EMPLOYMENT TRIBUNALS

Claimant: Ms Isil Alem

Respondent: British Airways plc

Heard at: Reading **On:** 24 April 2023

Before: Employment Judge Shastri-Hurst

Representation

Claimant: in person
Respondent: Ms K Hosking (counsel)

JUDGMENT having been handed down to the parties on **24 April 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

Introduction

1. The claimant commenced employment with the respondent on 23 October 2000 as a Cargo Agent. She remains employed.

2. The claimant, on her claim form, ticked the boxes for holiday pay and arrears of pay, stating she was making another type of claim, namely "holiday entitlement per year (annual leave and bank holidays in total)".

3. The claimant worked full time until she went on maternity leave in 2004. Upon returning to work on 2 February 2005, she reduced her hours to 20 hours a week, split into 2 shifts of 10 hours. Those hours were 1930hrs to 0600hrs every Saturday and Sunday, including an unpaid 30 minute break.

4. The claimant says that she received the following holiday entitlement:

    4.1. Fourteen days from 2005 to 2013;
    4.2. Fifteen days from 2014 to April 2021;
    4.3. Nineteen days from April 2021.

5. It is the claimant's case that, since 2005, the correct holiday entitlement was in fact 19 days, and that she has therefore lost around 75 days of holiday, for which she seeks to claim compensation.

6. The respondent defends the claim, arguing that the claimant has always been given the correct amount of holiday leave, and has always been paid for the holiday she took.

7. The ACAS early conciliation period commenced on 10 September 2021, and ended on 22 October 2021. The claimant presented her claim form to the Tribunal on 18 November 2021.

8. The matter was the subject of a preliminary hearing on 23 September 2022, heard by Employment Judge Din. At that hearing, two matters were raised as preliminary issues to be dealt with at the commencement of the final hearing:

   8.1. What claims can the claimant validly make before the Tribunal; and,
   8.2. In light of any valid claims, what remedies can the claimant validly seek before the Tribunal?

9. It was explained to the claimant at that hearing that a breach of contract claim (which is what the claim appeared to be) could only be brought by claimants whose employment had ended – [312]. The claimant was therefore asked to identify alternative grounds for her claim, and demonstrate that any claims were brought within the relevant time limit – [312]. The claimant sought to respond to this request by the document at [48] of the bundle, in which she claimed compensation of £13,754 for 74 days of holiday she says she was not given.

10. Today, the claimant represented herself before the Tribunal. The respondent was represented by Ms Hosking. The Tribunal was greatly assisted by the Turkish interpreter, Ms Emel Pryor, who was booked in order to translate for the claimant. Ms Pryor took the oath at the commencement of the hearing. Mr Mark Reeves, Resource and Manpower Planning Manager, also attended to give evidence on behalf of the respondent.

11. I had a bundle of 315 pages before me, as well as a witness statement from the claimant and Mr Reeves. Ms Hosking had also provided a Note on the law which was of assistance to me.

12. I explained to the parties that I would deal with the preliminary issues set out by EJ Din initially, to see where that would then take us.

Preliminary issue

13. At the commencement of the hearing, I raised a matter for disclosure with both parties. I explained that I needed to make a proper disclosure so that the parties could have the opportunity to object to me being the judge who dealt with this case if they so chose.

14. I explained that, until recently, I had been a barrister. In that capacity,y I explained that I had worked with the respondent's solicitor, Mr Guy Hollebon, over a number of years. I initially met him when undertaking work experience in around 2006/2007 and since qualifying in 2008 I worked with him sporadically. I last worked with him in 2019. I explained that we have only ever

had a professional relationship, and not a social one. I also explained that I had, on one occasion, represented the respondent in this matter. That was in a case in 2018.

15. I set out the various options for the way forward:

    15.1. If the claimant was content to continue, then I would proceed to hear the case;
    15.2. If the claimant had any concerns, she could apply for me to recuse myself from this hearing.

16. If the claimant chose to ask me to recuse myself, I would consider the application, and anything the respondent wanted to say on the matter.

17. If I determined, upon the claimant making an application, that I should recuse myself, then the hearing today would be postponed, and the parties would need to come back on another day. If the matter were to be postponed, then various dates were available from the end of May 2023 and into June 2023.

18. I explained to the parties that my view was that there was no reason for me to step aside. However, I set out that it was only right and proper that the claimant have the opportunity to think about this point and how she wanted to proceed. I offered her time to consider her options.

19. The claimant confirmed (without taking any time away from the hearing to consider) that she was content for me to deal with the case.

Issues

20. The issues to be dealt with as preliminary points were as follows:

    20.1. What claims can the claimant validly make before the Tribunal; and,
    20.2. In light of any valid claims, what remedies can the claimant validly seek before the Tribunal?

Law

21. The possible routes for complaining about holiday issues in the Tribunal are as follows:

    21.1. Unauthorised deduction of wages under the Employment Rights Act 1996 ("ERA") ss13/23. Under this section, a claimant argues that they have not been paid the right amount of holiday pay. This is not the case here: I clarified with the claimant that she was paid the correct amount for holiday she took throughout her employment. Her complaint is that she should have been entitled to take more days as holiday as opposed to having to work. This means that an action under ss13/23 is not available to the claimant.

    21.2. Breach of contract. These claims can only be brought to the Tribunal after the termination of the claimant's employment – see the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994, s4. Given that the claimant is still employed, there is no termination of employment, and so this action is not available to the claimant.

21.3. Right to minimum holiday leave, under rr13/30 of the Working Time Regulations 1998 ("WTR"). A claimant is entitled to a minimum amount of leave under rr13/13A: the full time amount is 5.6 weeks. The pro rated amount for someone in the claimant's position, working 2 days a week on a permanent shift, is 11.2 days (5.6 x (2/5) = 2.24 weeks, x 5 days a week = 11.2 days). The claimant accepts that she has, since 2005, had more than 11.2 days' holiday. Therefore she does not have a claim that she has not received her minimum amount of annual leave.

21.4. Accrued holiday under rr14/30 WTR. This is a claim that, at the point of termination of employment, the employer has not paid the employee for holiday that has accrued but not been taken. Again, that is not the case here as the claimant is still employed.

21.5. Right to be paid for holiday granted under rr16/30 WTR. A claimant is entitled to be paid for holiday granted under r13/13A. Under these regulations, and as set out above, the claimant agrees that since 2005 she has always been paid correctly for the holiday she took, and that she took more than 11.2 days each year. Therefore she has no claim under these regulations.

21.6. Failure to provide statement of employment particulars under s11 ERA. A worker may require a reference to be made to the Tribunal, where the employer does not give a worker a statement of employment particulars as required by s1, 4, 8 ERA. The reference will determine what particulars should have been included in order to make sure that the statement of employment complied with the requirements of the ERA. This is the only possible route available to the claimant. I will therefore consider the legal framework around this claim in more detail.

Failure to provide statement of employment particulars

22. It is a slightly tenuous connection, but the claimant's argument could be taken as being an issue of the interpretation of her contract; namely the interpretation of the terms "*staff member's average shift/day length*" regarding holiday entitlement, and "*usual shift/day length*" for bank holiday entitlement in the Employment Navigator (see below for more detail on this document).

23. Section 11 ERA applies when a claimant says that their employer has not provided the details required in ss1, 4, 8 ERA. Section 1(4)(d) requires a statement of employment particulars to include details of holiday entitlement and pay.

24. Under s11(2)(b), where a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this part, the worker may require the question to be referred to and determined by the Tribunal.

25. Under s12(2):

> On determining a reference under s11(2) relating to a statment purporting to be a statement under section 1 or 4, an employment tribunal may:

a. confirm the particulars as included or referred to in the statement given by the employer;
b. amend those particulars; or,
c. substitute other particulars for them,

as the tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the worker in accordance with the decision of the tribunal.

26. Under ss11/12, the courts have debated what terms between the parties the tribunal has the power (or jurisdiction) to get involved with, under the ERA. The two scenarios of discussion in the courts have been as follows:

26.1. If the parties have in fact agreed on the particular term in issue, can the Tribunal go further and decide what the term actually means? And,

26.2. If the parties have failed to agree the particular term in question, can the tribunal decide what they "ought" to have decided based on criteria other than their subjective intent?

27. Case-law has made clear that it is not the Tribunal's job to interpret contracts between parties, in fact it has no power to do so:

27.1. **Southern Cross Healthcare Ltd v Perkins [2010] EWCA Civ 1442**. The argument in the Court of Appeal in **Perkins** was about whether a holiday provision in a s1 statement of employment had been impliedly amended to reflect that the statutory holiday entitlement had changed to include bank holidays.

27.2. The Court of Appeal held that the Tribunal had no power/jurisdiction to decide this matter of interpretation. It went beyond the Tribunal's remit, which is limited to ensuring that statements of employment comply with the statutory requirements in s1,4,8 ERA. The Tribunal does not have power to construe or enforce statements of employment.

27.3. This limitation on the Tribunal's power does not apply in the same strict way to cases dealing with unauthorised deductions of wages under s13/23 ERA – **Agarwal and Tyne and Wear [2018] EWCA Civ 1434**. However we are not dealing with such a claim. The claimant confirmed that she had been paid all she was due to be paid; her claim is one for compensation.

28. Nor is it within the Tribunal's power to decide what particulars "ought" to have been included in a contract of employment:

28.1. There is a line of case-law that establishes that the Tribunal does not have the power to impose terms that have not been agreed between the parties. The Tribunal cannot re-write or amend a binding contract under s11/12 ERA.

28.2. The Court of Appeal in **Eagland v British Telecommunications plc [1992] IRLR 323** held that the Tribunal's power is limited to ensuring that the statement of particulars accurately records what (if anything) was agreed. The Tribunal does not have the power to perfect an agreement.

Findings of fact

29. This case was listed for a preliminary hearing on 23 September 2022 before EJ Din. The respondent sought to make a strike out application, but the Tribunal could not deal with that at a private case management telephone hearing. Therefore preliminary matters were set out to be dealt with at the commencement of the final hearing, due to commence on 24 April 2023 – [311]

30. The first preliminary issue, which was capable of determining the claim, was "What claims can the claimant validly make before the Tribunal?".

31. The claimant's complaint is that the respondent did not calculate the amount of holiday entitlement she was due correctly, and that according to her contract and contractual documents, she should have received 19 days' holiday since returning from maternity leave in February 2005. The claimant says that the respondent corrected this mistake moving forward from April 2021.

The claimant's claim

32. The claimant's claim is essentially one of breach of contract. Her Grounds of Complaint state that "they have been giving me the wrong amount of holiday". The claimant relies on the respondent's policies and procedures in reaching her calculation of annual leave. The claimant says that the respondent's mathematics is wrong, and that they have made a mistake but that her contract is right. This is confirmed on [13] where the claimant says "I can only claim according to BA policy and employment contract".

33. The claimant relies on various documents:

    33.1. A collective agreement called "A Scale Agreement", the Administrative Staff National Sectional Panel Agreement, which she says is contractual. In that document is a definition of a leave day upon which the claimant seeks to rely;
    33.2. The EG401 ("Employment Guide")– Annual and Statutory Leave – holiday entitlement policy;
    33.3. The accompanying explanatory note – EN401 ("Employment Navigator") .

34. The respondent did not admit in its Grounds of Response that these documents are contractual. However I note the statement of Mr Mark Reeves for the respondent, at paragraph 4, states that the claimant's contract on [101] incorporates the Employment Guide into the contract and, at paragraph 5, the A Scale Agreement is also said to be incorporated into the claimant's contract.

35. Under [77] of the A Scale Agreement, this dictates that holiday entitlement will be at the scale and in accordance with Appendix C:

    35.1. At [84], Appendix C of the A Scale Agreement contains the definition of a leave day at 2(e), as follows:

    Where shifts average up to 8 hours over a pattern then the annual leave day will equal a working day. Where regular shifts over 8 hours but less

than 12 hours are worked, then the annual leave will be taken as 8 hours equaling one leave day.

35.2. This does not however set out how pro-rated holidays for part-time workers will be calculated.

35.3. The Employment Guide sets out that part-time workers will be allowed pro-rated holidays both in relation to annual leave and statutory holidays - [162/163].

35.4. The calculation of the pro-rated holidays is within the Employment Navigator (not accepted as being contractual by the respondent) - [165/166].

35.5. The calculation is set out as follows:

> (Part-time contractual hours/full time contractual hours) x full time leave entitlement (days) x average shift length in NSP agreement

35.6. That provides the figure for the number of hours' holiday for a part-time worker. To work out what that means in terms of actual days' off, at [168] it is stated that it is then necessary to divide the number of hours' holiday by the "staff member's average shift/day length". There are mirror provisions for bank holiday entitlements - [169].

36. The claimant's case is that this is where the error lies. She says that the respondent divided her hours of holiday entitlement by 10 (as she does shifts of 10 hours). The claimant argues that they should have divided her hours of holiday entitlement by 8, as this is the number to be used as the average where employees work more than 8 hours but less than 12 hours under the A Scale Agreement - see paragraph 6 of the claimant's witness statement.

37. It therefore follows that the claimant's complaint is that the respondent has breached her contract by not applying the contractual figure of 8 hours in the A Scale Agreement when dividing her holiday entitlement from hours to work out the number of days.

38. The claimant clarified her claim in November 2022 – [48]. The claimant said in that communication that she is claiming compensation for missed holidays. In other words, she was not given her contractual entitlement to holidays, and should be compensated. That is, again, really a breach of contract claim.

Conclusions

39. The facts of this case is that there is agreement over the terms in the A Scale Agreement and in the Employment Guidance. There is agreement over the method of calculation in the EN401. The issue is what figure should have been used for "staff member's average shift/day length" regarding holiday entitlement, and "usual shift/day length" for bank holiday entitlement (to go from hours' entitlement to days' entitlement).

40. Following the case-law cited above, I do not have power to interpret what these two terms ought to mean, nor do I have power to decide whether these terms

ought to have been defined in any different or clearer way: to do so would be to perfect an agreement, which I am not entitled to do.

41. I therefore have to conclude that, having considered all possible routes, the Tribunal does not have jurisdiction to determine the claimant's factual complaint, and therefore the claim must be struck out.

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Employment Judge Shastri-Hurst

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Date 17 May 2023

REASONS SENT TO THE PARTIES ON

19 May 2023

GDJ

FOR THE TRIBUNAL OFFICE