



# EMPLOYMENT TRIBUNALS

**Claimant: Mrs M Mizrahi**

**Respondent: Dr A Naseri**

**Heard at: London North (CVP)**

**On: 10 October 2022**

**Before: Employment Judge A.M.S. Green**

## **Representation**

Claimant: In person

Respondent: In person

**JUDGMENT** having been sent to the parties on 27 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## **REASONS**

1. The claimant presented her claim form to the Tribunal on 18 October 2021 following a period of early conciliation which started on 31 August 2021 and ended on 23 September 2021. She is claiming notice pay and holiday pay.
2. The claimant claims the following:
  - a. She claims that she was originally employed by Dr Anthony Lam of the Orthodontic Gallery, Stanmore. Her duties were first to reorganise the administrative processes of the practice following which she was required to manage the financial aspects of the practice plus doing some reception work. She claims that she was required to work two days per week and was entitled to 20 days holiday plus 8 days bank holidays per calendar year.
  - b. On 11 February 2016, Dr Lam sold the practice to the respondent. She says that her employment transferred automatically under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

- c. When the pandemic started in March 2020, the claimant worked from home. She claims that in July 2021, she had to undergo major surgery to have her right shoulder replaced and she notified the respondent of this in June 2021 and explained that she would require to take the whole of July off to recuperate. At that point, she claims that 41 days holiday had accrued and she would take 11 of these to cover her sickness absence thereby reducing her holiday entitlement to 30 days. This meant that she would be paid fully for the month of July 2021. The respondent agreed to this.
  - d. The claimant returned to work on 28 July 2021 but found it very difficult after her surgery and she resigned on 30 July 2021 giving two weeks' notice. Her last day of employment was 13 August 2021.
  - e. The claimant managed staff wages and payments and would contact the payroll manager, Mr Mohamed, who worked at a firm of accountants called Joseph Khan. She would provide the amount of pay due to each member of staff for the month together with any adjustments. They would then send her the payslips which she would distribute to staff members. She would send a message to the respondent on the 26<sup>th</sup> day of the month. On 10 August 2021, she contacted Mr Mohamed to tell him that she would be leaving on 13 August 2021 and requested half a month's wages plus 30 days of accumulated leave. She also requested her P 45. Mr Mohamed complied with her request and issued her with a payslip and she was expecting to be paid accordingly on the day that she left. This did not happen and she was told that she would be paid on 26 August 2021 in line with the normal date when the payroll operated. She has not been paid.
  - f. She understood that the respondent was disputing her holiday entitlement. She said that it was custom and practice for staff to be allowed to accumulate leave not taken in one year and to carry it forward into the next year. At no stage during her employment with the respondent did he question this. She has also not received her wages in lieu of working her notice.
3. The claimant quantifies her claim as follows. The total sum claimed is £2849.38 as per the initial payslip provided to her. Of this amount, £835.99 equates to half her month salary for August. The balance of £2507.99 equates to 30 days accrued but untaken annual leave.
  4. The respondent contests this claim for the following reasons:
    - a. When he took over the business from Dr Lam there was no reference to employees' holiday entitlement. The claimant was not named in the contract of sale. Furthermore, the respondent was never given the claimant's contract of employment nor informed of arrangements regarding her holiday entitlement by Dr Lam or the

claimant. The arrangement regarding holidays was only claimed after the claimant left her employment.

- b. The claimant never worked full-time. She was required to work part-time and if she worked additional hours, this was not agreed nor expected of her. Any entitlement to holiday pay is prorated to reflect her part-time status and does not equate to an entitlement of 28 days holiday per year.
  - c. Mr Mohamed prepared the claimant's final payslip based on information provided to him by the claimant. He did not know that the claimant was only working two days per week. He was always given the gross figures and holiday entitlement by the claimant. He was not given the actual hours that she worked. Once Mr Mohamed was given the correct information, he amended the payslip accordingly and sent it to the respondent and the claimant. Her holiday entitlement was based on other part-time staff working practice. If there was an agreement with her previous employer to work part-time and to take holidays like a full-time employee, the respondent was unaware of that and did not agree to that.
  - d. The respondent contests that the holiday forms that were completed by the claimant did not provide information about annual leave entitlement. He says that he did not think it necessary to have the holiday (i.e. entitlement) figure on the form or to question the number of holidays that the claimant or other members of staff were taking. This was because the claimant was responsible for keeping a record of everybody's holidays including her own and for checking them against their entitlements.
  - e. When the respondent discovered that the claimant had been overpaid, he decided to let it go as a courtesy for her service and contributions to the practice and did not ask to repay the money.
5. The respondent disputes the sum claimed and bases this on a calculation prepared by his accountant, Mr Mohamed. This is as follows:

*2x5.6= 11.2 holidays per year  
11.2/12= 0.93 per month  
0.93x 5= 4.66 holiday days  
To work out Muriel earning per day (1811.33 x 12 /104= £208.99)  
4.66 x 208.99= £973.94 holiday pay  
From 01/08/21 to 13/08/21 based on contract Muriel worked 4 days in August.  
4 x 208.99= £835.96  
Total Pay for August is £1809.90*

*because Muriel works 2 days a week she's entitle for £48.18 per day. SSP in not payable*

*for the first 3 qualifying days in a PIW, there are waiting days.  
So Muriel is entitled for SSP for 6 days out of 9 working days taken  
off sick between 1 July  
2021 and 31 July 2021.*

*(If Muriel were paid SSP this is the amount she should have  
received 48.18x*

*6= £289.08 SSP Pay for July).*

*As per Muriel email she took the sick leave as holiday so 6 x  
208.99= £1253.94*

*We have paid her full for month of July (1811.33 – 1253.94=  
£557.39) overpaid*

*For tax year 19/20 Muriel entitle for 11.2 and took 16 days.*

*Same for tax year 20/21 Muriel was entitle for 11.2 days and took  
16.*

*(32 – 22.4= 9.6 days to be deducted) so Muriel took 9.6 days extra.  
9.6 x 208.99= £2006.30 holiday overpaid*

*So to work out August pay ( 1809.90-557.39- 2006.30= -£753.79)*

6. We worked from a digital bundle. The claimant and the respondent adopted their witness statements and gave oral evidence. As neither were represented, I used my powers under rule 41 to elicit further evidence from them and also to clarify my understanding. The parties made closing submissions. Before the respondent made his submissions, I said that that if either or both of the claims were well-founded, I might be minded to make an award of between 2 or 4 weeks' pay on account of the fact (which was not disputed) that the claimant had never been given a written statement of particulars of employment. I wanted to give the respondent opportunity to make representations as to whether such an award should be made or, if an award was made, why it should be limited to two weeks' pay.
7. The issues that I must decide are:
  - a. Is the claimant entitled to holiday pay? If she is, what is the correct amount?
  - b. Is the claimant entitled to notice pay? If she is, what is the correct amount?
  - c. If either or both of her claims are well-founded, should the claimant receive an award of 2 or 4 weeks' pay because she did not receive a written statement of particulars of employment?
8. The claimant must establish her claim on a balance of probabilities. In reaching my decision, the fact that I am not referred to every document provided in the bundle should not be taken to mean that I have not considered it.

9. Having considered the evidence, I make the following findings of fact.
- a. The claimant originally started working at the orthodontist practice in November 2007. At that time, she was employed by Dr Lam. She was never given a written contract of employment or a written statement of particulars of employment. Instead, there was a verbal arrangement.
  - b. The practice originally belonged to the claimant's husband and he had sold it to Dr Lam. Dr Lam asked the claimant to continue working at practice to help him sort out the administration. Thereafter she continued to work as a receptionist and was responsible for the administration.
  - c. The claimant's working hours were officially two days per week working from 8 AM to 5:30 PM. She said that this equated to 19 hours per week. The respondent disputes this and claims that she was required to work 17 hours per week. However, the claimant worked through her lunch break and by her reckoning, she did work 19 hours per week. I am prepared to accept that.
  - d. The claimant understood from her verbal arrangement that she would be entitled to 20 days holiday plus 8 days bank holiday per year. The holiday year ran from 1 January until 31 December. I have no reason to doubt this given what I have to say about the holiday forms that were used by the practice.
  - e. In 2016, the respondent purchased the practice from Dr Lam. Although the respondent says that the claimant was not named in the contract of sale, that is incorrect for the following reasons:
    - i. I took the respondent to an extract from the sale and purchase agreement which is exhibited in the bundle. This is headed "Schedule 4 Staff and Self Employed Persons". The following paragraphs are relevant:

*2.5 The Buyer shall assume all outstanding obligations of the Seller in respect of the Employee's accrued holiday entitlements and accrued holiday remuneration up to and including Completion and the Seller will pay to the Buyer within three months after completion the full amount necessary to enable the Buyer to meet the cost of providing such holiday entitlements and remuneration as at Completion...*

*2.6 The parties hereby declare that it is their intention that the contracts of employment of the Employees shall be transferred to the Buyer on actual completion hereof and pursuant to the Regulations.*

...

*Part 2*

*Employees*

...

*Muriel Mizraki - Receptionist*

- ii. The respondent confirmed that he had agreed to purchase the business from Dr Lam with effect from 11 February 2016 and this included several employees transferring to him at that date. This included the claimant. He also accepted that they transferred at the same time and he did not give the claimant a written contract of employment because he did not change anything in the practice. He said that he continued as before. Despite what the respondent says, the claimant was quite clearly named as one of the employees transferring as per the sale and purchase agreement although I accept that her surname is incorrectly spelt in the agreement.
  
- f. The arrangements for the claimant's holidays are reflected in a series of holiday forms which were produced in the bundle. There was no dispute between the parties that the forms provided for the periods 2016, 2017, 2018, 2019, 2020 & 2021 were completed by the claimant. Nor is it disputed that the record of leave taken in each particular year is what is stated in each of the forms. Initially, the claimant had signed and approved her holidays in the log for the relevant year. However, in late 2016, that practice changed and thereafter, the respondent would approve each period of leave in the relevant year by signing in the applicable column. The respondent agreed that this was the arrangement that operated and confirmed his signature in each instance where it appears in the holiday forms. Each holiday form purports to state an annual entitlement to leave of 28 days. The respondent disputed this in his oral evidence and went as far as to suggest that this was added by the claimant after the event. Essentially, he was suggesting that the claimant was fabricating this to bolster her claim. That is a serious allegation and I am not prepared to accept it given that there was a consistent practice of counter signing the forms every year for five years. In the absence of any further evidence to suggest dishonesty, I do not accept what is alleged. I found the claimant to be both credible and reliable. I accept that there was a practice in place which existed over many years which proceeded on the understanding that the claimant was entitled to 28 days leave per calendar year. This became a legitimate expectation for her to rely on. I also note that a practice of carrying forward untaken holiday

leave, certainly from 2017 onwards, where there is evidence of holidays being carried forward and added into the next leave year's entitlement. This continued right up until the holiday year 2020 & 2021 were I note that 25 ½ days of holidays were carried forward. This was also an established practice over several years which matured into a legitimate expectation on the part of the claimant which she could rely on. As at the end of the holiday year 2020 & 2021, the claimant had an accrued but untaken holiday entitlement of 29 ½ days.

- g. In the holiday year 2019, the claimant took 14 days holiday in total. In the holiday year 2020 & 2021, the claimant took 16 days holiday
- h. The claimant believed that she was required to give the respondent two weeks' notice of termination of employment. As she did not have a written contract of employment, I asked why she believed she was required to give two weeks' notice. She said it was the fair thing to do. In his oral evidence, the respondent said that he accepted that the claimant was required to give two weeks' notice on the premise that she was a part-time employee. A full-time employee would give four weeks' notice. He relied on what she said to him.

10. I now turn to the applicable law. The relationship between employer and employee is governed at common law by a contract of employment. This is so even if nothing has been put into writing. This means that an employment contract may simply be an oral agreement. The definition of 'contract of employment' in the Employment Rights Act 1996, section 230(2) ("ERA") is 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'. Nevertheless, there is a statutory requirement under ERA, section 1 for employers to give employees written particulars of a number of their main terms of employment. While the statement of written particulars is not a contract of employment, it is persuasive evidence as to the terms that have been agreed by the parties and could be held to represent the employee's contractual terms in the absence of any evidence to the contrary.

11. Contracts of employment may contain express and implied terms.

12. As previously mentioned, the source of express terms can be oral promises as well as written promises. However, it can be difficult to establish both that such a promise was made and what its content was.

13. Another way in which employment tribunals and courts may imply a term into employment contracts is to look at how the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it.

14. There are also statutory terms such as the statutory minimum period of notice to be given by an employee in the absence of an express term to the contrary. This is 1 weeks' notice (ERA, section 86(2)).
15. The Working Time Regulations 1998 ('the Regulations') provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions, all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1) implements Article 7(1) of the EU Working Time Directive (No.2003/88) ('the Directive'), which provides: 'Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.'
16. It is important to note that the amount of leave mentioned above constitutes an irreducible minimum to which workers are entitled under the relevant statutory provisions. A worker may also be entitled to enhanced holiday rights under his or her contract of employment or contract for personal service.
17. Statutory annual leave provides an irreducible minimum entitlement to leave for all workers. However, in many cases, the minimum statutory entitlement to holiday is likely to be supplemented by the terms of the worker's contract. Reg 17 provides that, if a worker is entitled to annual leave both under the Regulations and under a separate provision, including a provision in his or her contract, the worker may not exercise the two rights separately, but may take advantage of whichever right is, in any particular respect, the more favourable. In other words, one is set off against the other, so that the amount of leave a worker gets is whichever of the two kinds of leave is longer.
18. Regulation 13(9)(a) provides that the statutory basic annual leave entitlement of four weeks may only be taken in the leave year to which it relates. Employers and workers can, however, agree to carry over any additional statutory leave into the next leave year (but not beyond) by means of a relevant agreement (in the absence of such agreement, it is likely that any additional leave must be taken in the leave year to which it relates). Contractual leave in excess of the statutory entitlement may also be carried forward with agreement, perhaps to be taken by a particular date in the next holiday year.
19. The general rule is that statutory annual leave cannot be replaced by a payment in lieu — Regs 13(9)(b) and 13A(6) of the Regulations. The main exception to this rule, arises where the worker is owed outstanding holiday on the termination of his or her contract. In these circumstances, a payment in lieu is permitted by Article 7(2) of the Directive, which provides: 'The minimum period of paid annual leave may not be replaced by an



allowance in lieu, except where the employment relationship is terminated'. The rationale for permitting such an exception under the Directive is that it ensures that a worker is financially capable of taking a period of paid rest before embarking on new employment. There used to be another exception relating to additional leave, which is now of historical interest only. It allowed employers to make payment in lieu of the first increment of additional leave entitlement (the 0.8 weeks introduced on 1 October 2007) until 1 April 2009. Since that date, the position has been that additional leave under Reg 13A (like basic leave under Reg 13) may not be replaced by a payment in lieu except where the worker's employment is terminated.

20. Under Reg 14(1) and (2) a worker is entitled to a payment in lieu where:

- a. his or her employment is terminated during the course of the leave year, and
- b. on the termination date, the proportion of statutory annual leave he or she has taken under Regs 13 and 13A is less than the proportion of the leave year that has expired.

21. Where a worker is entitled to a payment in lieu of holiday entitlement, Reg 14(3) provides that the sum due shall be determined either by the terms of a relevant agreement or by reference to a statutory formula set out in Reg 14(3)(b).

22. In response to the outbreak of Novel Coronavirus (COVID-19) in the UK, the Government introduced a temporary relaxation of the general rule set out in Reg 13(9) that basic annual leave cannot be carried over and taken in a subsequent leave year. The Working Time (Coronavirus) (Amendment) Regulations 2020 (the '2020 Regulations'), which came into effect on 26 March 2020, make Reg 13(9)(a) subject to the exception set out in two newly inserted paragraphs, Reg 13(10) and (11). Under new Reg 13(10), where it was 'not reasonably practicable' for the worker to take some or all of his or her Reg 13 leave in the relevant leave year as a result of the effects of COVID-19, he or she is entitled to carry forward such untaken leave. The 'effects of COVID-19' include the effects on the worker, the employer or the wider economy or society. Reg 13(11) provides that the carried-forward leave may be taken in the two leave years immediately following the leave year in respect of which it was due. Additionally, Reg 14, which provides for the calculation of a payment in lieu of leave where the worker's employment has terminated, has been amended to ensure that the worker can receive a payment in lieu of this carried over leave if the employment terminates before the leave has been taken. The new rules apply to the four weeks' annual leave provided for by Reg 13 but not the additional 1.6 weeks' annual leave provided for by Reg 13A, which is already subject to different rules on carry-over.

23. Where the parties have entered into a contractual agreement regarding payment in lieu of unused leave on termination, there is nothing in the Directive or the Regulations to limit the amount of pay recoverable.
24. Where the proportion of annual leave a worker has taken by the date of termination exceeds the proportion of the leave year that has expired, he or she is not obliged by the Regulations to repay the employer. However, the parties may enter into a relevant agreement to provide that the worker will compensate the employer, 'whether by a payment, by undertaking additional work or otherwise' — Reg 14(4).
25. The general prohibition on deductions from wages is set out in ERA, section 13(1) which states that: 'An employer shall not make a deduction from wages of a worker employed by him.' However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction.
26. The first limb of ERA, section 13(1)(a) permits deductions if they are 'required or authorised to be made by virtue of a statutory provision'. This covers, for example, deductions in respect of PAYE for income tax and national insurance contributions.
27. The remedy for a breach of the statutory rules regarding written statements is by means of a reference to an employment tribunal under ERA, section 11. However, this provision does not give tribunals power to make a monetary award for breach of the requirements to provide a written statement. Tribunals do, however, have the power to award compensation under the Employment Act 2002, section 38 ("EA") where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 of EA, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under ERA, section 1. In other words, compensation for breaching the provisions relating to an employer's obligation to provide a written statement can only be awarded in circumstances where the tribunal has heard (and found to be substantiated) one or more of the claims listed in Schedule 5 to the EA 2002. This includes claims for holiday pay and notice pay.
28. Where under such a claim the tribunal finds for the employee, whether or not it makes an award in respect of that claim, and where when the proceedings were brought the employer was in breach of the duty to give written particulars, the tribunal will make an award of 2 weeks' pay unless it would be unjust and inequitable to do so, and may if it considers it just and equitable in all the circumstances make an award of 4 weeks' pay EA, sections 38(1) to (5). For such an award to be made, the employer must be in breach of the obligation at the time the proceedings have begun.
29. On assessing the claimant's annual holiday entitlement of 28 days, I must first decide what proportion of that is statutory and what proportion of that is contractual. I conclude as follows:

- a. The claimant worked two days per week. She had a statutory entitlement of 11.2 days holiday per year.
  - b. The claimant had a contractual entitlement to an additional 16.8 days holiday per year.
30. The claimant had a contractual entitlement to carry forward her contractually accrued but untaken holiday entitlement from one year to the next. She could not, as a matter of law, carry forward her untaken statutory entitlement unless covered by the amendment in relation to the Covid pandemic. I am not satisfied that the amendment applies here. In any event she had used her statutory holiday entitlement.
31. Whilst I accept that the claimant had a contractual right to carry forward accrued but untaken contractual holiday entitlement from one year to the next, I am not satisfied that she has established that she had a contractual right to payment for that accrued but untaken holiday on termination of employment. There is simply no evidence of an agreement, written, verbal or otherwise to support such a conclusion.
32. Consequently, any discussion about payment of accrued holiday pay on termination of employment has to be limited to her statutory entitlement. In the holiday year 2019, the claimant took 14 days holiday in total. This exceeded her statutory annual entitlement of 11.2 days. In the holiday year 2020 & 2021, the claimant took 16 days holiday. This exceeds her statutory entitlement. The balance is taken from her contractual entitlement. Consequently, the claimant is not entitled to payment of any accrued but untaken statutory holiday on termination of her employment.
33. I now turn to her notice entitlement. The statutory minimum period of notice that the claimant was required to give was one week. However, there was no written agreement relating to the correct notice that the claimant was required to give. I am prepared to accept that the respondent agreed that she should give two weeks' notice. That is what happened and the claimant has not been paid for that notice.
34. There is no suggestion that the respondent has a statutory entitlement to withhold notice pay. Nor is there any evidence that there was a contractual entitlement to do so or that the claimant agreed to this in writing. Consequently, I find that the claim for payment of notice pay is well-founded. Compensation is payable based on the claimant's net monthly pay. The respondent will pay the claimant £811.50 being 50% of the claimant's net monthly pay.
35. As the claimant has succeeded in her claim for notice pay, it is open for me to exercise discretion and to make an award to her for the respondent's failure to provide her with a written statement of particulars of employment. I am minded to do so and make an award of two weeks

gross pay. The claimant's gross weekly pay was £452.75. Consequently, the award that I make is £905.50.

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Employment Judge Green

Date 5 December 2022

JUDGMENT SENT TO THE PARTIES ON

8 December 2022

FOR THE TRIBUNAL OFFICE