



EMPLOYMENT TRIBUNALS

Claimant: Ms M Sheikh

Respondent: Pure Care Support Ltd t/a Pure Care

Heard at: Leicester **On:** 2 February 2018

Before: Employment Judge Britton (sitting alone)

Representation

Claimant: Mr O Hamir, Husband

Respondent: Miss L Ojomo, Director

JUDGMENT

The claim for outstanding holiday pay succeeds but limited to £294.55.

REASONS

Introduction and issues

1. The claim (ET1) was presented to this tribunal on 10 September 2017. It is a claim for outstanding holiday pay. It was a little muddled but during this morning's quite lengthy hearing, we have been able to clarify what it is all about.
2. Put at its simplest, the Claimant joined the Respondent (which is a caring business) on 19 August 2016 but she commenced her first day of work with them, it seems to me on 24 August 2016. She was a carer travelling about to provide care at home to elderly folk.
3. I will stop there by observing that in terms of the Respondent's systems and its general standard, from what I can see is to be commended. The documentary system, including contract of employment and issues of that nature and also the records for checking on the elderly for whom it cares and indeed supervision therefore for its carers and matters of that nature, cannot be faulted. This is obvious as the bundle before me has grown today.
4. The Claimant received a contract of employment. I have that before me and she signed for it. It is a comprehensive document to which I shall come back. The employment ended by the Claimant giving one month's notice which is as per contract on 27 April 2017.

5. In terms of that document, thereafter she did one 24 hour period which I can see reflected in the final pay slip which is before me dated 15 May. What she says is that as she did not take any leave during the entirety of the employment, thus she has accrued holiday entitlement in fact as per the contract, which in itself mirrors the Working Time Regulations, and that therefore she is owed on her calculation at the time she put in her claim £777.94. That figure has been explored before me during the course of this morning.

6. The Respondent defended this matter by its ET3 on the basis that she had lost any accrued holiday entitlement up to the end of the holiday year, which would run from 1 January to 31 December. Thus what would be left, although again it was not particularly clear, would be any holiday entitlement accrued during the 4 months in effect of the holiday year 2017.

7. If I cross-reference to the email trail which has grown before me but which is much clearer now, I can see that the Respondent calculated the amount due is £294.55 and offered to pay the same to the Claimant by email of 4 July in the next payroll run, which would be 15 July 2017.

8. The Claimant refused that money and indeed had made plain she was going to an employment tribunal because she disagreed that that was the limit of her entitlement that is why it has not been paid.

9. In a case that in some ways has become acrimonious, I have however been able to get to a clear understanding of what the issue is really all about and in that respect I have particularly been impressed by the clarity and professionalism by which Miss Ojomo has been able to explain how the business works and have cross-referenced it to the documentation now as it is before me.

10. The following applies. This is not a case where the Respondent requires holiday leave to be taken by the end of the holiday year, in other words take it or lose it. In fact, because of the caring regime, it factors in that it cannot allow its staff (because of the modus operandi) to actually take bank holidays and that means that it accepts that it is likely that staff at the end of the holiday year will have accrued holiday entitlement that they have not taken. Thus, they really have two options; they can either (and in either case a form is used) put in a request to take it but otherwise (and this seems to be the normal practice) they get paid for the leave they have not been able to take. That is quite clear from the practice of the Respondent and it is encapsulated in the email trial as it has developed before me by the email that Dan Craddock of the Respondent's Accounts Department Team sent to all staff and most importantly all of the care givers on 6 January 2017.

11. There is another one that has been put before me by Miss Ojomo for the year 6 January 2018. It is not in to confuse the woodwork so to speak; it is simply in to show that this is consistent treatment by the Respondent. The crucial document so the Claimant understands is that of 6 January 2017. As I say, the email circulation includes all care givers.

12. The Claimant says she did not get it but when she started the employment, the Respondent, because of the way it works, needed an email address. She may have given two but what is most important is that the email address that the Claimant was using at that material time (ie maysarasheikh@yahoo.co.uk) was in fact the one that the Respondent was

replying to, as to which see the email of the Claimant viz the rota that she sent on that day. What does the email of 6 January 2017 say. I will put it all into these reasons:

"Hello Everyone

In order that you remain fit and healthy it is important that you take the holiday you have worked for.

As we have now finished the holiday year please can you complete a holiday form for payment of remaining holiday.

Please date it December and send it through for consideration for next months wages. If you do not send in a holiday request from (sic) to claim your outstanding entitlement your remaining holiday will be lost. You cannot carry statutory holiday entitlement forward into the following year. The deadline for this form to be returned to us is MONDAY 23RD JANUARY 2018.

We encourage you to take you are entitled to during the year. You do not need to take a full week. It is also an option to book holiday for the days you do not work. This will ensure that you are paid your holiday pay in a timely manner. Holiday pay must be accrued before it is paid. If you take time off work and have not accrued enough holiday pay, you will only be paid for the holiday you have accrued.

Your Holiday pay is accrued at the rate of 12.07% per hour worked.

Please send all holiday requests to support@purehomecare.co.uk.

..."

13. If that was not enough, there is also the supervision document which the Claimant signed for on 14 February 2017. The Claimant does not seem sure as she did sign it. As far as I am concerned, I have no evidence to the contrary. Again, this is a model of the kind of structured supervision questions one would expect of a competent employer and particularly in the care industry. Also however inter alia it has, at 1.3 on page 2, the following:

"Are you aware that all Holidays are to be submitted on a Pure Homecare holiday form providing at least 4 weeks notice and sent to the support email address, and that your holiday is not approved until you receive written confirmation, failure to follow this procedure will result in formal action. We are unable to process any un-used holidays."

In the column where it signified whether the Claimant understands, is written the word "Yes". As to the dialogue is recorded in terms of the questions on the righthand side of this document, it cannot but be prima facie at the very least a true record because there are of lots of comments by the Claimant in relation to the clients she is dealing with and it is most unlikely that anyone can make up.

14. What does it mean? I am quite satisfied that the Respondent had clear procedures for the purposes of taking leave and also a process by which staff who had not been able to take accrued leave by the end of the holiday year, effectively had an option, either take it in the immediate period after Christmas because of course we are out of the bank holiday but having already put in the

application with sufficient; secondly, be paid for the holiday that was not able to be taken.

15. In this case, the Claimant is not saying in effect that really this is about not taking holiday. She is talking about not being paid for accrued holiday. However, let me deal with this. As is clear from the documentation before me and in a system which I consider to be a model of good employment practice, there is featuring the person who undertakes the HR (including supervisory functions) for the Respondent, who is Manisha Dabhi.

16. The Claimant says that in December on the date on which she was signed off from an extended period of probation in terms of from the commencement of the employment and which was 15 December 2016, that she asked Manisha about the holiday that she had by then accrued. The reason it had not been taken before then is that the Claimant understood that she could not take leave until the completion of the probationary period. Cross-referencing the contract, that appears to be correct.

17. The Claimant is now asking Manisha about it. She says that Manisha simply told her that she would be paid after the end of December. However, there is a stark conflict here because Miss Ojomo has already clearly talked about this to Manisha and also Miss Ojomo, whom I found to be an impressive witness and knows her business inside out, and it would not happen in that way without the completing of the formalities in the way of which I have described. The Claimant could not but have realized that given the email and also signing off from her supervision, to which I have now referred.

18. What has the Claimant said? She says she never got the email. There is in that respect a point I need to factor in and it goes to credibility and I say no more than this. When I look back on the supervision records that are now before me, the Claimant seems to me to have a problem with being consistent with paperwork. The other thing that shines through like a beacon is that she simply does not listen to what she is being told. I take account of that .

19. The other point that I am afraid goes to credibility is that it seems to me that because the Claimant became unhappy at the amount of hours she was not being given, so to speak, that she got a doctor to provide a statement for fitness for work, ie for the purposes of getting statutory sick pay on 28 March 2017. This document the employer did not see. Put frankly, it is contradictory to the one that ultimately the employer did see, which is what is known in common parlance as a fit note. The first said that the Claimant was actually fit for work with so to speak adjustments. If the Claimant had presented that one, then the employer would have discussed with her what adjustments were needed. She might then not have got statutory sick pay or any other benefits that she might have been able to get. As it is, the employer got one that simply said that she was not fit for work per se and for a period of 3 weeks.

20. The Claimant says under questioning today, "*I brought that in at the time*". Presumably that means 9 March 2017. I am very dubious about that given that she was being signed off as not fit for any work at all because of her back. If so, how would she have been able to get down to the office. I can only say from all the paperwork that I have got is that if she had, I think there would be something recorded and there is nothing. In other words, what is being said by the Respondent is the Claimant simply had sent it herself 3 weeks or so and then

was back asking for work. We can then see that she then only worked 24.25 hours of work before she resigned.

21. What it means is that I do not need to get involved in the intricacies of the law as it has now developed yet again and in terms of whether or not there is any limitation on the amount of holiday pay that can be claimed, as to which see the judgment of the European Court in **King -v- Sash Window Workshop Ltd [EUC2017] 914**. This is not a case which appeared to be initially about such issues as use it or lose it, all possible issues of what can be carried forward or not. It is a simple issue. The Claimant says that she was told that she would be paid for the holiday accrued in 2016 by the HR person and the Respondent says no it was made clear that in order to be eligible to receive it, she needed to put in the necessary application. That fits with the email to which I have referred.

22. What it therefore means is that I am not persuaded that the Claimant was so assured as she says and that therefore apropos not only the Respondent's practices she should have made application by the due deadline as per the email and I do not think that she is diligent, certainly until she starts to ask for her money at the date of resignation in considering those kind of issues in terms of the need to do that in order to get the entitlement to payment of the outstanding holiday pay.

23. That therefore leaves the period from 1 January to last day worked in terms of accrued holiday entitlement and that really is a simple calculation as I have all the pay slips for 2017. Thus, all that has to be done is to totalise the number of hours, factor in the pay rate (which was the living wage and thus changed during the period) and then apply the percentage to the actual holiday entitlement, which is 12.8% of hours. What the Respondent has done is to accurately calculate that and indeed the Claimant really does not disagree because the Claimant had calculated that the entitlement would be for that second period of 327.5 hours but she had not uplifted for the increase in the national living wage. The Respondent has done that and it has accurately calculated the amount due as said previous £294.55. It follows that I award that sum.

Employment Judge Britton

Date: 27 March 2018
JUDGMENT SENT TO THE PARTIES ON

03 April 2018

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