



EMPLOYMENT TRIBUNALS

Claimant: Andrzej Denis

Respondent: County Foods Ltd

Heard at: Bristol ET via VHS **On:** 3 March 2023

Before: Employment Judge G. King

Representation

Claimant: In person

Respondent: Mr C. Smith – Finance and Operations Manager

JUDGMENT having been sent to the parties on 17 March 2023 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

The Claim

1. By a claim form dated 17 September 2022, the Claimant brought a claim in respect of holiday pay.
2. The Tribunal was assisted by a bundle of 90 pages, which included statements from the Claimant and the Respondent. Where pages of the bundle are referred to in these reasons, they are cited in [square brackets].

Facts

3. The Claimant's claim is that in the holiday year from 1 February 2021 to 31 January 2022, he used only his holiday entitlement of 30 days (24 standard holiday days, plus six days for long service period), plus eight bank holidays. The Respondent agreed that the Claimant's holiday entitlement is 38 days, or 304 hours.
4. The Claimant is a night shift worker. He works a 48-hour week, working six nights a week. His shift is from 21:30 through to 06:30 the following morning. His working week is Monday to Saturday. What this in effect means is that

the Claimant does not work the night between Saturday and Sunday, but works every other night in the week.

5. The Claimant says his first holiday was from 16 August 2021 to 4 September 2021. He calculated this as 16 working days. His second holiday he describes as being from the night of 14 to 15 January 2022 to the night of 30 to 31 January 2022, which he calculates as 14 working days. This, by the Claimant's calculation, therefore gives a total of 30 working days.
6. The Respondent's holiday year runs from 1 February to 31 January in the following year.
7. The Respondent says, and is not challenged by the Claimant, that at the beginning of November 2021, the Claimant booked four weeks and one day of leave to be taken during January and February 2022, in order so the Claimant could go to Poland. The Claimant's holiday request therefore spanned two different holiday years. The actual dates were from the night of 14 to 15 January through to the night of 11 to 12 February. This is confirmed on the Holiday Request Form [50].
8. The Claimant's second claim is that there was an extra day recorded as "bank holiday" in his holiday record. It transpires that what this actually refers to is the 2 January 2022 which was a day when the Respondent was closed for business. The Respondent says that staff were notified about this in a team talk, and by email on 3 February 2021 (i.e. approximately 11 months before), and told that they would need to take one day's holiday to cover this business closure day.
9. The Claimant says that the bank holiday dates he was notified of do not align with the dates on the government website (i.e. the actual dates of the bank holidays), and secondly that nine bank holidays were included on his holiday record, not eight. His case, essentially, is that if the business chose to close for a day, that day should be paid for by the business and staff should not be required to take their own holiday to cover this business closure day.
10. In short, the Claimant's claims can be summarised as:
 - a. The holiday from 14 to 15 January 2022 to the night of 30 to 31 January 2022 is 14 days, not 15 days, so the Respondent incorrectly docked one extra day of holiday from the Claimant's holiday entitlement in the 2021-22 holiday year;
 - b. The Respondent should not be allowed to compel him to take one day of his holiday for a business closure day, and therefore any business closure day in the 2021-22 holiday year should be paid to staff as extra holiday.

The Law

Holiday Pay:

11. Regulations 13 and 13A of the Working Time Regulations 1998 (“WTR”) provide that a worker is entitled to annual leave in each leave year, (4 weeks and 1.6 weeks respectively).
12. Regulation 13(2) WTR, provides that a worker’s leave year begins on
 - a. On such date during the calendar year as may be provided for in a relevant agreement: or
 - b. Where there are no provisions of a relevant agreement which apply, the date will be (for all employment beginning after 1 October 1998), on the date which that employment begins and each subsequent anniversary of that date.
13. The word ‘calendar year’ is interpreted by regulation 2 WTR as meaning ‘...the period of twelve months beginning with 1st January in any year’.
14. Leave may not normally be carried over into a subsequent leave year, unless there is agreement between the parties or where it was not reasonably practicable to take the leave as a result of the effects of the coronavirus in accordance with regulation 13(10) WTR as amended.
15. Regulation 30 WTR, provides workers with the right to bring a complaint to the Tribunal regarding (amongst other things), breaches of rights under regulation 13 and 13A.

Deliberation

16. The Tribunal dealt first with the Claimant’s claim that the period of holiday from 14 to 15 January 2022 to the night of 30 to 31 January 2022 is 14 days, not 15 days.
17. The Tribunal heard evidence from Sandie Cutler, and read the signed statement of Sue Sillett although Ms Sillett was not able to be present at the Tribunal as she was unwell (which was confirmed with supporting medical evidence). Ms Sillett was therefore not able to be cross-examined, and the Tribunal had to bear this in mind when deciding what weight to place on her evidence. Nonetheless, the evidence of Ms Cutler and Ms Sillett is that it is the Respondent’s policy to count nightshift holiday from the day on which the nightshift starts.
18. The Claimant contended, that because the majority of his shift on the night between 31 January and 1 February (six hours out of nine, which includes a one-hour break), that his leave for that night should count as taking place in February, and therefore would be in the Respondent’s 2022-23 holiday year.
19. The Tribunal accepts the evidence of Ms Cutler and Ms Sillett, which was consistent and corroborative, that it is the Respondent’s policy to count nightshift holiday from the day on which the nightshift starts. The Tribunal accepts that this is a system that has been in place for many years, and it

does not matter on which day the majority of the nightshift is actually completed.

20. This is also supported by and is consistent with the Holiday Request Form at [61]. The form states “start” and underneath there is a box for the date, day and time of the holiday request. The Claimant filled these in with “14/01/22”, “FRI”, and “21:30”. The Tribunal finds that this is consistent with the date of any nightshift holiday being the day that the nightshift starts, regardless of how many hours are split between the two days.
21. The Claimant sought to advance an argument that the document at [52-53], which is a letter to the Claimant confirming a change in his roster, also confirmed that holiday for his nightshift would be on the day on which the majority of the hours fell. The Claimant states, in his statement [29]:

“This document clearly shows that starting work on Sunday at 21.30 to 6.30 Monday is Monday and the same applies to other days of the week,”

22. The Tribunal finds there is no substance in that argument, and the letter at [52-53] does not make any reference to how holiday should be calculated or recorded. If anything, it demonstrates the opposite of the Claimant’s argument. The letter states:

Sunday: 9.30 p.m. – 6.30 a.m. Monday

This, in view of the Tribunal, confirms that the nightshift that starts on Sunday at 21:30 is counted as Sunday, not Monday.

23. The Tribunal therefore concludes that the Claimant’s holiday began on 14 January 2022. The nightshift between 14 and 15 January was his first ‘day’ of holiday. This was between a Friday and a Saturday. The Claimant did not normally work the night between Saturday and Sunday, so therefore did not require holiday to be absent from work for this night. The Claimant was then absent from work, on annual leave, on the nights between 16 and 22 January. This was a further six ‘days’ annual leave. He did not require annual leave to be absent between 22 and 23 January, as this was Saturday to Sunday. The Claimant was again absent from work, on annual leave, between Sunday 23 January and Saturday morning 29 January, which is a further six ‘days’ of annual leave. The Claimant did not require annual leave to be absent between Saturday 29 January and Sunday 30 January.
24. He was then absent from work, on annual leave, between Sunday 30 January to Monday 31 January, and again between Monday 31 January and Tuesday 1 February. As per the findings above, the Respondent’s policy is to count holiday from the date the nightshift starts. The two ‘days’ of holiday between Sunday 30 January and Tuesday 1 February counted as starting on Sunday 30 January and Monday 31 January respectively. These two ‘days’ therefore fell within the 20 21-22 holiday year.
25. The Tribunal finds that the Claimant’s holiday in respect of his absence during January 2022 was correctly calculated by the Respondent and there was no incorrect deduction from the Claimant’s holiday entitlement.

26. Turning to the business closure on 2 January 2022, the Claimant's case is that any decision to close the business should be at the expense of the business, and staff should not be required to take their holiday in relation to this. The Claimant's case appeared to be based on the fact that this business closure date was notified to him as a bank holiday, when in fact it was not. The Claimant further points out that the dates of the bank holidays throughout the 2021-22 holiday year do not tally with the actual dates of the bank holidays.
27. On the point that the dates of the bank holidays do not tally with the actual bank holiday dates, the Tribunal is of the view that this does not assist the Claimant's argument. The Claimant is a nightshift worker, and the Tribunal accepts the Respondent evidence that the dates of bank holidays were aligned to coincide with night shifts that were being worked. This was to ensure that nightshift workers did receive their correct bank holiday entitlement, and seems to be an entirely logical and coherent method of doing this.
28. Unhelpfully, the Claimant's contract of employment was not included in the bundle. The Tribunal therefore had no evidence as to whether the Respondent was or was not prevented from requiring the Claimant to take holiday on certain dates by any particular term of the contract. The evidence of Ms Cutler was that the Respondent was entitled to do so, and the Tribunal notes that this is entirely normal arrangement. Employers are, as a matter of law, usually entitled to vary contracts so that an employee must take some holiday on certain days, e.g. for business closure between Christmas and New Year, provided that sufficient notice is given.
29. The Respondent says that the Claimant was notified about the need to take holiday for 2 January 2022 at a "team talk" and by email on 3 February 2021. There are no details provided by the Respondent as to when or how this team talk took place. The Claimant's statement makes no mention of whether or not he agrees that this team talk took place, or what was said in it.
30. The email of 3 February 2021 is in the bundle at [54]. It gives a breakdown of "planned" holiday in the form of a table. There are nine dates within the table; eight of which correspond to statutory bank holidays and the ninth is shown as to January 2022. This is described as "Bank Holiday". The Tribunal finds some sympathy with the Claimant's argument that this was described as a bank holiday when it was nothing of the sort. The Tribunal also feels that the Respondent could have been a lot clearer in making it apparent to staff that January 2022 was a business closure day, for which staff would be required to use one day of annual leave.
31. The Tribunal is satisfied, nonetheless, that the Respondent did notify staff, including the Claimant, that there would be a planned day of holiday on 2 January 2022, and that this notification was given within plenty of time. The Tribunal accepts that this was something that the Respondent was entitled to do and gave more than adequate notice to the Claimant. The Tribunal therefore rejects the Claimant's claim that he is owed a day's holiday pay for this day.

32. In conclusion, the Claimant's holiday entitlement for the 2021-22 holiday year was correctly calculated by the Respondent. The Claimant's claim for unpaid holiday therefore fails.

Employment Judge G. King

Date: 4 May 2023

Judgment sent to the Parties on 18 May 2023

For the Tribunal Office

Note

Reasons for the Judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.