



EMPLOYMENT TRIBUNALS

Claimant: Mr K Balakumar

Respondent: Menzies Aviation (UK) Limited

Heard at: Watford (by CVP video hearing) **On:** 25 November 2022

Before: Employment Judge Skehan, sitting alone

Appearances

For the Claimant: In person

For the Respondent: Mr Proffitt, counsel

JUDGMENT

The claimant's claim under the Working Time Regulations 1998 is partially successful. The respondent must pay to the claimant the sum of £113.57 within 14 days from the date of this Judgment.

REASONS

1. The Judgment and oral reasons were provided at the conclusion of the short hearing. These written reasons were requested by Mr Proffitt.
2. At the commencement of the hearing, it was noted that there had been limited engagement by the claimant in the preparation for the hearing. The employment tribunal had issued directions to the parties on 17 June 2022, however there was non-compliance on the part of the claimant. The respondent had prepared a bundle and provided witness statements. The claimant had disclosed limited further documentation at a late stage and had not prepared a witness statement. The respondent took a proportionate approach noted that the matters in dispute were limited and could be dealt with by way of cross examination and the value of the claim was also limited. I considered that in light of the limited issues, a fair trial could still be held in the circumstances and the hearing proceeded.
3. I was provided with a bundle of 57 pages. In addition, I was provided with email correspondence between the claimant and Mr Barfoot of 10 December 2021. I was provided with a letter from the claimant's colleague Mr Magar. I explained to the claimant that I would treat this as a proposed witness

statement and that I had read it. I explained that as Mr Magar was not available for cross examination, this detrimentally affected any weight which I could place upon the letter.

4. At the commencement of the hearing Mr Proffitt helpfully sought to clarify the basis of the claimant's claim. It was noted that the claim cannot be a breach of contract claim as the claimant remains employed. Further it could not be an unauthorised deduction from wages claim as the claimant did not allege that he had taken holiday but was not paid. Mr Proffitt submitted that the claimant's claim was a claim under the Working Time Regulations 1998. Mr Proffitt thereafter set out the issues as identified by the respondent:
 - a. What was the claimant's outstanding entitlement to holiday leave? The claimant says that he had accrued 25 hours of unpaid holiday leave at the end of the 2021 holiday year. The respondent said that the claimant had accrued 9 hours of unpaid holiday leave.
 - b. Does the claimant's request of 10 December 2021 amount to a valid request under Regulation 15 of the Working Time Regulations 1998.
5. All witnesses gave evidence by way of affirmation. The respondent's witnesses gave evidence by reference to their witness statements. The claimant by reference to his ET1. All witnesses were cross-examined. As is not unusual, the parties have referred in evidence to a wider range of issues than I deal with in my findings. I only set out our principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

The evidence

6. The respondent company provides airport services including ground handling, fuelling, cargo, transportation and executive services at airports. The claimant was and continues to be employed as a baggage handler.
7. The claimant said that when he checked the respondent holiday at the start of December 2021, it showed him to have 25 hours of accrued untaken holiday entitlement. The claimant was directed to the respondent's documents within the bundle and conceded that at the start of December the respondent records show the claimant to have 25 hours of outstanding holiday. Thereafter the claimant took 1 December and 16 December off as holiday. This reduced the claimant holiday entitlement to 9 hours. The claimant said that the error was on the respondent's part and the respondent should have clarified this point earlier but he did not dispute that he had taken the additional two days holiday. I consider it more likely than not that the claimant had 9 hours of holiday entitlement accrued as of the end of 2021.
8. Mr Elliott is the head of planning and resource management for the respondent. He is responsible for the preparation of planning rosters in relation to staff time and attendance. The respondent operates an automated system. The parameters of the system are controlled by the planning team. If staff ask for a day or set of days which are available, they will receive an automated message confirming that holiday booking. If more than the set number of staff members already have annual leave booked on a particular date, then the system will not accept a new request. The employee in those circumstances receives the holding message and the request is sent from the system to the planning team. The user thereafter receives notification that their leave request has been rejected.

9. Mr Elliott said that if staff have difficulties in booking time off that they need, it's their responsibility to speak to the duty managers who can work with the planning team to propose alternative days. Usually the team can find them other dates which are available within the system.
10. Mr Elliott set out the difficulties that the respondent encountered with planning due to Covid19. In particular staff were furloughed in early 2021. Many staff did not wish to take holiday while on furlough leave. It was identified that this would cause operational problems for the respondent later in the year when it was hoped that the number of flights would have increased. The respondent took steps to address this anticipated problem and sent a notice to all staff on 28 January 2021 requiring staff to use up at least 50% of holiday during the first part of the year. Where holiday was not booked, it was allocated by the respondent. Mr Elliott referred to emails showing that the claimant had been allocated three days off by the planning team within the first half of the year. For the second half of 2021 the onus was upon staff to book their holiday. The respondent sent further updates relating to holidays to its workforce on 17 May 2021, 2 July 2021 and 4 November 2021. All of these notices state that it was staff responsibility to book leave for the remainder of the year and that unused leave and would be lost.
11. The notice of 4 November 2021 states, '... We would like to remind all staff that it is your responsibility to all of your remaining leave by the end of the year. We will not be able to carry over or payout any leave at the end of this year-and unused leave will be lost. (We will consider any exceptional extenuating circumstances i.e. where it has not been reasonably practicable for you to take your annual leave.) Please note that we will require evidence that holiday requests have been submitted for approval throughout the year. As we move towards the end of the leave year, available slots have become limited..... If you have leave remaining and cannot book via Kronos, please contact the planning team. Please note options will be limited at this point in the year and any leave that can be allocated may not be on your preferred days....'
12. Mr Elliott said that where an issue was raised with a line manager the respondent could usually identify alternative days to allow the time off to be taken. The normal process was where line managers had refused the holiday request they would automatically forward the request to the planning team for further consideration.
13. I also heard evidence from Mr Barfoot who is the baggage operations manager. Mr Barfoot, when writing his statement had overlooked the email correspondence the claimant had sent him on 10 December 2021. Mr Barfoot reiterated the problems that Covid19 and furlough leave created for the respondent in respect of holiday planning. Mr Barfoot notes that the respondent's documents show the claimant making repeated unsuccessful requests for holiday on 10 November 2021. Mr Barfoot's statement says that the claimant raised an issue with the line manager he was confident that alternative days could have been suggested which were not fully booked he notes that these may not have been the days that the claimant ideally wanted but it would have allowed him to use his full entitlement.
14. The claimant said that he had raised his inability to book holidays repeatedly orally with his line managers. No action was taken and he then wrote to Mr Barfoot directly. On the balance of probability I conclude that the claimant has repeatedly sought to book holiday as he has claimed.

15. The email correspondence of 10 November states the following
- a. Email to Mr Barfoot 10 December 2021 @ 19:51: ... could you kindly book my remaining 25.00 hours holiday please. (any day).....[The email goes on to give the claimant's identification details]
 - b. Mr Barfoot respond @ 19:58: '.... Unfortunately there are no holiday days left for the month of December, so I cannot book your unused leave....
 - c. The claimant responds @ 20:17: I tried to book all my holidays in summer but some of my holiday [were turned] down 3, 4 times..
 - d. Mr Barfoot responds on 10 December @ 20:43: '.. And there is no leave available for the rest of this year, we are not processing any leave in the Spur anymore. Any leave which has not been used will not be paid or carried over to next year.'
16. For the sake of completeness I note the claimant's contract of employment dated 28 October 2015 provides a holiday entitlement of 224 hours pro rata annual leave per annum inclusive of bank holidays. The claimant worked in eight hour shifts and this entitlement reflects the 28 day entitlement contained within the Working Time Regulations 1998.
17. The claimant's hourly rate is £12.62.

The law

18. the relevant part of the Working Time Regulations are Regulation 15 that provides:

Dates on which leave is taken

15.—(1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2)

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

Deliberation and decision

19. I refer to my findings of fact note that the claimant's outstanding holiday entitlement at the end of 2021 was 9 hours. I do not criticise the claimant for this error as the respondent's documentation is difficult to interpret without assistance.
20. In relation to the legal question, Mr Proffitt's submission was that the sole legal question related to whether or not the claimant's email of 10 December 2021 constituted notice in accordance with Regulation 15 of the Working Time Regulations. The respondent submitted that it did not, and if that was the case the claim must fail. Mr Proffitt submitted that if the tribunal determined that the email of 10 December 2021 constituted valid notice under the Working Time Regulations 1998, the correct approach would be for the tribunal to make an award in the sum of the outstanding holiday, taking into account its submissions in respect of the correct holiday entitlement and application of the ACAS code.
21. Mr Proffitt submitted that the claimant's email of 10 December 2021 did not meet the requirements of regulation 15(3)(b) because the claimant did not specify 'the days on which leave is ..to be taken...'. As the claimant within his email referred to 'any day', this did not meet the regulation's requirements.
22. When looking at the evidence I note that the respondent's stated position as of 4 November 2021 was that staff were expressly informed that holiday options will be limited and any leave that can be allocated may not be on preferred days. The claimant requests in writing on 10 December to book his remaining holiday. His email states, 'could you kindly but my remaining 25 hours holiday please (any days)'
23. I consider that the claimant has specified the day on which he wishes to take leave by stating 'any days'. To frame the request in this way was sensible on the claimant's part as the respondent has previously informed the claimant that there was limited availability of holiday and any leave requested may not be on a preferred day, therefore the claimant's request was 'any day' appears to be actively encouraged by the respondent. There can be no sensible argument that the claimant's intention was not clear to the respondent at the time. The reference to 'any day' is a reference to each and every possible date from 11 December 2021 to 31 December 2021, using up the entirety of the claimant's remaining annual leave. This provides the respondent with as much flexibility as possible to accommodate the request. This is how the request was intended by the claimant and this is how the request was understood by the respondent.
24. For this reason, I conclude that the claimant's email of 10 December 2021 specifies the 'days to be taken' and constitutes a valid notice under regulation 15 (3) of the Working Time regulations 1998. In light of my findings the respondent accepts that the claimant is entitled to payment in respect of nine hours of holiday accrued to the end of 2021. The value of the claimant's outstanding holiday, prior to consideration of any deduction, is $9 \times \text{£}12.62 = \text{£}113.58$.

25. The final issue to consider is any potential increase or decrease to the claimant's award by reference to the ACAS code of practice. The respondent submits that the claimant has acted unreasonably in failing to follow the respondent's internal grievance procedure and his award should be decreased accordingly by up to 25%. I was referred to the reference within Mr Barfoot's email of 10 December 2021 pointing the claimant to Mr Elliott. Mr Elliott told the tribunal that Mr Barfoot's email was a reflection of the respondent's position and emailing him would not result in any changed position. There is no documentation within the bundle suggesting that the respondent has at any time directed the claimant to its grievance process. I note the nature of the dispute between the parties as presented during the hearing in particular the respondent's reliance upon its interpretation of the Working Time Regulations. It is most unlikely that implementation of the respondent's grievance procedure would have altered the position in any way. Taking the entirety of the evidence into account I do not consider the claimant's failure to follow the ACAS code unreasonable and decline to make any adjustments to the claimant's award by reference to failure to follow the ACAS code relating to grievances.
26. I find that the claimant's claim is successful in part. The respondent must pay the sum of hundred £113.57 to the claimant within 14 days.

Employment Judge Skehan

Date: 30 November 2022

Sent to the parties on: - 30/12/2022

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For the Tribunal Office