



EMPLOYMENT TRIBUNALS

Claimant: Mr Abdul Ashraf
Respondent: Total Security Services Limited
Heard at: East London Hearing Centre (via (CVP))
On: 29 September 2022
Before: Employment Judge E Fowell
Representation:
Claimant: In Person
Respondent: Mr D West of Peninsula Group Ltd

JUDGMENT

1. **The complaint made under the Working Time Regulations 1998 in respect of annual leave is dismissed**
2. **The complaint of breach of contract is dismissed.**

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given earlier today.
2. Mr Ashraf works for the company as a Security Officer. His main claim is for annual leave, which he was entitled to but did not take. In fact, it is agreed that for the first few years of his employment, which began in late 2015, he took no annual leave at all.
3. He has also brought a claim for his travel expenses. These are for his bus fares for getting to work. He works at a number of different places around the London area. Each of them is a branch of Tesco Express. The respondent (TSS) has a

contract to provide security at these branches. He gets to work by bus, and has a weekly travel card, but sometimes he has to go outside the travel card area. He has now put in a claim for that extra cost.

4. There is nothing in his contract of employment about payment of his travel expenses. He told me today that he heard from one of the Tesco managers that of the security officers was paid for their travel. TSS disputes this, and given that there is no evidence to show that this is a contractual entitlement, I have to dismiss that complaint at the outset.
5. The claim form also included complaints of discrimination on grounds of race or religion, but they were struck out by the tribunal at a preliminary hearing on 8 September 2022. The only remaining complaint therefore is under the Working Time Regulations 1998.

Procedure and evidence

6. Today, I heard evidence from Mr Ashraf, and on behalf of the company from Ms Carly Essoulami, HR Business Partner. There was also a bundle of 225 pages, mostly in the form of pay slips going back to 2016. No witness statement was provided by Ashraf, but Mr West was happy to explore his complaints in cross-examination based on his claim form and other correspondence.

Findings of Fact

7. Mr Ashraf started work for the company on 23 December 2015. He was given a contract of employment, which he signed. There were no set hours, although there was a minimum number – five hours a week. It said he would be working variable shifts from Monday to Sunday, on an hourly rate, and would be entitled to statutory holidays. The holiday year begins on 1 April each year.
8. As a security officer, he works on his own. Although they are based in a Tesco store, the only colleague they see from TSS is their line manager, who comes round from time to time to check up on them.
9. To keep in communication there is an online portal, i.e. a website they can log into to get details about that pay or holidays or other arrangements. They can also post queries which an HR manager responds to from time to time. All this is logged so there is a record of Mr Ashraf's queries. It is at page 93. His first query was on 4 February 2016. He posted "Please let us know when the next pay day is and when and how do I receive my pay slip and wages."
10. Mr Ashraf did not accept at this hearing that the portal existed in 2016. He had no recollection of making any posts that early. However, I see no reason to believe that the company has invented these entries. There is nothing for them to gain by it. The comments recorded on this log match other queries which he did raise. For example, on page 78 there is a query he raised on 6 March 2021 and that is also one of the entries in the log on page 93. Consequently I accept that the entries on page 93 are an accurate record and that Mr Ashraf's account, that he did not know how to use the portal, is untrue.

11. The first mention of holidays was on 5 February 2019 – “Dear sir, please let me know how many hours paid holiday do I have left. And how to book them. Many Thanks.”
12. This entry reveals that in the period of over three years since Mr Ashraf joined the company he had taken no holiday. He gave me a number of reasons for this. The first was that the contract of employment was in very small writing and he needed a magnifying glass to read it. I do not accept that. It is in quite small writing but he could have asked anyone else to read it for him if he wanted to find out about his holiday entitlement. The company also has a call centre he can ring. It is open 24/7. The number is on the ID card which he carries with him. Or he could have asked his line manager when they met.
13. He also said that he did not know how to book holidays or to use the portal. He did not find out until 2018 when he told his manager, Mr Kamara, that he was tired and wanted to leave the job. He asked Mr Kamara how much notice he had to give. That led to a discussion about his tiredness and the fact that he had not taken any holiday, and as a result Mr Kamara booked two weeks holiday for him on the portal.
14. In the course of giving these reasons Mr Ashraf interjected to say that this was in 2021, but that is not my record of his evidence, and in any event a 2021 discussion of this sort would be at odds with the fact that he was using the portal in February 2019 to ask about his holiday entitlement.
15. His holiday records are at pages 123 to 130 of the bundle. They are in the form of a table. The first record of any holiday being taken is on 11 October 2021.
16. The most likely explanation for the failure to take holiday is that Mr Ashraf thought that if he took a week off he would only get paid the five hours a week provided in his contract. The portal query he raised on 6 March 2021 stated “I am contracted 5 hours a week. I do not know how many hours a year I am entitled paid holiday. And I do not know how to book my holidays.”
17. The Payroll Team responded that day, saying that he had 250 hours. He was also warned that he needed to take his holiday quickly as it was coming to an end of the holiday year and only 60 hours could be carried forward. That is also in accordance with the company’s normal policy. (In the event, 90 hours was allowed).
18. It follows that Mr Ashraf’s explanation for his failure to take holiday - essentially that he was kept in the dark by the company who were trying to deprive him of his holiday, is not plausible. The more likely explanation, is that he was simply under a misapprehension that he would only be paid for five hours a week, and that misapprehension was only corrected in March 2021.
19. There was ample information given to him before that date, both in his contract and his staff handbook, that should have avoided that confusion. The staff handbook was issued or reissued in 2020 and explained that his holiday entitlement would be calculated at the rate of 12.07% of his normal working hours.

And as already mentioned, if he was confused there were a number of sources of information available to him.

20. At the same time, it is undeniably the case that he went from year to year taking no holiday at all and that neither his line manager nor anyone else in the company appears to have noticed this, or to have stepped in to remind him of the need to take it, or to tell him that if he did not take it he would lose his entitlement. As already noted, no leave was taken until October. In the meantime he posted another query on the portal on 26 September 2021 stating:

“Dear TSS, I have worked in your company for 5 years and did not have even 1 hour annual paid holiday. My contract is 5 hours a week with TSS, I have asked so many times from your managers Abdulai, Baboucar and Ade about my annual paid holidays but never understood a word they said. Could you please let me know how many hours or week paid annual holiday I have and how to claim it.”

21. The response began:

“to book leave you should have used the portal - do not book leave through the Area Managers - why have you left it 5 years to send a query?”

22. By this stage, Mr Ashraf believed that he was entitled to financial compensation for the lack of holiday pay, and has put forward a claim for about £12,000.

Applicable Law

23. The entitlement to statutory holiday pay is set out regulation 13 and 13A of the Working Time Regulations 1998.
24. Regulation 13 gives a basic entitlement to four weeks annual leave, on a pro rata basis, and regulation 13A adds an additional 1.6 weeks, over and above the EU minimum provided by regulation 13, so the total is the 5.6 weeks for a full time worker.
25. In **Smith v Pimlico Plumbers Ltd** 2022 IRLR 347, CA, the Court of Appeal confirmed that a worker must be encouraged to take paid annual leave before the end of the relevant reference period. A worker can only lose the EU-derived right to paid annual leave (under regulation 13) if the employer can show that it:
- (a) gave the worker the opportunity to take paid annual leave
 - (b) encouraged the worker to do so, and
 - (c) informed the worker that the right would be lost at the end of the relevant leave period.
26. Mr Ashraf was given the opportunity to take paid annual leave but he wasn't encouraged to do so, except in the most general sense that the entitlement was set out in his contract and staff handbook, but he was certainly not informed that the right would be lost at the end of the relevant period, until March 2021.

27. It follows that until that holiday year he did not have an effective opportunity of taking his basic leave.

Time Limits

28. The right to bring a complaint to an employment tribunal about a breach of regulation 13 is set out at regulation 30. Regulation 30(2) provides that a complaint must normally be presented to a tribunal before the end of the period of three months, beginning with the date on which it is alleged that the exercise of the right should have been permitted.
29. This was considered by the Employment Appeal Tribunal in **Grange v Abellio London Ltd** 2017, ICR, 287. The tribunal there had to consider whether there was any sort of positive application on the employee to request a rest break of any sort. If so, time would logically begin to run from the date of refusal. However, it was concluded that that was incompatible with the purpose behind the entitlement to annual leave, which is a health and safety measure, and employers had an obligation to make that the entitlement was effective. That entitlement would be "refused" by an employer if it put into place working arrangements that failed to allow the taking of a rest break, and the right to bring a claim would continue while that situation persisted.
30. That is what has happened here. Applying this principle in light of the recent guidance in **Smith v Pimlico Plumbers**, an employer which does not meet the requirements for providing an effective exercise of the right cannot complain that the employee is out of time while failing to make the right effective.
31. However, time does run once the right becomes effective. According to the information on the portal, which I accept, Mr Ashraf was aware of it from at least 6 March 2021. That is when he was told that if he did not book his annual leave he would lose it.
32. He disputes this. The fact that he raised another query on the same point in September 2021 might indicate that he was still in the dark about his right to book annual leave, but I do not accept that. Firstly, I have no reason to doubt the portal record showing a response in March. Secondly, if he had not received a response on the portal to his query, he could have followed up his query or asked his manager, but nothing more was said until September. During that time he was using it regularly, for example to post information about payroll or jury service. It seems to me more likely that Mr Ashraf thought he was entitled to financial compensation for the lack of holiday and was therefore still not taking any, storing up his claim while blaming the company for the situation.
33. I also note that after the September request he made regular requests for holiday. These were forwarded to his manager for approval, and appear to have been approved. All this was instigated by Mr Ashraf rather than by a manager on his behalf.
34. Even if Mr Ashraf had overlooked the information on the portal on 6 March 2021, by then the company had done all that could reasonably be expected to bring to his attention the need to book annual leave, and that it should be done through the

portal. On any view, he then had all the information he needed to bring an employment tribunal claim, and so time had started to run. Early conciliation began on 25 November 2021 and ended on 5 January 2022. The claim form was lodged on 7 January 2022, so events before 26 August 2021, i.e. more than three months before early conciliation started, are outside the normal time limit. It follows that the claim form was out of time.

35. Regulation 30(2)(b) allows an extension of time to such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the claimant to be presented before the end of that three-month period. He maintains that he did not know of his right to annual leave until September 2021, but for the reasons already given I do not accept that.
36. If I am wrong about that, even if time did not begin to run until 26 September 2021, the claim still has to be submitted within a reasonable period of that date, and here early conciliation was not commenced until 25 November 2021, almost two months later. On that basis too the complaint is out of time.
37. But for the time limit point the outcome would have been a declaration to the effect that Mr Ashraf remains entitled to the basic annual leave entitlement (under regulation 13) accumulated during the previous financial years, subject of course to any leave actually taken. That would not have resulted in a direct payment to him, since compensation payments are only available on termination of employment.
38. There is also right to compensation where an employer has *refused* to permit him to exercise any such right, under regulation 30(3), but that requires an express refusal, not simply a failure to enable him to exercise his rights.
39. As it is however, that declaration cannot now be made, given that the claim is out of time, although the respondent will no doubt wish to take note of the conclusions reached in this hearing, both in connection with Mr Ashraf and generally.
40. For all of the above reasons the claim is dismissed.

**Employment Judge Fowell
Dated: 29 September 2022**