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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108415/2021

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**Final Hearing held by Cloud Video Platform (CVP) on
6 September 2021**

Employment Judge M Robison

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Mr W Dymond

**Claimant
Represented by
Mr J McCourt
Employment
Consultant**

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Professional Canine and Security Limited

**Respondent
Represented by
Ms S Harvey
Accounts manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim for holiday pay succeeds and the respondent shall pay to the claimant the sum of **ONE THOUSAND THREE HUNDRED AND EIGHTY ONE POUNDS** (£1,381).

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REASONS

1. This hearing took place by video conferencing on Monday 6 September 2021. The claim relates to holiday pay only in respect of a period of approximately six months when the claimant worked for the respondent as a security guard

at Lidl Greenock, in respect of annual leave which he claims he requested but was refused. The respondent resists the claim on the basis that the claimant accepted the contractual terms that no annual leave entitlement could be carried forward from one year to the next, the respondent's leave year being January to December.

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2. This final hearing had previously been adjourned (on 2 August 2021) to allow the claimant to lodge further documents and to allow Ms Harvey the opportunity to call Mr Roberts as a witness.

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3. Mr McCourt had lodged further documents (C1 to C31), a schedule of loss, written submissions and copies of the case law he was relying on. These had all been forwarded to Ms Harvey. Ms Harvey relied on the documents which she had previously lodged, although as these were still unnumbered, they required to be numbered during the course of the hearing.

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4. Ms Harvey confirmed that Mr Roberts was not available and that he would not be giving evidence.

5. The Tribunal heard evidence from the claimant and then from Ms Harvey.

Findings in fact

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6. The Tribunal finds the following facts proved, admitted or agreed based on the evidence heard and the documents referred to.

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7. The claimant was engaged in July 2021 by Mr Jim Roberts who is the respondent's operations manager in Scotland. He passed the relevant paperwork relating to the claimant including his application form, identification and other information to the respondent's office in Kent to perform the necessary checks.

8. The claimant was employed as a security guard who was based at Lidl Greenock. The claimant commenced employment on 10 July 2021 (contract of employment R1). His employment ended on 5 January 2021 when he resigned (R26 e-mail to Jim Roberts dated 5 January 2021).

9. The contract of employment was issued to the claimant by email (R1). The respondent's handbook was also attached to that e-mail. The claimant signed the contract by typewriting his name on 12 July 2020. Under the heading "acknowledgement by employee", it is stated that "I acknowledge receipt of my statement of terms and conditions of employment. I confirm that I have read and understand the contents. I accept that the statement of terms and conditions and, where specified, the rules detailed in the employee handbook, from my contract of employment".
10. The claimant returned the signed contract by e-mail. This was also signed by the HR manager, Ellie Austin on 12 July 2020 (R1/6).
11. The contract of employment states under "holidays" at section 9 (R1/3) as follows:
- "Full-time employees (working 5 days per week) are entitled to 28 days' holiday per year including all recognized bank/public holidays....we recognize 8 bank/public holidays each year....you may be required to work bank/public holidays to meet the needs of the business. If you work on a bank/public holiday you will receive time off in lieu as compensation. Rules as to holidays and holiday pay are set out in the employee handbook provided with this statement. For the purposes of the application of statutory holiday entitlement under the Working Time Regulations, you agree that the holiday section of this statement and the company handbook will be held to be a 'relevant agreement'".
12. The extract from the company handbook (R4) sets out at section 1 the rules relating to holidays. Section 1.1 states:
- "Our holiday year begins on 1 January and finishes on 31 December. Your holiday entitlement is stated in your individual statement of terms and conditions of employment. If you start or finish your employment during the year, holiday entitlement will be calculated as a ratio of the annual entitlement for each completed month of service during that first year of employment at

the rate of one-twelfth of the annual entitlement on the first day of each month”.

13. Section 1.2 states under the heading “rules regarding annual leave” includes the following:

- 5 “a) holiday request forms have to be completed by you and then signed by your line manager.
- b) All holidays should be authorized before bookings are made....
- c) We will do our utmost to ensure that your request is accommodated but please be aware that operational issues must be the priority....
- 10 e) You need to give a minimum of one month’s notice for any holiday requests, unless agreed otherwise in writing.
- h) you may only take holidays as they are accrued during the first year of employment.
- i) no part of one year’s holiday to be carried forward to subsequent
15 years except if you do not take holiday because you are on sick leave.
- j) you are required to take all your statutory annual leave, to be booked in line with normal procedures, as stated above. Holiday that is not taken will be lost and not paid in lieu. However, should
20 your employment come to an end before any accrued holiday is taken, you will be paid the balance of holiday due.
- k) holiday pay is your normal basic rate of pay. Where this rate of pay varies or where there are not fixed contractual hours of work (normal working hours) the rate may be calculated as an average
25 of the pay received in the 12 weeks leading up to the period of holiday requested....”

14. On 11 November, the claimant e-mailed Ms Sarah Harvey, accounts manager, to ask “how do we put in for holidays” (page 23).
15. Ms Harvey forwarded that e-mail to the other accounts manager, Ms Michelle Billings, to reply. The claimant received no reply.
- 5 16. The claimant again e-mailed Ms Harvey on 18 December. Ms Harvey forwarded the e-mail to Ms Billings. The claimant recalls that he did receive a reply but he does not have a copy of it and nor does the respondent.
17. Ms Billings sent the claimant a blank template of the holiday request form.
18. On 21 December the claimant sent an e-mail to Ms Billing asking, “how many
10 days do I have to take” (page 24). Again the claimant has no copy of her reply.
19. The claimant does however recall on occasion being told that he had four or six days to take. He recalls being told that it was “down to Mr Roberts” and that he had to refer to Mr Roberts to get his holidays approved. He spoke to Mr Roberts on the telephone about holidays but any requests were refused.
- 15 20. Towards the end of December, the claimant asked Mr Roberts for annual leave but he told him that the company was too busy at that time and that he was not allowed to take holidays then.
21. The claimant thereafter completed a holiday request form (page 25) seeking
20 holidays between 3 and 8 January 2021. He sent this by e-mail to Mr Roberts but received no reply.
22. Apart from the references in the contract of employment and staff handbook, the claimant was never advised or reminded that if he did not take holidays before the end of the year then he would lose them.
23. The claimant’s gross weekly wages, averaged over the last 12 weeks of his
25 employment, were £493 (C28-31), with a daily rate of £98.65.

24. The claimant was entitled to 14 days' holiday for the period of his employment from 10 July 2020 to 5 January 2020. The claimant took no holidays during the duration of his employment.

Relevant law

- 5 25. The law relating to holiday pay is contained in the Working Time Regulations 1998. Regulation 13 provides that a worker is entitled to four weeks' annual leave in each leave year. Regulation 13A provides that a worker is entitled to an additional 1.6 weeks' leave (that is 28 days in total).
- 10 26. Regulations 13(3) states that a worker's leave year begins on such date as is provided for in a relevant agreement.
27. Regulation 13(5) states that where the worker starts after the date their first leave year began, "the leave to which he is entitled in that leave year is a proportion of the [28 days] equal to the proportion of that leave year remaining on the date on which his employment begins".
- 15 28. By reason of regulation 13(9) leave may only be taken in the year in respect of which it is due and may not be replaced by a payment in lieu except where the worker's employment terminated.
29. Equivalent provisions relating to the additional 1.6 weeks leave are set out in regulation 13A.
- 20 30. Regulation 14 relates to where a worker's employment is terminated during the course of his leave year, and regulation 14(2) states that "where the proportion of the leave taken by the worker is less than the proportion of the leave year which has expired his employer shall make him a payment in lieu in accordance with paragraph (3)"
- 25 31. Paragraph 14(3) states that "the payment due under paragraph (2) shall be (a) such sum as may be provided for the purposes of this regulation in a relevant agreement or (b) where there are no provisions of a relevant agreement which apply" calculated in accordance with the formula set out there.

32. Regulation 14(4) states that “A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise”.
- 5 33. Regulation 2 states that a “relevant agreement” means “a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer or any other agreement in writing which is legally enforceable as between the worker and his employer”.
- 10 34. Regulation 35, headed “restrictions on contracting out”, states that (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports (a) to exclude or limit the operation of any provision of these regulations, save in so far as these regulations provide for an agreement to have that effect....
- 15 35. Regulation 30(1)(b) states that a worker may present a complaint to an employment tribunal where his employer has failed to pay him the whole or any part of any amount due to him by way of payment in lieu of accrued but untaken leave upon termination of employment.

20 **Submissions for the claimant**

36. Mr McCourt had lodged written submissions for the claimant. He had prepared these prior to hearing the evidence of the claimant but none the less relied on them in their entirety following the evidence.
37. Mr McCourt submitted that the claimant gave evidence of his attempts that he made to take his annual leave; and that when he left employment he had been prevented from taking his annual leave.
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38. He relied on Regulation 13(9)(b) of the Working Time Regulations 1998, which states that annual leave to which a worker is entitled may not be replaced by a payment in lieu except when the worker’s employment is terminated. He submitted that entitled the claimant, in circumstances where
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he had been prevented from exercising his right to take annual leave, to seek a payment for that annual leave upon termination of employment.

39. In support of his submissions he relied on the decisions of the ECJ in *KHS AG v Schulte* 2012 IRLR 156, *Max-Planck Gesellschaft v Shimizu* C-684/16 and *King v Sash Windows* 2018 ICR 693, which he argued were authority for the following propositions: the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of the European social law from which there can be no derogation; any worker who has lost his right to paid annual leave must have actually had the opportunity to exercise that right; incentives not to take annual leave are incompatible with the objectives of the right to paid annual leave, relating in particular to the need to ensure that workers enjoy a period of actual rest, with a view to ensuring effective protection of their health and safety; that the very purpose of paid annual leave is to enable the workers to rest and enjoy a period of relaxation and leisure; that any practice or omission of an employer that may potentially deter a worker from taking annual leave is incompatible with the purpose of the right to take paid annual leave; a worker who has not been able for reasons beyond his control to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu; a worker might not be entitled to a payment in lieu of annual leave upon termination of employment, specifically where a worker refrained from taking leave in full knowledge of the ensuing consequences; the right of a worker to paid annual leave is not connected to a situation in which his employer was faced with periods of his absence which, as with long-term sickness absence, would have led to difficulties in the organisation of work; even if it were proved, the fact that a respondent wrongly advised that a worker was not entitled to paid annual leave is irrelevant and it is for the employer to seek all information regarding his obligations in that regard.

40. Mr McCourt argued that the uncontested evidence given by the claimant in this case is that he was denied the opportunity to exercise that right to take annual leave. His evidence was that when he tried to exercise his right to take leave he was prevented from exercising that right. The respondent, in this

case, failed to comply with their obligation to ensure protection of the health and safety of the claimant by preventing him from taking his annual leave. The claimant's evidence was that he was prevented from his right to take annual leave and that it was due to circumstances beyond his control, which entitles the claimant to seek a payment in lieu of that annual leave upon termination of his employment.

Submissions for the respondent

41. Ms Harvey in submissions summarised her position by reference to the contract of employment, which she said specifically states that holidays not taken in the company's annual leave year cannot be carried forward and no payment in lieu will be made. This contract forms the agreement which the claimant reached with the respondent once it was signed, and was a "relevant agreement"

42. While the claimant references being entitled to four days, that would not be correct anyway; and he is not entitled to any holidays in the new year because he had only worked two days.

43. Ms Harvey said that the process for getting annual leave approved was quite strict. She had been unable to locate the claimant's annual leave request form on their systems. Any request for annual leave even if approved by the line manager will come to them to check that the worker has accrued the entitlement.

44. The respondent submits therefore that no money is due to the claimant.

Tribunal decision

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Observations on the witnesses

45. The claimant's evidence in chief was very brief, as was cross examination. The claimant gave further evidence on being questioned by the Tribunal which shed some further light on communications between the claimant and the

respondent regarding holidays, although the claimant did not recall what had been said with any precision.

46. This highlighted the fact that the claimant could not remember the details of the conversations or the e-mail responses (which he was not able to access).
5 I came to the view that while credible, the claimant's evidence was not reliable.

47. Although the claimant stated in evidence that he had not received the handbook, I did not accept that evidence. He may have not appreciated that it was attached to the e-mail with the contract, and indeed I would accept that
10 he had not read it. I accepted Ms Harvey's evidence that it was attached, not least because of the references to it in the contract and therefore that the claimant ought to have read it, since he signed the contract.

48. I was however able to accept that he had asked for holidays; that he had asked how to apply for holidays and how many days he had outstanding; and
15 also that he was not advised initially how to take holidays or encouraged to take them before the end of the leave year.

49. It is unfortunate that the Tribunal did not hear evidence from Mr Roberts who could have shed further light on the position regarding the claimant's requests of him for annual leave. Nor did we hear from Ms Billings. Ms Harvey advised
20 that she had left the company in May 2021.

50. Ms Harvey's evidence was inevitably limited because she had no direct involvement in the matter of the claimant's annual leave. Further she explained that Ms Billings e-mail account was deactivated after she left and that she was not able to access any e-mails from her. Again this was very
25 unfortunate, because it seems that this resulted in the claimant not being able to access her replies either.

51. Although Ms Harvey had not been able to locate the holiday request form following a search of e-mails, which led her to argue that this had not been submitted, this may well be because it was not in the end forwarded to head
30 office. The claimant's evidence which I accepted was that he had forwarded

the form to Mr Roberts in the first instance for his approval. It may well be that Mr Roberts did not think to forward it to the Kent office because the claimant had by 5 January 2021 resigned. Mr Roberts did not give evidence so his position is not known.

- 5 52. While Ms Harvey relied in her submissions on the fact that the claimant had produced “no evidence” to support his position, what she of course meant was that he had not produced relevant documentary evidence. The Tribunal heard oral evidence from the claimant and the Tribunal is entitled to rely on that oral evidence, if it is accepted, in coming to its decision.

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The right to payment in lieu on termination

53. The claimant in this case seeks holiday pay in respect of the period of his employment from July to December 2020, during which time he took no holidays.
- 15 54. The respondent’s position broadly is that the claimant has signed a contract accepting that any leave which he did not take in the respondent’s annual leave year could not be carried over so that it was lost. This was the case, the respondent argued, even in the first year of employment. The respondent’s position is that no requests for holiday were made by the claimant.
- 20 55. Mr McCourt’s position broadly is that the claimant did ask for holidays and was prevented from taking them, and therefore that he should be entitled to carry them forward. Mr McCourt relies on principles derived from European law, essentially that where a worker is prevented from taking leave he must be entitled to payment in lieu on termination.
- 25 56. I have concluded based on the claimant’s evidence that he did make a request for holidays and this was refused. I accepted the claimant’s evidence in this case that he had asked for holidays but that for one reason or another the correct process for getting holidays was not explained to him, and he was not reminded or advised or encouraged to take his leave before the end of the holiday year otherwise he would lose it. I accepted the claimant’s evidence
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that he had asked for holidays in late December but that he was advised by Mr Roberts that he could not take holidays because the company was too busy at that time.

57. I accepted Mr McCourt's submissions, relying on decisions of the ECJ, that
5 a worker who was prevented from taking leave should be entitled to carry it forward.

58. Ms Harvey relies on the contract and handbook as a relevant agreement. I accept that the claimant received both the contract and the handbook, and I accept, in principle that these form the basis of a "relevant agreement" for the
10 purposes of the Working Time Regulations.

59. She points to the sections of the contract and in particular the staff handbook, which stated that workers cannot carry forward leave into the next leave year unless they are sick.

60. However, the provisions of the Working Time Regulations set out statutory
15 rights which are intended to protect a worker's health and safety. While there can be a variation or a derogation from certain rights where that is agreed in a relevant agreement, not all rights are capable of being varied by agreement.

61. In particular, regulation 14(2) confirms that an employer "shall" make a payment in lieu on termination for any untaken holidays. While regulation
20 14(4) permits a derogation from that, that relates only to circumstances where a worker has taken more leave than he is due on termination.

62. Otherwise regulation 14(2) states than an employer, on termination, can vary these provisions to specify "such sum as may be provided for....in a relevant agreement". The EAT in *Witley and District Mens Club v MacKay 2001 IRLR*
25 *595*, decided that a relevant agreement cannot provide for **no** payment in lieu on termination (my emphasis). The EAT confirmed that the reference to "such sum" did not include the possibility of "no sum" and that an agreement to that effect breached the Regulations. Such a provision is rendered void by regulation 35(1)(a) which states that any provision in a relevant agreement is

void in so far as it purposed to exclude or limit the operation of these regulations, unless the regulations provide for an agreement to that effect.

63. Here the relevant agreement purported to provide that “no sum” would be due to the claimant on termination in this case. However, the employer is not permitted to rely on such a term in breach of the regulations.

64. Consequently I find that the provision in regulation 14(2) applies and the claimant is entitled to a payment in lieu on termination.

The amount due

65. Ms Harvey accepted that, based on the claimant’s pay, his gross average weekly wage was £493 per week, and therefore that his daily rate for holiday pay entitlement purposes was £98.65.

66. Although she accepted that the claimant had worked for six months, she did not accept that the claimant was therefore entitled to 14 days leave. She submitted that the claimant was due only 10 days and this was because the holidays included 8 days leave for public holidays. Where an employee works on bank holidays, they are entitled to take a day in lieu.

67. I did not understand, or accept, Ms Harvey’s argument that the claimant was only entitled to 10 days leave for the six month period. As Mr McCourt pointed out, and as is clear from regulation 13 and 13A, workers have a statutory annual entitlement to 28 days leave. While this may include bank holidays, there is no provision that if a worker works on a bank holiday that he will otherwise get a day in lieu but if he does not request that day in lieu he will not be entitled to holidays.

68. I conclude therefore that the claimant is entitled to holiday pay for 14 days.

69. The claimant is therefore entitled to holiday 14 days' holiday pay at £98.65 per day. The respondent shall pay to the claimant the sum of £1,381.

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Employment Judge: Muriel Robison
Date of Judgment: 13 September 2021
Entered in register: 17 September 2021

10 and copied to parties