



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Smith

**Respondent:** Fowler Sandford LLP

**Heard at:** Leeds (by video)      **On:** 29 July 2024

**Before:** Employment Judge T Knowles

## Representation

Claimant: In person

Respondent: Mr M Todd, Counsel

# JUDGMENT

The Claimant's claims of breach of contract, and under the Working Time Regulations 1998, for a payment in lieu of accrued but untaken holiday pay on termination of employment are not well founded and fail.

# REASONS

## Issues

1. The Claimant brought a claim for a payment in lieu of her accrued but untaken holiday pay.
2. The issues for me to determine are:
  - a. What were the Claimant's contractual terms concerning holidays and have those terms been breached.
  - b. What entitlement does the Claimant have to a payment in lieu of accrued but untaken holiday leave upon termination of employment under the Working Time Regulations 1998 ("WTR") and has there been a failure by the Respondent to make any payment due.

## Evidence

3. I heard evidence from the Claimant who affirmed. The Claimant did not produce a written witness statement.
4. I heard evidence from Mr J Robinson, LLP Member, on behalf of the Respondent,

who also affirmed. Mr Robinson produced a written witness statement.

5. The Respondent produced a bundle of documents, 45 pages. References in this Judgment to numbers in brackets are to page number in the bundle of documents.

6. The Respondent produced a document on the day of the hearing, which is a copy of the Claimant's year planner on which she recorded holidays.

7. This hearing was heard by video utilising HMCTS's cloud video platform. No technical issues were encountered during the hearing.

## **Findings of fact**

8. I made the following findings of fact on the balance of probabilities. This is not an account of all of the evidence I heard or read, but instead sets out the key points relevant to the issues and my determination.

9. The Claimant was employed by the Respondent as an Accounts Clerk / Administrator and her employment had begun on 1 June 2004.

10. The Claimant resigned from her employment 30 June 2024, giving three months' notice, meaning that her employment ended 29 September 2024.

11. The Respondent operates a holiday year 1 April in each year to 31 March in the following year.

12. When the Claimant began her employment, she was given an employment contract. She no longer has a copy. Nor has the Respondent.

13. The parties agree that the contract was silent on carrying forwards holiday leave, albeit it is the Respondent's case that carry forward was therefore not permitted, whereas the Claimant reads the situation as being that carry forward was not prevented.

14. The parties agree that the contractual entitlement to leave was 25 days plus bank holidays in each holiday year.

15. The Respondent states that it does not allow employees to carry forwards leave. They produced documentary evidence of refusal to another employee but the Claimant said she was unaware that had happened.

16. The Claimant states that she has always been able to carry forwards untaken leave.

17. When questioned by the Respondent's representative the Claimant stated that she could not say with her hand on her heart that a particular person had ever approved her practice of carrying forwards leave.

18. When I asked her questions around the same subject, the Claimant stated that she believed that she had discussed it with a previous partner (Mr Robinson's father), some years ago when she was unable to take leave due to workload and he approved her request.

19. Mr Robinson has said he has discussed the issue with his father but he could not recall ever discussing the issue with the Claimant.

20. On the balance of probabilities, I find that the Claimant's account is more likely than not to be an honest one, that Mr Robinson's father had approved carry forward from one year to the next due to workload.

21. I take the Claimant's words at their height. Although she recalled the discussion with Mr Robinson's father when pressed on the subject her answer does not indicate that

any enduring or indefinite agreement had been reached concerning future years.

22. I also note that she had, at least at that time, felt that permission should be sought.
23. The Claimant has not suggested that she was ever prevented (by which I mean denied) her right to take leave. She said she sometimes had to carry forwards leave because she had made a decision that due to her workload it would not be wise to take them at that time. This indicated to me a choice by the Claimant to prioritise work over leave from time to time.
24. There was nothing written about carrying forwards leave, there were no policy statements or contractual permission to carry leave forwards.
25. The Respondent had trusted the Claimant to administer her own leave.
26. The Claimant could take holidays without approval.
27. The Claimant recorded them on a year planner which marked each day and at the bottom of the column for a month set out the number of holidays left to carry into the next month.
28. Nobody checked what leave she took or checked the records.
29. Holidays were not administered through payroll. Salary was simply paid whether you were working or on holiday leave.
30. At the end of the 2022 / 2023 holiday year the Claimant had in her record carried forwards 10 days accrued but untaken from the previous year.
31. The Claimant accepts that she had not sought permission for that carry forward nor had anyone approved it.
32. The Claimant worked for half the holiday year 2023 / 2024, taking Bank Holidays as they fell and accruing half of her annual entitlement (i.e. she accrued 12.5 days).
33. The parties agree that she took 14.5 days leave during the 2023 / 2024 holiday leave year before her employment ended 29 September 2023.
34. The Claimant stated that she believed the balance due was half of what was left, i.e. 10  $\frac{1}{4}$  days.
35. I found that if the Claimant was correct in saying that she could carry forwards leave, then she would be entitled to 8 days on leaving (10 days carried forwards, plus 12.5 days accrued, minus 14.5 days taken).

## **Submissions**

36. The Respondent submitted that the Claimant had taken more than her entitlement that accrued in the 2023 / 2024 leave year when she left the Respondent's employment. The Respondent submitted that the legal position was "use it or lose it". There was no contractual agreement concerning holiday leave, no relevant agreement for working time purposes, and no policy. The Claimant has stated that she may have spoken to someone, but Mr Robinson has said his father does not recall that conversation. The burden is on the Claimant and she has not been able to establish that she was given positive authority to carry forwards leave.
37. The Claimant submitted that it is quite obvious where the leave came from and it is recorded on the year planners. She suggested it had become customary practice. She had no issues before she left.

## The Law

38. Regulation 13(9)(a) provides that the statutory basic annual leave entitlement of four weeks may only be taken in the leave year to which it relates. Employers and workers can, however, agree to carry over any additional statutory leave into the next leave year (but not beyond) by means of a relevant agreement

39. In the absence of such agreement, it is likely that any additional leave must be taken in the leave year to which it relates.

40. Contractual leave in excess of the statutory entitlement may also be carried forward with agreement.

41. Whilst the carrying forward of a certain portion of the basic four weeks' statutory leave entitlement is permitted under the Working Time Directive, a private sector employee would only be entitled to rely on this in limited circumstances where a purposive interpretation is taken to UK legislation. For example, where the employee was unable to take their leave because their employer prevented them from taking their leave, or where they were unable to take their leave due to sickness.

42. The position is summarised in Harvey as follows:

*“Unlike Dutch law, however, with respect to the position prior to 1 January 2024, the WTR do not give workers rights to carry forward untaken leave (subject to limited exceptions for additional leave explained below), and in the absence of a contractual provision permitting carrying forward, basic leave not taken is simply lost (unless the reason that it is not taken within the leave year is that the worker was not permitted to take the leave by his or her employer, or was unable to take it because of being on sick leave or maternity leave, or other circumstances beyond his or her control such as a refusal by the employer to pay holiday pay.”*

43. The position concerning a claim of breach of contract is a question of what was in fact agreed between the parties.

44. The law may imply a term into a contract of employment where the terms is reasonable, notorious and certain (***Devonald v Rosser and Sons 1906 2 KB 728, CA, and Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA***).

## Conclusions

45. In my conclusion, the Claimant has not described any circumstances which would trigger any statutory carry forward under the Working Time Regulations 1998.

46. The Claimant's circumstances are not any of those which trigger a purposive interpretation of the Regulations in the light of the Working Time Directive.

47. In my conclusion, the circumstances described by the Claimant fall squarely within the “use it or lose it” category from a Working Time Regulations 1998 perspective and Regulation 13(9)(a) means that untaken leave from previous years has been lost.

48. From a contractual perspective, I conclude that the Claimant only had an oral agreement in one year to carry forwards leave.

49. I cannot conclude from the specific evidence that has been given by the Claimant that there has been any enduring agreement that this would always be allowed.

50. A term cannot be implied in the circumstances described by the Claimant.

51. A term allowing carry forward cannot be described as notorious where the Claimant admits she asked for permission in one year where she had been unable to take some of

her leave due to workloads.

52. A term allowing carry forward cannot be described as certain or reasonable where it is absent from any details of how it would operate in practice. The Claimant appears to have simply self-administered carry forwards in any amount at any time without anyone ever having known.

53. For those reasons, I conclude that the Claimant's claim of breach of contract is not well founded.

Employment Judge T Knowles

29 July 2024