



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Wiblin-Meakin

Respondent: Chaddlewood Farm Community Association

Heard at: Plymouth Employment Tribunal **(by CVP) On:** 05 April 2024

Before: Employment Judge Scott

Representation

Claimant: In person

Respondent: Mr Ryan (Counsel)

JUDGMENT

1. The claimant has accrued holiday for the leave years as follows,
 - a. 01/04/2020 – 31/03/2021
 - b. 01/04/2021 – 31/03/2022
 - c. 01/04/2022 – 31/03/2023
 - d. 01/04/2023 - 31/03/2024totalling 16 weeks leave to a value of £3842.06, which she is entitled to take now.
2. The claimant has not given the respondent notice of her intention to take her 16 week holiday and accordingly, her claim for holiday pay / unlawful deductions from wages is not well founded.

REASONS

1. By a claim form dated 8 March 2023, the claimant claimed payments for holiday pay from September 2019.
2. The claimant contacted ACAS on 10 January 2023 and a certificate was issued on 21 February 2023, against a prospective respondent, Chaddlewood Farm Community Association.
3. Accordingly, any action on or after 11 October 2022 is within time.

Applicable law.

4. Section 13(1) of the Employment Rights Act 1996 ("ERA") provides as follows –

“An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

5. Section 13(3) ERA provides as follows –

“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

6. The Working Time Regulations 1998 (“WTR”) as amended include the following provisions –

- Regulation 13 **Entitlement to annual leave**
- Regulation 13A **Entitlement to additional annual leave**
- Regulation 14 **Compensation related to entitlement to leave**
- Regulation 15 **Dates on which leave is taken**

I have omitted Regulation 15A which relates to leave during the first year of employment as this is not relevant.

7. Regulation 13 (A1) applies changes to the working time regulations made by the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 as follows:

(A1) *This regulation applies to—*

(a) a worker in respect of any leave years beginning before 1st April 2024, and

(b) a worker to whom regulation 15B does not apply in respect of any leave years beginning on or after 1st April 2024.

8. Regulation 13(9) acts to prevent leave being carried over to a subsequent leave year as follows and as relied upon by the Respondent:

13(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) subject to the exceptions in paragraphs (14), (15) and (17) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

9. Regulation 13(15) – (18) provides exceptions to that bar on carrying over leave:

(15) Where, as a result of taking a period of sick leave in any leave year, a worker is unable to take some or all of the annual leave to which the worker is entitled in that leave year under this regulation, the worker is entitled to carry forward such untaken leave into the following leave year provided it is taken by the end of the period of 18 months from the end of the leave year in which the entitlement originally arose.

(16) Paragraph (17) applies where, in any leave year, an employer fails to—

(a) recognise a worker's right to annual leave under this regulation or to payment for that leave in accordance with regulation 16;

(b) give the worker a reasonable opportunity to take the leave to which the worker is entitled under this regulation or encourage them to do so; or

(c) inform the worker that any leave not taken by the end of the leave year, which cannot be carried forward, will be lost.

(17) Where this paragraph applies and subject to paragraph (18), the worker is entitled to carry forward any leave to which the worker is entitled under this regulation which is untaken in that leave year or has been taken but not paid in accordance with regulation 16.

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(18) Annual leave that has been carried forward pursuant to paragraph (17) cannot be carried forward beyond the end of the first full leave year in which paragraph (17) does not apply.

10. Regulation 15 so far as relevant provides as follows –

- “(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*
- (2) A worker’s employer may require the worker –*
- (a) to take leave to which the worker is entitled under regulation 13 or regulation 13A; or*
- (b) not to take such leave,*
- on particular days, by giving notice to the worker in accordance with paragraph (3).*
- (3) A notice under paragraph (1) or (2) –*
- (a) may relate to all or part of the leave to which a worker is entitled in a leave year;*
- (b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
- (c) shall be given to the employer or, as the case may be, the worker before the relevant date.*
- (4) The relevant date, for the purposes of paragraph (3), is the date –*
- (a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number*

*of days or part-days to which the notice relates,
and*

*(b) in the case of a notice under paragraph (2)(b), as
many days in advance of the earliest day so
specified as the number of days or part-days to
which the notice relates.*

*(5) Any right or obligation under paragraphs (1) to (4) may
be varied or excluded by a relevant agreement.”*

11. The Court of Appeal in *NHS Leeds v Mrs Janet Larner* [2012] EWCA Civ 1034 considered the question as to whether an employee on sick leave needed to request annual leave as follows:

88. Mr Ford's essential point is that regulation 15 has no application where a worker is on sick leave and is prevented by sickness from taking paid annual leave during that period of sick leave. I agree with Mr Ford that if, as has been explained, a worker has a right under Article 7 to take annual leave at another time, it would be fundamentally inconsistent with the Article 7 right to take leave at another time outside sick leave, to require the worker to serve a notice or to make a request to take paid annual leave during sick leave. If, like the claimant, the worker has not recovered or returned from sick leave and therefore had no opportunity to take that leave at another time, the service of a notice for a period which is not sick leave is not practically possible.

89. I also agree with Mr Ford that, if necessary, it would be possible to interpret the 1998 Regulations so as to be compatible with Article 7, as interpreted in the rulings of the Court of Justice. I did not understand Mr Sean Jones to dispute Mr Ford's suggested interpretation of the 1998 Regulations to comply with Article 7. The issue between them is about the requirement of a prior request and the absence of such a request from the claimant.

90. First, in relation to the carrying forward of unused annual leave, regulation 13 (9) would be construed to read as follows—

“Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) it may only be taken in the leave year in respect of which it is due, save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave .”

91. Secondly, in relation to payment on termination of employment, regulation 14 would be read and interpreted to include the following insertion—:

“(5) Where a worker’s employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under regulation 16 for the period of untaken leave.”

12. However, following the withdrawal of the UK from the European Union on 31/12/2020, workers in the UK can no longer rely on the Working Time Directive 2003/88/EC.

Findings of Fact

13. The facts in this case are broadly agreed between the parties.

14. The Claimant has inoperable cancer for which she is receiving ongoing chemotherapy and does not expect to return to work in the near future, if at all.

15. It is not disputed that Ms Wiblin Meakin commenced work for Chaddlewood Farm Community Association in August 1996 and was employed for the majority of her employment as Company Secretary and Administrator for 16 hours a week.

16. The Respondent accepts that it was agreed that Mrs Wiblin Meakin would be paid 30p above the minimum wage through her employment. The parties also agreed that holiday requests were agreed verbally in the office.

17. The parties agree that Ms Wiblin Meakin most recently became unfit for work on 1st September 2019 and has not returned to work since that time.

18. The parties agree that there is no copy of Ms Wiblin-Meakin's employment contract, but it was common ground that a contract had been provided to her and kept at the offices. The terms of her employment contract are therefore unknown.
19. The parties agreed that the holiday year ran from 1 April to 31 March each year.
20. On 31 March 2020 Mrs Wiblin Meakin received a payment in lieu for holiday accrued but not taken at the end of that holiday year (p65 bundle).
21. The parties agreed that Ms Wiblin-Meakin had not requested specific holiday for any of the period from 1 September 2019 when she has been on sickness absence.
22. Neither party was able to say whether Mrs Wiblin Meakin's employment contract allowed for the accrual of annual leave from one year until the following year.
23. In April 2022 the parties agree that Mrs Wiblin-Meakin met with Mr Glenn Jordan, the Association Chairman regarding her employment situation. It is common ground between the parties that during this meeting, the possibility of a 'goodwill' payment was discussed were the Claimant to resign.
24. Following this meeting, in May 2022, the Claimant says she contacted ACAS, and was advised that she could make a claim for her holiday pay. The Claimant says she emailed such a request to Mr Jordan on 10 May 2022 (Bundle p44). The Respondent disputes receiving this email and states that around this time he stopped having access to an email address he had used as a counsellor. Given that the document within the bundle does not disclose the email address used for the Respondent, I accept that Mr Jordan did not receive this email. However, having heard evidence from the Claimant, I accept she is a credible witness. The Claimant did not seek to bolster her evidence and confirmed she could not recall which email address she had used to send the message. I find that this email was sent on the date claimed.
25. On 11 August 2022 Mrs Wiblin-Meakin claims to have sent a further email about her holiday pay, work situation and request for a redundancy payment to Mr Jordan. It is common ground that there was no response to this email. Again, the email address this document was sent to is not apparent from the documentation in the bundle and again, I find this email was sent on this date but was not received by the Respondent.
26. The parties agree that Mrs Wiblin-Meakin remains in employment, although it was common ground between the parties that she would likely not be well enough to return to her role. It is therefore agreed between the parties that she continues to accrue leave.

Determination

27. The Claimant's ET1 sets out her claim for holiday pay. No application was made to amend those grounds of claim to include further claims against the

Respondent. In her schedule of loss, the Claimant sought payment for loss of earnings whilst on sick leave, and a redundancy payment.

28. The parties agree that the Claimant's employment has not been terminated and the Claimant remains in employment. Accordingly, her claim for redundancy pay is not well founded. Furthermore, the Claimant does not advance any justification for her claim of loss of earnings, and accordingly, this too is not well-founded.
29. The Respondent accepts that the Claimant has not been paid holiday pay for the periods:
 - a. 01/04/2020 – 31/03/2021
 - b. 01/04/2021 – 31/03/2022
 - c. 01/04/2022 – 31/03/2023
 - d. 01/04/2023 - 31/03/2024
30. The Respondent argues that Claimant should not be able to recover any payment for accrued holiday pay on the basis that she did not make any request for holiday during the time she was unfit for work, and that any previous years entitlement has 'expired' as she is not entitled to carry over her leave pursuant to regulation 13(9) of the working time regulations 1998.
31. However, neither party indicated that Mrs Wiblin-Meakin requested leave at the end of 2019/2020 leave year when she did receive a payment for her holiday for the period ending in March 2019. It is difficult to reconcile this payment with the Respondent's case.
32. Mr Jordan stated in his witness statement that this payment was made as a goodwill gesture, but there is no contemporaneous evidence of that decision and his statement is at odds to the response in the ET3, which indicated that *'we would have no problem looking into this if Mrs Wiblin-Meakin contacted the Association to get this addressed.'* The defence goes on to state that the Respondent then sought advice and reviewed the contracts from which the Respondent concluded leave could not be carried over.
33. There is no evidence within the Respondent's defence, that the Respondent believed paying the holiday pay was a goodwill decision taken at the time of her sickness, in fact, it indicates the contrary, that no consideration had been given to the question of Mrs Wiblin-Meakin's holiday until after the Claimant sought to make a claim to the Employment Tribunal.
34. It is accepted by the Respondent that the Claimant was and remains on sick leave since September 2019, and accordingly, she was able to carry over her unused leave from 01/04/2020 – 31/03/2021 for 18 months from the date of that leave pursuant to regulation 13(15), therefore allowing her to carry over that leave until 31/09/2022.
35. Furthermore, it is clear from the Respondents ET3 response as set out in paragraph 33 above, and from Mr Jorden's witness statement that they have failed to encourage her to take her annual leave pursuant to regulation 13(16)(b) and has failed to notify her that her annual leave would be lost pursuant to regulation 13(16)(c) at any time. Accordingly, regulation 17 applies to all relevant years and Mrs Wiblin Meakin is entitled to carry over

that leave.

36. The Claimant first requests her holiday pay by email on 11 August 2022 for which there has been no response. There is no evidence within the bundle that the Respondent has yet complied with regulation 13(16) and (17) therefore her leave continues to accrue.
37. The Respondent's second point in defence, is that it subsequently reviewed Employees contracts and concluded that leave could not be carried over. Given the Respondent is unable to provide a copy of Mrs Wiblin Meakin's employment contract, this was explained to be other Employees contracts, which were not before the Tribunal. There is no evidence that the Employee contracts reviewed were on the same terms as the Claimant's contract, and in any event, there is no evidence of the contents of those statements. Accordingly, I do not accept that there is a relevant contractual term excluding the carry over of leave.
38. The Appellant wishes to be paid money she is owed for holiday which she has not been able to take. Whilst she technically remains in employment, as she has not resigned and her employment has not been terminated, neither party has remained in contact as would be expected in an employment relationship. Mr Jordan rightly acknowledges at paragraph 11 of the witness statement, that the community association has not been as active as it should have been in contacting Mrs Wiblin-Meakin.
39. Whilst the relationship between Mr Jordan and Mrs Wiblin-Meakin has now clearly soured, it is also clear that Mrs Wiblin Meakin had been a valued employee of Chaddlewood Farm Community Association and that the Respondent had sought to keep her position open for an indefinite period, so as to give her the opportunity to return should she be able to do so. Mr Jordan was clearly seeking to act in Mrs Wiblin-Meakin's best interest in doing so.
40. However, it is also clear in the ET3 that the Respondent considered Mrs Wiblin Meakin was not currently employed, but would be able to return to the community association if she wished. There is nothing in the ET3 which indicates that the Respondent viewed Mrs Wiblin Meakin as a current employee at the time of drafting the response.
41. In the course of this Tribunal claim the Claimant has made clear that she wishes to be paid for the holiday she has accrued and that her request has been refused. The Respondent submitted that the Claimant has not given notice of her holiday and that this should be requested by email.
42. The Tribunal cannot consider any deductions from wages which occurred more than two years before the claim was brought pursuant to s23 ERA 1996 as follows:

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

43. However, to date, there has been no unlawful deduction from her wages as she has not given notice of the dates she wishes to take her holiday. The construction of regulation 13 indicates that a payment in lieu of holiday can only be made on termination of employment. As the Claimant has not given notice of her holiday, but she remains on sick leave and she has not been notified of her leave entitlement expiring, her leave continues to accrue.
44. The parties accept the yearly figure for holiday pay should be £960.51. The Claimant has therefore accrued 16 weeks holiday, equivalent to a payment of £3842.06.
45. I have considered whether this claim form was filed within time. Any act after 11 October 2022 is within time. Given the Claimant continues to accrue holiday on a monthly basis and the Respondent continues to deny her holiday entitlement, I am satisfied that this claim was made within time.
46. If, as stated by the Claimant, she wishes to be paid for this holiday period, she should give notice to her employer that she now wishes to take this 16 week period of holiday.
47. The Respondent should now contact the Claimant and confirm to her how she should request holiday going forward to ensure that she receives payment for her outstanding holiday, pending the resolution of her employment situation.

Employment Judge Scott
Date: 03 July 2024

JUDGMENT SENT TO THE PARTIES ON
04 July 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>