



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000501/2023

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**Final Hearing held at Glasgow on 14 March 2024**

**Employment Judge M Robison  
Tribunal Member J McElwee  
Tribunal Member G McKay**

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**Ms C Docherty**

**Claimant  
In Person**

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**Stuart Gibson Cleaning Services Ltd**

**Respondent  
Represented by  
Mrs W Gibson  
Director's Wife**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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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 **SEVEN HUNDRED AND EIGHTY ONE POUNDS AND FIFTY PENCE (£781.50)**.

The claim for disability discrimination is dismissed, following withdrawal.

### REASONS

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1. The claimant raised a claim in the Employment Tribunal for disability discrimination and unpaid holiday pay on 3 October 2023. These claims are made by the claimant following the termination of her employment as a cleaner with the respondent, when she worked in the offices of Harper Macleod, Solicitors, one of the respondent's clients.

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2. At the outset of the hearing, the claimant withdrew her claim for disability discrimination, which is dismissed.

3. Accordingly the only issue for determination by the Tribunal is the amount of holiday pay due, and in particular whether the claimant was entitled to carry forward accrued but untaken leave between one holiday year and the next.

4. The Tribunal heard evidence from the claimant and for the respondent from  
5 Mr S Gibson, sole director, who was represented by his wife Mrs W Gibson, who also gave evidence.

### Findings in fact

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

10 6. The claimant commenced employment with the respondent as a cleaner on 16 June 2022. The claimant received a job offer by e-mail stating that the location of the contract was Harper Macleod's offices; the hours were 10 am to 4 pm Monday to Friday with occasional flexibility required; train travel was to be included from Blantyre to Glasgow Central; and holiday entitlement as  
15 per government guidance.

7. Although in regard to holiday entitlement, it was stated "TBC" in the e-mail offering her the job, there was no further discussion about holiday entitlement. No contract of employment or employment particulars were issued.

8. The claimant was entitled to 28 days annual leave each year, to include public  
20 and bank holidays. Public and bank holidays for the respondent normally consisted of two days at Christmas and New Year, one day at Easter, and one day for September week-end. That did not include "Fair Monday" in July. The respondent's holiday year runs from April to March.

9. The claimant took annual leave for the September week-end, on 26  
25 September 2022.

10. On one occasion when the claimant had a doctor's appointment, which would have resulted in her starting work late, Mr Gibson advised that she would require to take that day as annual leave.

11. In or around early November 2022, the claimant requested, and was granted, five days of annual leave.
12. The claimant's annual leave included two days at Christmas and New Year. The offices of Harper Macleod closed at 1 pm on Christmas Eve and Hogmanay (or the last working day before those days). The claimant consequently finished work at 1 pm and was paid only for working from 10 to 1 pm. This was because the respondent was only paid for those hours by their client, Harper Macleod.
13. At the end of January 2023, the claimant telephoned Mr Gibson to advise that she was unwell and was then absent for three days on sick leave on Wednesday 1, Thursday 2 and Friday 3 February 2023. The claimant returned to work the following Monday and then was "sent home" by a member of staff at Harper Macleod on Tuesday. She was then absent on sick leave for two weeks, in respect of which she submitted a sick line, that is from 7 February to 20 February 2023. The claimant was not paid when she was absent on sick leave, but was entitled to statutory sick pay.
14. The claimant returned to work on Tuesday 21 February 2023. Mr Gibson asked her to go into the Harper Macleod office for 1 pm where he would meet her. He advised her that her shift pattern was to change from that day, from 10 am to 4 pm to 1 pm to 6 pm, and that her hours would therefore reduce to 25 hours each week.
15. At that meeting the claimant raised concerns about the fact that she had lost pay for the afternoons of Christmas Eve and New Years' Eve (or equivalent) and that had she been told about that, she would have taken annual leave.
16. On 25 March 2023, the claimant contacted Mr Gibson with a view to requesting annual leave. Subsequently, on 28 March 2023, the claimant spoke to Mr Gibson on the telephone and made a request for annual leave. The claimant requested dates in April but was advised that these were unsuitable because other staff were on annual leave. The outcome of the call was that Mr Gibson would contact the claimant regarding suitable days for her to take leave but he did not get in touch with her. The claimant was not advised

that if she did not take outstanding annual leave before the end of their leave year that she would lose the leave and not get paid for it.

17. In the annual leave year, from the commencement of her employment on 16 June 2022 to the end of the annual leave year on 31 March 2023, the claimant took eleven days of annual leave. The claimant was entitled to 18 days of annual leave for that leave year.
18. The claimant's pay increased from £10 per hour to £10.42 per hour effective 1 April 2023.
19. The claimant attended work on Monday 10 April 2023 which was Easter Monday. She had been advised by Mr Gibson that she was to attend work unless she was told otherwise. She worked that day until around 4 pm when she was invited to join members of Harper Macleod staff for a meal. She subsequently made up the hours which she had missed later that week.
20. On 27 April 2023, the claimant was advised by Mr Gibson that she should take a covid test before attending work because of concerns about being in contact with someone with covid. Before he heard back from her, Mr Gibson made arrangements for the claimant's shift to be covered so that she was not required to attend work that day. The claimant did not attend work on that date. That day, 27 April 2023, the claimant took a bad fall and was taken to hospital. She was thereafter, from 28 April 2023, signed off sick.
21. The respondent initially allocated these two days, 27 and 28 April 2023, as annual leave and accordingly the claimant was paid for these days and initially they were said to count towards her annual leave taken. However, following a dispute adjudicated by HMRC these dates have been identified as sick leave days in respect of which statutory sick pay is due.
22. The claimant submitted sick lines for May and June, which stated that the claimant was not fit for work due to arthralgia. The claimant was due to receive statutory sick pay during her absence on sick leave at this time.
23. The claimant was advised in an e-mail from Mr Gibson dated 7 July 2023, that "Following some organisational changes within the business needs of your

place of employment I regret to inform you that you are no longer required effective with 1 weeks' notice from today. Thank you for providing the sick notes. I will pass these to my accountant and these will be included in the July pay run". The termination of the claimant's employment was therefore effective 14 July 2023.

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24. For the holiday year from 1 April 2023 to the termination of her employment on 14 July 2023, the claimant took no annual leave. The claimant was entitled to eight days of annual leave for that period. The claimant did not receive any holiday pay on the termination of her employment.

10 25. The claimant was not advised at any time that if she did not take holidays before the end of the annual leave year then she would lose them.

### Relevant law

15 26. 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. That entitlement is derived from rights under European law. Regulation 13A provides that a worker is entitled to an additional 1.6 weeks' leave (that is 28 days in total).

27. Regulations 13(3) states that a worker's leave year begins on such date as is provided for in a relevant agreement.

20 28. 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".

25 29. 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.

30. Equivalent provisions relating to the additional 1.6 weeks leave are set out in regulation 13A.

31. 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)".
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32. 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.
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33. 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.

15 **Tribunal deliberations and decision**

34. We found the evidence of the respondent, both Mr and Mr Gibson, to be unreliable. This is largely because the respondent appears to have no system at all for deciding and more importantly recording annual leave. We heard evidence about a diary in which Mr Gibson recorded annual leave, but that diary was not lodged. It was not at all clear how employees would know what annual leave they had accumulated and what was outstanding, or their rights in general relating to annual leave.
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35. We appreciate that Mr and Mr Gibson gave evidence to the best of their recollection, but their recollection of events was extremely poor. Had they had records the position would almost certainly have been clearer.
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36. Consequently, where there are disputes about the evidence, we have in general preferred the evidence of the claimant. We considered that she was more likely to be aware of the dates when she had taken annual leave, given the failures of Mr Gibson's memory and in particular the failure of the respondent's systems for recording annual leave.
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*Annual leave year from commencement of employment to end March 2023*

37. In respect of the annual leave year from the commencement of the claimant's employment to the end of the holiday year 31 March 2023, there was no dispute that the claimant had taken 10 days of leave, that is one day for the  
5 September week-end, five days' holiday in November, and four days' holiday at Christmas/New Year.

38. In respect of one further day, which we have found should be categorised as annual leave, the claimant's evidence was that on one day that she had a hospital appointment, Mr Gibson had advised her that she would require to  
10 take annual leave. Mrs Gibson, at the eleventh hour, said in evidence that the claimant had taken two single days of holiday on 30 August and 5 September 2022. However, this came as a surprise to us because the claimant had not mentioned these dates, she had not been cross examined on that, Mr Gibson had not mentioned that in his evidence and there was no reference at all to  
15 that in any of the paperwork submitted by the respondent. We took the view that it was more likely than not that one of these dates related to leave which Mr Gibson had advised the claimant she required to take to allow her to attend her hospital appointment.

39. Consequently we conclude the claimant took 11 days of leave during that first  
20 annual leave period. According to the regulations referenced above, the claimant would have been entitled to 18 days of leave for that period.

40. There were references to "Fair Monday" and while the claimant could not recall whether she had got that day off or not, Mr Gibson confirmed that "Fair Monday" is not included as a statutory holiday and so would not have been  
25 taken as a day of annual leave by the claimant.

*Annual leave period from 1 April 2023 to termination of employment*

41. Mrs Gibson did appear, in the end, to concede that the claimant was due seven days for the annual year from 1 April 2023 (though not eight as  
30 claimed). This was because, although the claimant had been absent on 27 April 2023, relating to a misunderstanding around the taking of a covid test

before attending work, and was then absent on sick leave on 28 April 2023 following a fall, these dates were originally categorised as annual leave, and the claimant was paid full pay for these days as holiday. However, it has subsequently transpired, following an investigation by HMRC relating to statutory sick pay, that these have in fact been categorised as sick leave days for which statutory sick pay is apparently due. These leave days cannot be both sick leave and annual leave. Mrs Gibson appeared to accept in evidence that the claimant was to be paid sick pay for these dates, and therefore they were not taken as annual leave.

42. The only dispute in regard to that holiday year related to 10 April 2023. That was Easter Monday. Normally employees would get Easter Monday as a statutory holiday. However, the claimant's evidence was that she went in to work that day because the offices of Harper Macleod were open. She understood that she was to go into work unless she was told otherwise by Mr Gibson. We accepted her evidence that she had attended work that day and we accepted that while she had left with other staff around 4 pm to go to a restaurant, she had made up the hours later in the week. It may be that Mr Gibson was not aware of this, but in any event we accepted the claimant's evidence because as discussed above his memory was poor and his record keeping non-existent.

43. We have found therefore that the claimant had not taken any annual leave in the leave year when her employment was terminated. We have calculated, and indeed it was agreed, that the claimant had accumulated eight days of annual leave during that period.

*Carry over of leave between leave years*

44. The key area of dispute between the parties related to "carry over of leave". We have found that the claimant is entitled to eight days' leave for the annual leave year prior to termination. Mrs Gibson essentially accepted that payment was due for that period. The respondent did not however accept that the claimant was entitled to carry forward leave from the previous annual leave year. That essentially explains the discrepancy in the number of days which



the claimant says she is due on termination of employment and what the respondent says is due.

45. Mrs Gibson understood that there was no requirement for the respondent to allow carry over of accrued but untaken holidays. She said that she had researched the matter and that other employers did not allow carry over. She said that as a small company they simply could not afford it. Although there seemed to be no system for advising employees of their holidays or their rights relating to holidays, or indeed even a fool-proof system for recording them, she said that this had never been a problem for them before.
46. It should be noted that no contract of employment was issued. Nor indeed did the respondent issue particulars of employment as required by the Employment Rights Act 1996. Thus there was no written term of employment relating to carry over of annual leave. In so far as we understood Mr Gibson's evidence, we understood that he did not tell staff they were not entitled to carry over and specifically that he had not told the claimant, which was her position. We accepted her evidence, not least because she had discussed with Mr Gibson in February that she had outstanding leave. She mentioned the fact that she had not received full wages for the day before Christmas Eve and New Year's Eve, and had she known she would lose leave, she would have taken those as annual leave. Further, she said that had she known that she would not be entitled to carry forward leave, then she would also have taken sick leave in February as annual leave, so that she would have got full pay for the time she was off sick (rather than statutory sick pay).
47. The claimant's position essentially is that she was not told that she could not carry forward leave or it would be lost, and that she was, following the telephone call on 28 March, effectively prevented from taking leave since she was not offered dates when she asked for them. Nor indeed was she told that she would lose them if she did not take them that annual leave year. Further, the claimant was absent on sick leave during February but was not advised then that she could have taken those days as annual leave because she was about to lose the balance of her entitlement by end March.

48. The regulations do not allow for carry over in the normal course (this is likely to relate to the fact they the right to take annual leave, derived from European law, is essentially a health and safety measure). However, the Court of Appeal has confirmed, in the case of *Smith v Pimlico Plumbers* 2022 IRLR 347, relying on decisions of the European Court of Justice, that an employee can only lose their right to paid annual leave by refusing carry over if the employer can show that it gave the worker the opportunity to take paid annual leave; encouraged the worker to do so; and informed the worker that the right would be lost as the end of the annual leave period. If the employer cannot show that it took these steps, then there is a right to carry over. An employer may satisfy its obligation by providing information as to the workers' annual leave entitlement and a clear procedure for booking holidays, and by adopting a well-publicised "use it or lose it" policy.
49. We have found in this case that the respondent had no policy at all for booking holidays or recording them. Further and in particular the claimant was not at any time told that if she did not take leave in the year in which it accrued that she would lose it.
50. For that reason, we conclude that the claimant was entitled to carry forward leave into the next leave year. As discussed above, we have concluded that the claimant had seven days outstanding from the previous annual leave year, and eight days from the year in which her employment terminated. We find therefore that the claimant had an outstanding right to be paid for accrued but untaken annual leave on termination of employment totalling 15 days, at five hours each day, that is for a total of 75 hours.
51. It should be noted that we have found that the claimant's hours reduced from late February 2023 to 25 hours. We have found that the claimant's hourly rate increased from £10 per hour to £10.42 per hour on 1 April 2023. We did note that the claimant when calculating outstanding leave had calculated this on a pro rata basis relating to accrual when she was earning £10 per hour and when she was earning £10.42 per hour. It is not however appropriate to "pro rata" leave in this way. This is because for annual leave accrued this could be

taken at any time in the final annual leave year when the claimant was earning £10.42 per hour and working 25 hours per week.

52. We therefore find that the claimant is entitled to pay in respect of untaken annual leave for a total of 15 days, that is 75 hours, which at £10.42 per hour totals £781.50. The respondent shall therefore pay to the claimant the sum of £781.50.

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**Date sent to parties**

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**M Robison**

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**Employment Judge**

**22 March 2024**

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**Date**

**26 March 2024**

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