



EMPLOYMENT TRIBUNALS

Claimant: Mr R Anderson

Respondent: Thames Design and Build Limited

Heard at: Croydon (By CVP)

On: 21 December 2021

Before: Employment Judge Self

Appearances

For the Claimant: In Person

For Respondent: In Person

JUDGMENT

The Claimant's claim for breach of his employment contract is well-founded and the Respondent shall pay to the Claimant within 14 days of the date of this Judgment the gross sum of £4,467.29 to which the appropriate tax deduction needs to be made. The estimated net sum is £3,567.

WRITTEN REASONS

(As requested by the Respondent)

1. The Claimant was employed between 14 November 2016 and 30 April 2020 as a Commercial Manager / Estimator. He entered Early Conciliation on 22 May 2020 and that concluded on 15 June 2020. The Claimant lodged his Claim on 1 July 2020 asserting that he was due contractual holiday pay at the termination of his contract of employment. The Claim has been lodged within the statutory time limit.

2. The Judgment this case was originally sent across by me to the Tribunal for promulgation on the same day as the hearing (21 December 2021). It appears that there was some delay before it was sent out as the original Judgment sent to the parties seems to be dated 1 March 2022. It appears that there was a request for Written Reasons soon after that but that was not brought to my attention until October 2022. Having been made aware of the request for written reasons I have undertaken them at the earliest chance I have had.
3. The Response confirmed that the Claimant was entitled to 23 days per year but that by policy and custom only 5 days per year could be carried over and the Claimant had no approval to carry over any more. The issue brought up on the Response was solely whether the Claimant, upon termination, was entitled to be paid all outstanding leave that would have accrued or had the Claimant forfeited his right to some holiday accrued in previous years
4. Neither party lodged a witness statement as such and neither party offered to give evidence at this hearing. There was no bundle but both parties had submitted some limited documents to the hearing. Both parties were given the opportunity to make representations to me. In all the circumstances where the facts were effectively unchallenged this seemed to me to be a proportionate manner in which to undertake the hearing which lasted 50 minutes.
5. The Claimant's holiday year under his contract runs from 1 January to 31 December each year. The parties were both in agreement as to what was in the contract even if they differed about interpretation. The contract read as follows (so far as is relevant):

“Annual Holidays:

The holiday year runs from 1st January to 31st December. Your annual holiday entitlement in any holiday year is 22 days excluding all public holidays.

Holiday Entitlement:

Annual holiday entitlement during the first year of employment accrues at the rate of one twelfth of the full annual holiday entitlement, on the last of each month, in arrears. You will be paid at your normal rate of pay in respect of periods of annual holiday.

In the event of termination of employment, you will be entitled to holiday pay calculated on a pro-rata basis in respect of all annual holiday already accrued but not taken at the date of termination of employment. If, on termination of employment, you have taken more annual holiday entitlement

than you have accrued in that holiday year, an appropriate deduction will be made from your final payment”.

6. The contract sets out when the holiday year starts and finishes and explains how the holiday entitlement will be calculated during the first year of employment if an individual joins part way through the year.
7. Holiday accrues during the course of employment and upon termination the entitlement is to ***“holiday accrued but not taken at the date of termination”***. There is no mention within the contract of that accrual being limited to the holiday accrued but not taken in that holiday year. Indeed, there is no mention at all, either positive or negative, about holiday being lost if not taken during the holiday year or about there being limits or any other restriction on carrying over holiday from one year to the next. It would be remarkably easy for such a term to be included within the contract.
8. I have seen a number of documents that show precisely how holiday was dealt with in practice. They are in the form of documents headed as being “Holiday Record”. These are forms which are relatively common in businesses.
9. The Holiday Record for 2017 identifies the Claimant by his first name and nobody has suggested that it does not refer to the Claimant’s entitlement. The document states that the Claimant’s Annual Allowance is 22 days and that his allowance brought forward from the previous year (2016) was 3 days and so his Total Current Year Allowance was 25 days. The sheet goes on to record the dates which the Claimant took as Annual Leave and the Remaining leave is specified as being 11 days.
10. In the 2018 Holiday Record it is apparent that the Claimant’s Annual Holiday entitlement has risen to 23 per annum and the Allowance brought forward from the previous year is set at 11 which is consistent with the 2017 record. The Claimant is marked as having 34 days available to him and after deducting holiday taken that leaves 4 to carry over to the next year (2019).
11. In 2019 he has 27 days available to him (23 for the year and 4 carried over) and he is shown as taking 2 days. A Holiday Leave Request Form was produced for holiday in late December 2019 / early January 2020 which shows a further 5 days being requested leaving 20 days untaken leave after that point.
12. The Respondent contended in their Response and in correspondence that by policy and custom only 5 days were permitted to be carried over. It is clear that that was not the policy / custom applied to the Claimant. The suggestion was that the forms detailed above were completed by somebody who was not on top of their job.

13. The contractual position makes it clear that “***In the event of termination of employment, you will be entitled to holiday pay calculated on a pro-rata basis in respect of all annual holiday already accrued but not taken at the date of termination of employment***”. It is entirely silent in respect of days being forfeited if they are not taken in the leave year they are granted and, at the formation of the contract, absent any express provision, the expectation would be for payment of all holiday accrued. The Respondent accepted that the Claimant was not told of a any restricting “policy” for carry over which is asserted to have been in place, and I have seen no evidence to support the fact that it was applied to anybody or in place for anybody at all. The manner in which holiday was conducted throughout the employment was in keeping with holidays being permitted to be carried over without restriction.
14. Applying the unambiguous term of the contract I am quite satisfied that the Claimant was not obliged to forfeit any leave that had accrued and was required to be paid for the totality of his unused leave entitlement. No other argument was deployed by the Respondent either in the pleadings or at the hearing to set against that finding.
15. The Claimant was paid 6 days holiday upon termination and sought payment for the outstanding 23 days owing to him. There was no issue as to that number of days after the primary arguments had been disposed of. The Claimant’s daily gross pay was £194.23 per day and so the gross sum subject to appropriate statutory deductions was £4467.29. A rough calculation from a reckoner suggested that the net sum would be circa £3,567 although the pay roll will be the most appropriate determinant on that net sum when it is calculated and paid.

Employment Judge Self

Date: 21 October 2022