



EMPLOYMENT TRIBUNALS

Claimant: Ms D Le Marinel

Respondent: The Boatyard Bus Cafe

HELD AT: Manchester

ON:

13 May 2022

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: Ms Maureen Le Marinel, Claimant's sister

Respondents: Mr Lucien Burkhardt, owner

JUDGMENT

The JUDGMENT of the Tribunal is:

1. The claimant is entitled to 53 hours of holiday pay, calculated at her gross rate of pay, ie £9 per hour (£477), carried over from 2020 and still owed at the time she left the respondent's employment in May 2021.
2. The respondent is ordered to pay the claimant:
 - a. £477

REASONS

Preamble

1. In a claim form received on 6 May 2021 following ACAS Early Conciliation that took place on 19 April 2021, the claimant, who was employed has brought complaints of unpaid holiday pay.

Evidence

2. I heard evidence from the claimant on her own behalf. I also heard from Mr Burkhardt, the owner of the respondent company.

3. In the bundle there were *inter alia* copies of correspondence between the parties over the issue of holiday pay, as well as a copy of the claimant's employment contract.

Agreed issues

4. The issues were agreed between the parties, as follows:

Holiday Pay (Working Time Regulations 1998)

4.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

5. The Tribunal was referred to an agreed bundle of documents totalling 92 pages, inclusive of witness statements. Having considered the oral and written evidence and submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of the relevant facts having resolved conflicts in the evidence on the balance of probabilities.

6. The claimant sought 53 hours of holiday pay for 2020 at £9 per hour, for a total claim of £477.

Facts

7. The respondent company is a cafe. The claimant was employed there as a “waiting assistant”. The claimant’s employment commenced on 22 September 2018 and ended on 17 May 2021. The claimant was placed in the “Coronavirus Job Retention Scheme” ie furloughed for several months during the COVID pandemic in 2020-2021. The claimant took none of her holiday entitlement, agreed to be 53 hours based on her part-time working hours, in 2020, due to the temporary closure of the respondent company during the lockdowns. She sought payment in lieu of that time upon dismissal by redundancy on 17 May 2021. There is no complaint about her dismissal before me.

8. The claimant’s employment contract states:

8.3 The Employee must use all of his or her holiday entitlement by the last day of each holiday year and, unless there are exceptional circumstances, the Employee may not carry any unused holiday entitlement forward into the next holiday year. Holiday entitlement not used by the correct date will usually be lost and under no circumstances will payment be made for holiday entitlement that is lost through not being exercised by the correct date.

9. The respondent company was closed during the pandemic between 21 March 2020 and 13 August 2020, and again from 5 November 2020 through the end of the year.

Findings

10. I accept the claimant’s claim, not substantively in dispute, that on or about 18 November 2020 she met with Mr Burkhardt to discuss what to do about her annual leave entitlement for 2020, agreed to be 53 hours.

11. I accept the claimant’s evidence that various options were discussed at this meeting but that there was no resolution. Mr Burkhardt did not deny that he said something to the effect that he would “look into the matter and get back to [the claimant] with my response”. He did not do this. He accepted that he texted the

claimant in January 2021 saying that her annual leave had been lost as it was not taken in 2020, as per her employment contract.

12. The claimant's position was that the COVID pandemic amounted to an "exceptional circumstance" as described in her employment contract, thus allowing her to defer the annual leave to the following year, ie 2021.

13. She also claimed that in any event her annual leave was protected by the the Working Time (Coronavirus) (Amendment) Regulations 2020 (the COVID Regulations), and so she was entitled to the annual leave for a further two years after 2020.

14. Mr Burkhardt argued that the COVID pandemic was not an exceptional circumstance as described in her contract. He also claimed that the business took a loss in 2020 and this was an 'exceptional circumstance' that entitled him not to allow the claimant to carry over her annual leave into 2021. He said in the ET3, and again in evidence, that he believed that the the Working Time (Coronavirus) (Amendment) Regulations 2020 only applied to 'key workers' and therefore the claimant could not rely on it.

15. Mr Burkhardt could have required the claimant to take her leave while on furlough at any time before the end of her employment but did not. I find that he did not do this because it would have required him to pay the claimant's full wage for the 53 hours of £9 per hour, instead of the 80% furlough wage. The difference is £95.40. Instead Mr Burkhardt deferred the annual leave issue until January 2021 and then relying on the claimant's contract to refuse to allow the leave to be carried over. Mr Burkhardt's opinion that the COVID Regulations only apply to 'key workers', ie specified public service or essential service employees such as police or nurses, has no basis.

Law

16. The Working Time Regulations 1998, as amended by the Working Time (Coronavirus) (Amendment) Regulations 2020 that came into force on 27 March 2020, materially state:

Entitlement to annual leave

13.—1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

...

(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(13) For the purpose of this regulation “coronavirus” means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).

...

Entitlement to additional annual leave

13A.—(1) ...a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

...

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker’s leave year begins for the purposes of this regulation on the same date as the worker’s leave year begins for the purposes of regulation 13.

...

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker’s employment is terminated; or

...

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

17. The basic rule is that annual leave must be taken in the year it is accrued. However, there are a number of exceptions to this rule that allow annual leave to be carried over, including when the employer does 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*. It is not necessary to consider that situation in this case, since in any event, the COVID Regulations allow the four weeks of annual leave described in Regulation 13 of the Working Time Regulations to be carried over for up to two years after 2020, if it was not reasonably practicable for a worker to take the annual leave in 2020.

18. The COVID Regulations do not apply to the further 1.6 weeks of annual leave that workers receive under Regulation 13A of the Working Time Regulations. The 1.6 weeks under 13A may be carried forward if there is a “relevant agreement”, such as an employment contract, for leave to be carried over into the following year.

19. Article 7(2) of the Working Time Directive, provides: “The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the

employment relationship is terminated.” This means that employees are not entitled to receive a payment instead of their leave time, except when their employment ends.

Conclusion

20. I find that it was not reasonably practicable, within the meaning of her employment contract, for the claimant to take her annual leave in 2020 because Mr Burkhardt obstructed her attempt to resolve the issue. The claimant could not take her annual leave unilaterally. Mr Burkhardt deferred the issue with the claimant until January 2021, when he relied upon the claimant’s employment contract to refuse to allow her to carry it over.

21. I find that the claimant is entitled to payment for her 53 hours of untaken annual leave upon the termination of her employment with the respondent. She is entitled, under Regulation 13(10) of the Working Time Regulations to carry forward four weeks of her annual leave into 2021 if it was not “reasonably practicable” for her to take it in 2020. The COVID Regulations that amend the Working Time Regulations apply to every worker, not just ‘key workers’. The claimant was unable to take her leave due to Mr Burkhardt’s obstruction, which rendered it not reasonably practicable to take. She is entitled to four weeks’ worth of annual leave upon termination of her employment as of 21 May 2021.

22. I find that the remaining period of her leave over the four weeks’ worth is covered by Regulation 13A(7), and that the “relevant agreement” is her employment contract. Her employment contract says that leave may be carried forward in “exceptional circumstances” which the COVID pandemic clearly is. The fact that the business was closed due to lockdowns for nearly seven months of 2020 is clearly an exceptional circumstance.

23. Mr Burkhardt refused to allow or require the claimant to take her leave in 2020 and deferred the issue into 2021 so that he could rely on a strict reading of her employment contract. I find that Mr Burkhardt’s reading of the employment contract is wrong. He could have required her to take the annual leave at any time in 2020, and indeed any time up to the end of her employment. The claimant is entitled to be paid for 53 hours of annual leave at £9 per hour, for a total of £477.

Employment Judge Ficklin
2 November 2022

REASONS SENT TO THE PARTIES ON

4 November 2022

FOR THE SECRETARY OF THE TRIBUNALS

(1) Damages for breach of contract have been awarded gross. This is because it counts as Post-Employment Notice Pay and the claimant is liable to pay tax and national insurance on it. The respondent may deduct the tax and national insurance at source.