Case Number: 2301644/2024

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON (by CVP)**

BETWEEN:

Mrs A Quinn **Claimant**

AND

Help at Home Limited **Respondent**

ON: **12 July 2024**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr M Haywood, Counsel**

RESERVED JUDGMENT

1. The Claimant is entitled under her contract of employment to receive one hour's holiday pay for each 4.77 hours worked at the prevailing rate of pay under her contract from time to time.
2. At the date of the claim the Claimant was entitled to 81.35 hours of holiday pay, at the hourly rate of £10.42 that applied at the date of the claim, amounting to £847.67.
3. The Claimant must give credit for any sum already paid by the Respondent towards that amount, including 40 hours of pay paid to the Claimant by the Respondent between the date of the claim and the hearing date, leaving a total sum payable of £430.49.
4. The Respondent must pay the Claimant any further sums in respect of holiday pay that have accrued since the hearing date at the rate of one hour's holiday pay for each 4.77 hours worked. The Claimant must give

credit for any amounts of holiday pay already paid by the Respondent in this period.

Reasons

1. This claim was about the Claimant's entitlement to holiday pay. The hearing, which was a final hearing, took place by CVP with all parties and Mr Haywood attending remotely. I was satisfied that all parties could see and hear and were able to participate effectively.

2. I was referred to a bundle of documents of approximately 74 pages and any reference to page numbers below are references to page numbers in the bundle. I heard evidence from the Claimant and Ms Durling, for the Respondent, answered one question put by me.

3. The dispute relates to a period in 2023/24. The Claimant's employment started on 26 January 2023 and she presented her claim on 20 January 2024, at which point she was still in her first year of employment. Her claim was set out as follows:

   Holiday refusal by company 02/01/24 was told I didn't have any left by coordinator and manager. I have only had 20 days holiday spoken to Acas a few times who advised 28 days I work 12 on 2 off different amount of hours daily. My manager has said they work it out in hours not days I'm not entitled to 28days as they don't do it in days. Then sent out holiday entitlement form saying I'm -25hrs at the moment but if I continue to work the same I should get 18hours to use before March. They pay 8 hours day holiday pay whether you work that many or not. So effectively it's using it before you got it.

   They have confirmed that they are using calculation of 12.07 which Acas has said they shouldn't be. My contract states 1 hours holiday for every 4.77 hours hours worked my managers says it the same (which it's not) Even the holiday in hours are not matching my figures are different as I am going by my contract they are not, They also are now saying I have had 25 days this again is wrong they are using 2 days from before April 23 and 2 days are on my weekend off and the other I was not paid anything. I have sent emails asking questions to manager but seem to be not helping and she now said she will no long respond to any email regarding holiday.

4. In her evidence the Claimant confirmed that what had cause her to bring her claim was the response she received when she asked for leave on 5, 8 and 9 January 2024. The relevant correspondence was at pages 34-37 and 40-42, which I return to below. I therefore take the Claimant's claim to be both about how much holiday she was entitled to and whether the way she was paid for that holiday was correct. Having heard her evidence, I do not consider this to be a claim about a refusal to grant holiday. It was clear from the evidence that the Respondent did take its responsibilities to provide paid holiday seriously and this was not a case in which the Claimant was in fact being refused holiday or being actively deterred from taking it.

5. I have made my decision based on the period up to the date on which the claim was presented – 20 January 2024. This was the claim to which the Respondent

gave its response. There was some evidence in the bundle about holiday entitlement that arose after the date of the claim. I was insufficiently clear at the end of the hearing about the precise figures involved to make an award of a specific amount in respect of that period, but the principles that apply to the sums that were discussed during the hearing will apply equally to the period following the date of presentation of the claim. I would therefore expect that the parties will be able to resolve any disagreement about this later period without further assistance from the Tribunal.

The legal principles

6. The law concerning holiday entitlement and holiday pay is complex. It is set out in the Working Time Regulations 1998 ("WTR") and the Employment Rights Act 1996 ("ERA"). I have summarised the rules that applied at the time this claim arose. Since then, a new regime has been introduced for irregular and part year workers, such as the Claimant in this case, but I am only concerned with the dispute that arose over the Claimant's entitlement up to the date she brought her claim and the new rules do not apply to that period.

7. Different rules apply to the calculation of holiday itself and to pay for that holiday.
    a. Regulations 13 and 13A WTR provide that every worker has a right to 28 days holiday in each leave year;
    b. Regulation 15 sets out the rules on when leave may be taken, and provides that a worker's contract can vary these rules. The rules were varied in this case, by clause 10 of the Claimant's contract, which is set out below.
    c. Regulation 15A provides that in the first year of a worker's employment leave accrues at a rate of one twelfth of the annual entitlement per month and that the entitlement arises on the first day of each month of that year. It is not clear from the legislation whether this means the first calendar day of the or a month measured from the start date of employment but the latter is considered to be more likely what Parliament intended;
    d. Regulation 16 provides that a worker is entitled to be paid at the rate of a week's pay for any period of leave taken. Where a worker works irregular hours (or as the legislation puts it, has 'no normal working hours' as was the case with the Claimant in this case), the amount of a week's pay may vary from week to week. The WTR therefore adopt the rules in ss221-224 ERA for the purpose of working out the amount of a week's pay.
    e. The specific section applicable to the Claimant was s222 ERA, which applies where there are no normal working hours for a worker. Under s222 ERA, the amount due is an average of weekly pay. If, as in this case, the worker has been employed for less than 52 weeks, the amount in question is calculated at the start of each period of leave by looking back at the period over which the worker has been working. Once the 52-week anniversary is reached the look back period is 52 weeks. Any weeks during which no work is done are taken out of account in calculating holiday pay. I did not hear evidence that there were any weeks in which the Claimant did no work at all.
    f. An employer can provide for more generous holiday and holiday pay in

> the contract of employment, but cannot provide for amounts that are less generous. If the amount calculated under the statutory rules are higher than the amounts arrived at by following the contract, the worker will be entitled to the higher amount. But if the amount arrived at by applying the terms of the contract provide for a higher amount, the worker is entitled to rely on that.

8. The Respondent referred me to the Claimant's contract of employment. Under clause 6 of that contract the Claimant's hours were said to be variable. There seemed to be no dispute about this, or that the Claimant would provide her availability in advance. Under clause 6.2 she was required to provide 16 hours guaranteed availability, but it was not clear from the clause over what period that guarantee of hours applied.

9. Holiday entitlement was dealt with in clause 10 which provided:

> **10.1. The holiday year is 1st April to 31st March.**
> **10 .2 The annual holiday entitlement for a full time Community Care member of staff is accrued hourly, which is inclusive of Bank Holidays. If you do not work a bank holiday; then this must be booked as holiday.**
> **10.3. Part time members of staff will accrue entitlement hourly, which is 1 hour's holiday for every 4.77 hours worked. Fractions will be rounded up to the nearest half hour.**
> **10.4 You may not carry forward any unused entitlement to the next holiday year. You will not be paid in lieu of unused holiday entitlement except on the termination of your employment.**
> **10.5 You are required to give us 3 weeks' written notice of your proposed holiday dates and we reserve the right to refuse a request having regard to the reasonable requirements of our business.**
> **10.6 You are specifically precluded from taking any holidays during the period 22 December to 2 January and will be expected to work some or all of the Bank/Public Holidays during this period.**
> **10.7 If you leave our employment, payment will be made for any accrued holiday entitlement not taken, or deducted from your final salary for holiday taken without accrued entitlement.**
> **10.8. You will not accrue any contractual holiday entitlement during any period of notice for which you are paid in lieu.**
> **10.9. A day's holiday pay is paid at the social hourly rate of £9.52. [Now accepted to be £10.42 per hour].**

10. The parties were not in agreement about whether the Claimant was a full or part time worker. The Claimant put her case on the basis that she was part time and that her holiday should therefore be calculated in accordance with clause 10.3. The drafting of this clause was not very clear and it was not clear to me whether there was any difference in practice between how leave was calculated for different staff members according to whether they were designated "full time" or "part time". The nature of full-time hours was not set out in the contract, but the Respondent maintained that the Claimant was treated as full time. The Claimant agreed that she worked roughly 32 hours per week, but said that her hours were too variable to be full time. For the purposes of this claim, as the drafting is not clear I accept the Claimant's interpretation that she was for the purposes of her contract a part time worker. I arrived at this view on the basis that a normal full time working week is between 35 and 40 hours and the evidence I saw showed that Claimant was working fewer hours than that. Accordingly, the Claimant was properly designated under her contract as a part time worker and she therefore had a right under the

contract to receive an hour's holiday pay for each 4.77 hours she worked.

11. Irrespective of what was set out in the contract, the Respondent does what many employers do when they have a workforce that is providing services over irregular hours and uses a computer package to calculate holiday and holiday pay entitlements. On page 37 there was an email from the Respondent to the Claimant that explained that a computer system called Care Planner calculates holiday pay for the Respondent's workers. The detailed explanation on pages 40-42 purported to explain how Care Planner calculated leave entitlement. The system worked on the basis of the Respondent's holiday year, which runs from 1 April to 31 March. It worked out from the actual hours worked by the Claimant how many hours of holiday she had already accrued and what she would be projected to accrue over the remainder of the Respondent's holiday year had she continued to work roughly the same number of hours. At page 44 the Respondent confirmed that the system calculates entitlement by using a percentage of 12.07, although the explanation was not specific about how this percentage was applied.

12. The Claimant's explained her case by setting out a calculation at page 36, which showed in hours what she thought she was owed on 3 January 2024. She said that between 1 April 2023 and 3 January 2024 she had worked 1142.03 hours and that using the formula from her contract, that equated to 239.42 hours of holiday entitlement for a 9-month period. Out of that she had already used 158 hours, leaving, she said, 81.35 hours to take.

13. Pausing there, I considered whether, if the entitlement was expressed in days rather than hours, the contract would have been compliant with the statutory minimum under the WTR. I concluded that it would, as the statutory entitlement, expressed in hours would have been lower. 1142.03 worked over 9 months equates to 1523 hours over a 12-month period, which means weekly working hours of 29.28 and thus an annual holiday entitlement of 163.98 hours assuming that 28 days equates to 5.6 weeks. Pro rata over 9 months this gives an entitlement of 123 hours. Thus the contract was providing for a more generous entitlement than the minimum guaranteed by the statutory rules.

14. The Respondent disagreed with the Claimant's calculation, which was at odds with what its computer system, Care Planner, calculated. That system, as was explained to the Claimant on page 40, calculated her entitlement as 142 hours and 36 minutes and was based on the hours she had worked as per her rostered weeks. She was then shown a projected entitlement based on what she was likely to earn in holiday over the remainder of the holiday year, based on her working pattern and was informed that she had "roughly 18 hours and 33 minutes left to book up until 31 March 2024". She was told that this figure would go up if she worked more hours than predicted. The Respondent's case was that the Claimant had used 168 hours of holiday at that point, not 158. There was also a dispute about whether the Claimant had taken 17 hours of holiday, shown as the first entry in an absence log on page 48. The Claimant disputed that she had taken this 17 hours of leave at all.

15. Having taken the Claimant thought the documents, Mr Haywood made submissions looking at the issues from the statutory and contractual perspective.

As I have already said, I agree with him that this is clearly not a case in which the Claimant was unlawfully denied the right to paid leave and there was therefore no breach of Regulation 13 or 13A of the WTR.

16. He then took me through a calculation based on the Claimant's statutory rights. He said that the Respondent's position was that the Claimant was a full-time employee, working on average 31 hours per week. I have already stated that I do not accept that analysis and that given the imperfect drafting of the contract, the proper interpretation was that the Claimant worked part time. But when it comes to the Claimant's statutory rights it seems to me beside the point how the Claimant was to be treated under the contract – the way to calculate her entitlement would be to apply the wording of the WTR and ERA. I have already noted that if the statutory rules were the whole story, the Claimant's entitlement would be less than she has claimed in this case (paragraph 13 above). The Respondent maintained that as a matter of fact the Claimant had had 185 hours of holiday – if that was the case I agree that that exceeds the Claimant's statutory entitlement, as indeed did the amount the Claimant said she had had (158 hours).

17. Mr Haywood then turned to the contractual position. He submitted that the correct interpretation was that the Claimant was full time and that the position was governed by clause 10.2 of her contract. He then submitted that as clause 10.2 is incompatible with the statute, the statue must prevail. I did not fully understand this submission, but I would observe that the meaning of clause 10.2 is not clear and it is ostensibly non-compliant with the statutory rules. However, for reasons I have already given, I did not think that the Claimant in this case was properly regarded as full time under the contract. The contract does not properly define what a full-time worker is and it seems to me that someone working on average 32 hours per week is not working full time as ordinarily understood. I therefore rejected Mr Haywood's first submission that there is no claim under the contract in this case. My conclusion therefore is that the Claimant was a part time employee and that entitled under her contract to one hour of paid holiday for every 4.77 hours worked. She was not obliged to settle for the sums calculated by the Respondent's computer system, which were not consistent with the promise made under the contract.

18. Mr Haywood submitted that if that were my conclusion, at its highest the Claimant was owed 10 days of holiday pay for which she would be obliged to give credit for days already conceded and paid for by the Respondent of which he said there were five.

19. Having heard the submissions, I considered the evidence I was shown about exactly how much leave the Claimant had actually taken – whether it was 158 or 168 hours and whether or not the Claimant had had the 17 hours of leave referred to on page 40. I decided that on a balance of probabilities the summary the Claimant prepared at page 36 was correct and that the documents provided by the Respondent did not show clearly that it was incorrect, or how it was incorrect, being based on computer generated calculations and the Claimant's managers' interpretation of those calculations.

20. As regards remedy, the Claimant is entitled to be reimbursed for any holiday pay

that she has not received and should have received and she must be paid her holiday pay in accordance with her contract in the future. Accordingly at the date of the claim, the Claimant was entitled to 81.35 hours of outstanding holiday pay, payable at the agreed hourly rate of £10.42. She must however give credit for any sums paid by the Respondent towards that amount in the relevant period. The Claimant accepted that by the time of the hearing she had received another five days of holiday pay (which I take to be 40 hours) and must give credit for that.

21. The Claimant is entitled on an ongoing basis to have her holiday and holiday pay calculated in accordance with her contract and she asserts that between the date of the claim and the date of the hearing she had worked further hours giving rise to holiday pay entitlement which had not been paid to her. As mentioned above, I did not hear clear submissions about the precise sums involved, but clearly the Claimant must give credit for any sums paid towards holiday by the Respondent since her claim was submitted. It was not clear to me from the documents exactly what sums the Respondent has said it has already paid and my judgment therefore sets out the principles as regards this later period rather than a specific amount.

22. The Claimant is not entitled to any other sums such as preparation time for the tribunal proceedings or loss of earnings for attending the hearing as these sums are not ordinarily recoverable unless an award of costs or a preparation time order is appropriate. There was nothing about the way that the Respondent conducted itself during these proceedings that would have justified a preparation time order in the Claimant's favour. The Claimant also made a reference to the ACAS Code of Practice. I do not think this is a case in which any uplift of the award would be justified. The Respondent dealt conscientiously with the Claimant's concerns and the Claimant has not explained how the ACAS Code of Practice applied or was not adhered to in this case.

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Employment Judge Morton
Date: 27 August 2024