



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107342/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 27 February 2024

Employment Judge A Jones

10 **Mr G Crawley**

**Claimant
Represented by:
Ms J Stewart -
Wife**

15 **Unison**

**Respondent
Represented by:
Mr C Harrington -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claims are dismissed.

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REASONS

Introduction

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1. The claimant submitted a claim on 13 December 2023 alleging that the respondent had failed to pay him in lieu of annual leave to which he said he was entitled between his suspension from work in July 2020 and his resignation in August 2023. He also claimed that the respondent had failed to pay him in lieu of additional hours he had worked in 2020, in respect of which he said he was entitled to take time off in lieu.

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2. The claimant had not specified the legal basis of his claims. The respondent had made some efforts to encourage the claimant to clarify the basis of his claims, but by the time of the hearing, his claims remained unspecified.

3. The case was listed for a 2-hour hearing but in the event lasted for over 3 and half hours. The claimant was represented by his wife who is also a regional organiser for the respondent. He gave evidence and called one witness, Ms

Smith, whose evidence was of no value to the issues to be determined. The respondent led evidence from its Head of HR and Employee and Relations.

4. At the commencement of the hearing, I sought to clarify the nature of the claims. I asked the claimant's representative to specify whether the claim in relation to payment in respect of time off in lieu was based on contract or it was being alleged that this amounted to an unlawful deduction from wages. It was said that the claim was based on contract and I asked for clarification as to the contractual term being relied upon. No term could be identified. It was suggested that it was custom and practice for a payment in respect of time off in lieu which had not been taken to be made on termination of employment. However, there was no documentary or oral evidence being advanced to support that allegation.
5. I then sought to clarify the claim relating to holiday pay. It was said that this was based on statute and contract. There was no reference to any specific contractual provision. In addition, no reference was made to the specific provisions of the Working Time Regulations being relied upon, if that was in fact the legislation being relied upon. While I was mindful that the claimant was not being represented by a solicitor, I was also aware that both he and his wife had been regional organisers for the respondent Union for many years.
6. I also sought to clarify the relevance of a witness, given that the witness remained in employment but was said to be able to speak to the respondent's relevant practices in relation to her situation.
7. There was a short adjournment to allow the claimant to consider whether given what was said, he wished to insist on his claim in relation to a payment in respect of time off in lieu and also to consider whether it was necessary to call the witness who had been identified. After the adjournment, the claimant's representative indicated that the claim in relation to TOIL would not be withdrawn, albeit it was recognised that the argument only related to custom and practice and 'not much would be made of it'. It was also said that Ms Smith, the witness would still be called.

8. The witnesses who gave evidence all did so in a straightforward manner. Having considered the evidence, the documents to which reference was made and the oral submissions made by the parties, the following facts were found to have been established.

5 **Findings in fact**

9. The claimant was an area organiser for the respondent and had worked for them for over 20 years. While for the majority of his employment, he had worked on a full-time basis, he had reduced his hours to 17.5 per week from September 2017.

10 10. The respondent operated a practice of staff being able to take time off in lieu in respect of hours worked over their contractual requirement. The respondent has a policy called Flexible Working Policy which indicated that in terms of time off in lieu, any additional hours should normally be taken within one month. Although the claimant suggested that this policy did not apply to him,
15 the Tribunal found that it did as there was no evidence about any other basis on which to establish that he would be entitled to time off in lieu.

11. The claimant worked additional hours in the weeks following restrictions being imposed by the government in relation to the pandemic, from March 2020 to April 2020. At that time, he asked whether he could revert to full time working
20 for a period. That request, which was passed to the Assistant General Secretary was declined. The claimant's manager was instructed to discuss with the claimant how he could manage his hours to remain within his contracted hours.

12. There was no agreement between the claimant and Mr Kirby, his manager
25 that he could accrue time off in lieu which could be paid back post pandemic.

13. The claimant was suspended from work on 23 July 2020 and did not return to work.

14. During his suspension, the claimant took annual leave in every leave year prior the termination of his employment. He informed Mr Kirby who was his
30 initial point of contact and then Mr Farmer, who was the Director of HR for the

respondent once Mr Kirby had retired of the dates on which he was to take leave.

15. The claimant had a holiday entitlement of 154 hours per year and a pro rata entitlement to bank holidays.
- 5 16. The claimant's contract provided that he could carry forward up to 5 day's annual leave. The respondent's policy was that while in some circumstances annual leave in addition to five days could be carried forward, this would require the agreement of the Assistant General Secretary.
- 10 17. The Assistant General Secretary was never asked to agree to the claimant carrying forward any additional annual leave during the period of his suspension.
18. The claimant was paid in lieu of annual leave not taken in the last year of his employment.

Discussion and decision

- 15 19. The claimant did not produce any documentary evidence to demonstrate that there was a binding contractual agreement between him and the respondent that he could be paid in lieu of additional hours worked during the pandemic. The Tribunal found that it would be extraordinary for a manager who would have had to refer any such matters to an Assistant General Secretary to have reached such agreement. Moreover, given the claimant was a regional
20 organiser with more than 20 years' experience, the Tribunal concluded that had such agreement been reached, the claimant would have ensured that this was committed to writing. There was nothing in the policy regarding time off in lieu to suggest that any payment would be made to employees whose
25 employment had terminated and had not been able to take any hours which had accumulated. The Tribunal found the claimant's claim in this regard to be entirely speculative and wholly without merit.
20. The claimant's claim in respect of annual leave appeared to be that he was entitled to accrue annual leave over a 3-year period during which he was
30 suspended and be entitled to be paid in lieu of any leave he had not taken on

5 termination of his employment. His position was that he was entitled to carry forward any unused leave from one year to the next even though it was more than 5 days. He did not specify the legal or contractual basis of his claim and appeared to suggest that this was an agreement reached with Mr Kirby at some unspecified time.

21. The Tribunal was mindful that there have been many authorities which have addressed the entitlement of workers to holiday pay on termination of employment. Many of those authorities related to circumstances in which a worker was off sick or otherwise unable to take annual leave.

10 22. In the present case, the claimant was able to and indeed did take annual leave during each leave year. There was no suggestion that his ability to take leave was in any way restricted. While he indicated that he was signed off sick for 2 months when had suffered a mini-stroke and was again signed off for a period prior to his resignation, he did not suggest that this in any way limited
15 his ability to take annual leave.

23. In any event, the claimant's contract was quite clear that he could carry up to 5 days' annual leave into the following leave year. He took leave in each leave year and gave no explanation as to why he did not use all the leave to which he was entitled in each leave year or raise any issue with his point of contact
20 that he had been unable to take leave. There was no documentary evidence at all, despite the respondent having indicated that it had carried out a number of searches of its email system to determine whether there had been any emails between the claimant and Mr Kirby or Mr Farmer who has also since retired.

25 24. The claimant's position was that there would have been emails between him and others which he was not able to access. He said that the respondent had changed its systems and that he was never provided with an UpToDate laptop. However, he also said that he was able to receive emails on his phone and did check his phone from time to time. The Tribunal is satisfied that if the
30 claimant had been aware of specific email communications between him and others setting out agreement regarding these matters, it would have been

identified by him. It appeared instead that the claimant was seeking to recover diary entries to demonstrate that he had worked additional hours prior to his suspension, which was unrelated to his claim for holiday pay.

25. The Tribunal gave consideration to *Revenue and Customs Commissioners v Stringer* 2009 ICR 985, HL, and *Smith v Pimlico Plumbers Ltd* 2022 IRLR 347, CA and considered the extent to which either case was relevant in relation to the claimant's circumstances. The claimant had not specified whether he was relying on the Working Time Regulations or seeking to argue that there was a series of deductions in relation to his holiday entitlement and therefore the Tribunal considered his claim both in relation to the Working Time Regulations and as a continuing unlawful deduction from wages.

26. In either circumstance, the Tribunal found that a claim had not been made out. The claimant had taken annual leave in each leave year, there was no suggestion that there were any restrictions on him in that regard. He was aware who he should contact to take annual leave and his request was granted on each occasion. He did not give any evidence to suggest that he was limited in any way in using his full annual leave entitlement in each year. There was no evidence to suggest that he had contacted anyone to ask that any remaining entitlement be carried forward to the following year. There was nothing in his contract of employment which would suggest that he would be entitled to carry forward any unused leave beyond the 5 days permitted. Permission would have to have been sought and obtained from the Assistant General Secretary and there was no suggestion that she was asked for a view on such matters.

27. Therefore there was no contractual entitlement to carry leave forward. In each year, leave had been taken but not the entirety of the leave entitlement. There was no barrier to taking leave and the claimant was aware of his entitlement. There was therefore no breach of Regulations 13, 16 or 30 of the Working Time Regulations, an unlawful deduction from the claimant's wages in terms of section 13 Employment Rights Act 1996 or a breach of contract on the part of the respondent in failing to pay the claimant any accrued but untaken holiday pay in respect of 2020, 2021 or 2022.

28. In these circumstances, the claimant's claims fail and are dismissed.

A Jones

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Employment Judge

05 March 2024

Date

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Date sent to parties

05 March 2024