



## EMPLOYMENT TRIBUNALS

**Claimant:** Miss Penelope Seaton  
**Respondent:** Dall Cleaning Services PLC

**Heard at:** Reading ET by Cloud Video Platform      **On:** 17 October 2022

**Before:** Employment Tribunal Judge S.L.L. Boyes (sitting alone)

Representation

Claimant: In Person

Respondent: Mr Christopher Fenn, Director

## RESERVED JUDGMENT

**The Claimant's claim for holiday pay is not well founded and is dismissed.**

**The Claimant's breach of contract claim is not well founded and is dismissed**

### REASONS

1. The Claimant asserts that she is owed holiday pay. She also asserts breach of contract. The Respondent denies all claims.

#### **The Proceedings/Hearing**

2. After a period of early conciliation through ACAS from 1 October 2021 to 11 November 2021, the claim form (ET1) was lodged with Tribunal on the 24 November 2021.
3. The Respondent subsequently filed a response to the claim on 11 January 2022.
4. In her claim form, the Claimant states that she wants travel costs reimbursed. I sought clarification regarding what this meant. She stated that this was the travel costs to the Employment Tribunal hearing. This therefore did not form part her claim against the Respondent.
5. There is reference in the ET1 to an offer of settlement. Both parties have also made reference to this offer in various documents. I raised this with the parties.

I explained that this was not something that I may take in to account when reaching my decision. I asked them how they wished to proceed. Both parties wanted to proceed despite documents referring to an offer of settlement having been put before the Tribunal. In the circumstances, I considered it in accordance with the overriding objective to proceed with the hearing. I have had no regard to the offer of settlement when reaching my decision.

6. I heard evidence from the Claimant. She had not provided a witness statement but she had outlined her case in an email sent on the 13 June 2022. She adopted this as her evidence in chief and I asked her a series of questions to establish what her evidence was. She was cross examined by the Respondent.
7. The Respondent called Clare Sitaram, Payroll Manager, and Christopher Fenn, Director, to give evidence. Christopher Fenn was cross examined by the Claimant.
8. I heard closing submissions from the Respondent. The Claimant did not make any closing submissions.
9. I reserved Judgment and Reasons.

### **Documents**

10. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle (prepared by the Respondent) of 73 pages, holiday diaries for 2020 and 2021 and the witness statements of Clare Sitaram and Christopher Fenn.

### **Issues to be determined**

11. Whilst it was unclear from the documents filed with the Tribunal, the Claimant confirmed at the hearing that she accepted that she was not owed accrued holiday pay for 1 February 2020 to 31 January 2021. She also accepted that she has been paid for the holiday accrued between 1 February 2021 and 10 September 2021.
12. At the hearing, the Claimant accepted that the amount of holiday pay sought for 1 February 2019 to 31 January 2020 was 14.5 days not 16 or 16.5 days as previously stated by the Claimant.
13. The outstanding issues are therefore:
  - i. What was the end date of the Claimant's employment.
  - ii. If the end date of the Claimant's employment was the 14 October 2021, or some other date, is she entitled to any additional holiday pay for any period subsequent to 10 September 2021.
  - iii. Is the Claimant owed holiday pay for the holiday year 1 February 2019 to 31 January 2020.

### **Findings of Fact**

14. The Claimant and both witnesses for the Respondent gave their evidence in a straightforward manner and I found each of them to be credible.
15. Where there is no dispute between the parties as to a particular fact, my findings

of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.

My findings of fact are as follows:

16. The Respondent employees in the region of 400 employees. It provides cleaning services.
17. The Claimant commenced employment with the Respondent on the 29 March 2016 as a Regional Manager. Her salary was £3833 gross and £2673 net. She generally worked Mondays to Fridays although occasionally worked Saturdays.
18. The Claimant's Terms and Conditions of Employment are signed by her on the 29 March 2016. These state that the Respondent's holiday year runs from 1 February to 31 January. Holiday entitlement was 28 days per annum. At section 9(a) it states that the Claimant is entitled to 28 days annual leave per year. At section 9(d) it states that "*Unused holiday entitlement in one year may not be held over into the following year except with the written consent of your manager*". There is no express term relating to pay in lieu of accrued and unused holiday on termination.
19. As per section 15, the Claimant was required to give one week's written notice of termination.
20. The Respondent wrote to the Claimant on 1 August 2019 to inform her of a salary increase. The letter also states "*the Company would also like to amend at the same time the notice period by both employer and employee to 6 weeks*". She was also informed that she had been awarded extra holiday which would now be 25 days per year. This appears to be exclusive of public/bank holidays making a total entitlement of 33 days.
21. The Claimant's evidence is that she did not sign anything to confirm that she agreed to give increased notice of 6 weeks. She stated that she was required to give 4 weeks' notice although she was unable to point me to when her notice increased from one week to four weeks: she stated that it was the same for all employees; it was just general knowledge.
22. On one occasion, the Claimant was paid in lieu of 10 days accrued holiday.
23. At some point in December 2019 or January 2020, the Claimant asked Chrispher Fenn if she could roll over some of her holiday from that holiday year. This was agreed. Her reason for requesting this was because her son's partner was pregnant and she wanted to help her once the baby was born. The baby was born on the 23 February 2020, but she was unable to help out as planned because of COVID 19.
24. The Claimant does not recall any subsequent conversations about rolling over the unused holiday. The Claimant stated that she did, at some point, ask to be paid instead of taking the unused holiday but this was declined for business reasons.
25. The Respondent emailed the Claimant on the 3 July 2020 to inform her that the holiday that she accrued during lockdown could be carried over and must be

used by February 2023. The email continues *“All other annual leave will remain as normal and is to be used by February 2021.”*

26. The Respondent emailed the Claimant on the 14 October 2020. The email contained the following,

*“Chris has also agreed that your holiday not used last year can be carried over as “lieu days” which equates to a further 14.5 days (please note that holiday needs to be used before lieu days can be taken)*

*Please can you ensure that you either use all your holiday by 31st January or let me know should you wish to carry forward a maximum of 6 days to 2021 to Jan 2023, excluding your lieu days.”*
27. Christopher Fenn confirms at paragraph 22 of his witness statement that the intention was that these ‘lieu days’ could be held indefinitely.
28. The Claimant sent a text message to Christopher Fenn on 12 September 2021 stating that she had dropped the company equipment at head office and her resignation letter was saved on the company laptop.
29. The Claimant’s letter of resignation is dated 10 September 2021. It begins *“It is with great disappointment that I am submitting my formal resignation with immediate effect”*. She later states that she had accrued 20 days annual leave from 1 February 2019 to 8 October 2021 which she expects to be included in her final salary payment and in lieu of her notice period.
30. The Claimant explained in oral evidence that she had expected to be able to use her unused holiday during her notice period. She was aware that operatives had been permitted to do this in the past, but she was not sure whether managers have been permitted to do this.
31. The Respondent wrote to the Claimant on the 14 September 2021 to confirm that it had received her resignation letter of the 10 September 2021, that her resignation was accepted and that her last working day was 10 September 2021.
32. In a letter dated 27 September 2021, the Respondent stated that any unused annual leave prior to the final year’s entitlement was converted to lieu days as per the mail sent to her on the 14 October 2020 so are not included in her annual leave entitlement for the current year and was not payable in lieu of notice.
33. The Respondent wrote again to the Claimant on the 1 October 2021. In it, the Respondent states that the Claimant’s annual leave entitlement for 1 February 2021 to 10 September 2021 was 18 days of which she has taken 17 days. In addition, she was permitted to carry over 6 days from 1 February 2020 to 31 January 2021 which resulted from the COVID lockdown. The Respondent acknowledged that there had been an error in the calculation of the holiday entitlement resulting in her being owed a further 2 days which it agreed to pay.

## The Relevant Law

### Statutory entitlement to holiday

34. Under the Working Time Regulations 1998 (“WTR”) a worker is entitled to 5.6 weeks’ (28 days) annual leave in each leave year [Regulations 13 and 13A WTR]. Regulation 30 WTR 1998 provides for a complaint to an employment tribunal that the employer has failed to pay the worker the whole or any part of any amount due under Regulations 14(2) or 16(1) WTR.
35. The WTR do not make any provision for carrying forward any unused leave from the 4 weeks’ leave into a following holiday year unless regulation 13(10) applies (see below). Employers and workers can agree to carry over any of the additional 1.6 weeks’ additional statutory leave into the next leave year (but not beyond) by means of a relevant agreement [regulation 13A(7)].
36. The general rule under the WTR is that a worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year [regulation 13(9)(a)]. If they only worked part of the final year, they will be entitled to be paid in lieu of such part of the pro rata entitlement that they accrued but did not take as leave.
37. The WTR were amended by The Working Time (Coronavirus) (Amendment) Regulations 2020 on the 26 March 2020 which inserted the following:

*(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).*

*(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.*

*(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.*

*(13) For the purpose of this regulation “coronavirus” means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).*
38. Regulation 17 of the WTR provides that:

**“17. Entitlements under other provisions**

*Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provisions of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.”*
39. There are exceptions, developed in case law, allowing the 4 weeks’ WTR leave (but not the additional 1.6 weeks’ leave) to be carried over in situations where the worker was unable to take leave such as during sick leave, maternity leave,

when prevented from taking that leave by the employer or where the employer has not taken sufficient steps to encourage workers to take their holiday entitlement.

Contractual entitlement to pay in lieu of unused holiday on termination

40. If the written contract of employment provides for payment in lieu of unused holiday on termination then the employee will be entitled to receive such a payment. If there is no express right to do so, which is the position in this case, the issue then arises as to whether such a right can be implied.
41. A term cannot be implied in a contract of employment simply because it is reasonable or because the agreement would be unreasonable or unfair without it. In order for there to be an implied term, the Tribunal must be satisfied that:
  - the term is necessary in order to give business efficacy to the contract; or,
  - it is normal custom and practice to include such a term in contracts of that type; or,
  - an intention to include the term has been demonstrated by the way in which the particular contract is being performed; or
  - the term is so obvious that the parties must have intended it to be implied.
42. In the case of *Morley v Heritage plc* 1993 IRLR 400, CA, the Court of Appeal decided that entitlement to pay for unused holiday on termination could not be implied on the ground of business efficacy because an employment contract does not need a term relating to holiday pay on termination to make it workable. The Court also rejected the argument that the parties would have agreed to a term relating to payment in lieu of holidays had they directed their minds to the matter when the contract was entered into.
43. The Employment Appeal Tribunal reached the opposite conclusion in the case of *Janes Solicitors v Lamb-Simpson* EAT 323/94. However, in that case the employee did not have any written contract of employment and the Employment Tribunal had accepted that the oral contract entered into contained an express term requiring the employer to pay her in lieu of holiday pay accrued but not taken at the date of termination of her employment.
44. In order for a term to be implied on the basis of custom and practice it must be reasonable, notorious and certain. In *Park Cakes Ltd v Shumba and ors* 2013 IRLR 800, CA, Lord Justice Underhill reviewed previous caselaw and provided clarification regarding the principles to be applied. He stated that what is important is not what the employer actually intended but what intention its words or conduct had reasonably communicated to the employees concerned. Further, when considering whether a payment was made automatically, what is important is not whether the employer believed that it was choosing whether to make the payment but whether that was what should reasonably have been understood by the employees on the facts.
45. In *Park Cakes Ltd v Shumba*, Lord Justice Underhill listed some factors that may be relevant to establishing if there was an implied term. Whilst that case related to enhanced redundancy payments, these factors are potentially relevant in other circumstances when considering what, objectively, employees

should reasonably have understood. The factors identified include the number of occasions on which, and the length of the period over which, such benefits have been paid; whether the benefits are always the same; the extent to which the benefits have been publicised; how the terms are described; what is said in the express contract; and how clear the employer's actions have been.

### **My Conclusions**

#### What was the end date of the Claimant's employment?

46. The Claimant states that the employment ended on the 14 October 2021. The Respondent states that the employment ended on the 10 September 2021.
47. The Claimant's letter of resignation is dated 10 September 2021. It is clear from that letter that her resignation was "*with immediate effect*".
48. In her resignation letter she asks for her accrued 20 days annual leave "*to be included in her final salary payment and in lieu of her notice period*".
49. When the contents of the letter is considered as a whole, and bearing in mind the Claimant's opening statement that she was resigning with immediate effect, I do not consider that it is obvious from the subsequent somewhat ambiguous reference to using accrued holiday in lieu of notice that she was resigning with notice.
50. Further, the Claimant's last physical day at work was the 10 September 2021. On the same day that she typed her resignation letter, she returned all of the company property in her possession to the Respondent. She had no intention of returning to work. Her actions were not commensurate with her employment continuing past the 10 September 2021.
51. Consequently, I find that the last day of her employment was 10 September 2021. She is therefore not entitled to any additional holiday pay for any period subsequent to 10 September 2021.

#### Is the Claimant owed holiday pay for the holiday year 1 February 2019 to 31 January 2020?

52. The Claimant has been paid in lieu of the unused holiday accrued during the final holiday year before termination as required by the WTR.
53. It is not suggested that the Claimant was unable to, or prevented by the Respondent, from taking leave at any point. There are no circumstances arising in this case (such as sickness, maternity leave, refusal by the Respondent to provide paid holiday, or insufficient steps taken to encourage the Claimant to take her holiday entitlement) which prevented the Claimant from taking the 14.5 days holiday during the holiday 1 February 2019 to 31 January 2020.
54. However, amendments made to the WTR by The Working Time (Coronavirus) (Amendment) Regulations 2020 do provide for holiday to be carried forward in certain circumstances. I have considered whether this enabled the Claimant to carry forward the unused 14.5 days from 2019/2020 to her final holiday year thus meaning that she would be entitled to be paid for it.
55. There was a verbal agreement between Christopher Fenn and the Claimant in December 2019 or January 2020 that she could carry forward 14.5 days to the

- 1 February 2020-31 January 2021 holiday year to enable her to help care for her son's newborn child. However, she did not take this holiday as planned in the spring of 2020 because of the COVID 19 pandemic.
56. The Respondent then wrote to the Claimant on 14 October 2020 to confirm that Christopher Fenn had agreed that the 14.5 days holiday not used in the previous holiday year could be carried over as 'lieu days' but that her holiday needed to be used before lieu days can be taken.
  57. The Claimant submits that there is no material difference between 'lieu days' and carried over holiday days. I agree. There seems to me to be no discernable difference despite different terminology being used. Indeed, the Respondent did not provide any explanation of what the term 'lieu days' meant or what the practical consequences were, other than stating that they had to be used after holiday entitlement was taken.
  58. Regulation 13(10) of the WTR only applies to "*the leave to which the worker was entitled under this regulation* [my underlining]. Regulation 13 provides for four weeks annual leave per leave year. The 14.5 days were carried over from the 2019/20 holiday year as a consequence of a contractual agreement between the Claimant and Respondent: it was not leave that the Claimant held as a consequence of regulation 13 because regulation 13 does not make provision for leave to be carried over.
  59. Regulation 13(10) therefore did not provide a statutory basis for the Claimant to carry forward the unused 14.5 days holiday from holiday year 2019/2020 to her final holiday year.
  60. The WTR therefore do not assist the Claimant in this case.
  61. The express terms of the Claimant's contract of employment provide only for unused holiday to be carried forward to the following holiday year with the written agreement of her manager.
  62. When Respondent agreed in writing that the Claimant could take days off in lieu of the 14.5 days unused holiday, it did not state that the Claimant would be able to be paid in lieu of any unused days in the event of termination.
  63. There is nothing in the evidence before me to suggest that there was an oral agreement between the parties that the Claimant would be paid for the 14.5 days unused holiday if the contract of employment was terminated.
  64. I have considered whether there was an implied term in the Claimant's contract of employment that she would be paid in lieu of unused holidays on termination. Whilst the Respondent had previously paid the Claimant in lieu of unused holiday it refused to pay the Claimant pay in lieu of unused holiday in 2020/2021. The Claimant can therefore have had no expectation of payment in lieu of unused holiday generally. Further, the evidence before me does not demonstrate that it was custom and practice for the Respondent to make payment in lieu of unused holiday on termination in the circumstances that arose in the Claimant's case.



65. Whilst the Respondent agreed to the Claimant carrying forward unused holiday from holiday year 2019/2020 to 2020/2021, it was not under a contractual obligation to pay the Claimant in lieu of that unused holiday on termination.
66. Consequently, the Claimant was not entitled to receive payment in lieu on termination in respect of the unused 14.5 days' holiday accrued in the 1 February 2019 to 31 January 2020 holiday year.
67. I apologise to the parties for the length of time that it has taken to produce my Judgment and Reasons in this case, which is, in part, due to illness.

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**Employment Judge S.L.L. Boyes**

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**Date: 15 January 2023**

**Reserved Judgment and Reasons Sent to The  
Parties On 16 January 2023**

**FOR EMPLOYMENT TRIBUNALS**

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