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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Hackett  
**Respondent:** Tascor E&D Services Limited  
**Heard at:** East London Hearing Centre  
**On:** 13 November 2017  
**Before:** Employment Judge Russell

## Representation

**Claimant:** In person  
**Respondent:** Ms Amna Nagvi (HR Representative)

## JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent made an unauthorised deduction from the Claimant's wages in respect of an accident on duty. The claim succeeds in the sum of £6,390.17 gross.
2. There was no unauthorised deduction in respect of Occupational Health appointments.
3. The Claimant accrued and is entitled to carry forward 24 days holiday from the leave year 1 May 2016 to 31 April 2017 into the following leave year.

## REASONS

1 The Respondent is a private company providing repatriation services to the Home Office from a number of airports, including London City. The nature of the work means that there may be problems with detainees becoming distressed or aggressive. It is important therefore that employees undertaking such work are properly trained and qualified.

2 The Claimant is employed as a detainee custody officer based at London City with continuous service since August 2001. The Respondent operates an Injury and Illness on Duty policy which recognises amongst other things the nature of the work and the risk to

which employees are exposed. It applies to any employee who, whilst on company duty, sustains bodily injury caused solely and directly, through an assault or whilst participating in HOMES training where the injury independent of any other cause results in disablement from work.

3 The Claimant attended HOMES refresher training on 28 July 2016. I accept her evidence that she sustained no visible injury on the day but upon awakening the following day, she felt pain in the middle left area of her back. The Claimant completed an accident report and investigation form. I reject Ms Naqvi's suggestions that the form completed was not a recognised form and/or suggested bad faith on the part of the Claimant. I accept the Claimant's evidence that a number of different versions of the form were held locally and the version completed by the Claimant was done at the time on the form obtained from the workplace.

4 The Claimant's evidence is that she submitted the form to Mr Victor Von Pentz her line manager on 29 July 2016 in accordance with the policy. The Claimant says that Mr Von Pentz confirmed that he would tell other managers, including the training department. The Respondent however has no record of the form having been received and as such purports to deny the Claimant's entitlement to the payment, in part relying on paragraph 3.3 which provides that:

**“Failure to report an injury/illness at the time it occurs or as soon as practicable thereafter will disqualify the employee from payment under this policy.”**

5 Mr Singh, a colleague working with the Claimant on 29 July 2016, gave evidence that he recalled the Claimant speaking to Mr Von Pentz about the accident form that day and that Mr Von Pentz telephoned her back to confirm receipt of the accident form. I considered both the Claimant and Mr Singh to be credible and reliable witnesses. Ms Naqvi called into question the Claimant's credibility by reference to previous back problems in 2010 and an answer in an Occupational Health interview on 21 November 2016 to the effect that she could not remember having any significant health problems prior to the onset of this back trouble or any pre-course systems. I do not find any inconsistency which was probative or relevant to this case. The back problem in 2010 related to a different condition and was not chronic or symptomatic in July 2016. I have no direct evidence from Mr Von Pentz but am told that in the internal investigation, he denied any knowledge of the claim form being submitted. However, Mr Von Pentz commenced a period of sickness absence on or around 1 August 2016 and I find it more likely than not that he simply overlooked the Claimant's form. On the balance of probabilities, I find that the form was submitted by the Claimant in accordance with the policy.

6 The second basis upon which the Respondent denies an obligation to pay is the nature of the injury. Clause 3.2 provides that the policy does not include trips, slips and falls, muscle strain, back pains and similar resulting from normal body movements in the course of work. Company sick pay applies to such injuries. The notification form indicated that the problem was a muscle strain, apparently falling within the exclusion. Although there was limited medical evidence, I had regard to that provided by Occupational Health. The period of sickness absence did not commence until 21 November 2016 as until then the Claimant was able to undertake light duties only. At that date, the medical condition was described as a bulging thoracic disc and this was confirmed in subsequent Occupational Health. On balance, I find that the injury which has

caused the Claimant to be absent from work relates to the disc and not simply a muscle strain. The Claimant is not a trained medic and I prefer the diagnosis and evidence of Occupational Health. I am not satisfied that the Claimant's condition falls within the exclusion.

7 The Claimant was off sick during the period from 21 November 2016 until 12 April 2017 she is therefore entitled to pay under the policy the maximum sum of 60 days (expiring on 12 April 2017). Since the hearing, the Respondent has confirmed that the appropriate sum is £6,390.17 gross. This sum must be subject to deductions for tax and National Insurance which will be processed through the Respondent's payroll. The Claimant has received contractual sick pay and SSP during the period in which accident on duty pay should have been received. She must give credit for these sums, however, the Respondent must also pay the Claimant any contractual sick pay and/or SSP which would have been due from the end of the accident payments until her return to work on 12 April 2017.

8 The Claimant also claims to be entitled to pay for time attending Occupational Health appointments on 21 November 2016 and 25 April 2017. Having regard to the hours worked records produced by the Respondent, I find on balance that the Claimant has already been paid in full for both of those days and there has been no authorised deduction in respect of the same.

9 The final issue is the holiday claim. The Respondent's holiday year runs from 1 May until 30 April in any given year and the Claimant is entitled to 210 hours (or 26 days) inclusive of 8 public holidays. It seems to be common ground that the Claimant was also entitled to a further 5 days holiday by virtue of her length of service.

10 By the time the Claimant went on sickness absence in November 2016, she had therefore accrued a considerable proportion of her annual leave entitlement but had only taken seven days in the relevant holiday year. As the Claimant is on long term sickness absence from 21 November 2016, she was thereafter deprived of the ability to take the balance of her holiday leave until her return to work on 12 April 2017, approximately 18 days before the end of the 2016/17 leave year.

11 The Respondent relied upon an annualised hours agreement, said to be in force from 1 May 2017 which provides that annual leave entitlement of up to 40 hours may be carried forward from the previous year but must be used within six months. The Respondent also relies upon an internal memo dated 4 May 2016 which purports to apply the maximum carry forward of five days (40 hours) even to employees rendered unable to take their leave because of long term sickness absence during a holiday year. The Respondent also relies upon the Capita employment handbook which applies to the Claimant and which states that where special circumstances prevent an employee from taking full legal entitlement by the end of the leave year, the employee should consult in good time with their managers to see whether they can carry up to five days over and, if so, that those must be taken within three months the following leave year. The Respondent's case is that in accordance with its policies it has permitted the Claimant to take forward five days but no more.

12 Whilst the policies limit the carrying forward of leave to five days even in cases of long term sickness absence, I had regard to the provisions of the Working Time

Regulations as interpreted by the courts, in particular in **NHS Leeds v Larnner** [2012] EWCA Civ 1034, that there is a legal requirement that a person on long-term sick leave who has not had an opportunity to take annual leave and who wishes to carry forward that leave to another leave year be permitted to do so and without requirement of making a request to do so before the end of the relevant leave year. A term implied by statute overrides the effect of internal policies which are inconsistent with it, no matter how clear the policy.

13 Here, the Claimant tried to take her outstanding 2016/17 leave before the end of the year by way of a request to Mr Darren Lam on 29 March 2017. The request was not approved and the Claimant was thereby deprived of her annual leave and she is entitled to carry the balance forward into the 2017/18 leave year. The total entitlement was 31 days (26 days plus 5 length of service), of which 7 days had been taken. Payment in lieu of accrued but untaken annual leave is permissible only upon termination of employment. The Claimant continues to be employed and so is not entitled to compensation but rather a declaration that she is entitled to have 24 days paid leave added to her 2017/18 leave year to be taken in accordance with the normal requirements of booking leave and by the end of 30 April 2018.

14 Since the giving of this Judgment and oral reasons, emails from the parties suggest that there is an ongoing dispute about the leave entitlement. It is not clear why the Claimant refers to holiday from the 2015/16 leave year or how she gets to the figure of 29 days. This may be an issue about holiday carried forward from the previous leave year. If so, then it should and could have been taken before the sickness absence commenced in accordance with the policies and, as such, cannot be carried forward yet further.

Employment Judge Russell

1 December 2017