



EMPLOYMENT TRIBUNALS

Claimant: Mr P Kershaw

Respondent: Montgomery Transport Limited

HELD AT: Liverpool

ON: 13 November 2020
and
18 December 2020 (in
chambers)

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Gibbs, lay representative

Respondent: Mr Richards, counsel

JUDGMENT

1. The claimant's claim for contractual sick pay was withdrawn by him during the course of this hearing and is hereby dismissed.
2. The claimant's claim for payment for annual leave fails and is dismissed.
3. The claimant's claims for unlawful deductions from wages for bereavement leave and payment for attending meetings fail and are dismissed.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. This was a remote hearing which was not objected to by the parties. The form of remote hearing was a code "V" hearing, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable and no one requested the same. The documents that I was referred to are in a bundle the contents of which I have recorded. Witness statements were provided by both witnesses in these proceedings, being Mr Kershaw himself and Mr Adam Seed, HR officer of the respondent.

2. The claimant brings claims of unpaid holiday pay and sick pay. He was employed by the respondent as a "Class 1" driver from August 2013. He suffered a branch retinal artery occlusion of his left eye in September 2017, as a result of which he lost his ability to drive for the respondent. He began sickness absence on 25 September 2017 and remained off sick from work until his employment terminated on 22 October 2019 on capability grounds.
3. The claimant's ET1 was presented to the Tribunal prior to his dismissal, on 23 September 2019, before his employment was terminated on 22 October 2019. The respondent has in pleadings asserted that the Tribunal has no jurisdiction to consider the claimant's claim for payment for accrued but untaken annual leave, as this is only payable on termination of employment. However, the respondent's response form acknowledges that at the time of submission of the ET3 the claimant's employment was terminated and goes on to assert that his outstanding holiday entitlement had been paid in full.
4. No application to amend the claim was presented to the Tribunal prior to the start of the main liability hearing.
5. It is clear from the documents provided by the claimant and Mr Gibbs to the Tribunal and comments made by them during the hearing that they have a significant number of complaints that they wished to bring to the Tribunal's attention about the respondent's conduct and that of Mr Seed in particular. Mr Gibbs is also a former employee of the respondent, and it became clear during the course of the hearing that his relationship with his former employer had ended somewhat acrimoniously.
6. Mr Kershaw had produced lengthy and detailed witness evidence, comprised of several separate statements. These contained a significant amount of information about the respondent's working practices generally and the claimant's views of the lawfulness of these which was not relevant to the issues for the Tribunal to decide.

Contractual Sick Pay Claim Withdrawn

7. The claimant confirmed at the outset of the hearing that he was withdrawing his claim for contractual sick pay as he had been paid this already, albeit late. This claim is therefore dismissed.

Holiday Pay

8. The original claim issued by Mr Kershaw was submitted on the basis that he had not been paid for his accrued but untaken annual leave during the period of his sickness absence. At the time that his claim was lodged at the Tribunal, he was still in employment with the respondent. He has since been dismissed. He was paid a sum in lieu of his accrued but untaken annual leave entitlement after his

dismissal, which the respondent says is more than he was entitled to under the terms of the Working Time Regulations.

9. The respondent's primary case is that at the time the claim was lodged at the Tribunal on 23 September 2019, Mr Kershaw was still in employment. The respondent's case is that annual leave entitlement which has accrued but not been taken by an employee only becomes payable to that employee at the end of their employment. Therefore, although Mr Kershaw repeatedly requested payment for his annual leave during his employment, the respondent's case is that he was not entitled to be paid it as he was still in employment.
10. Mr Kershaw's employment was terminated by the respondents on the grounds of capability on 21 October 2019. It is accepted by the claimant that after his dismissal, he was paid a sum in lieu of his annual leave.
11. Although the claimant's claim has not been the subject of any formal application to amend to reflect the fact that he has now been dismissed, the claimant and the respondent have proceeded on the basis that the claim has been amended. The Tribunal therefore allows the claim to be amended to include reference to the claimant's dismissal, taking into account the claimant's status as someone without the benefit of legal advice and the respondent's lack of any formal objection to this course of action.

Previous Case Management Hearings

12. There have been two earlier preliminary hearings in this matter. The first was held on 21 February 2020 before Employment Judge Grundy at which the claimant was required to pay deposits of £25 per claim before being permitted to proceed with both his holiday pay claim and his sick pay claim, these being judged by the Tribunal on that occasion as having little prospects of success. The second preliminary hearing was a case management hearing on 2 October 2020 before Employment Judge Feeney.
13. It is apparent from the written records of both preliminary hearings that the scope of the claimant's claims was discussed with him and Mr Gibbs by both judges. In the preliminary hearing in February 2020, Employment Judge Grundy notes at paragraph 5:

"It is clear from that statement [i.e. the claimant's statement of loss] that the claimant also thought he could make within this claim claims relating to the termination of his employment. The Tribunal has explained that that is not possible and would require a different claim to be made."
14. Mr Kershaw and Mr Gibbs were warned by Employment Judge Grundy that the consequence of the deposit orders is that they are at risk of having to pay the respondent's costs if they are unsuccessful at this hearing. At the start of the hearing on 13 November 2020, Mr Kershaw appeared to have been compensated to a significant extent for his annual leave. Also, the respondent

made an open offer to pay £1435 in full and final settlement of all claims to Mr Kershaw prior to this hearing. This was rejected by him.

15. At the second preliminary hearing on 2 October 2020, Employment Judge Feeney noted at paragraph 8:

“I was also concerned that Mr Gibbs had written to the Tribunal raising issues in relation to a public disclosure claim, however I ascertained today that there was no such claim before the Tribunal and confirmed that the claim was simply holiday pay and sick pay.”

16. At the outset of these proceedings the respondent made an application to have certain sections of the claimant’s witness statement struck out so that they be removed from the public record. In support of that application, the respondent noted that the claimant and his representative had discussed the scope of Mr Kershaw’s claim on two separate occasions before the Tribunal and had confirmed that the claim related only to holiday pay and sick pay. The disputed paragraphs did not go, in the respondent’s case, to these issues and should not be admitted.

17. The claimant’s response to this application at the outset of the main hearing was to say that he wished to raise issues of whistleblowing and criminal activity before Employment Judge Barker. Mr Gibbs told the Tribunal:

“We want to prove that during the course of this they [the respondent] have conducted themselves in a criminal manner. I am going to tell you all of this and then you are going to decide this and you [Employment Judge Barker] are going to blow the whistle.”

18. The Tribunal explained to Mr Gibbs that Mr Kershaw had not brought claims of whistleblowing to the Tribunal, and that this matter had been discussed and clarified at two previous hearings. It was also explained to the claimant and his representative that the Tribunal had no jurisdiction to consider criminal complaints. It was also not possible for Employment Tribunals, or Employment Judges, to “blow the whistle” on behalf of a party. This was for an individual to do within the prescribed channels.

19. Mr Gibbs and Mr Kershaw maintained that Employment Judge Grundy had told them that she would “hear” their whistleblowing complaints and that they believed that they were permitted to present such evidence at the main hearing. Mr Richards told the Tribunal that this had not been said by Employment Judge Grundy – on the contrary, she had confirmed with the claimant and Mr Gibbs that the claims that they had brought were for holiday pay and sick pay only.

20. I note that when expressly asked about the issue of a public disclosure/whistleblowing complaint by Employment Judge Feeney, Mr Gibbs told Judge Feeney that there was no such claim before the Tribunal. It is therefore not accepted by the Tribunal that he and Mr Kershaw could have understood that

a whistleblowing claim would be considered on this occasion – it had been made expressly clear by Employment Judge Feeney that it would not be. The claimant was therefore not permitted to raise issues of whistleblowing at the hearing on 13 November.

The Respondent's Application to Strike Out Parts of the Claimant's Witness Statement

21. At the second preliminary hearing on 2 October 2020, Employment Judge Feeney noted that the respondent had taken issue with the content of the claimant's witness statement, in that the respondent maintained that "*many of the paragraphs were irrelevant*" to the issues that the Tribunal would decide. The issue of whether the paragraphs should be struck from the public record was, however, deferred to be decided by the Tribunal at this (final) hearing.
22. Therefore, at the outset of these proceedings the Tribunal heard the respondent's application to have certain sections of the claimant's witness statement struck out so that they be removed from the public record. In support of that application, the respondent noted that the claimant and his representative had discussed the scope of Mr Kershaw's claim on two separate occasions before the Tribunal and had confirmed that the claim related only to holiday pay and sick pay. The disputed paragraphs did not go, in the respondent's case, to these issues and should not be admitted.
23. Taking the information before the Tribunal as a whole, it is clear that Mr Gibbs and Mr Kershaw knew that the claim that had been brought was not a whistleblowing claim. The paragraphs in Mr Kershaw's witness statement that were not relevant to issues of holiday pay and sick pay would be struck from the record and not considered further.

The Scope of the Claimant's Existing Claims and Additional Claims

24. However, the claimant and Mr Gibbs were informed by the Tribunal at the hearing on 13 November that should they wish to, they could make an application to amend the claimant's claim to include further complaints that fell within the Tribunal's jurisdiction, including whistleblowing and unfair dismissal. Mr Gibbs replied by saying "*yes, we'll add those claims in now then*".
25. The Tribunal explained that it was not possible to add in claims in that way, as the Tribunal needed to consider the amendments requested, whether they were out of time and why they were being added at this late stage, and any issues of fairness to both parties in either allowing or refusing any amendments sought. Also, given that only one day had been allocated to hear the claimant's sick pay and holiday pay claims and that over an hour of that hearing time had been spent dealing with the claimant's objections to the respondent's application, dealing

with an application to amend could result in the claimant's existing claims not being heard on this occasion.

26. It was suggested by the Tribunal that, to allow the sick pay and holiday pay claims to be determined in the hearing time available, that these be heard first and that should the claimant wish to apply to amend his claim to add additional complaints, that could be considered at the conclusion of this hearing given that the issues relating to sick pay and holiday pay were able to be dealt with discretely. The claimant agreed with this.
27. Taking all the discussions between the parties both at this hearing and at the previous two case management hearings into consideration, the issues brought to the Tribunal by Mr Kershaw were:
 - a. Was he entitled to be paid during his employment for annual leave entitlement accrued during his long-term sickness absence;
 - b. If so, how much was he entitled to receive by way of payment? Was he subject to the terms of a "collective agreement" that provided for an increase in holiday as a result of "rounding up" of half days of holiday entitlement into full days;
 - c. Was he entitled to payment during his long-term sickness absence of 3 days' bereavement leave;
 - d. Was he entitled to payment for four days pay (or some other sum) for attending meetings during his long-term sickness absence; and
 - e. Had there been an unauthorised deduction of wages in the sum of £1 from his final payment on the termination of his employment? This sum was deducted as the claimant was a member of the company "Employee Sickness Scheme" ("ESS"), a kind of savings club that provided for a payment of £40 per week for up to four weeks if the employee was absent due to sickness. The claimant's case is that as his employment was terminating and he could receive no further benefit from this scheme, the respondent was therefore not permitted to make deductions for membership of the ESS.
28. It is noted that only the first two of these issues was contained in the claimant's ET1 form. It is clear from the respondents' conduct in these proceedings and particularly that of Mr Richards that they have sought to accommodate the claimant's changing grounds of appeal where possible. To that end, the respondents have acknowledged that the claimant was owed additional contractual holiday payments by way of "service days" payable to him on the basis of the length of his service. They acknowledge that he was owed two service days for annual leave year 2017-2018 and two for 2018-2019. They have not taken issue with the addition of claims relating to bereavement leave and pay for attending meetings during his sickness absence. I have taken account of the claimant's lack of legal representation and allow these amendments to his claims in spite of the unconventional manner in which they have been presented.

29. However, any sums claimed for meetings which took place before his sick leave commenced are not permitted to be added as amendments to these claims. These fall outside the scope of the original appeal as they do not relate to sick pay or holiday pay during sickness absence and are significantly out of time.

Refusal of Unlawful Deduction From Wages Claim

30. Furthermore, the claim for the £1 unlawful deduction from wages cannot be included in the claimant's claims before this Tribunal. It arose out of deductions made on termination of employment. It therefore post-dated the submission date of the ET1 claim form. A flexible approach has been taken to allow the "deductions" claims that were broadly referred to in the ET1 (in particular, to note that the claimant had ticked the box to state that he sought recover of "other payments") to allow those claims listed at c) and d) above, as they occurred at the time to which the ET1 relates. However, the claim at e) above arose after the submission of the ET1 and no application has since been made to include it, at either case management hearing or since.
31. Therefore, the issues for the Tribunal to decide at this hearing are those listed at paragraph 27 a)-d) only.
32. Although a significant amount of time was spent on this occasion clarifying the claims that the Tribunal was to decide, and although this had been discussed on two previous occasions, Mr Kershaw and Mr Gibbs sought to use the time at this hearing to make additional complaints against the respondent which were not part of the claims before the Tribunal. They were reminded by the Tribunal that this was not appropriate. They also made several highly critical remarks about the respondent's witness Mr Seed that were not related to the issues before the Tribunal.
33. Mr Gibbs was asked by the Tribunal to limit his cross-examination to issues that the Tribunal had to decide and was asked several times not to shout at the witness. Mr Gibbs told the Tribunal at the end of his cross-examination of Mr Seed that there was "a lot more" that he wanted to question Mr Seed about, with the suggestion that this related to issues outside the scope of Mr Kershaw's complaints.
34. The following findings of fact reflect the facts that were relevant to the issues that the Tribunal had to decide. Not all of the information that was presented to the Tribunal is set out below. This is not because that information was not taken into consideration, but because it was not sufficiently relevant to the issues that the Tribunal had to decide.

Findings of Fact

The Terms of the Claimant's Contract

35. Mr Gibbs, on behalf of Mr Kershaw, disputes that Mr Kershaw's contract of employment was genuine or lawful. Mr Gibbs took issue with the legality of Mr Kershaw's contract on the basis that the respondent's address was stated in the contract to be in Northern Ireland, but Mr Kershaw's place of work was Preston. Mr Gibbs noted "*this isn't a proper contract, his contract was at a workplace in Preston*". The respondent noted that the Northern Ireland address was the head office of the respondent and would not affect the validity of his contract. Mr Gibbs also alleged that the amendments to Mr Kershaw's contract were not contractually binding because they were contained in a separate letter. This assertion was contradicted by Mr Kershaw's evidence under cross-examination when he acknowledged that they were terms agreed to and accepted by him with his signature.
36. Taken as a whole, I find that the contractual documents, including the letters amending the terms of the contract, are valid agreements in relation to Mr Kershaw's relationship with the respondent.
37. The claimant told the Tribunal that he and Mr Gibbs had succeeded in negotiating a change to their holiday entitlement on behalf of the other night shift drivers that to allowed for the rounding-up of night drivers' holiday entitlement so that, for example, if they were entitled to 22.4 days' holiday, the 0.4 would be credited as a whole day's holiday. The respondent disputed that this agreement had been reached both with Mr Kershaw individually and on behalf of the other night drivers.
38. There was significant disagreement in the facts presented by the parties as to whether there had been a "collective grievance" presented by Mr Gibbs and Mr Kershaw on behalf of the other drivers on the same shift, or "collective bargaining". The respondent maintained that there had been a grievance presented by Mr Gibbs and Mr Kershaw but no collective bargaining negotiations, and that as there had been no election of employee representatives, Mr Gibbs and Mr Kershaw were not authorised to conduct collective bargaining on the other drivers' behalf.
39. Mr Gibbs and Mr Kershaw appeared to assert that they were so authorised, but Mr Kershaw's evidence in cross-examination was not consistent. He both said that he had not been elected as an employee representative and also that he was entitled to conduct collective bargaining. It was also unclear what the claimant considered the nature of the discussions with the respondent to have been.
40. I find that the claimant and Mr Gibbs raised a grievance with the respondent, ostensibly on behalf of the other drivers. Having considered the evidence before the Tribunal, I find that the claimant has neither been able to establish that he and Mr Gibbs were authorised to conduct collective bargaining nor that they reached agreement with the respondent that drivers' holidays would be rounded-up. This was not established on the balance of probabilities before the Tribunal.

The Claimant's Sickness Absence

41. The claimant suffered a branch retinal artery occlusion of his left eye in September 2017, as a result of which he lost his ability to drive for the respondent. He began sickness absence on 25 September 2017 and remained off sick from work until his employment terminated on 22 October 2019. I find that during the period of the claimant's sickness absence, he repeatedly requested that he be given what his witness statement refers to as "*redundancy or an agreed termination of my contract*". I find from the evidence before me that the claimant and respondent discussed alternative employment but were unable to agree on a suitable role. It is clear that finding himself unable to drive and therefore unable to work will have been a cause of significant stress to the claimant.
42. Having commenced his sickness absence on 25 September 2017 and having been paid his 28 weeks' Statutory Sick Pay ("SSP") entitlement, it is clear that the claimant would have been in straightened financial circumstances on the expiry of his SSP in the spring of 2018, adding to his distress.
43. The claimant began to contact the respondent to request payment for accrued but untaken annual leave entitlement. Evidence of his requests for payment were before me in the bundle from February 2018, 12 April 2018, 5 April 2019, 10 August 2019 and 18 September 2019 and 20 September 2019. I note that none of these communications request that annual leave be taken (as opposed to paid in lieu). No request is made for leave to be taken on particular dates or for a particular period of time. On 5 April 2019, the claimant requested payment for leave that had not yet accrued, for leave year 2019/2020.
44. There were attempts by the respondent to meet with the claimant to discuss his untaken holiday entitlement in April and May 2018, but the meetings failed to take place because on each occasion Mr Kershaw asked to be accompanied by Mr Gibbs, who by that time had been dismissed by the respondent and was not permitted by them to return to the premises. It is regrettable that the claimant and the respondent were unable to discuss the claimant's holiday entitlement directly.
45. The respondent told the claimant in a letter of 3 May 2018 that he was permitted to be accompanied by a colleague or trade union official or representative, but in a letter dated 5 May 2018 Mr Kershaw insisted on being accompanied by Mr Gibbs. Mr Kershaw then wrote to the respondent informing them that he would not be in attendance at the meeting scheduled for 16 May 2018 to discuss his annual leave entitlement.
46. Mr Kershaw again refused to attend the meeting scheduled for 12 July 2018 because of his request that Mr Gibbs accompany him. In both his letter of 14 May 2018 and 6 July 2018 he alleges that he is a disabled person under the Equality Act 2010 and that for this reason Mr Gibbs should be allowed to accompany him as a representative.

47. In a further letter in July 2018 Mr Kershaw suggests a meeting take place on 27 July 2018, again with Mr Gibbs as his representative, and that the primary issue to be discussed was his “*voluntary severance package*” as well as “*other serious issues*” such as “*bullying, discrimination and collective grievances*”. The claimant did attend a sickness review meeting in mid-July 2018 at which alternative work was discussed but no progress was made in finding Mr Kershaw alternative work by December 2018 when the claimant wrote to the respondent again.
48. The claimant wrote to the respondent on 5 April 2019 as follows:
- “I am writing to you to make a formal request to claim all the following holidays. 16 days holidays at P60 earnings which I believe was calculated at £90 a day... I also believe that 2018/2019 I am entitled to 25.4 days and that 2019/2020 I am entitled to 26.4 days...can you please confirm that this is correct and let me know the calculations...”*
49. Mr Kershaw wrote on 10 August 2019 and informs the respondent “*I have outstanding holidays yet to be taken or paid for...*” but does not request that he take a period of annual leave.
50. In his letter of 18 September 2019 the claimant refers to “*resolving this issue with paying holiday pay that’s all accrued and the money due*”. He also notes “*I had requested way back in April 2019 a request that you pay my holidays pay that had been accrued.*”
51. On 24 September 2019, the day after the claimant’s ET1 had been submitted to the Tribunal, the respondent notified the claimant of the amount of his accrued annual leave entitlement.
52. Taking all of the above evidence into account, I find that the claimant did not ask to take periods of annual leave during his sickness absence, but each time requested that he be paid in lieu of that accrued holiday entitlement.

The Claimant’s Accrued Holiday Entitlement

53. The respondent has set out in full in its counter schedule of loss its calculations as to Mr Kershaw’s entitlement to holiday pay on the termination of his employment. Mr Kershaw disagrees with this calculation, which does not allow for payment of leave from leave year 1 April 2017 to 31 March 2018 and does not allow for additional leave to be recovered from leave year 1 April 2018 to 31 March 2019. Mr Kershaw’s case is that he is due these sums in full. The Tribunal’s findings as to Mr Kershaw’s entitlement to leave are set out below.

Bereavement Leave and Payment for Attending Meetings

54. The claimant claims payment at his contractual rate of pay for three days’ bereavement leave in March 2019 and for four occasions on which he says (but the respondent disputes) he attended meetings at the respondent. Some of the meetings were to discuss Mr Kershaw’s sickness absence (and include an

occasion when he attended with Mr Gibbs and were escorted off the premises without the meeting taking place).

55. It is not disputed by the respondent that, had the claimant been in work (as opposed to during a period of sickness absence), that he would have been entitled to three days' bereavement leave due to the death of his mother.

The Law

56. Regulation 13(9)(a) of the Working Time Regulations 1998 ("WTR") prohibit the carrying-over of annual leave. This is because the requirement for workers to take minimum periods of annual leave is a health and safety measure to protect the health and well-being of workers. The payment of workers in lieu of annual leave is therefore discouraged by the WTR and workers are encouraged to take their annual entitlement as leave wherever possible.
57. Regulation 15 of the WTR sets out the notice requirements that must be met by workers when seeking to take annual leave. These are, at Regulation 15(3), that a worker must give notice in the following terms:

"(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."

58. In England and Wales, a workers' annual leave entitlement is made up of four weeks or 20 days' leave (or the pro-rata equivalent for part-time workers) under Regulation 13 of the WTR and an additional 8 days' leave (often referred to as public and bank holidays, and again pro-rated for part-time employees) which is granted under Regulation 13A of the WTR. The leave in Regulation 13 comes from the European Working Time Directive. Regulation 13A leave is a domestic measure implemented by the UK government and is therefore not directly subject to European law.
59. The case of *Stringer v HMRC [2009] All ER (D) 147* established the principle that annual leave cannot be cancelled in a particular year if sickness prevents a worker from taking that leave in a leave year. The case of *Plumb v Duncan Print Group [2015] IRLR 711* put an 18-month limit on the carry-over of accrued annual leave that could not be taken due to long-term sickness absence.
60. However, the additional 8 days' leave provided for in Regulation 13A of the WTR cannot be carried over from one leave year to the next, even in situations of long-term sickness absence (*Dominguez v Centre Information de Centre Ouest*

Atlantique & others 2012 [ICR D23 ECJ], Sood Enterprises v Healy [2013] IRLR 865).

61. Regulation 13 of the WTR prohibits employers from making payments in lieu of untaken annual leave entitlement until the termination of the worker's employment.
62. There is no need to put in a request to carry over annual leave (*Larner v NHS Leeds [2012] EWCA Civ 1304*).
63. *List Design v Douglas [2003] IRLR 14* established that there is a distinction between leave during employment, where the claimant must have asked to take leave to be entitled to be paid for it, and leave accrued but untaken on termination of employment, where there is no need for the claimant to have asked for it to be paid for it to be payable.
64. Access to special leave (such as bereavement leave) depends on being in work, since its purpose was solely to enable workers to take time off from work in order to meet certain specific needs or obligations that required their personal presence. That leave was inextricably linked to working time as such, and consequently workers would not have recourse to such leave during weekly rest periods or periods of paid annual leave. By analogy this leave is also not available during periods of long-term sickness absence (*Federación de Trabajadores Independientes de Comercio (Fetico) and others v Grupo de Empresas DIA SA and another [2020] IRLR 713*).
65. There is no requirement that attendance at work for the purpose of keeping in touch meetings during sickness absence must be paid at the full rate of the worker's pay.

Application of the Law to the Facts Found

The Claimant's Claim for Holiday Pay

66. From the facts found above, the claimant did not ask the Respondent to take periods of annual leave as holiday during his sickness absence. He did not give notice as is required by Regulation 15 of the WTR. Instead, he asked for payment of it in lieu. In line with Regulation 13 of the WTR, the respondent acted lawfully when it refused to pay him in lieu of his holiday while on sick leave, because the claimant is not entitled to payment in lieu of annual leave accrued but untaken until the termination of his employment.
67. I have carefully considered, on the facts before me, whether it could be said that Mr Kershaw could be inferred to have asked to take leave in his correspondence requesting payment. From the information before me, I find that this could not be inferred. On each occasion the request was to be paid sums in lieu of annual leave, even at times when that leave had not yet accrued to him. At no point did

Mr Kershaw specify dates on which he intended to take periods of leave in accordance with the notice requirements of Regulation 15 of the WTR.

68. It may have been that, had Mr Kershaw attended the meetings offered by the respondent to discuss his annual leave, that this requirement would have been explained to him and the issue resolved to the parties' satisfaction. However, those meetings did not take place for the reasons set out above. The respondent did not act unreasonably in refusing Mr Gibbs' presence at the meetings. Mr Kershaw was offered alternative companions but did not accept the offer of an alternative.
69. On the basis that the claim before the Tribunal was for unpaid holiday entitlement as at the date of the presentation of the ET1 claim form, the claimant's claim for holiday pay fails and is dismissed.
70. However, as the respondent did not raise any objection to the claimant's claim being amended by implication to include a claim for holiday pay outstanding on termination of his employment, and in the interests of finality in these proceedings, the claimant also is not, I find, owed any further payments for holiday pay by the respondent.
71. The respondent's counter-schedule of loss at page 127 of the bundle correctly sets out the claimant's annual leave entitlement and sums owed by the respondent on termination of his employment, as follows.
72. The claimant is not entitled to payment for untaken annual leave in the leave year 1 April 2017 to 31 March 2018, as this leave year ended more than 18 months before the termination of his employment (as per *Plumb v Duncan Print Group* [2015] IRLR 711).
73. For leave year 1 April 2018 to 31 March 2019, the claimant is entitled to carry forward the 4 weeks' leave granted under Regulation 13 Working Time Regulations but not the public and bank holidays (8 days' equivalent) granted by Regulation 13A of the Working Time Regulations, not even in cases where the leave was not taken due to long-term sickness absence (as per (*Dominguez v Centre Information de Centre Ouest Atlantique & others* 2012 [ICR D23 ECJ], *Sood Enterprises v Healy* [2013] IRLR 865). The only way in which Mr Kershaw could have carried forward this additional leave would have been if his contract allowed him to do so, but it did not – clause 14 does not permit leave to be carried over from one year to the next.
74. Therefore, Mr Kershaw was permitted to carry forward four weeks' annual leave entitlement to the following leave year, which on the basis of a four-day week was 16 days' leave. The respondents have agreed and do not contest that he was also permitted to carry forward the two "service days" contractual leave granted by the respondents in their letter of 27 September 2018, even though clause 14 of the contract did not permit the carrying forward of contractual or additional leave. This was because the letter of 27 September 2018 notes that

“service days” leave may be carried forward in “*exceptional circumstances*” and the respondents have accepted that Mr Kershaw’s circumstances can be said to be exceptional in this regard.

75. Mr Kershaw therefore carried over 18 days’ leave from leave year 1 April 2018 to 31 March 2019 into the following leave year, which based on a four-day week is four weeks and two days’ leave entitlement. At £500 per week (or £125 per day), this equates to £2250.
76. In the final leave year of his employment (1 April 2019 onwards) Mr Kershaw was employed for 29 out of 52 weeks, which is 0.56 of the year. His annual leave entitlement was therefore 5.6 weeks x 0.56 = 3.136 weeks which is £1568 at £500 per week, plus two additional “service days” which have not been apportioned by the respondent and equate to £250 (at £125 pay per day). For his final leave year, Mr Kershaw is therefore entitled to £1818.
77. For both leave years and rounded up to whole numbers, this equates to £4068. The respondents’ schedule of loss calculates the sum in a different way using days of leave rather than weeks, but arrives at the same result.
78. The respondents have already paid Mr Kershaw (and accepted that he had been paid) a sum in excess of this, which is £5240. Mr Kershaw was also offered in open correspondence a further sum which he did not accept. Mr Kershaw is not owed any further sums by the respondent for outstanding annual leave entitlement following the termination of his employment.

Bereavement Leave and Pay for Attending Meetings

79. Mr Kershaw belatedly added claims for unpaid bereavement leave and for attending meetings during his sickness absence to his claim. These were accepted by the Tribunal for the reasons set out above.
80. Payment for attending meetings (such as keeping in touch meetings) does not need to be paid at an employee’s full contractual rate. If the employee is absent due to long-term sickness and is invited to attend meetings this would be paid at the employee’s rate of sick pay (if available). No additional payment is owing to Mr Kershaw for time involved in relation to welfare or other meetings during his period of sickness absence. Payment for meetings that took place before Mr Kershaw commenced sick leave are outside the scope of these proceedings.
81. In terms of payment for bereavement leave, this is only payable if an employee is in work (as opposed to absent from work due to sickness) as the purpose of bereavement leave is to allow employees to take time off from work to meet certain specific needs or obligations that required their personal presence.

(Federación de Trabajadores Independientes de Comercio (Fetico) and others v Grupo de Empresas DIA SA and another [2020] IRLR 713) and therefore was not payable in any event to Mr Kershaw during his sickness absence.

Future Applications by the Claimant to Amend this Claim

82. The claimant's representative expressed an intention to apply to add further claims to this appeal during the hearing, as described above. At the conclusion of the hearing, Mr Kershaw told the Tribunal that he did not wish to do so and wished to conclude his claims against the respondent. However, on hearing that the respondent was considering its position on costs, Mr Gibbs noted that the claimant was more likely to apply to amend the grounds of appeal as a consequence.
83. Given that the claimant and his representative did not appear to agree on the next steps to be taken Judge Barker suggested that the claimant consider his position with Mr Gibbs and contact the Tribunal concerning any applications to amend the claims once a decision had been made by them.

Employment Judge Barker

Date: 18 December 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 December 2020

FOR THE TRIBUNAL OFFICE