



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105853/2022

Final Hearing held in Dundee on 2 February 2023

Employment Judge A Kemp

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Mr Donald McGregor

**Claimant
In person**

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Kinross Curling Trust

**Respondent
Represented by
Mr P McGowan
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant is awarded the sum of NINE HUNDRED AND TWENTY FOUR POUNDS (£924.00) payable by the respondent, in respect of breach of contract, and the remaining claims are dismissed.

REASONS

Introduction

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1. This was a Final Hearing held remotely. The claims are for notice pay as a claim for breach of contract, and for annual leave, which can be a breach of contract claim, a claim for unlawful deduction from wages or a claim under the 1998 Regulations referred to below. The respondent disputes all the claims and argues that no sum is due.

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Evidence

E.T. Z4 (WR)

2. The parties had prepared a single Bundle of Documents. Evidence was heard from the claimant, and from Mrs Margaret Forrest and Mr James Martin for the respondent. Before the hearing commenced I explained about the giving of evidence, the conduct of the hearing, cross examination, and that all evidence a party wished to lead required to be provided now, as doing so later was allowed only in exceptional circumstances. I further explained about making a submission, and that I could give some assistance to the claimant under the overriding objective including ensuring that the parties are on an equal footing, but not so as to act as if his solicitor. Not all the evidence that might have been presented was, as referred to below.

Issues

3. The issues were identified at the start of the hearing and are:
- (i) Was the respondent in breach of contract in relation to notice or holiday pay?
 - (ii) Has there been an unlawful deduction from wages or breach of the Working Time Regulations 1998 in relation to pay for accrued annual leave due to the claimant?
 - (iii) If the claims, or either of them, succeed to what remedy is the claimant entitled?

Facts

4. The following facts, material to the issues before the Tribunal, were found to have been established:
5. The claimant is Mr Donald McGregor.
6. The respondent is Kinross Curling Trust. It is a Scottish Guarantee Company and a charity.
7. The claimant was employed by the respondent from 14 October 1997. The terms of employment were set out in a written contract of employment signed by the claimant on 5 December 2014. That had the following provisions in relation to holidays:

“6.1 You are entitled to 33 days holiday during each holiday year and is to be taken in the year it is earned.....The KCT’S holiday year runs between 1 August and 31 July. ...

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6.2...You will be required to take your planned holidays during the months of May June July and August when the Rink business is in low season or halted for the summer. WE may require you to take holiday on specific days as notified to you.

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6.3 You cannot carry untaken holiday entitlement forward from one holiday year to the following holiday year [unless a period of statutory maternity, paternity or adoption leave has prevented you from taking it in the relevant year].....”

8. There was a provision on termination which was for notice of “one week for each complete year of continuous employment up to a maximum of 12 weeks’ notice”.

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9. He worked normally for five days per week, although on occasion for six or seven days per week during the curling season, and on average 40 – 43 hours per week, as an Ice Technician. The rink’s season started in September each year, and ended in the following April, normally in the first or second week of that month. The ice was thawed and then the rink drained, such that there was little work for an Ice Technician from then until starting work for the new season. The net pay the claimant received from the respondent latterly was £420 per week.

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10. In around May 2021 the claimant met Mr Jim Barton, Operations Manager of the respondent and a Trustee, and indicated that he was likely to retire on his 66th birthday on 14 July 2022. They had a conversation about the arrangement, and the claimant indicated that he would like to take the holidays he thought had accrued to him over the last two years so that he would end work around 14 April 2022, take those holidays which he thought would be 14 weeks, and be paid to his retirement on 14 July 2022. Mr Barton agreed to that, and reported the position to the respondent’s Board, who approved it. It was not confirmed in writing, save in a Board minute that was not before the Tribunal.

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11. In about September 2021 the claimant and Mr Barton had a further discussion when the claimant mentioned something to the effect that he could carry forward holidays due to Covid as he had seen that on a government website.
- 5 12. In December 2021 the claimant indicated that he had changed his mind and did not wish to retire on the proposed date. Mr Barton said something to the effect that the position on accrued leave would have to be worked out. No specific further discussion on that later took place.
- 10 13. The respondent had two Ice Technicians and decided that only one was required. It commenced consultation on redundancy and provided details on 4 April 2022 at meetings with those concerned, including the claimant. Both employees who were Ice Technicians applied for voluntary redundancy. A meeting was held on 7 April 2022 at which the claimant received a redundancy statement setting out the payments that would be made, and the respondent afterwards decided to accept the application from the claimant. A further meeting was held with the claimant on 11 April at which the claimant was told that his application was to be granted, but specific details as to when that was effective from were not discussed.
- 15 14. On 15 April 2022 the claimant sent a message to Mr Barton stating “Just to remind you I’m off on holiday tomorrow til the 22nd of May. I will not be able for phone calls or messages.”
- 20 15. The claimant commenced that holiday on 16 April 2022, which included a trip to the USA. He returned initially on or around 22 May 2022, and thereafter had a further holiday for about two weeks returning on or around 15 July 2022. He did not work for the respondent during the period 14 April 2022 to 15 July 2022 and regarded himself as on holiday during that period.
- 25 16. The claimant returned from holiday on 22 May 2022. He sent Mr Barton a message stating “What’s happening about the redundancy?” Mr Barton replied to say that he should have got a letter. The claimant responded to state that he had not received it. Mr Barton discovered that a letter he
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thought had been sent, dated 4 May 2022 from Mrs Margaret Forrest, also a Trustee, had been wrongly addressed, and it was sent again.

17. The said letter was dated 4 May 2022 and informed the claimant that his “employment will end, by reason of redundancy, on 3 August 2022. This includes your 12 week notice period.” The claimant was not required to work his notice. The letter stated “You will be regarded as taking the remainder of your holiday entitlement during notice.” It referred to an attached redundancy statement for the payments that would be made to him. It stated “we are aware that you are abroad on holiday until 23 May. Therefore we have extended your right of appeal to 28 May 2022.”
18. The claimant received the said letter on 26 May 2022. He referred to the redundancy statement not being attached to the letter in a message that day to Mr Barton, and that statement was sent to him by post on that day. He received it on 28 May 2022 and sent a message to Mr Barton to confirm “received it today” in response to a message of 28 May 2022 from Mr Barton confirming that he had sent it “a couple of days ago.”
19. There was a meeting between the parties at the request of the claimant who argued that giving notice when on holiday was not lawful, as well as raising other matters, on 26 July 2022, the notes of which were taken by Mrs Forrest and are a reasonably accurate record of the same.
20. The claimant received salary for the period from 4 May 2022 to 3 August 2022. He did not carry out work for the respondent in the period 15 July 2022 to 3 August 2022. His employment ended on 3 August 2022
21. The claimant commenced early conciliation on 22 August 2022. The certificate in relation to that was issued on 3 October 2022. The Claim Form was presented by the first claimant on 1 November 2022. The claimant wrote to the Tribunal giving further details of his claim on 14 December 2022.

Submissions

22. The parties made very brief submissions, asking me to find in their favour, and with the respondent adopting the position set out in its Response Form. Neither party referred to case law.

The law

- 5 23. The Employment Rights Act 1996 (“the Act”) provides for a right to a notice by virtue of section 86. It is, for the claimant, for a minimum period of 12 weeks. If notice of termination of employment is given by letter, it is deemed to be given when the employee actually receives it or has had a reasonable opportunity to see it (and not any earlier date when it was sent or when it was actually delivered in the post): **Newcastle upon Tyne NHS Foundation Trust v Haywood [2018] IRLR 644**. If the full notice due is not given or paid, a claim may be made under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 as a breach of contract.
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- 15 24. Where a contract provides for holiday pay, not to make payment of that may also either be an unlawful deduction from wages or a breach of contract. A claim for unlawful deduction from wages may be made to the Tribunal under section 23. Wages are defined in section 27 and include holiday pay.
- 20 25. There is separately an entitlement to annual leave under the Working Time Regulations 1998. The Regulations implement the Working Time Directive 2003/88/EC and require a purposive interpretation in that regard so far as they do so. The Directive is retained law under the European Union (Withdrawal) Act 2018.
- 25 26. The entitlement to holidays is set out in Regulation 13 as four weeks, implementing the Directive, and in Regulation 13A as an additional 1.6 weeks, that is a UK measure. In general terms unused annual leave cannot be carried forward from one leave year to the next, under Regulation 13(9) – (11) which states:
- 30 “(9) Subject to the exception in paragraphs (10) and (11), leave to which a worker is entitled under this regulation may be taken in instalments, but

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

5 (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
10 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.”

15 27. Case law from the Court of Justice of the European Union, applied to the Regulations including in case law in the UK, has further qualified the position by allowing carry forward of leave where a worker is off sick, or on maternity leave, circumstances which do not apply to the claimant.

20 28. There is an entitlement to payment for leave accrued but untaken as at the date of termination of employment under Regulation 14. The amount is related to the actual week's pay. It may be an unlawful deduction from wages if not paid, or a claim may be made under Regulation 30. There are provisions as to giving notice and related matters in Regulation 15. The material provisions for present purposes are as follows:

“15 Dates on which leave is taken

25 (1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

30 (2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A or

(b) not to take such leave [subject, where it applies, to the requirement in regulation 13(12),

5 on particular days, by giving notice to the worker in accordance with paragraph (3).

(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;

10 (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, 15 the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), 20 twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many 25 days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.....”

29. A “relevant agreement” is defined in Regulation 2 as including “any other agreement in writing which is legally enforceable as between the worker 30 and his employer”.

Observations on the evidence

30. I address the factual disputes between the parties. It is appropriate to start by stating that not all evidence that might have been before me was so. That included records as to holidays taken, which the respondent as employer is required to keep under the Regulations, wages records, 5 payslips, or the minute of the board meeting where a discussion on the claimant's carrying forward of leave was discussed. Nor was the redundancy statement given to the claimant provided. The claimant had not acted on case management orders for details of remedy and supporting documents, and emails with Mrs Forrest had not shown the 10 degree of co-operation that Rule 2 refers to. He accepted that he had not acted appropriately in that regard, and I appreciate that he is a party litigant. Mr McGowan had himself been instructed only very recently. I required to make the best of what was before me.

31. I considered that all witnesses were seeking to give honest evidence. It was the issue of reliability that I required to determine. I preferred the 15 evidence of the respondent in that regard. That is because although the claimant was adamant in his evidence that Mr Barton had agreed to his carry over of leave because firstly of a retirement but secondly from Covid issues that is not what he said in his ET1, where he only referred to the 20 prospective retirement, nor was it what he said in the meeting on 26 July 2022 the minute for which he did not dispute. He had raised the issue only in an email to the Tribunal on 14 December 2022. That was a material level of inconsistency which did not support his position. I also took into account other aspects of the evidence which did not support him, such as 25 his evidence that the meeting on 26 July 2022 was held as he wished to raise why he had not been approached to return to his role when other employees had also left, including the other Ice Technician, but the note of it, and Mrs Forrest's evidence which I accepted, made clear that it was held primarily because the claimant wished to raise his entitlement to 30 notice separately from holidays, as he saw it.

32. I also considered that Mr Barton was clear and candid in his evidence, and was able to explain both when he had discussed the issue of retirement with the claimant, the circumstances of that, and the later events, in a manner I considered compelling. His evidence was supported by that of

Mrs Forrest, who was clear that what had been reported to her at the time was only carry forward of holidays because of retirement, and nothing about Covid. I considered her evidence to be equally clear and candid, and she was particularly so on the issue of the sending of the 4 May 2022 letter as I address below.

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33. It appeared to me that it was most likely that the agreement reached between the claimant and Mr Barton was to the effect that if the claimant retired he would be permitted to carry forward holidays. He did not retire. The basis of that agreement did not therefore materialise. But in my view that issue of the agreement to carry forward leave is a form of red herring for the purposes of this case, as the claimant did go on holiday, as he accepted, in the period 14 April 2022 to 15 July 2022. There was no suggestion that he was not paid for that. He had all the holidays he might be entitled to either if that agreement was effective, or otherwise such as under Regulation 13(10) regarding carry forward of leave for Covid reasons. Mr Barton accepted that there was no specific discussion with the claimant to address the issue of leave in light of the change of mind on his part about his retirement. Nevertheless, as Mrs Forrest spoke to in her evidence, the respondent honoured the agreement, even though there was to be a redundancy not a retirement and they might not have been required to do so. The claimant was on holiday for 14 weeks in the period 14 April 2022 to 15 July 2022, as he accepted in his evidence. I consider that the period of holiday in fact extended to 3 August 2022.

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34. I should also address two points of detail. The claimant sought to argue that the redundancy statement was not received by him until early June 2022, but the messages he exchanged with Mr Barton make it clear that he did so in the post on 28 May 2022, and that the letter itself was received on 26 May 2022. I did not consider the claimant's evidence on that aspect to be reliable.

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35. Although I consider that this point is not material to my decision, which concerns the amount of the contractual annual leave, there was a dispute over the entitlement to holidays. The contract itself provided for 33 days. The claimant argued that that had been increased to 35 about two years

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before he left, but that was disputed, he did not refer to it in the Claim Form or at the meeting on 26 July 2022, and on balance I did not consider that that aspect had been proved by him.

Discussion

5 36. I considered the arguments for the parties. For reasons I shall explain I did not accept the argument for either party in full.

Breach of contract

37. The claimant argued that notice pay is due on the basis that one cannot have holidays and notice at the same time. That was what the CAB and
10 ACAS had told him, he said. I do not consider that that is correct.

38. In ***Industrial and Commercial Maintenance Ltd v Briffa UKEAT/0215/08***, the EAT accepted that notice could be given and holidays taken during that notice period. It also held that the statutory notice requirements could be varied by a contractual document, being a
15 relevant agreement under Regulation 15, and that the outcome complied with the purpose of the Regulations. I am bound by that authority.

39. In ***Maschek v Magistratsdirektion der Stadt Wien [2016] IRLR 801*** the Court of Justice of the European Union came to a similar conclusion, and although it stated a qualification in respect of someone off ill, that does not
20 apply in this case. In that case an official was given notice of termination of a year in advance, and not required to work during it.

40. That appears to me to support the conclusion that someone given notice of termination prospectively may at the same time be agree to, or instructed to, take annual leave, unless off work through illness. European
25 law is no different to that in the UK. There is I consider no claim for breach of contract in relation to notice simply on the basis that the claimant was on holiday.

41. There is another aspect to the issue of breach of contract however. The claimant has raised a claim for breach of contract on the basis of not
30 having received full notice in law. He sought in his Claim Form not 12

5 weeks of notice but eight. His specific argument was related to having holidays at the same time as serving notice as discussed, but he also raised the fact that the letter of 4 May 2022 was not received by him until later, on a date I found to be 26 May 2022 (he argued that it was not fully received until early June 2022 but I did not accept that evidence as discussed above).

10 42. The respondent did not seek to argue that it did not require to give notice. The contract provided for notice, for the claimant of 12 weeks, as did the statutory provision. The respondent gave notice in the letter, and in that referred specifically to the 12 week notice period. But the letter was not received on or around 4 May 2022, the date it bears. That was firstly as it was addressed wrongly, but secondly that in any event and as the respondent knew the claimant was abroad on holiday at that time. They were aware of it as this is stated specifically in the letter that he would not see it until his return on or around 23 May 2022 (in fact his return was on 15 22 May 2022 as he sent a message on that day). It appears to me to be clear from the Supreme Court authority above that in such a situation notice was effectively given on 26 May 2022.

20 43. That then raises an issue as to whether the notice required of 12 weeks was given. It was clearly not. The notice was less than that. It was from 26 May 2022 to 3 August 2022, which the parties agree was the date of termination of employment. Mrs Forrest very fairly accepted that that point had not been considered at the time the letter was sent, although as he was abroad the time for appeal had been extended such that that issue was raised. 25

30 44. The timings are not straightforward as 12 weeks from 4 May 2022 is not 3 August 2022, but in any event it appears to me that one day less than 10 weeks' notice was given, not 12, and that the notice is therefore less than the statutory minimum by two weeks and one day. Not giving that notice, also due within the contract of employment, is I consider a breach of contract. I consider that this falls within the claim made by the claimant firstly as the Claim Form refers to the letter being sent out wrongly and re-sent, secondly as including this issue as within the claim made by the

claimant is within the overriding objective, and thirdly as more recent case law such as ***Mervyn v BW Controls Ltd [2020] IRLR 464*** refers to the need to ensure that the correct legal framework is applied to the factual complaint the claimant makes. I have concluded that that claim of breach of contract succeeds.

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45. I award damages of two weeks and one day's pay. The amount of a week's pay at £420 was not in dispute. The parties also proceeded, in the contractual term at clause 6.4, on the basis of a working week of five days, which accords with the claimant's evidence on which he was not cross-examined, which means that the daily rate is £84 net. The award is £924 accordingly.

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Payment for annual leave

46. I now address the issue of holiday pay. That has two aspects. The first is the contractual position, and the second is the statutory position. The contractual position is the more straightforward. The contract states specifically that the claimant may be required to take holidays by the respondent, and sets out months for that as well. The claimant was not at work during the period from notice being received to termination. He was on holiday, as he accepts, at least for the period from 14 April 2022 to 15 July 2022, and paid for that. That is far more than the contractual entitlements, which are to 33 days per holiday year, and even if there was to be carry forward such that there was entitlement to 14 weeks, that period was taken as holiday. There is I consider no breach of contract as to holidays.

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47. The position in relation to the statutory rights in my opinion is as follows. Firstly the respondent can give notice under Regulation 15. It did so in the letter dated 4 May 2022. But it did not give the notice required by Regulation 15(3). In light of that, I initially was concerned whether that notice was not fully compliant with that Regulation. It appeared to me however from the terms of the message the claimant sent the respondent on 15 April 2022 referring to his being on holiday from the next day i.e. 16 April 2022 that he in fact had initiated those holidays, with the

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respondent's consent, such that he, the claimant, had in effect given notice under Regulation 15 which the respondent had accepted. His message must be taken as indicating an earlier discussion about those holidays as he uses the word "remind". He had then gone on holiday in fact. He had regarded himself as on holiday, and had not attended work to carry out contractual duties in the period until termination of employment. The holidays had been taken in the holiday year to 31 July 2022 in full, and for the period 1 – 3 August 2022 the claimant was I consider on holiday.

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48. I then considered whether, if that was wrong, and there had been a breach of the notice provisions under Regulation 15, that position is varied by a relevant agreement. I consider that it was. There is an agreement confirmed in writing being both the contract, and the letter to him of 4 May 2022. It was accepted by the claimant that there was an agreement as to voluntary redundancy and that that letter was accurate in confirming it. It appears to me that that suffices as a relevant agreement, and it is fortified by the contractual terms. That analysis is further required I consider by the case of **Briffa**.

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49. There are further issues. Firstly, under Regulation 13(9) unused annual leave cannot be carried forward from one leave year to the next save in certain circumstances. Secondly the leave year here starts on 1 August. Thirdly, that means that all leave accrued to 31 July 2022 fell in so far as it was not taken during that period. The circumstances as to coronavirus might apply, and the claimant referred to not being able to take a holiday initially because of Covid. Assuming that that provision applies, it appears to me clear that the claimant was on leave in fact during the period from 14 April 2022 to 3 August 2022. There is some difference in the evidence between 14 and 16 April 2022 but I consider that he was not at work from 14 April 2022, and on 16 April 2022 he went abroad. In fact therefore he was on leave from then onwards, that being the purpose of the Directive as discussed in **Briffa**, and there is no requirement to seek a purposive construction beyond what I have found. The entitlement under the EU Directive is to four weeks per annum, and the leave period taken in the 2022 holiday year was far more than that.

50. Whilst the claimant did accrue annual leave in the period from 1 August 2022, the start of a new holiday year, to termination on 3 August 2022, he was on holiday in the sense of not being required to be at work, having been told that in the letter of 4 May 2022, including that that was to be a period of holiday. He knew that on 26 May 2022. There is no outstanding leave due under Regulation 14.

51. I consider that there has been no breach of the statutory provisions as to pay for annual leave in light of that.

Conclusion

52. Having so found I make the award for breach of contract in his favour above, and dismiss the other claims. For the avoidance of doubt I have used net figures for the award, and in the event that any tax or other payment is due, that is payable by the respondent in addition.

53. Finally, I did not consider it necessary under Rule 2 to refer the parties to the case law and analysis above before making a decision, but in the event that either party considers that they have suffered prejudice by that they can seek a reconsideration under the terms of Rule 71.

Employment Judge: A Kemp
Date of Judgment: 9th February 2023
Date sent to parties: 15th February 2023