



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)**

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**Judgment of the Employment Tribunal in Case No: 4104184/2023 Issued  
Following Final Hearing Heard on the Cloud Based Video Platform on  
5<sup>th</sup> March 2023 at 10 am**

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**Employment Judge J G d'Inverno**

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**George Rafferty**

**Claimant  
In Person**

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**Challenge-TRG Recruitment Limited**

**Respondent  
Represented by:  
Mr Brill, Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is;

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**(First)** That the claimant's claim under the Working Time Regulations, for payment from the respondent in lieu of 12 days paid annual leave entitlement assertedly accrued during the claimant's holiday year 4<sup>th</sup> July 22 to 3<sup>rd</sup> July 23 and said by the claimant to be outstanding and due to him as at 9<sup>th</sup> July 2023, the date of transfer of his employment from Pertemps Recruitment Partnership Limited to the respondent, fails.

**(Second)** The claimant's claim is dismissed.

J d'Inverno

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**Employment Judge**

**07 March 2024**

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**Date of Judgment**

**Date sent to parties**

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**08/03/2024**

**I confirm that this is my Judgment in the case of Rafferty v Challenge-TRG Recruitment Limited and that I have signed the Judgment by electronic signature.**

### **REASONS**

1. This case called for Final Hearing on the Cloud Based Video Platform on 5<sup>th</sup> March 2024 at 10 am. The claimant appeared on his own behalf and gave evidence on oath and answered questions put in cross examination and questions from the Tribunal. The Respondent Company was represented by Mr P Brill, Solicitor.
2. For the respondent the Tribunal heard evidence from Mr H Bamford, an HR Advisor within the Respondent Company. The witness Mr Bamford gave evidence on affirmation, answered questions put to him in cross examination and questions from the Tribunal.
3. Following the conclusion of the evidentially part of the Hearing, each party addressed the Tribunal in submission. The claimant addressed the Tribunal first, followed by the respondent's representative with the claimant thereafter exercising a limited right of reply.

4. In accordance with the Tribunal's Directions a Hearing Bundle, containing documents to some of which the Tribunal was referred in the course of evidence and submission, and extending to some 71 pages had been lodged and was before the Tribunal at the Hearing.

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### The Issues

5. The Issues for Determination before the Tribunal were:-

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(a) Whether as at the 4<sup>th</sup> of July 2023, that is the first day of the holiday year on which the claimant's employment was subsequently transferred, on 9<sup>th</sup> July 2023, from Pertemps Recruitment Partnership Limited ("Pertemps") to the respondent, how many days, if any, of accrued but untaken paid annual leave entitlement had the claimant carried forward, either under contract or the Working Time Regulations ("WTR/AL") from his holiday year which ran from 4<sup>th</sup> July 2022 until 3<sup>rd</sup> July 2023.

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(b) As at the date of transfer, 9<sup>th</sup> July 2023, what liability, if any, to make payment in respect of as yet untaken annual paid leave entitlement accrued between the start of the claimant's holiday year on 4<sup>th</sup> July 2023 and the date of transfer on 9<sup>th</sup> July 2023 had transferred from Pertemps ("the Transferor") to Challenge-TRG Recruitment Limited, the respondent, ("the Transferee").

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(c) What payment, if any, was made to the claimant by the Transferor in respect of accrued, but as at the date of transfer as yet untaken paid annual leave entitlement, and when was such payment made.

(d) What payments have the respondent (the Transferee) made to the claimant following the termination of his employment on 3<sup>rd</sup> August 2023 in respect of as at the date of termination of

employment, 3<sup>rd</sup> August 2023, untaken paid annual leave entitlement, which was accrued in the claimant's holiday year commencing on 4<sup>th</sup> July 2023 in respect of the part holiday year from 4<sup>th</sup> July to 3<sup>rd</sup> August 23 inclusive, and in what amounts and in what dates were such payments made.

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- (e) What sums, if any, has the claimant established are due by the respondent to the claimant in respect of accrued and outstanding paid annual leave entitlement as at the date of termination of his employment on 3<sup>rd</sup> August 2023.

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**Preliminary Issue focused by the Respondent's Representative in Submission**

- (f) On what date did the claimant first present his claim for a lump sum payment in respect of accrued but untaken holiday pay, to the Employment Tribunal (Scotland), and in particular, did the claimant so present his claim on the 2<sup>nd</sup> of August 2023, that is prior to the termination of his employment on the 3<sup>rd</sup> of August 2023.

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- (g) Let it be assumed that the claimant so first presented his claim did he do so before his cause of action (right and title to raise the complaint) arose and, in consequence, does the Tribunal, in any event, lack Jurisdiction to consider his claim.

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**Findings in Fact**

6. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact restricted to those necessary for the determination of the complaint.

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7. The claimant worked in the Tesco Distribution Centre, Livingston, West Lothian as a Warehouse Operative.
8. Prior to transferring to the respondent, the claimant was employed by an agency, Pertemps Recruitment Partnership Limited which trades under the name 'Pertemps' ('Transferor').
9. When employed by Pertemps, the claimant worked under the terms and conditions of contract which are set out in the document produced at pages 54 to 58 inclusive of the Hearing Bundle.
10. Those terms included, at paragraph 5, an increased contractual right to holiday entitlement of a total of 31 days per annum.
11. The terms, which are referred to and held here incorporated by reference, further provided:-
  - (a) That the claimant's holiday year ran from the date of his first assignment until the first anniversary of that date, in the case of the claimant from 4<sup>th</sup> July 2022 until 3<sup>rd</sup> July 2023 etc (Clause 9.1).
  - (b) That all entitlements to annual leave must be taken during the course of the leave year in which it accrues and none may be carried forward to the next year (Clause 9.4).
  - (c) That on termination of the claimant's employment his employer will pay to him the appropriate holiday pay for each day of annual leave entitlement which he had accrued in the relevant year, that is the year in which the termination of his employment occurs, and in respect of which he had not taken holidays.

12. The claimant was employed to work assignments with no guarantee of any minimum number of hours, or any particular hours, in any period of employment.
- 5 13. The start date of the claimant's employment with Pertemps was the 4<sup>th</sup> of July 2022.
14. His contractual entitlement to paid holiday was increased to 31 days whilst he worked for Pertemps.
- 10 15. In 2022 the respondent was awarded the contract to manage the provision of personnel at the Tesco site.
- 15 16. In or around June and July of 2023 a process of consultation began with all employees of the Transferor, who would be transferring to the respondent, including with the claimant.
- 20 17. Immediately prior to the transfer it was agreed, between the Transferor and Transferee, that all employees who had accrued outstanding and untaken holiday entitlement with the Transferor, Pertemps, would receive and had received payment in lieu of that outstanding holiday entitlement from Pertemps.
- 25 18. The effect of that agreement, if and when implemented, was that, as at the date of transfer to the respondent, all transferring employees would have a nil holiday accrued but untaken paid annual leave entitlement and that no liability for untaken holiday as at the date of transfer, would pass to the respondent.
- 30 19. Had such agreement not been made and implemented, the Transferee would have required the Transferor to pay over to the Transferee the sum of money required to discharge any such liability which transferred.
20. The date of transfer was the 9<sup>th</sup> of July 2023.

21. On or around, the 14<sup>th</sup> of July 2023, the claimant received a payment from Pertemps, the Transferor, in the gross sum of £282.89, as vouched by the pay slip produced at page 63 of the Bundle which prescribes the payment as "LEAVERWTRPAY".

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22. That payment was a lump sum payment, paid in terms of the agreement between the Transferor and Transferee, by the Transferor to the claimant in respect of what the Transferor considered to be accrued, outstanding but as yet untaken paid annual leave entitlement.

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23. The claimant's assignment with Tesco ended on the 3<sup>rd</sup> of August 2023.

24. The claimant was issued with a P45 which identifies the 3<sup>rd</sup> of August 2023 as his last day of employment with the respondent.

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25. While the respondent is not in a position to admit or deny that the £282.89 holiday pay payment made to the claimant on or around 14<sup>th</sup> of July 2023 included holiday pay, entitlement to which had accrued in the first part of the claimant's leave year prior to transfer, that is in the 4 day period from and including the 4<sup>th</sup> up to and including the 8<sup>th</sup> of July 2023, the respondent, without admission of liability, has made payment to the claimant in respect of that period as follows;

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**1/52 x 28 = 0.54 days accrued, say half a day**

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**7.5 hours x £14.09 per hour average pay/2 = £52.84 (gross)**

Payment in that amount of £52.84 in respect of accrued holiday pay entitlement in that pre transfer period from 4<sup>th</sup> to 8<sup>th</sup> July 2023 was made by the respondent to the claimant on the 23<sup>rd</sup> of February 2024

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26. The respondent calculated the claimant's holiday accrual from the date of transfer to the termination date, that is from the 9<sup>th</sup> of July to the 3<sup>rd</sup> of August 2023, based upon the claimant's contractual entitlement as follows;

$$\underline{4/52 \times 31 = 2.38 \text{ days}}$$

$$\underline{2.38 \times \pounds 96.22 \text{ average pay per day} = \pounds 229.00 \text{ (gross)}}$$

- 5 27. The respondent made payment to the claimant of the sum of £229 gross, in respect of accrued but untaken paid annual leave entitlement for the period 9<sup>th</sup> July to 3<sup>rd</sup> August 2023, on the 9<sup>th</sup> of February 2024.
- 10 28. A total of £564.73 (gross) has been paid to the claimant in respect of holiday pay.
- 15 29. The contractual provision under which the claimant worked (Clause 9.4 of the terms and conditions at page 56 of the Bundle) and which is to the effect that “unless stated otherwise in Assignment Details, all entitlements to annual leave must be taken during the course of the leave year in which it accrues and none may be carried forward to the next year”, echoes the same provision contained in Regulation 13.9(a) of the Working Time Regulations 1998 (“the Regulations”).
- 20 30. Had no contractual provision such as that set out at Clause 9.4 of the terms of employment been in existence, the position would have been regulated, to the same effect, by Regulation 13.9(a) of the Regulations.
- 25 31. The effect of both the contractual provision under which the claimant was working at the end of his holiday year 4<sup>th</sup> July 2022 to 3<sup>rd</sup> July 2023, and of Regulation 13.9(a) of the Regulations is that, as at the 3<sup>rd</sup> of July 2023 any untaken paid annual leave entitlement which the claimant had accrued in the holiday year which ended on the 3<sup>rd</sup> July 2023, whether the 12 or the 13 days claimed by the claimant or some greater or lesser amount, fell away and ceased to exist.
- 30 32. No accrued but untaken paid annual leave entitlement was carried forward by the claimant from his holiday year which ended on the 3<sup>rd</sup> of July 2023 into the holiday year which commenced on the 4<sup>th</sup> of July 2023.



33. As at the date of transfer, the amount of any liability for paid annual leave entitlement which had accrued in the 4 days of the holiday year which elapsed between 4<sup>th</sup> and 8<sup>th</sup> July 2023 and which, absent the agreement to the contrary between the Transferor and the Transferee, would have had the potential to transfer from Pertemps to the Respondents in respect of the claimant, did not exceed, at a maximum, the 7.5 hours of entitlement in respect of which the Transferor Pertemps may have paid to the claimant as part of the £282.89 remittance made to him on or about the 14<sup>th</sup> of July 2023, and which separately, and in any event, the respondent made/also made payment to the claimant of £52.84 on 23<sup>rd</sup> February 2024.
34. Let it be assumed that Pertemps did include, within the £282.89 payment made to the claimant payment in respect of accrued holiday pay pre transfer in the period 4<sup>th</sup> to 8<sup>th</sup> July 2023, then as at the date of transfer no liability in respect of accrued but untaken paid annual leave entitlement transferred to the respondent.
35. Alternatively, let it be assumed:-
- (a) that Pertemps did not include, within the £282.89 payment made to the claimant payment in respect of accrued but untaken holiday pay for the period 4<sup>th</sup> to 8<sup>th</sup> July 23 inclusive, and further let it be assumed
  - (b) that liability to account to the claimant in respect of the same transferred to the respondent, which is not admitted by the respondent, nor found in fact to be the case by the Tribunal, and
  - (c) let it be assumed that upon the termination of the claimant's employment on 3<sup>rd</sup> August 2023 liability in respect of that accrued entitlement fell to be discharged by lump sum payment by the respondent,

(d) the respondent so discharge that liability by the payment made to the claimant by them in the sum of £52.84 gross on the 23<sup>rd</sup> February 2024.

- 5 36. In the holiday year post transfer, in which the termination of the claimant's employment occurred, the claimant had accrued, in the period from 9<sup>th</sup> July to 3<sup>rd</sup> August 2023 inclusive a proportionate entitlement to 2.38 days of paid annual leave.
- 10 37. In the period in question, the claimant's average gross pay was £96.22 per day resulting in a liability, on the part of the respondent to make payment to the claimant upon the termination of his employment of a lump sum payment of £229 gross in respect of that accrued but untaken entitlement.
- 15 38. The respondent so made payment to the claimant on the 9<sup>th</sup> of February 2024 and in doing so fully discharged its residual liability to the claimant in respect of post transfer accrued but untaken paid annual leave entitlement.
- 20 39. Some 400 employees who the Transferor confirmed to the Transferee in terms of the ELI statutory information provided by the Transferor to the Transferee were working under the same terms and conditions as the claimant and were subject to the same transfer.
- 25 40. Of those so transferred no employee other than the claimant had raised an issue with non receipt from the Transferor of their accrued and outstanding holiday pay entitlement as at the date of transfer.
- 30 41. There was no discussion or agreement in place between the claimant and Pertemps to the effect that contrary to the provisions of both his contractual terms of employment or of Regulation 13.9(a) of the Working Time Regulations, he would be entitled to carry forward into the annual leave year which began on 4<sup>th</sup> July 2023, any untaken annual leave which had accrued in the holiday year which ended on 3<sup>rd</sup> July 2023.

**Summary of Submissions**

42. Mr Rafferty submitted that at the end of his holiday year 4<sup>th</sup> July 22 to 3<sup>rd</sup> July 2023 he had an accrued but untaken balance of paid annual leave entitlement of either 12 or 13 days. In the course of his submissions the claimant made reference to what he described variously as his “holiday records” and his “pay records” showing a bundle of documents in camera view from time to time. Those documents were not before the Tribunal nor did the claimant give detailed evidence as to their content. By way of explanation he stated that he had only found them on the preceding day, that is 4<sup>th</sup> March 2023 and read short he asked the Tribunal to accept his oral evidence that they demonstrated, that in the holiday year 4<sup>th</sup> July 22 to 3<sup>rd</sup> July 23 he had taken either 17, or 18, or 19 days leave which against his then contractual entitlement of 31 resulted in a balance untaken leave, at the end of that holiday year, of either 12, 13, or 14 days, although he accepted that he had hitherto only given notice of claiming for 12 days. In his submission he asked the Tribunal in essence to accept his oral evidence, without further detail that the documents in his possession supported that position.

43. The claimant submitted that since he had given evidence of having asked to take some of his accrued leave in the summer of 2023 but not had that request approved, it followed that the accrued leave fell to be regarded as still outstanding as at the date of transfer and, under TUPE Regulations, to have transferred with his employment to the respondents who were then liable to account to him for it. He submitted that the respondent should have been aware, at the point of transfer, that he had a number of days of outstanding leave and should have proactively made arrangements for him to take that leave in the period from the date of transfer on 9<sup>th</sup> of July until the date of his resignation on 3<sup>rd</sup> August 2023. Since they had not done so, in his submission they should be liable to make payment to him now in respect of those days. While he acknowledged that he had indeed received from the transferor on or around the 14<sup>th</sup> of July 2023 the payment of £282.89 vouched as “LEAVERWTRPAY” in the gross amount of £282.89, he was reluctant to

agree that it was payment made in respect of accrued Working Time Regulations paid annual leave entitlement, saying that he could not confirm that without checking his bank statements to be sure that it wasn't payment for something else.

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44. In exercising a limited right of response to the respondent's submissions, the claimant stated that after the transfer and in the 2 month period between it and the cessation of his employment on the 3<sup>rd</sup> of August, he had again raised the issue of what he considered to be the arrears of holiday pay due to him with the same Managers who, having transferred along with him, were now employees of the respondent. They had not resolved the matter to his satisfaction before he resigned and therefore the respondent should be liable to make payment to him.

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45. For the respondent Mr Bliss firstly made reference to the preliminary point of jurisdiction not previously focused prior to the Hearing. Read shortly, in his submission, the P45 on the one hand showed the date of termination of the claimant's employment as being 3<sup>rd</sup> August 2023, a date which the claimant had indicated in cross examination he was not in a position to contradict and that thus, the 3<sup>rd</sup> of August 23 fell to be regarded as the earliest date upon which the cause of action which the claimant sought to pursue before the Tribunal, namely an asserted right to be paid in a lump sum on termination of employment in lieu of untaken paid annual leave (the exception contained in terms of Regulation 13(9)(b)) could be seen to have arisen. On the other hand, there arose from the "date stamp" on the claimant's initiating Application ET1, an inference that he had raised his claim in the Employment Tribunal against the respondent on the 2<sup>nd</sup> of August 2023; that is on a date before the cause of action had arisen. Although he accepted that the respondent had not placed before the Tribunal any other evidence which went to establish beyond per adventure that the date of first presentation was indeed the 2<sup>nd</sup> of August 2023 he urged the Tribunal to give effect to the inferences arising from the date stamp and to hold, in those circumstances, that as at the date of its raising the claimant had no right or Title to Present his complaint and that the Tribunal had no Jurisdiction to consider it. Further,

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as such lack of Title and Interest and of Jurisdiction could not be cured by subsequent amendment, to dismiss the claim for want of Jurisdiction, regardless of its merits.

5 46. In the alternative, and accepting that the preliminary point had not been focused by the respondent prior to the Hearing, it having only occurred to Mr Brill in the course of preparing for the Hearing, he went on to make submissions as to the merits of the claim.

10 47. Under reference to the agreement between the Transferor and Transferee, to the effect that the Transferor would make payment to employees on the ELI spreadsheet List, which included the claimant, of any accrued paid annual leave entitlement which remained outstanding and due by the Transferor to the employee as at the date of transfer, 9<sup>th</sup> July 2023, the respondent's  
15 representative made the following submissions:

(a) It was for the claimant to prove and establish the number of days of paid annual leave entitlement, if any, he had accrued but not taken in the 2022/2023 holiday year. It was a matter for  
20 the Tribunal to evaluate the claimant's evidence in that regard but the documents referred to by the claimant in the course of his evidence were not before the Tribunal and even on the basis of the claimant's own evidence which amounted to no more than a general statement without specification of dates, the  
25 claimant was uncertain as to whether he had taken 17, 18 or 19 days leave in the holiday year in question.

(b) However, regardless of the number of days which the claimant may have accrued and may have been outstanding the end of  
30 22/23 holiday year, that is as at the 3<sup>rd</sup> of July 2023, he submitted that, as at the start of the new holiday year on the 4<sup>th</sup> of July 23, that entitlement fell away and ceased to exist, it not having been taken in the course of the year in which it had accrued. That, he submitted was the position both under the

contractual terms upon which the claimant worked and under Regulation 13.9(b) of the Working Time Regulations. Accordingly, none of what the claimant alleged was his 12, or 13, or 14 accrued but untaken entitlement from holiday year 22/24 was carried forward into the new holiday year 22/23 which commenced on 4<sup>th</sup> July 23.

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(c) It followed therefore that the accrued but untaken paid annual leave entitlement which was outstanding in respect of the claimant as at the date of transfer on 9<sup>th</sup> July 23 was the proportionate amount earned in the 4 day period from 4<sup>th</sup> to 8<sup>th</sup> July 2023. That, as had been established in evidence, amounted to an entitlement of 7.5 hours which, as had again been established in evidence fell to be compensated in the sum of £52.84 gross.

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(d) In terms of the contract between the Transferor and Transferee that liability was one which fell to be discharged by the Transferor prior to transfer.

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(e) It was his primary submission that the claimant while accepting that he had received the "LEAVERWTRPAY" remittance of £282.89 on or about the 14<sup>th</sup> of July from the First Respondent had failed to establish that that did not include payment in respect of the 7.5 hours of entitlement which had accrued between the 4<sup>th</sup> and 8<sup>th</sup> July 23.

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(f) His separate submission was that, by way of belt and braces, the respondent had, without admission of liability on its part, separately made payment to the claimant in respect of that entitlement and thus, any potential liability fell to be regarded as discharged.

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5 (g) The claim advanced before the Tribunal did not relate to the untaken paid annual leave entitlement, which had accrued in the holiday year in which the termination of the claimant's employment of the 3<sup>rd</sup> and which was outstanding as at the date of termination, namely 3<sup>rd</sup> August 2023. For completeness sake, however, the respondent had sought to demonstrate and, on the evidence presented he submitted had established on the balance of probabilities, that it had made payment to the claimant in the sum of £229 gross on or about the 9<sup>th</sup> of 10 February 2024 in discharge of that liability.

15 (h) The claimant for his part had acknowledged that he had received that payment and accepted that he was not in a position to dispute that it was accurate or inadequate in respect of the period to which it related, namely 9<sup>th</sup> July to 3<sup>rd</sup> August 2023.

20 (i) On these various grounds he invited the Tribunal to hold the claimant had failed to establish any liability on the part of the respondent in respect of the identified asserted accrued but untaken holiday pay and, having failed to discharge his burden of proof in that regard, the claim should be dismissed on its merits; He separately submitted, in any event, that the claim should be dismissed for want of Jurisdiction.

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### **Discussion and Disposal**

30 48. The claim is one which proceeds under the Tribunal's Jurisdiction to Consider rights of workers to paid annual leave entitlement under the Working Time Regulations 1998. Although in exercising his right of response the claimant made reference to it also being possible to regard the claim as one of an unlawful deduction from wages I respectfully reject that submission. Firstly, because the claimant has never been registered with the Tribunal under that jurisdiction, secondly, and in any event, in order that a withheld payment may

5 fall to be regarded as a deduction for the purposes of section 13 of the Employment Rights Act 1996, the party complaining of the deduction must first establish that they had some entitlement in law, whether in contract, or otherwise, to the payment, at the point at which it was withheld. In the instant case, whether under the contractual terms which the Tribunal has found the claimant was working, or in terms of Regulation 19.9(b) of the Working Time Regulations, the right to receive a lump sum payment in lieu of accrued holiday leave entitlement does not arise during the currency of employment but only upon its termination.

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49. The initial proposition advanced by the claimant was that the contract terms should be regarded, to use his phrase, as "*null and void*" because the respondent had not produced a signed copy of an individual contract between himself and the Transferor Pertemps.

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50. The claimant subsequently recognised the terms and conditions contained in the Bundle and in particular those relating to paid annual leave entitlement including the contractually enhanced entitlement of 31 days per year, as the terms and conditions under which he in fact worked. On the preponderance of the evidence the Tribunal were satisfied, on the balance of probabilities, that the employees who transferred and whose names appeared on the ELI spreadsheet, including the claimant, were working on the terms and conditions set out at pages 54 to 58 of the Hearing Bundle and that it was on those terms and conditions that their employment transferred to the respondent.

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51. The evidence before the Tribunal was insufficient and insufficiently reliable to enable it to make a Finding in Fact as to how many days paid annual leave entitlement the claimant had accrued in his 2022-2023 holiday year but, as at 3<sup>rd</sup> July 23, had not yet taken. In this regard the Tribunal observes that it did not doubt the veracity of the claimant's evidence to the extent that he had not taken all of his entitlement as at the 3<sup>rd</sup> of July and that thus some balance remained outstanding on that day. That that was indeed the case is supported by the fact that the Transferor Pertemps did in fact make the

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£282.89 “LEAVERWTRPAY” payment to the claimant on or about the 14<sup>th</sup> of July 2023, an action which appears consistent with the terms of the agreement entered into between the Transferor and the Transferee.

- 5 52. If the Transferor’s assessment of the claimant’s entitlement as at the 3<sup>rd</sup> of  
July 23 was accurately quantified in the sum of £282.89, then the claimant is  
in the position of having had his claim satisfied by the Transferor Pertemps,  
before he raised his proceedings against the respondent, the Transferee.  
The evidence placed before the Tribunal was insufficient for it to determine  
10 whether or not the payment, made by the Transferor, fully or only partly  
discharged any such liability in respect of outstanding annual leave in the  
leave year 22/23.
- 15 53. Notwithstanding the above and let it be assumed that some balance of  
entitlement remained, as at the 3<sup>rd</sup> of July 23 in respect of which the  
Transferor had not fully compensated the claimant, no part of that entitlement  
was carried forward into the holiday year 23-24. Any such balance, both in  
terms of the contractual provisions regulating the claimant’s employment and  
the Working Time Regulations, fell away and ceased to exist on the 4<sup>th</sup> of July  
20 2023.
- 25 54. Accordingly, as at the date of transfer, some 4 days later on the 9<sup>th</sup> of July  
2023, the only entitlement in respect of which a liability to account to the  
claimant on the part of the respondent, whether in giving him paid annual  
leave in the course of his employment with the respondent or in  
compensating him by lump sum on the termination of his employment, which  
could potentially have transferred to the respondent, was in respect of a  
proportionate entitlement accrued in the 4 day period 4<sup>th</sup> to 8<sup>th</sup> July 2023  
inclusive.
- 30 55. As the Tribunal has found in fact, although it may be the case that the  
Transferor included compensation in respect of those 4 days in the £282.89  
payment of 14<sup>th</sup> July 23, the respondent has separately and in any event  
made payment, or also made payment, to the claimant in respect of that

accrued entitlement, the 23<sup>rd</sup> of February 2024 and thus, has already extinguished any such liability.

56. Although not the subject of the complaint before the Tribunal the respondent  
5 has separately made payment to the claimant in terms of lump sum in lieu of his proportionately accrued annual leave entitlement in the period from the date of transfer, 9<sup>th</sup> July 23 up to and including the date of his resignation on 3<sup>rd</sup> August 2023.
- 10 57. On the evidence presented and on the Findings in Fact made, the claimant has failed to discharge his burden of proof in respect of establishing that any liability which was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) from the Transferor to the respondent (the Transferee), remains outstanding and undischarged by the  
15 respondent.
58. The claimant’s claim accordingly fails on its merits and falls to be dismissed.
59. In respect of the Preliminary Issue of Jurisdiction, focused by the  
20 respondent’s representative in submission, while there is substance in the submission made by Mr Brill, it is predicated upon an assumption that the claimant’s cause of action, that is to claim a lump sum payment in lieu of holiday pay, first arose on the 3<sup>rd</sup> of August 2023 and further that his claim in that regard was raised i.e. was on the dependence prematurely, that is to say  
25 on the 2<sup>nd</sup> of August 2023 prior to the cause of action arising. While the documentary evidence before the Tribunal would be capable of supporting inference to those effects as to the juxtaposition of the relevant dates, on a fundamental issue of Jurisdiction the Tribunal would wish to be satisfied on direct evidence sufficient to establish, without the need to draw inference, and  
30 on the balance of probabilities, that the position was indeed one which resulted in a lack of Jurisdiction. Were this the only ground of resistance the Tribunal might have considered it appropriate to adjourn the Hearing pending the sourcing of such direct evidence. In the event, however, as the Tribunal has determined that the claims fail on their merits, let it be assumed that it

had Jurisdiction to consider them, it is not necessary for the potential Preliminary Issue of Jurisdiction to be determined nor, in the circumstances would it be proportionate to seek to do so.

5 60. In relation to the claimant's submission that because the Transferor had not facilitated his taking outstanding leave in the leave year 22-23, the respondents should now compensate him in that regard, the Tribunal observes:-

10 (a) That there was insufficient evidence before the Tribunal to support a finding that the claimant from taking any such leave or in preventing him had breached his Contract of Employment and,

15 (b) That even if such a finding had been capable of being made on the evidence, while it may have given rise to some Remedy in contract between the claimant and Pertemps it would not have had the effect of carrying forward into the next holiday any such untaken holiday.

20 61. For the reasons set out above the claim is dismissed.

*Joseph d'Inverno*

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**Employment Judge**

**07 March 2024**

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**Date of Judgment**

30 **Date sent to parties**

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**08/03/2024**

35 **I confirm that this is my Judgment in the case of Rafferty v Challenge-TRG Recruitment Limited and that I have signed the Judgment by electronic signature.**