



EMPLOYMENT TRIBUNALS

Claimant

Mr S. Dubrowski

v

Respondent

I.C.T.S. (UK) Limited

Heard at: Watford

On: 28 February 2025

Before: Employment Judge Hunt
Mr A. Kapur
Mr D. Wharton

Appearances

For the Claimant: no attendance

For the Respondent: Mr M. Ramsbottom

JUDGMENT

1. The claim for an entitlement to carry forward unused annual leave from calendar year 2023 to 2024 in accordance with Regulation 13 of the Working Time Regulations 1998 is well-founded and succeeds.
2. The Respondent must pay the Claimant £424.23 in compensation.

REASONS

1. Reasons for the Tribunal's decision were given orally at the hearing of this application. Written reasons were requested at the conclusion of that hearing. The Tribunal has therefore prepared this single document including both its judgment and its reasons.

Introduction and Preliminary Issues

2. The Claimant was employed by the Respondent as a security agent at Heathrow airport with effect from 9 May 2023. He remains an employee, albeit he has been on sick leave since early 2024.
3. The Claimant sent his claim form to the Tribunal on 8 May 2024 (according to the stamp on the envelope), after undertaking ACAS conciliation between 19 February and 28 March 2024. Due to problems accessing documents at

HMCTS' designated address for sending paper copies of claim forms, the claim form was not stamped as received by the Tribunal until 23 May 2024.

4. The claim concerns an alleged failure to permit the Claimant to carry forward his annual leave entitlement from the 2023 calendar year to 2024, contrary to Regulation 13 of the Working Time Regulations 1998 (the "Regulations").
5. The Claimant did not attend the hearing. At the time it was due to start, the Tribunal clerk called the Claimant's phone number as indicated on the Tribunal file but received no response. She also sent him an email that received no reply. The Respondent's representative indicated that he had emailed the Claimant about the hearing in early February and again in the days leading up to the hearing without response. He says that he had been informed by ACAS that it had sought to call the Claimant without success. The Tribunal was satisfied that the Claimant had received notice of the hearing.
6. The Claimant had been on sick leave for over a year by the time of the hearing with mental health issues. He had ticked box 12 of the claim form to say that he had a disability related to anxiety and depression. The Claimant had not contacted the Tribunal to say that he would not attend or that he no longer wished to pursue his claim.
7. The Respondent submitted that the claim should be struck out or dismissed on the basis that the Claimant was no longer actively pursuing it. The Tribunal considered Rules 3 and 47 of the Employment Tribunal Procedure Rules 2024. It determined to proceed with the hearing in the Claimant's absence for the following reasons. The Respondent had not provided any notice to the Claimant that it would seek to have the claim dismissed on this basis. The nature of the complaint was very clear. There were few factual disputes to resolve. The Tribunal felt it had enough information to determine the claim fairly. Overall, it considered that deciding the claim on its merits would better further the overriding objective of having claims determined in a proportionate and flexible manner whilst avoiding unnecessary delay and expense. In addition, Rule 42 envisages that parties need not always attend a hearing. In that case, it provides that the Tribunal must consider any written representations received in advance, which the Tribunal did (the Claimant's only written representations were in the claim form itself). Although the Tribunal proceeded to hear the claim, it plainly could only decide it on the basis of the evidence before it.
8. The Respondent had initially indicated in its ET3 response form that it believed the claim had been brought out of time. That contention was not pursued at the hearing. The Respondent submitted that the date the cause of action arose was 31 December 2023 (the final day of the 2023 leave year). It had believed the claim had been presented on 23 May 2024. However, it accepted the claim had in fact been made earlier as explained above and was

accordingly “in time” when taking into account the period of ACAS conciliation.

9. The Tribunal nevertheless wanted to be satisfied it had jurisdiction to hear the claim. It found the relevant date would in fact likely have been later than 31 December 2023. Regulation 30 provides that the time period for bringing a claim starts with “the date on which it is alleged that the exercise of the right should have been permitted”. It is not necessary to identify the precise date as limitation is not in issue, but the Tribunal notes that discussions about the carry forward were ongoing, including presumably via ACAS, until at least 15 April 2024. On this date, there was an exchange of emails between the Claimant and Respondent where the Claimant requested his accrued annual leave from 2023 be carried forward (p.50 of the file). At the hearing, the Claimant’s manager accepted this was the first formal request but stated that informal conversations on the subject had taken place before then. Accordingly, the Claimant may well have been aware that company policy did not permit the carry forward of annual leave save for in exceptional circumstances, but he had not made any clear request for that to his manager until 15 April 2024. Discussions took place thereafter up until 4 July 2024. It was clear to the Tribunal that, if the Claimant had a right to carry forward his unused annual leave, the exercise of the right should have been permitted immediately after 15 April 2024, without the need for further discussion. No doubt this is why the Claimant made his claim in May, rather than wait for those discussions to end. Assuming the ACAS conciliation process was properly undertaken, it may well be that a formal request to the Respondent’s broader management team had been made earlier, in or around February 2023. It matters not; the Tribunal concluded it had jurisdiction either way.
10. The Respondent provided the Tribunal with a 70-page file of papers. The Tribunal also read a witness statement and heard evidence from the Claimant’s manager, and heard submissions from the Respondent’s representative, all of which were very helpful to the Tribunal’s determination. The Tribunal was grateful to the Respondent for its valuable assistance both in the preparation of the claim and at the hearing.

The Facts

11. Few relevant facts were in dispute. When findings have been made, the Tribunal has made them on the balance of probability from the available documents and statements.
12. The Claimant was employed as a security agent from 9 May 2023. He worked at Heathrow airport. He worked initially in an area he refers to as the “vehicle control point”. He later transferred to a different team involved in catering services, in which he had access to the restricted sections of the airport. This was in or before October 2023.

13. He was paid £11.95 per hour worked. His annual leave year was 1 January – 31 December. His employment contract providing that he would have no fixed working hours, it stipulated that he would accrue 12.03% of his hours worked as annual leave entitlement. In effect, his annual leave entitlement would be credited to a “holiday account”. Whenever a request for annual leave was approved, he would be paid 8 hours per day for those days, with those 8 hours being deducted from his holiday account.
14. For the annual leave year ending 31 December 2023, the Claimant had accrued 118 hours of annual leave. He had not taken any annual leave during the year.
15. The Claimant’s employment contract does not allow accrued annual leave to be carried forward from one leave year to the next. It states as follows.

“You are not permitted to carry over any annual leave entitlement from one annual leave year, to the next. Any annual leave that remains unused on the 31st December will normally be lost”.

16. The Respondent’s staff handbook provides clarity and for a certain amount of flexibility as follows.

“We believe that it is mutually beneficial and leads to a better work-life balance for you to take all your annual holiday entitlement in the current leave year. You must normally use all your holiday entitlement during the current holiday year.

This is your own responsibility. If you don’t use it, you potentially forfeit what is left. Exceptionally, we may allow you to carry forward an agreed number of days to the next year. This is at our complete discretion.

We normally only consider this when you have taken at least four working weeks of holidays. You must also obtain the specific approval of your Manager. Where we agree, we will confirm approval in writing. We will make clear how many days and the latest date by which they must be taken. If you don’t take them by this date you forfeit what is left”.

17. The Respondent’s manager explained at the hearing that in practice employees are permitted to carry forward up to 60 hours of annual leave, but only in exceptional circumstances. An example was given of somebody that had booked annual leave towards the end of the year, which was cancelled on the Respondent’s request. Naturally the Respondent would not want to penalise its employee and would allow them to carry forward that unused leave. This “maximum” carry forward of 60 hours was an unwritten policy, but the Respondent’s manager believed it was universally adopted within the organisation. Similarly, the organisation required requests for carry forward of annual leave to be made by the end of March of the following year.

18. The Respondent did not authorise the Claimant to carry forward any of his unused annual leave from 2023. He made a formal request after 31 March 2024, but the deadline for making such requests was not enforced in the Claimant's case. Neither policy is very relevant to this case as the issue for the Tribunal is one of law, not application of company policy.
19. As to the process for requesting annual leave, the staff handbook provides as follows.

"To plan our holiday rota effectively, we normally expect six weeks notice of holidays of a week or more. We normally expect at least one week's notice of a single day's holiday.

In the first six months of employment, total leave is normally restricted to the amount you have accrued thus far.

Normally we do not allow more than two consecutive working weeks of annual holiday. We may make an exception for a "once in a lifetime" opportunity. However, we must first consider the needs of the organisation and staffing levels. Our decision in this respect will be final".

20. The Claimant's employment contract specifies that the Respondent's staff handbook also contains a disciplinary policy. The Tribunal was not provided with a copy. The Claimant's manager told the Tribunal that employees are not permitted to take annual leave during any periods of suspension. He said that he believes this is an unwritten policy. Whether that is so, or whether there is provision for that in the staff handbook, once again the issue for the Tribunal is one of law, not the application of company policy.
21. Either way, this policy restriction on taking annual leave is relevant to this case. The Claimant was suspended in October 2023 due to a security breach. He allowed an elderly lady to go to the toilet in a restricted area of the airport. The Respondent could not find any information about the date of the incident or when exactly the Claimant was suspended, even after having been allowed time over the lunch break to investigate. In the absence of any contrary evidence, the Tribunal considered it was most likely that the suspension was precautionary and a "neutral" act, pending disciplinary investigation and hearing. This would be most in line with standard industry practice as detailed in the ACAS Guide on Discipline and Grievances at Work and its Code of Practice on Disciplinary and Grievance Procedures. It would also better reflect the ultimate sanction, which was a warning, given at the conclusion of a disciplinary hearing on 11 December 2023. The suspension was lifted on that date.
22. During the suspension, both parties accept that the Claimant held at least one informal discussion about his annual leave. The Claimant says that he applied for leave "on different occasions", the Respondent disputes that. It submits

that information was given to the Claimant at the outset of his suspension to the effect that he would not be allowed to take any annual leave for the duration of his suspension. It alleges that no formal annual leave requests were made, but that the issue was once again brought up in December, towards the end of the suspension period. For the purposes of this case, all that is important is that the Tribunal accepted that the Claimant clearly had had the intention to apply to take annual leave at some point during his suspension. Either he had made one or several requests and was refused due to his suspension, or he had not made any requests because he had already been told the request would be refused. He had not determined to forfeit his annual leave by simply not formally applying for any.

23. By the time the Claimant's suspension was lifted, the Claimant's manager explained to the Tribunal that any possibility of taking annual leave before the end of the year was limited. It is likely he would have explained the same to the Claimant. It is a time of year when the airport is busy and many colleagues had already had annual leave requests authorised well in advance. Accordingly, there was little possibility of accommodating any further applications for annual leave. That said, the Tribunal heard that in fact the Claimant did not return to work after his suspension. He was investigating with the Respondent an alternative workstation away from the restricted areas of the airport. Apart from attending training (which the Claimant's manager recalled was in January), there doesn't seem any particular reason why in fact a "last-minute" leave request could not have been allowed in the relatively exceptional circumstances in which the Claimant found himself, had he made an application for annual leave for any specific dates when his suspension was lifted. The Tribunal found that he did not make any such application.
24. In general terms, the Tribunal was satisfied that the Respondent had put in place sufficient measures to encourage its employees to take annual leave. The staff handbook was clear, the Claimant's manager also explained that the Respondent posted notifications on the employees' online HR platform, gave reminders during employee meetings or forums, gave reminders informally when popping into crew rooms, and sometimes also sent emails on the subject.
25. The Claimant had said that requests for annual leave had been denied on several occasions. No further evidence was supplied or any specific details. The Claimant's manager could not recall any specific requests, save for one relating to annual leave in April 2024, which was granted. He did remember general discussions about annual leave, and the process for requesting it, including in an initial meeting when the Claimant joined his team. The Tribunal found the Claimant's manager to be a straightforward and honest witness and accepted that no specific requests for annual leave had been made or refused. There was no obvious reason why an employer, who is aware of its statutory obligations and who encouraged its employees to take annual leave, would systematically refuse requests for annual leave from the Claimant. The Tribunal accepted that, had the Claimant applied for annual leave in

accordance with his employer's protocol, he would have been allowed to take some. Up until his suspension, he had had reasonable opportunity to do so.

The Law and Issues

26. The relevant parts of the Working Time Regulations 1998 are as follows. The Respondent accepted at the hearing that they applied to the case.

Regulation 13 – Entitlement to annual leave

(A1) This regulation applies to–

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

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

...

(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; ...

(17) Where this paragraph applies and subject to paragraph (18) [irrelevant in this case], 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.

Regulation 30 – Remedies

(1) A worker may present a complaint to an employment tribunal that his employer–

(a) has refused to permit him to exercise any right he has under–

(i) regulation... 13...

(3) Where an employment tribunal finds a complaint under paragraph 1(a) well-founded, the tribunal–

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to–

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

27. The issues for the Tribunal to determine were as follows:

27.1. did the Respondent give the Claimant a reasonable opportunity to take the annual leave to which he was entitled under the Regulations?

27.2. if not, as it is accepted that the Claimant was not permitted to exercise his right to carry forward that unused leave, should the Tribunal make an award of compensation?

27.3. if so, in what amount (having regard to the Respondent's default and the Claimant's loss)?

Conclusions

28. The first issue for the Tribunal was one both of principle and fact-specific.

29. As to the principle, could an employer that refuses to allow a suspended employee to take annual leave be considered to have failed to give that employee a reasonable opportunity to take annual leave to which they are entitled? The Tribunal found that it could, certainly in the case before it that concerned a "neutral" suspension pending disciplinary investigation, as opposed to a suspension that was decided upon as a specific disciplinary sanction (the Tribunal did not deliberate on whether there may be any relevant differences between the two).

30. The Tribunal accepted that such a policy is relatively common industrial practice. It is not for this Tribunal to determine whether such a policy is sound or appropriate. However, it considered it might be helpful to make some general observations.

31. There could be good reasons for the Respondent's policy. An employee that is suspended should be ready and able to participate in any disciplinary investigation and hearing. They should also be ready and able to return to work as and when any suspension is lifted (noting that it is good practice for such suspensions to be kept under review and as short as possible).

32. However, these considerations become less relevant the longer the period of suspension. If a disciplinary investigation is to last several weeks, any investigation meetings and hearings with the employee can and should be planned in advance. It is hard to see any good reason why an employee who has been suspended as a "neutral" measure and may well ultimately not suffer any disciplinary sanction, should be prevented from taking annual leave for an extended period mainly because of their employer's failure to efficiently organise or progress a disciplinary process. It would seem that taking annual leave during any such extended period might benefit all parties. The employer might benefit, as an employee would use annual leave entitlement at a time

when they are already absent from work. Further absences on a return to work on account of annual leave would accordingly be limited. The employee might benefit, as a period of annual leave might allow some respite from the undoubted stress of being on an extended suspension for a disciplinary matter.

33. Be all that as it may, all the Tribunal needed to determine was whether a failure to allow an employee to take annual leave during a period of suspension could, in appropriate circumstances, entitle that employee to carry forward such leave to the next year in accordance with Regulation 13(17). The Tribunal found it could. The underlying analysis is not dissimilar to a situation whereby an employee is prevented from taking annual leave due to sickness. In that situation, the employee is entitled to carry forward leave in accordance with Regulation 30(15).
34. Even if, in principle, refusing annual leave to suspended employees could amount to a failure to provide an employee a reasonable opportunity to take annual leave, as a matter of fact it clearly will not always do so. A short suspension, especially one earlier on in the leave year, would be unlikely to have that effect. It is reasonable to expect an employee to be flexible as to annual leave dates, especially when under disciplinary investigation, and to spread annual leave to an extent across the year. It is only in those cases where a period of suspension has genuinely prevented the employee a reasonable opportunity to take annual leave that the Regulations would entitle them to carry that forward.
35. In this case, the Claimant did not intend to voluntarily forfeit his annual leave entitlement. The Tribunal has found that he intended to use at least some of it in the period between October and December 2023. He was prevented from doing so due to a combination of the Respondent's policy to prohibit employees from taking annual leave during periods of suspension, the extended length of that suspension, and the time of year that the suspension fell. By the time it was lifted, it was practically impossible for the Claimant to have taken all of his annual leave before the end of the year, even if he may have been able to take some had he been clear about any specific dates he wished to book. Accordingly, the Claimant was entitled to carry forward such annual leave that he had not been afforded a reasonable opportunity to take in accordance with Regulation 13(17).
36. The Tribunal would add that, although it had little information about the alleged misconduct that resulted in the suspension, it appears that it was a straightforward matter. The Claimant, in breach of policy, allowed an elderly lady to access a toilet in a restricted section of the airport. He may well have admitted the breach immediately. If he had not, it is hard to conceive why the Respondent could not conduct a swift investigation. It is also unclear why a lengthy suspension was considered to be necessary. The Tribunal did not come to any conclusions on these issues. It merely considered that there

would have been options available to afford the Claimant a reasonable opportunity to take at least some of his annual leave, such as allowing the Claimant to take such leave during the suspension or limiting the length of that suspension by either handling the disciplinary process more swiftly or reviewing the suspension at an earlier point.

37. The remaining issue for the Tribunal to decide was whether to award compensation and in what amount. The Tribunal concluded it should award compensation. The Claimant is in part “at fault” for his suspension due to a breach of policy resulting in disciplinary sanction. However, he was not responsible for the decision to suspend him, or to do so for a number of weeks, or to prevent him from taking annual leave during that period. The misconduct was to allow an elderly lady into a restricted area to go to the toilet. It was without doubt an error of judgment, but the Respondent accepted at the hearing it was not overly serious and that was reflected in the decision to give a warning, rather than any greater sanction. The Claimant was immediately informed that he would not be allowed to take annual leave and sought clarification. The Tribunal found there was no obvious reason why the Claimant’s suspension needed to be so long, or the Respondent’s policy so strict, such as to effectively eliminate any possibility of allowing the Claimant to use any of the 118 hours of annual leave he had accumulated to that point. The importance generally of providing workers with annual leave is plain from the fact that it is a long-standing statutory right, and that employers are under a statutory obligation to encourage employees to take it. It would be entirely disproportionate and unjust for the Claimant to be deprived of all of his annual leave entitlement due to what was ultimately viewed by his manager as a well-intentioned error of judgment. The subsequent steps taken by his employer that resulted in him being prevented from taking his annual leave were entirely out of the Claimant’s control.
38. Establishing an appropriate level of compensation was not an easy task on the limited evidence available. The Tribunal had no evidence about the periods of annual leave the Claimant had wished to take within the leave year or if there were any specific reasons for that. It found only that he wished to take some between October and December 2023. Having not booked any annual leave by October, and the Respondent typically requiring six weeks’ notice for any lengthy period and only permitting periods of two consecutive weeks’ annual leave, it is unlikely that the Claimant would have been permitted to take all of his annual leave entitlement. As he had not made any application for annual leave by then, it is unlikely that he had any major holidays lined up. In any event, the real issue for the Tribunal was whether he had had reasonable opportunity to take annual leave, not necessarily on the specific dates he would have wanted. Up until his suspension he had. No evidence was presented about any specific loss the Claimant had suffered from either the failure to allow him to take annual leave during his suspension, or from the denial of his right to carry forward annual leave (which is the specific issue

in dispute). All he was seeking was the paid annual leave to which he felt entitled.

39. Accordingly, the Tribunal found that the main loss the Claimant suffered was the financial loss of pay he would have received had he been allowed to carry forward his unused annual leave.
40. As to the Respondent's default, the Tribunal found that the only real fault lay in its refusal to allow the Claimant to carry forward his annual leave. Of course, this is a breach of the Regulations that is evidently a serious matter. However, that must be inherent in any successful claim. Aside from that, the Tribunal could find little fault on the Respondent's behalf. It accepted the Respondent's evidence that it encouraged its employees to take annual leave. The parties' employment contract was clear that the Claimant had no right to carry forward annual leave. The staff handbook provided more clarity on the position, clearly outlined the process for applying for annual leave and provided for an element of flexibility in relation to carrying forward unused annual leave. The Tribunal accepted the Claimant's manager's evidence that this flexibility is genuine and not simply contained within a written policy that is never in practice applied. In this case, despite applying to carry forward his unused annual leave after the March cut-off, the Respondent gave proper consideration to the Claimant's request. It may be the case that the Claimant's suspension was longer than it needed to be, but the Tribunal had insufficient evidence to make any firm findings about that. In any event, there was no direct complaint about the delay.
41. Taking these matters into account, the Tribunal found the just and equitable compensation to be a payment to reflect the pay the Claimant would have received for the annual leave that he was prevented from taking due to his suspension. There was little evidence of the exact amount the Claimant was prevented from taking. However, it could not be his whole entitlement as that would have been difficult to arrange in practice in light of the Respondent's clear annual leave policies. That would also fail to recognise that the Claimant had had a reasonable opportunity to take annual leave prior to his suspension.
42. The approach the Tribunal decided upon was to assess the proportion of the leave year for which the Claimant was suspended and to award him compensation to reflect the same proportion of his accrued annual leave entitlement. This takes into account both that the Claimant would not likely have been able to take his full accrued annual leave entitlement, and that he can reasonably be expected to spread annual leave across the year (absent contrary evidence). The Claimant had had the chance to take his annual leave earlier in the year and the Tribunal had no evidence that it was being "saved up" for any particular purpose. This approach would also fairly reflect the parties' employment agreement that annual leave will be lost if not used, and that the majority of annual leave should be taken within the year it is accrued.

It also recognises that the Claimant may have been able to request limited annual leave once his suspension was lifted.

43. Bearing in mind that the only evidence as to when the Claimant's suspension began was very broadly "October 2023", the Tribunal determined that it should calculate the period as if it began on 1 October. The Tribunal was mindful that the calculation of compensation was not an arithmetical science, and that even if this period exceeded the true length of suspension, it would provide a fair method of assessment. This includes because the Respondent breached the Claimant's statutory rights, for which no separate award is made, and to reflect that it is far from clear that the Claimant would in fact have been allowed to take any annual leave between 12 – 31 December 2023. When presented with this proposed methodology after liability had been established, the Respondent accepted it to be a sensible and principled approach to assessing compensation.
44. The calculation the Tribunal made was as follows.
45. Between 1 October and 31 December 2023, the Claimant was not afforded a reasonable opportunity to take his annual leave. This is a period of 71 days. His leave year from 9 May to 31 December 2023 was a period of 236 days. He was therefore suspended for 30.0847% of the leave year ($71/236 \times 100$).
46. The annual leave he was prevented a reasonable opportunity from taking during this period was 30.0847% of 118 hours = 35.5 hours. This is the amount the Tribunal found he was entitled to carry forward to the following leave year in accordance with the Regulations.
47. The Tribunal had concluded to award the Claimant compensation amounting to the remuneration he would have received for these hours. At the Claimant's rate of pay of £11.95 per hour, this equates to £424.23 ($35.5 \times £11.95$). This is the sum the Tribunal awarded as compensation.

Approved by
Employment Judge Hunt

Date: 10 March 2025

Sent to the parties on: 15 March 2025

For the Tribunal Office