

# THE INDUSTRIAL TRIBUNALS

CASE REF: 640/13

**CLAIMANT:** Stephen Thomas Douglas

**RESPONDENT:** First Choice Selection Services Ltd

## DECISION

The unanimous decision of the tribunal is that the respondent failed to provide the claimant with written terms and accordingly we order the respondent to pay the claimant the sum of £700 representing 4 weeks' gross pay by way of compensation as set out at paragraph 29 of this decision.

### Constitution of Tribunal:

**Chairman:** Miss E McCaffrey

**Members:** Mr F Murtagh  
Mr H Fox

### Appearances:

**The claimant appeared in person.**

**The respondent was represented by Mr Tom Sheridan of Peninsula Business Services Ltd.**

### Issues

1. The issues for the tribunal to consider were:-
  - (1) Whether the claimant was entitled to pay in lieu of untaken holidays which had accrued up to 3 December 2012, prior to him leaving employment with the respondent company.
  - (2) Whether the respondent failed to provide the claimant with written terms and conditions of employment and, if so, whether the claimant is entitled to compensation for this failure?

## Facts

2. We heard evidence from the claimant and from Mrs Michelle Robinson of the respondent company ( "First Choice"). We also had the opportunity to consider documents which were opened to us by the respondent.
3. The claimant started work for the respondent on 3 December 2011 as a day care worker. He completed a placement for six months at Mount Oriel Day Centre which he completed in May 2012 and then was assigned to Edgecumb Training Centre until 4 January 2013 when he moved to a full-time job with another employer.
4. The claimant's evidence was that the wages were always paid a week behind and that he was not guaranteed full-time hours with the respondent which was his reason for looking for another job.
5. He agreed that he had gone through an induction process when he started worked for the respondent and that he and a number of others who were present (he said at least 15 to 20) were presented with documents and given them to sign. It was Mrs Robinson's evidence that when the claimant registered with First Choice he would have gone through a one to one process with one of their consultants in the office to complete an application form. When asked if she had direct knowledge of this she indicated that it was another colleague who was presently on maternity leave who had dealt with the claimant and she had not had any direct dealings with the claimant in relation to the commencement of his employment, so she was unable to give direct evidence of it, simply to say what was usual procedure. We therefore accept the unchallenged evidence of the claimant that while he was aware that he had signed a contract, he was not given a copy of it.
6. When the claimant was asked to clarify the information he had been given about applying for leave, he said that he knew that he had to fill in a form four weeks beforehand, but he had assumed that he would continue to accrue holidays while with First Choice. He also said that when working for other employers, they had normally notified him that he must take holidays before the year end, as different companies had different rules about carrying holidays forward.
7. The documentation opened to us included the contract of employment which had been signed by the claimant with the respondent company. That contract indicates that the leave year starts on the date when the employee starts an assignment or a series of assignments and runs for one calendar year from that date.
8. The contract also indicates the following:-

"Under the Working Time Regulations 1998, the employee is entitled pro rata to 28 days paid leave per year (inclusive of bank and public holidays, where the employee is permitted to take such holidays). All entitlement to leave must be taken during the course of the leave year in which it is accrued and none may be carried forward to the next year. Failure to take any holiday pay by the end of the holiday year in which the entitlement arises will result in such outstanding holiday being forfeited."

9. It was agreed that the claimant worked 29 hours per week, that he was paid £6.45 per hour and therefore that his gross pay was £189 and his net pay was £175 per week.
10. During the first year of his employment with the respondent the claimant took five days' leave in July 2012, which showed that he was aware of the procedure for taking leave and had complied with it.
11. In January 2013 the claimant moved to a new job. When he received his wages a week later he realised that he had not been paid for untaken holiday pay. He spoke to Sarah O'Hagan at First Choice and four to five days later a lady named Karen from First Choice contacted him to say that he was not entitled to holiday pay as his leave should have been taken before the end of the year.
12. Following this the claimant wrote a detailed letter to the respondent on 29 January 2013. Amongst other points, he complained that he had requested other days off but was told this could not be facilitated due to staff shortages. This is mentioned at least twice during the letter.
13. In the reply dated 31 January 2013 which was opened to us by the respondent, they refute the idea that leave was refused. However, no other independent evidence of this was adduced. The claimant had not completed any leave application forms which had been turned down and there were no letters from the respondent confirming this. However, we find as a fact that the claimant had verbally requested leave and was refused it. We also note from comments made in relation to his pay for the month of December that he was only paid for days that he actually worked during that month and we assume therefore that although he may not have been working on certain public holidays during his first year, he may not have been paid for these. .

### 3. Relevant Law

17. The law in relation to the entitlement to annual leave is to be found in the Working Time Regulations (Northern Ireland) 1998 as amended , in particular by the Working Time (Amendment) Regulations (Northern Ireland) 2007 (the Working Time Regulations).
18. The Working Time Regulations provide that every worker shall be entitled to a period of paid leave of 28 days (5.6 weeks) and the leave year is to begin as stipulated in his contract. The general rule is to be found in Regulation 13(9) of the Working Time Regulations which stipulates that:-

“ 13(9) 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.”

19. That provision was amended by the Working Time Regulations 2007 which provide for a period of additional leave not required by the Working Time Directive, bringing a worker's annual leave entitlement up to 28 days (pro rata). Those Regulations provide at Regulation 13A(7) –

“A relevant agreement may provide for any leave to which a worker is entitled under this Regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.”

This means that a worker may be entitled, by his contract, to carry forward up to eight days statutory leave, with his employer's agreement. However, it is not an automatic right.

20. Harvey makes it clear that the general rule is that if leave is not taken in the leave year in which it accrues that leave will be lost (Harvey on Industrial Relations and Employment Law Division CI para 143 and following).
21. In that section the authors of Harvey quote the decision of the Court of Justice of the European Union in **Federatie Nederlandse Vakbeweging –v- Staat der Nederlanden [2006] IRLR561** where the Court held it was incompatible with Article 7 of the Working Time Directive (on which the 1998 Regulations are based) to have a provision permitting leave not taken in the leave year to be carried forward to the following year, when it can either be taken or commuted for payment in lieu. While the Court accepted that untaken leave might be inevitable it balked at the idea that it might then be commuted to payment rather than taken as leave. The thrust of the Working Time Regulations is clearly that a worker should be entitled to take his/her annual leave during the year.
22. The authors of Harvey comment that the Court of Appeal in England and Wales has now confirmed that if the reason leave has not been taken during the leave year is that it was not possible for the worker to do so because of absence on sick leave, the prohibition on carrying forward the untaken leave contained in Regulation 13(9) is incompatible with the requirements of the Working Time Directive as developed in the case law of the European Court of Justice (**NHS Leeds –v- Larner [2012] EWCA Civ 1034**). The authors of Harvey suggest that same must equally be true for leave not taken because of other statutory leave (maternity, paternity, adoption or parental leave) or because the employer prevented the worker from taking his or her entitlement within the leave year.
23. Regulation 15 of the 1998 Regulations requires a worker to give notice to his employer of an intention to take leave. That notice must specify all or any part of the leave which the worker is entitled to take and the days he wishes to take it. It must also be given to the employer before the relevant date. The relevant date is specified as being twice as many days in advance of the earliest date specified in the notice as the number of days or part days to which the notice relates. This is reflected in the contract of employment which the respondent operated under. While there is no requirement in the Working Time Regulations that the notice must be in writing, Regulation 15 (5) specifies that any right or obligation in Regulation 15 may be varied by a relevant agreement, namely the contract of employment in any given case.

### Written terms and conditions of employment

24. An employee is entitled to receive written terms and conditions of employment by virtue of Articles 33(1) and 36(1) of the Employment Rights (Northern Ireland) Order 1996. By Article 27 of the Employment (Northern Ireland) Order 2003 where a tribunal finds that no contract has been provided, it shall award two weeks' gross pay and may award up to four weeks' gross pay if it considers just and equitable to do so.

### Decision

25. We have considered this matter carefully and we accept that the evidence of the claimant that he was not provided with written terms and conditions of employment and that he was not aware that he would lose his holiday if he did not take it within the leave year. The situation was also compounded by the fact that the claimant had been told that he had been successful in obtaining other employment in the summer of 2012, but had to defer his start date because of the fact that he was waiting for an Access NI clearance. It is apparent that if he had terminated his employment with the respondent before 3 December 2012 he would have received payment in lieu for untaken holidays. However, the claimant worked on over the Christmas period of 2012 and no issue arises in relation to untaken holiday for the month from 3 December 2012 to 4 January 2013. While we accept that the claimant may have verbally requested holidays from his employers, Regulation 15 of the 1998 Regulations requires that he gives a notice which specifies the number of days he wishes to take and when. Regulation 15(5) says "Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement". A relevant agreement in this context is a contract of employment and the relevant clause in the respondent's contract of employment provides:-

"Where an employee wishes to take any leave to which he/she is entitled, he should notify The Employment Business four weeks before, in writing, of the dates of his/her intended absence."

26. As the claimant in this case had taken leave in the summer of 2012 and had filled out the necessary leave request form, it is clear that he was aware of this process.
27. While we consider it would be desirable in every case for an employer to notify its staff or remind them of the need to take leave before the year end, it is not a requirement of the legislation. We have also considered the relevant case law and in particular the decision of **Lyons –v- Mitie Security Limited [2010] IRLR 288** where the claimant argued that he had an inalienable right to take his full leave entitlement within the leave year. In that case the EAT pointed out that the Working Time Directive envisaged that there would be "conditions for entitlement" and these are set out in Regulation 15 of the Working Time Regulations or any modification in a contract. The EAT found that provided the conditions were not applied in an unreasonable arbitrary or capricious way so as to deny any entitlement lawfully requested, it was possible for the procedures to result in the loss of leave not taken before the end of the leave year. From this it seems that if the taking of leave is prevented by causes beyond the control of the worker, such as sickness or injury, absence on maternity leave or action by the

employer preventing the taking of leave, the employer is under an obligation to permit the carrying forward of untaken leave, but this will not arise otherwise.

28. We consider that the practice of the employer in this case, where they stipulated that all holidays should be taken before the end of 12 months' employment, but failed to provide written contract to staff so that that employees could check for themselves, to be reprehensible. This smacks of sharp practice, given that the employer in this case has saved approximately £650 by failing to remind the employee of the need to take his holidays or lose them. We understand that this is a substantial employer and we are sure that the Working Time Regulations were intended to ensure that workers received paid holidays, rather than not.
29. In relation to the failure to provide written terms and conditions of employment, we are of the view that the employer in this situation failed to provide written terms and conditions of employment to the claimant. This was very much to the claimant's detriment as he was unable to check the relevant terms and conditions of employment, particularly in relation to his work and leave entitlement. In the circumstances we consider that it would be appropriate to award four weeks' gross pay by way of compensation and accordingly we order the respondent to pay to the claimant £700 by way of compensation in this regard.
30. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order 1990.

**Chairman:**

**Date and place of hearing:**

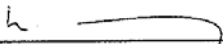
**Date decision recorded in register and issued to parties:**

**INTEREST NOTICE  
INDUSTRIAL TRIBUNALS  
INTEREST ON AWARDS IN NON DISCRIMINATION  
CASES**

The Industrial Tribunals (Interest) Order (Northern Ireland) 1990 provides that interest shall accrue on a sum of money payable as a result of a decision of an industrial tribunal where that sum remains unpaid in whole or part 42 days after the day the decision of the tribunal was issued to the parties. 'Decision day' in this context means the day the decision of the tribunal was issued to the parties and 'calculation day' means the day immediately after the expiry of the period of 42 days from (and including) the decision day. The 'stipulated rate of interest' is the rate of interest in force on amounts awarded by decree in the county court on the decision day. Interest does not accrue on costs or expenses awarded by the tribunal.

In this claim, please note that -

1. the decision day is **1<sup>st</sup> August 2013** being the day the decision was sent to the parties;
2. the calculation day is **12<sup>th</sup> September 2013** being the day immediately after the expiry of the period of 42 days from and including the decision day; and
3. the stipulated rate of interest is **8%** being the rate of interest in force on amounts awarded by decree in the county court on the decision day.

  
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Secretary of the Tribunals

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## Certificate of Correction

In the last page of the decision, issued on 1<sup>st</sup> August 2013, the date and place of hearing is incorrect and should have read as follows:

'Date and place of hearing: 4<sup>th</sup> July 2013, Belfast.'

CHAIRMAN: Erabern Caffrey

Date: 7th August 2013