



EMPLOYMENT TRIBUNALS

Claimant: Ms Freda Moulds

Respondent The Trustees of Whirlow Hall farm Trust (a registered Charity)

Heard at: Leeds (By Video Link) **On:** 26 May 2023

Before: Employment Judge R S Drake

Representation:

Claimant: In Person

Respondent: Mr Kevin McNerney (of Counsel)

RESERVED JUDGMENT

1. The title of the Respondents is amended so as to describe them as “The Trustees of Whirlow Hall Farm Trust (a registered Charity)”.
2. The Claimant has not established that she is entitled to unpaid holiday pay pursuant to Reg 16 of the Working Time Regulations 1998 - (“WTR”), nor that she has sustained a withholding of holiday entitlement upto April 2022 in respect of five days worked and not viewed as Time of In Lieu (“TOIL”). The Claimant’s claims are therefore dismissed.

REASONS

3. The Claimant attended in person and with appropriate guidance from me represented herself very effectively. I heard her cross-examined oral testimony after giving the Respondents time to consider her late served Statement, and I was referred to a number of documents in an agreed paginated bundle to which I refer below.
4. I heard testimony and saw evidence given in the same way by Ms Jeanette Hill-Wickham (a past manager of the Respondents) and from Messrs Ben Davies (CEO) and John Jenkins (HR Advice Volunteer) the latte being uncontested. Again, my attention was drawn to documents in the agreed bundle.
5. Lastly, I heard concise but succinct final submissions from both sides and at the start of the hearing with Counsel’s help narrowed down the

issues to being as follows:-

6.1 Could the Claimant show that by the end of April 2022, she had sustained a removal of 5 days holiday entitlement instead of the same being afforded to her as TOIL? In effect, this amounted to an allegation of unlawful deduction from holiday entitlement under Regulation 13 of the Working Time regulations 1998 ("WTR") which fall to be treated for enforcement purposes as unlawful, deduction from pay covered by the Deduction from Wages (Limitation) Tregs 22014 ("DWL Regs") and Reg 30 WTR and thus requiring commencement of proceedings within 3 months of any individual "deduction or "withholding"; The Respondents argue that this claim is out of time and that the Claimant has to establish it was not reasonably practicable for her to issue her claim under this head within 3 months of this alleged deduction;

6.2 Could the Claimant establish that she agreed orally with Ms Hill-Wickham that she be entitled to carry over holiday not taken during holiday year 1 August 2021 to 31 July 2022 and thus be entitled to pay therefor in the following year during which she had resigned? In effect she alleged that payment of 10 days holiday pay had been withheld as at the date of termination of employment (21 December 2022);

6.3 If such an oral agreement could be established, was it legally binding as a variation of an existing express written term in the contract of employment which prescribed that holiday entitlement cannot be carried over?

7. My findings of fact are as follows: -

7.1 The parties had and still continue to have considerable mutual respect for each other and acted accordingly during the course of today's hearing; It is indeed unfortunate that they have not been able to resolve this dispute amicably and therefore require my judgement;

7.2 The Claimant was engaged from 3 November 2021 as cafe manager at the Respondents' premises at Whirlow Hall Farm; her diligence and good service were noted by all concerned and are much to the Claimant's credit;

7.3 The terms of the Claimant's Particulars of her Contract of Employment appear at Pages 41-45, are agreed and are dated 3 November 2021; They are a part of a formal written document and are signed for by the Claimant; Clause 11.5 provides – *"you may not carry forward any unused entitlement to the next holiday year, or be paid in lieu of holidays except following the termination of employment where a payment in lieu may be made"*;

Clause 22 then provides – *"this agreement is now the entire and sole agreement between you and the Trust and replaces all other agreements or arrangements whether they were written or verbal, and by signing this agreement you are confirming that you accept the terms of this agreement ..."*

7.4 The Claimant says that five days annual leave were taken off her in April 2022 and were not viewed as TOIL but that she did not realise this until she began preparing the current proceedings after leaving the Respondents employment, though she accepts that she received her pay slip for April 2022 and did not query its content; Having received her pay slip for April 2022 and being an assiduous examiner of her own records, I find that she is fixed with constructive knowledge of her pay and its breakdown in April 2022 but that she did not raise any complaint about it until the current proceedings were issued on the 16th March 2023, and thus well over three months after the event complained of; Her claim under this head is manifestly out of time and I am not satisfied that her evidence shows me that it was not reasonably practicable to make a complaint about it within three months of receiving the April pay slip;

7.5 Because it is common ground between the Claimant and Mrs Hill-Wickham, I can accept that the Claimant did raise with Mrs Hill-Wickham on several occasions from Spring 2022 onwards that she wanted the Respondents to permit her to carry over annual leave for the then current holiday year to the next year; I find that Mrs Hill-Wickham told the Claimant that this would be contrary to the Respondents' policy but that she would discuss it with higher management, and that she did so; the CEO Mr Davies declined this request; Whereas the Claimant says that this amounted to agreement to permit carryover, I prefer Ms Hill-Wickham's account as it is more likely on a balance of probabilities that knowing as she did that carryover was contrary to policy, she would need to seek authority to make an exception, but that when she sought that authority, Mr Davies made it clear that such authority was not to be given, that it was indeed contrary to the Respondents' policy, and not in accordance with the Claimant's Contract of Employment; Mrs Hill-Wickham made clear orally that carryover was not permitted after she had spoken to Mr Davies; Thus I find that there was no oral agreement established by the Claimant that carryover would be permitted;

7.6 in any event I can find no evidence that any such carryover agreement was ever recorded in writing so as to vary the Claimant's Contract of Employment; This finding is of crucial importance to my legal analysis set out below;

8 I apply the law accordingly as follows:-

8.1 Because the TOIL claim constitutes an unlawful deduction claim for the purposes of Section 13 of the Employment Rights Act 1996 ("ERA") it must be commended within 3 months of the instance of withholding complained of in accordance with Section 23(2) ERA; If as in this case it is not, the Claimant must show under Section 23(4) that it was not reasonably practicable to do so in time, and in this case her evidence does not go that far. This head of claim fails on this point.

8.2 The Claimant has not established that there was an oral; agreement

to permit holiday entitlement carryover; I prefer Ms Hill-Wickham's evidence on this and note that the Claimant's own evidence is that after such agreement she still sought confirmation which was not forthcoming, suggesting she knew or ought to know such confirmation were necessary.

8.3 At common law, it is an axiomatic and well-founded principle that an implied agreement (and by extension of logic, one that is oral) cannot displace an express written agreement and further that an express written agreement can only be varied if such variation is itself contractual in nature; Thus in this case to displace the terms of clause 11.5 of the Claimant's Contract of Employment, she would have to present evidence of a formal written confirmation varying that provision, coupled with consideration being offered for it, as at common law a variation of an express written contract must itself be contractual and be supported by the usual elements required of any form of contract enforceable under English law. She was unable to show such evidence and agreed this was the case.

8.4 Accordingly I find that the Claimant has not established there was an oral agreement permitting carryover, but even if I had reached a different conclusion, I would have to find that's such oral agreement would have no legal binding validity as it was not itself a written variation of contractual nature. Therefore despite the Claimant 's best efforts to establish her case, I find that she has not been able to do so and I must therefore dismiss it in full.

Employment Judge R S Drake

Signed 26 May 2023