



EMPLOYMENT TRIBUNALS

Claimant: Mr D Asprey
Respondent: McGeoch Technology Limited
Heard at: Midlands West Employment Tribunal
On: 18 February 2025
Before: Employment Judge Hussain

Representation

Claimant: In person
Respondent: Iain Lovejoy (Lawyer)

RESERVED JUDGMENT

1. The complaint in respect of holiday pay is well-founded. The respondent was in breach of contract in failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent shall pay the claimant **£6,092.74 (gross)** subject tax and National Insurance.
2. The complaint of unauthorised deductions from wages is well-founded. The respondent was in breach of contract in failing to pay the claimant sums due (car allowance and pension contributions) in the period **08 June 2024 to 28 June 2024**. The respondent shall pay the claimant **£714.12 (gross)** subject to tax and National Insurance.

REASONS

Introduction

1. The respondent is a manufacturer of lighting and electrical systems to the marine industry. The claimant was initially employed by the respondent as its Head of Operations having commenced employment on 02 January 2020. By an agreement dated 18 October 2021, the claimant moved to the role of Operations Director until his employment was terminated in June 2024.
2. The claimant, on 11 August 2024, presented claims for holiday pay and arrears of pay, namely car allowance and pension contributions. The claimant

contends that the respondent agreed to pay 15.5 days of carried over leave upon termination of employment and then failed to do so. The claimant further contends that the respondent agreed to a termination date of 28 June 2024 but treated 07 June 2024 as the termination date resulting in loss of car allowance benefit and pension contribution.

3. The respondent asserts that there was no agreement between the parties to allow the claimant to carry over leave until his termination date and relies on the contract of employment, which states that unused leave cannot be carried forward without the written consent of the parties. The respondent further contends that the claimant lost the right to carry over leave on 31 March 2024. This point was noted in the grounds of response but was not referred to in the submissions.
4. The respondent does not accept that the claimant's employment ended on 28 June 2024 and argues that the claimant's employment was terminated on 07 June 2024 when he failed to attend work. The respondent asserts that the claimant is not entitled to any pay or benefits from 07 June 2024 as he did not work after that date.
5. The hearing took place remotely and was conducted by CVP. It lasted 3 hours, leaving insufficient time for the Tribunal to consider its decision.
6. In terms of documentary evidence, the Tribunal was presented with a bundle containing 42 pages. The bundle did not contain the claim form, response form or the grounds of resistance which were considered in addition to the bundle.
7. The claimant gave evidence on his behalf. For the respondent, the Tribunal heard from Mr John D'Ambrogio (Managing Director) and Miss Lisa Brown (HR Manager). These individuals provided written statements in advance, and the Tribunal took time to read them. Each witness was asked questions about the evidence contained in their statements.

Issues in the case

8. This is a short track case listed for 2 hours and did not have the benefit of a preliminary case management hearing to determine the issues in the case. The issues were discussed with the parties to determine which matters remained in dispute.
9. The parties agree that there were factual disputes over the effective date of termination and whether there was an agreement in place regarding the carryover leave, which needed to be determined to decide the claims.

10. The issues are as follows:

Holiday pay/ breach of contract

10.1 Did this claim arise or was it outstanding when the claimant's employment ended?

10.2 Did the respondent do the following:

- 10.2.1 Enter into an agreement permitting the claimant to carry over leave accrued in the year 2020?
- 10.2.2 Fail to pay the claimant for 15.5 days carried over annual leave the claimant had accrued but not taken when their employment ended?
- 10.3 Was that a breach of contract?
- 10.4 How much should the claimant be awarded as damages?

Unlawful deductions from wages/ breach of contract

- 10.1 What was the date of termination of the contract of employment?
- 10.2 Were the wages paid to the claimant on 28 June 2024 less than the wages they should have been paid?
- 10.3 How much is the claimant owed?

Findings of fact

- 11. The claimant was initially employed by the respondent as its Head of Operations having commenced employment on 02 January 2020. By an agreement dated 18 October 2021, the claimant moved to the role of Operations Director.
- 12. The contract of employment included a provision at paragraph 8.1.1 that, in addition to bank and public holidays, the claimant was entitled to 25 days paid holiday. The provision goes on to state that the claimant could not, without the written consent of the respondent, carry forward any unused part of his holiday entitlement to a subsequent year.
- 13. At paragraph 6.1, the contract of employment stipulated that the respondent shall provide a car allowance of £7,200 per annum and contribute 6% into the company pension scheme.
- 14. The claimant's holiday year ran from the 1 January to 31 December.
- 15. The claimant was permitted, by Mr D'Ambrogio, to carry forward 16 days from his holiday entitlement for the holiday year 2020 into 2021 and then into 2022. Mr D'Ambrogio denies that he was aware that the claimant had carried over leave from 2020 prior to 20 May 2024, however, the Tribunal finds that Mr D'Ambrogio was aware of the claimant's outstanding carried over leave prior to 20 May 2024. On 31 October 2022, Mr D'Ambrogio received an up-to-date list as to the position of staff regarding their holidays and the carried over leave from 2020. At this point, he was aware that the claimant had outstanding leave from 2020.
- 16. After considering the list, Mr D'Ambrogio decided that all but 4 staff members who had not yet taken the holiday carried forward from 2020 would have to

take it all by the first quarter of 2023 or lose it. The 4 staff members included the claimant. There was an agreement between the respondent and the claimant that the claimant would manage his own leave. The respondent did not stipulate a date by which the 4 staff members, including the claimant, would need to use their leave. There is no dispute between the parties that the agreement permitted the claimant to carry over leave beyond the first quarter of 2023 or that there was no end date by which the leave needed to be taken.

17. The claimant, on 23 February 2024, gave notice of his resignation and requested a shorter notice period than the contractual notice period of 6 months. The respondent agreed that the resignation would take effect from 28 June 2023.
18. Shortly after the claimant's notice of resignation was submitted the claimant and the respondent had a conversation about the claimant's outstanding leave. Mr D'Ambrogio denies that there was a discussion about how accrued leave was taken, however, the Tribunal finds that the parties came to agreement that the claimant would not take all his leave prior to termination of the employment to facilitate a handover to his replacement, and to ensure that business needs would be met. The Tribunal also finds that it was agreed between the parties that the claimant would be paid in lieu of any outstanding holiday upon termination.
19. There was regular liaison between the claimant and Mr D'Ambrogio, in the weeks leading up to the date of termination to manage operations. Mr D'Ambrogio refutes the claimant's claim that there were discussions about leave during these meetings. The Tribunal finds that there were discussions about the claimant's outstanding leave and it was agreed that the last working day would be 07 June with leave being used for the rest of June.
20. The Tribunal further finds that the email dated 31 May 2024 was not an offer, as asserted by the respondent, but instead reflected an agreement between the respondent and claimant whereby the last working day would be 07 June 2024, 15 days of leave would be used till the end of June with the outstanding carryover leave of 15.5 days being paid upon termination. The Tribunal is satisfied that the employer did agree in writing to the ongoing carry over of accrued holiday and, in any event, agreed to pay it in discussions about the claimant's handover arrangements.
21. The contract of employment does not state which type of leave is taken first. The carried over leave of 15.5 days was considered by the respondent to be the remainder of the contractual leave of 25 days.
22. The Tribunal finds that the termination date was 28 June 2024 and 15.5 days of carryover leave had accrued for which payment was due upon termination. The claimant is also entitled to losses that accrued between 08 June 2024 and 28 June 2024 in respect of car allowance and pension contributions.

The law

Holiday pay/Breach of contract

23. Under Regulations 13 and 13A Working Time Regulations 1998 (WTR) workers are entitled to take paid holidays and to be paid holiday pay. The right under Reg 13 is 4 weeks; the right under Reg 13A is 1.6 weeks, resulting in the worker having a right to 5.6 weeks paid holiday. Under Regulation 14 WTR, an employee is entitled to be paid, at termination of employment, the proportion of holiday that he is entitled to in proportion to the holiday year expired but which has not been taken by the employee during that time.

Regulation 13

“... a worker is entitled to four weeks’ annual leave in each leave year ...”

Regulation 13A

“a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is

... (e)1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days ...”

Regulation 14

“... (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula— $(A \times B) - C$

where A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker’s leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.”

24. Regulation 16 WTR provides so far as is relevant:

“(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A at the rate of a week’s pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week’s pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) ...”.

25. The WTR provides interpretation at regulation 2 which sets out that a relevant agreement:

“-in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer ...”

26. Reg 4 of The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 states:

“Where a worker relied on regulation 13(10) and (11) of the 1998 Regulations to carry forward leave, that leave—

(a) must be taken on or before 31st March 2024, and

(b) may not be replaced by a payment in lieu except where the worker’s employment is terminated on or before that date, in which case the employer must make the worker a payment in lieu of leave equal to the sum due under regulation 16 of the 1998 Regulations for the period of untaken leave.”

27. Regulation 35 sets out the restrictions on contracting out of the WTR:

“(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of these Regulations, save in so far as these Regulations provide for an agreement to have that effect, or

(b) to preclude a person from bringing proceedings under these Regulations before an employment tribunal.”

28. Regulation 17 entitles an employee to advantage of the more favourable provision where rights are provided for by both the WTR and a contract of employment:

“Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provisions of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.”

29. The Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994 gives the Employment Tribunal jurisdiction with regard to contractual claims arising or outstanding at the termination of the employment of an employee.

Unlawful deductions from wages

30. Section 13 Employment Rights Act 1996 (ERA) stipulates that a worker has the right not to suffer unauthorised deductions from wages.

“(1) 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.”

31. Section 27(1) ERA sets out the definition of wages:

“In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including: a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise. ...” .

32. Section 23 ERA gives a worker the right to present a complaint to the Employment Tribunal in circumstances where an employer has contravened section 13 ERA.

33. Claims for unpaid wages can also be pursued as a breach of contract in the Employment Tribunal where the claim is arising or outstanding at the termination of the employment of an employee (The Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994).

Evidence and Conclusions

34. This judgment does not seek to address every point about which the parties have disagreed. It only deals with the points that are relevant to the issues that the tribunal must consider to decide if the claim succeeds or fails. If I have not mentioned a particular point, it is not because I have overlooked it, it is because it is not relevant to the issues.

Holiday pay

35. The claim for holiday pay is in relation to 15.5 days of annual leave that had accrued in the leave year 2020 which had not been taken by 28 June 2024. It is agreed between the parties that the claimant had accrued 15.5 days of annual leave that was not taken for which the claimant did not receive payment in lieu upon termination.

36. The main issue in contention between the parties was whether there was an agreement in place that allowed the claimant to carry over the accrued leave until the date of termination. The Working Time Regulations 1998 provides minimum protections for employees but this was primarily a contract claim.

37. The Tribunal has carefully considered the evidence and made findings that there was an agreement between the parties where the respondent had permitted the claimant to carry over leave and failure to make payment for the outstanding accrued leave upon the termination of the contract amounted to a breach of contract.

38. On behalf of the respondent, Mr D'Ambrogio gave evidence that he had given the claimant permission to carry forward 16 days from his holiday entitlement for the leave year 2020 into 2021. This is reflected in paragraph 5 of his witness statement as well as pages 23 to 24 of the bundle, namely email communication in which Mr D'Ambrogio suggests all outstanding leave to be used by the end of the leave year 2022.

39. Mr D'Ambrogio gave oral evidence that at no point prior to 20 May 2024, when the claimant forwarded a copy of an email detailing his outstanding leave, did he become aware that the claimant was yet to take accrued leave from 2020. This contradicts the evidence in his statement and the bundle. The position regarding accrued annual leave was further reviewed and on 31 October 2022, Mr D'Ambrogio received an up-to-date list as to the position of staff regarding their holidays and the carried over leave from 2020. This is confirmed in paragraph 8 of his witness statement and a copy of the email is evidenced at page 29 of the bundle. The documents are dated and demonstrate that details of the claimant's carried over leave was communicated to Mr D'Ambrogio. Mr D'Ambrogio reviewed the annual leave information and concluded that "All the issues lie in Ops" (page 28), from which it can be inferred that he read the up-to-date list, assessed the information and understood that the claimant had outstanding accrued leave. For these reasons the Tribunal finds that Mr D'Ambrogio was aware of the claimant's outstanding carried over leave prior to 20 May 2024.
40. Mr D'Ambrogio agreed that he had spoken to the claimant in November 2022 and agreed that the claimant would manage his own leave and was not subject to the limitation imposed on other employees, who were required to use their leave by the end of quarter 1 in 2023 or lose their leave. Mr D'Ambrogio gave evidence that he could not recall the exact nature of the conversation but confirmed that there was no discussion about when the leave must be used by. This is consistent with the claimant's evidence and is corroborated by documentary evidence at page 27 of the bundle, an email dated 04 November 2022 in which Mr D'Ambrogio writes "I have spoken to Dan and Dan will need to manage the 4 people mentioned below. The others must use their entitlement in Q1". There is no dispute between the parties that the claimant is one of the 4 employees being referred to. This is compelling evidence that there was an agreement between the parties that the claimant would manage his own leave which was not subject to any restrictions or a specific date by which the accrued leave must be used.
41. The Tribunal has considered this agreement in the context of the contract of employment which states that "The Executive shall not without the written consent of the company carry forward any unused part of his holiday entitlement to a subsequent year". The agreement appears to have been made verbally but is noted in writing at page 27 of the bundle. Both parties understood it to mean that the leave could be carried over beyond quarter 1 of 2023 and Mr D'Ambrogio, in evidence, confirmed that he expected the claimant to get back to him and tell him how he would manage it. This evidence supports the finding that there was an agreement between the respondent and the claimant which permitted the claimant to carry over leave and the permission did not impose any restrictions on the claimant as to when the leave had to be used.
42. Mr D'Ambrogio gave evidence that there were no discussions about annual leave between the email from 04 November 2022 and 31 May 2024. The Tribunal does not accept this evidence. When questioned, Mr D'Ambrogio accepted that there was a discussion about leave soon after the notice of resignation had been submitted, where the claimant had offered not to take leave leading up to his termination date, save for the pre-booked leave for a

week in June 2024. This would enable the claimant to support a handover. The claimant also gave evidence that a discussion took place about how operational needs would be managed, however, he stated that Mr D'Ambrogio requested that limited leave is used during the notice period to assist with the transfer and it was agreed that the outstanding holiday would be paid upon termination. The Tribunal prefers the evidence of the claimant as Mr D'Ambrogio could not initially recall that this conversation took place, did not mention it in his statement and recalled it only when questioned. Further, if on Mr D'Ambrogio's account there was an offer by the claimant to limit the use of his leave and not an agreement, it is plausible that some discussion about what would happen to accrued leave is likely to have taken place bearing in mind that both parties would have known there would be outstanding leave at termination of the contract. In addition, Mr D'Ambrogio did not explain why he changed his initial account that there were no discussions about leave between 04 November 2022 and 31 May 2024.

43. Mr D'Ambrogio stated that the email of 31 May 2024 was a proposal that he had put forward in the absence of any discussions taking place. However, this is not reflected within the email itself where Mr D'Ambrogio notes "I have reviewed your holidays and discussed and agreed this with you but there are some adjustments to make in the e-mail below". In oral evidence, Mr D'Ambrogio maintained there had not been any discussions and explained his use of the term "discussion" by stating he was referring to any email sent by the claimant with details of his outstanding annual leave. He further explained that he used the term "agree" in reference to agreeing the last day being 07 June 2024. The Tribunal does not find this evidence convincing as it is more plausible that when Mr D'Ambrogio wrote "I have reviewed your holidays and discussed and agreed this with you but there are some adjustments to make in the e-mail below" he was referring to discussions and agreements about holidays. Further, the claimant gave evidence that there were regular conversations about annual leave and the email reflected the agreement that parties had already reached. This account is more consistent with the comment made by Mr D'Ambrogio in his email dated 31 May 2024. For these reasons, the Tribunal finds that it can be inferred from the wording used in the email dated 31 May 2024 that there were further discussions about how the issues accrued leave would be reconciled, and that there was an agreement between the parties.
44. The adjustments referred to in that email appear to be about the email sent by Miss Brown on 15 May 2024 (page 36), which sets out the outstanding leave to be taken in June 2024 and the number of days which will be paid in lieu. The Tribunal finds the evidence of the claimant compelling as he explained that the only adjustments from the agreement was the number of days he would be paid in lieu on termination. This is a more plausible account than the account given by Mr D'Ambrogio that there were no discussions and that the email from 31 May 2024 was a new proposal that was not accepted by the claimant.
45. The Tribunal finds the claimant to be a reliable witness as his evidence was consistent with his statement and during cross examination and is also supported by the documentary evidence in the bundle.
46. Mr D'Ambrogio changed his account about how many conversations there were about leave between November 2022 and May 2024. The respondent

was not able to provide a satisfactory explanation as to why the terms “discussion” and “agreement” had been used when, on his account, there had been no discussions or agreement about holiday. The Tribunal recognises that an honest witness can be a mistaken witness as memory can be unreliable and that, with the passing of time, a witnesses’ recollection of events can fade or be altered. In this instance, reliance can be placed on the email that was drafted contemporaneously. This supports the Tribunal’s findings that the documentary evidence contradicts Mr D’Ambrogio’s version of events as he recalls them.

47. Accordingly, the Tribunal finds that there was an agreement between the parties that the claimant would manage his own leave. The Tribunal further finds that there was a further oral agreement about how outstanding annual leave and accrued carried over leave would be treated upon termination, which was reflected in writing in the email dated 31 May 2021. The agreement had the effect of excluding the restriction under the WTR to use leave carried over from 2020 by 31 March 2024. However, per regulation 17 the claimant was entitled to rely on the more favourable provision, namely that he could manage his own accrued annual leave and so the agreement did not engage regulation 35(1)(a).
48. The agreement states that 15.5 days accrued annual leave will be paid in lieu upon termination. The respondent failed to make this payment and is in breach of contract.

Unlawful deductions from wages

49. The claimant claimed that his agreed date of termination was 28 June 2024 whereas the respondent contends that the date of termination changed to 07 June 2024, when the claimant failed to show up for work.
50. In his statement, the claimant stated that his last planned working day was 07 June 2024 due to a pre-booked holiday. In oral evidence, he stated that during his ongoing discussions with Mr D’Ambrogio they had agreed an earlier leaving date because it could cause disruption if the claimant returned to work for 1 week and used annual leave for the rest of the period.
51. This is denied by Mr D’Ambrogio. In his witness statement, Mr D’ambrogio stated that after the claimant’s departure had been announced, the claimant made a request for his leaving date to be bought forward to 13 June 2024 and then to 07 June 2024. He agreed to both requests. He went on to state that it is only when the claimant sent an email forwarding details of his outstanding leave (page 36) that he considered the position regarding outstanding leave and sent the email dated 31 May 2024 offering to pay the claimant holiday pay, provided he left on 07 June 2024 and used leave for the remainder of June 2024.
52. The Tribunal has already made findings that the email dated 31 May 2024 reflected the agreement between the parties, rather than an offer being made. Reasons for these findings have been given in paragraphs 40 to 46 above. It also reflected the agreement that the last working day would be 07 June 2024 with leave being used for the remainder of June. For these reasons, the Tribunal finds that the effective date of termination was 28 June 2024.

53. By treating 07 June 2024 as the date of termination, the respondent was in breach of contract and caused the claimant to suffer the losses claimed, namely car allowance and pension contributions for the last 3 weeks of June 2024.

Remedy

Holiday pay/ breach of contract

54. Damages are awarded in the sum of £6,092.74 (£393.0800 x 15.5). The holiday pay day rate was taken from the payslip dated 28 June 2024 (page 42).

Unlawful deductions from wages/ breach of contract

55. The claimant sought pension contributions for the sum of £124.36, however, he did not provide any details on how this figure had been calculated. The claimant's contract of employment at paragraph 6.1 (page 17) stipulates that the respondent will contribute 6 % to the company pension scheme. The pay slip at page 42 records total gross pay to date as a sum of £24888.19. Total employer pension contributions to date amount to £1244.42. 6% of the total salary to date is £1493.29, leaving an outstanding balance of £248.87. Therefore, the sum of £248.87 is awarded as a loss of pension contributions.

56. Damages are awarded in the sum of £465.25 for car allowance (608.3300 x 0.75 (reflects 3/4 weeks)).

57. The total damages awarded are £6806.86.

Employment Judge **M Hussain**

Date approved 23 February 2025