence it has heard. The Tribunal does not propose to set these out in detail.

35. Turning to the relevant law, the submissions set out what are said to be the relevant statutory provisions. Reference is made to the case of *Scottish Ambulance Service v Truslove* UKEATS/0028/11 as authority for the proposition that, for an employer to be found to be in default of Regulation 30 WTR, there must be a request for annual leave in terms of Regulation 15. Reference was also made to *Grange v Abellio London Ltd* [2017] IRLR 108 where reference is made to *Truslove*.
36. It was submitted that, in cross-examination, both Claimants accepted that they did not give notice to the Respondent or make any request to take their annual leave and they therefore failed to comply with Regulation 15 so cannot seek a remedy under Regulation 30.
37. In the event that the Tribunal did not accept that submission, the submissions went on to address the question of whether the Claimants were entitled to carry over their annual leave.
38. It was accepted that the case of *Larner* did hold that words could be read into Regulation 13(9) that permitted a carry-over of annual leave but it was submitted that the facts of *Larner* are very different from the present case. In *Larner*, the claimant had been off sick for more than an entire leave year and claimed holiday pay when she was subsequently dismissed. It was submitted that this is different from the present case in which the Claimants had returned during the leave year and had the opportunity to take their annual leave. They should not, therefore, be entitled to carry over their leave.
39. The submissions concluded by addressing certain matters relating to remedy which, in light of the Tribunal's decision, are not relevant.
40. In response to the submissions by the Claimants, the Respondent repeated the argument relating to the factual differences between the present case and that of *Larner*. It was also submitted that the submissions relating to Regulation 13A were irrelevant as the claims had only been advanced under Regulation 13 and no evidence relating to any alleged breach of Regulation 13A had been led at the hearing.



41. The rebuttal from the Respondent noted that, at no point in the Claimant's submissions, was it said that they had given notice in terms of Regulation 15 and so they Claimants cannot claim for a remedy.

### Relevant Law

5 42. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year. Those Regulations state that such leave must be taken with in the leave year in which it is due.

43. In order to exercise their rights under Regulations 13 & 13A, workers must give their employer notice of their intention to take holidays in terms that  
10 comply with Regulation 15.

44. The power to remedy any breach of these Regulations is conferred on the Tribunal by virtue of Regulation 30(1)(a) which states:-

### **30 Remedies**

(1) *A worker may present a complaint to an employment tribunal that his  
15 employer—*

(a) *has refused to permit him to exercise any right he has under—*

(i) *regulation ... 13 or 13A;*

45. There is no direct authority dealing with the question of when an employer has "refused to permit" a worker to exercise any right under Regulation 13.  
20 The cases dealing with the term "refused to permit" have related to breaches of other rights given in the Regulations such as rest breaks and compensatory rest. Those cases have held that, contrary to what might be thought to be the natural approach to the word "refused" requiring a positive decision by an employer, a broader approach should be taken to ensure that the rights  
25 provided for by the Regulations can be effectively enforced. For example, where the working pattern of a particular worker prevented them from taking a rest break then this would amount to a "refusal" by the employer. The decision of the EAT in *Grange v Abellio London Ltd* [2017] IRLR 108 is referred to as authority for this approach.

46. The only discussion in the authorities relating to how Regulation 30 should be interpreted in claims involving Regulation 13 is found in *Scottish Ambulance Service v Truslove* UKEATS/0028/11 where Lady Smith, at paragraph 29, draws a distinction between claims relating to Regulation 13 and those involving rights provided by other Regulations:-

“A distinction has to be drawn, of course, between daily rest periods and annual leave – which does require to be specifically requested (see reg 15) – and is explanatory of the need, in reg 30, to cover those situations where triggering of the right depends on requesting it as well as those which do not. The language requires to be apt for claims both about daily rest and about annual leave. In my view, it is.”

### Decision

47. The Employment Tribunal is a creation of statute and only has the jurisdiction to hear claims where it has been given the power to do so by a statutory provision.

48. For the purposes of any claim that a worker’s rights under WTR have been breached then the relevant statutory provision is Regulation 30 which states that the Tribunal has the power to hear a claim where the employer has “refused to permit” a worker to exercise one of their rights under WTR.

49. The phrase “refused to permit” has been given a broad interpretation in relation to certain of the rights under WTR and it is obvious why this should be so; in relation to many of these rights (for example, rest breaks or daily rest) there may not be a positive refusal by the employer and, rather, a worker may be denied the relevant rest because of the way their working hours are organised.

50. However, the right to annual leave is different. Unlike the other rights under WTR, which apply as a matter of law, a worker must take action in order to exercise this right and give notice to their employer in terms of Regulation 15 that they intend to take a period of annual leave. It follows that, to give rise to a dispute, the employer must make an actual refusal of such a request and,

indeed, Regulation 15 specifically addresses this by setting out a process for the employer to do so.

51. The Tribunal, therefore, agrees with what is said by Lady Smith in *Truslove* that there is a distinction in terms of Regulation 30 between claims relating to Regulations 13 & 13A and claims relating to other Regulations of WTR. Although, the comment by Lady Smith may be said to be *obiter* given that she was not concerned with a claim for a breach of either Regulation 13 or 13A, the Tribunal considers that what she says is a correct statement of the law and, although it may not be strictly binding, the Tribunal finds this to be highly persuasive and chooses to follow this approach.

52. The Tribunal, therefore, considers that for it to have jurisdiction under Regulation 30 to hear a claim relating to an alleged refusal to permit the Claimants to exercise their rights under either Regulation 13, 13A or both then there requires to have been an actual refusal by the Respondent made in response to the Claimants giving notice in terms of Regulation 15.

53. To put it another way, if the Claimants have not exercised their rights in the manner set out in WTR then the Respondent cannot have refused to allow them to do so and so no claim arises under Regulation 30.

54. There was no evidence that the Claimant had ever sought to take the outstanding balance of their 2019 annual leave before lodging the present claims. Indeed, as the Respondent submitted, the Claimants accepted in evidence that they never made any request to the Respondent to take that leave.

55. Although it was not suggested by the Claimants in their evidence or submissions that their request to carry forward their leave beyond 31 January 2020 amounted to notice under Regulation, the Tribunal did consider whether this could be the case. However, the Tribunal concluded that the request at p52 did not amount to notice under Regulation 15 as it was clearly not a request to take a specific period of leave.

56. In these circumstances, the Tribunal considers that it does not have jurisdiction to hear the present claims under Regulation 30 WTR on the basis that the Claimants had not given notice in terms of Regulation 15 to take their outstanding annual leave. It cannot, therefore, be said that the Respondent  
5 refused to permit them to exercise their right to that leave as is required to trigger Regulation 30.

57. Although it is implicit in this conclusion that the Tribunal does not accept the Claimants' submission that by requiring them to take their outstanding leave by 31 January 2020 the Respondent was refusing to permit them to exercise  
10 their right to that leave, the Tribunal will address this submission for the sake of completeness.

58. The Tribunal does not consider that this requirement amounts to a "refusal" for the very same reasons as set out above. The Claimants need to have given notice in terms of Regulation 15 in order to exercise their rights and they  
15 did not do so. This is the case regardless of whether the Respondent indicated that the leave could be taken in some further period or not.

59. Further, the Tribunal has some difficulty in seeing how any communications seeking to encourage and permit the Claimants to take their leave by a certain date could amount to a "refusal".

20 60. The claims are hereby dismissed for the reasons set out above.

Employment Judge: Peter O'Donnell  
Date of Judgment: 25 January 2021  
Entered in register: 25 January 2021  
25 and copied to parties