EMPLOYMENT TRIBUNALS

Claimant: **Miss C Bradbury**

Respondent: **Cubone Limited t/a Planet Bounce**

Heard at: **Nottingham** **On:** **Friday 15 January 2021**

Before: **Employment Judge Broughton (sitting alone)**

Representation

Claimant: **In Person**
Respondent: **Mr Smith – Director of the Respondent**

JUDGMENT having been sent to the parties on 22 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

The Respondent has failed to pay the Claimant's holiday entitlement and is ordered to pay the Claimant the sum of £1,054.00

REASONS

Background and Issues

1. The Claimant was employed by the Respondent from 18 December 2019 until she resigned with immediate effect on the 20 July 2020. She had been employed in the role of Duty Manager. The Claimant presented her claim on 27 August 2020 following a period of Acas early conciliation from 18 August 2020 to 25 August 2020.

2. The claim is for accrued holiday pay which the Claimant alleges was outstanding and unpaid on the termination of employment. With respect to the calculation of the holiday accrued during her employment as at the termination date, there is no dispute between the parties, it is agreed that she had accrued 15.5 days. What holiday had accrued therefore is not something which needs to be determined by the Tribunal.

3. What is in dispute however is whether there was an agreement in writing regarding the taking of holiday during a period when the Claimant was on furlough that qualified as a 'relevant agreement' as provided for within regulation 2 of the Working Time Regulations 1998 (WTR), whether it removed the requirements under regulation 15 WTR to give notice and specify dates when annual leave had to be taken and, whether it operated such that the Claimant was deemed to have taken some or all her 15.5 days of accrued annual leave before her employment ended and if so how much.

Evidence

4. The Tribunal was presented with a bundle of documents from the Respondent which numbered 29 pages and included a witness statement from a Director of the Respondent, Mr Holliman. The Claimant produced 5 pages of document including a number of payslips.

5. The Tribunal heard oral evidence from the Claimant who was cross examined by Mr Smith, representing the Respondent.

6. The Tribunal also heard oral evidence from Mr Holliman. The Claimant who was unrepresented chose not to cross examine Mr Holliman however, he was asked questions by way of clarification of the Respondent's case, by the Tribunal.

Findings of Fact

7. It is not in dispute that the Claimant was employed by the Respondent from 18 December 2019 as a Duty Manager. It is also not in dispute that the Claimant was placed on furlough from 21 March 2020 to enable the Respondent to receive payments through the Coronavirus Job Retention Scheme (Scheme). While absent on furlough the Claimant was concerned about the security of her employment and obtained other work with a supermarket.

8. It is agreed between the parties that the Claimant was sent a letter (the **Furlough Letter**) by e-mail on 6 April 2020, two weeks after she had started her furlough leave. The Furlough Letter is the relevant contractual document on which the Respondent relies and therefore we turn to the relevant specific provisions of it. It provides as follows;

"*This is a variation to your contract of employment, designed to implement and take advantage of the government's Coronavirus Job Retention Scheme.*

*1.We agree that from [21/03/2020] you shall be **deemed** to have been on Furlough Leave. This means you cannot do any work for us apart from undergoing training although your contract of employment will continue and you will continue to accrue holiday. We will **normally expect** you be on furlough leave **for at least three weeks**, as that is the minimum period which will allow us to reclaim 80% of your basic salary from HMRC." [Tribunal stress]*

9. The Furlough Letter also provided at paragraph 6 as follows:

"6. *Your Furlough Leave shall end on the earliest of the following events.*

(a) the Government's Coronavirus Job Retention Scheme ending

(b) either you or us ceasing to be eligible for funding under that scheme or;

(d) us deciding to cancel Furlough Leave and asking you back to work"

10. The Respondent accepts that it was not known as at 6 April 2020, how long the Claimant was going to be on furlough leave. The Claimant could have continued on furlough leave for another week or for many more months until the Scheme ended.

11. The Furlough Letter went on to provide at Paragraph 7 that:

"7. Holiday Pay and Taking Holiday During Furlough – ***we require you to take Holiday (which will be paid at the same 80% rate of your normal wages) during your Furlough Period****." [Tribunal's own stress]*

12. It is not in dispute that the Claimant responded by email on the 6 April 2020 stating that she had read and agreed to it.

13. The Claimant's contract of employment was not included within the documents disclosed by the parties. The Claimant and Mr Holliman's evidence was that employees apply for annual leave by filling in an online system. The Respondent does not assert that the Claimant filled in the online system in respect of the accrued leave during the furlough period nor does it allege she was asked to do so. The Furlough Letter does not address how the Claimant is to confirm the amount of leave she takes during the furlough period.

14. As Mr Holliman accepted in his evidence, the letter fails to specify how much of the Claimant's holiday entitlement she is 'required' to take during the furlough period; was she required to take 1 day or all of the 15.5 days? It does not specify. When asked by the Tribunal where the Furlough Letter states how much leave the Claimant was required to take during the furlough period, Mr Holliman's response was;

"it does not state how much leave to take – would just be able to take holiday"

15. The Furlough Letter states that 'normally' the Claimant will be expected to be on furlough leave for at least 3 weeks, however the Claimant had already been on furlough for two weeks and therefore if it were to be cancelled at the end of three weeks, she would in practice have only had 1 week to take 15.5 days of leave from the date of the Furlough Letter. The Furlough Letter does not state that she is 'deemed' to have already taken annual leave while on furlough.

16. Mr Holliman further gave evidence that when the Claimant was asked to return on the 30 July she was required to return; *"immediately*" and his evidence was that if she had refused to return immediately then;

"we would probably have taken disciplinary proceedings"

17. In respect of how the Respondent would have reacted if the Claimant had been asked to return to work and had booked a holiday, Mr Holliman gave evidence that the Respondent would have worked around the rota but he

went on to say in response to a question from the Tribunal, that if Claimant had booked a holiday which meant she was away from 20 July onwards, the Respondent would not have treated that booked holiday as part of her accrued leave (which the Respondent asserts she was required to take during the furlough period) but the Respondent would have taken it off the Claimant's entitlement for the remainder of the annual leave year. This would give rise to a situation where the Claimant, having no idea when the furlough period may end, may have booked and paid for a holiday and then is informed at short notice that she was now required to work and if she took the holiday she had booked, that would be taken off her as yet unaccrued leave. The wording of the Furlough Letter certainly does not address that.

18. The Respondent had no further contact with the Claimant after sending the Furlough Letter until she was contacted on 20 July 2020 when she was told that she was required to return to work "as *soon as possible*". At that point the Claimant resigned from her position by e-mail of the same date of 20 July.

19. It is not in dispute that the Claimant's payslips do no allocate payments as holiday pay, the payment for holiday or ordinary pay is not differentiated on the payslips.

20. Mr Holliman gave evidence that on termination of an employee's employment, the payment in lieu of holiday is calculated based on normal salary.

Legal Principles

21. The Tribunal have considered the relevant legal principles which it must consider.

Entitlement to Annual Leave; Reg 13 and 13A

22. Regulation 13 of WTR sets out the entitlement to annual leave;

"*Regulation 13*

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

Regulation 13A

(1) Subject to regulation 26A and paragraph (3) and (5) a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2)
(2) The period of additional leave to which a worker is entitled under para (1) is-
(e) In any leave year beginning on or after 1 April 2009; 1.6 weeks

Regulation 14

23. Regulation 14 deals with compensation related to entitlement to leave and this provides that where the worker's employment is terminated during the

leave year and on the date on which termination takes effect the proportion of the leave he has been taken is less than that prescribed by regulation 13 and 13A; the worker is entitled to compensation for payment in lieu of that annual leave.

Regulation 16 – calculation

24. Regulation 16 that deals with the calculation of annual leave. The Respondent does not seek to argue that the Claimant's payment in lieu of holiday should be calculated at 80% of the Claimant's normal salary. The Respondent put forward its calculation of what was payable to the Claimant, based on her ordinary salary.

Regulation 15

25. Regulation 15 sets out the dates on which leave may be taken and the notice provisions;

Regulation 15(1) provides as follows;

(1) A worker's employer may require the worker-

(a) To take leave to which the worker is entitled under regulation 13 or regulation 13A or

…..

*On particular days, **by giving notice** to the worker in accordance with paragraph (3)*

Notice

(1) A *notice under paragraph (1) or (2)*

*(a) May relate **to all or part** of the leave of which a worker is entitled in a leave year;*

*(b) **Shall specify the days** on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*

(c)** Shall be given to the employer or, as the case may be the worker, **before the relevant date.

(2) The relevant date, for the purposes of paragraph (3) is the date-

(a) In the case of a notice under paragraph (1) or (2)(a) twice as many days in advance of the earliest day specified in the notice as the number of days or part days to which the notice relates.

(3) Any right of obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

[Tribunal stress]

Regulation 2 Interpretation;

26. Regulation 2 provides that "relevant agreement in relation to a worker means a workforce agreement which applies to him, any provision of a

collective agreement which forms part of contract between him and his employer or any other agreement in writing which is legally enforceable between the worker and his employer.

27. The Respondent's case is that the Furlough Letter was a relevant agreement being *an "agreement in writing which is legally enforceable".*

Case Law

28. I provided the parties with a copy of the decision in **Industrial and Commercial Maintenance Limited v Briffa**, UKEAT/0215/08/CEA; this was a case where the employee complained that the employer had not given him the notice required notice under section regulation 15(4) WTR. The company in Briffa had issued a statement to all employees headed Benefits and Contractual Conditions Review 1 July 2005, which announced a 3 per cent pay increase for staff across the board and two changes to the contractual terms of employment, the second of which read as follows:

> *"If an individual gives or receives statutory notice and is not required to perform physical work during that period of notice,* ***the employee shall be regarded as being on holiday during the period of notice."*** *[the variation]*
>
> [Tribunal stress]

29. The employee's relevant period of employment had commenced on 14 March 2007 and on 10 August 2007 he was given one week's notice of termination by a letter of that date which said, among other things:

> *"… Your notice is one week and therefore your last day of work on the books is Friday, August 17th. However, we do not want or need you to work your notice. Instead and in accordance with our contract terms, insofar as you have accrued but not taken paid holiday you* ***must take the holiday next week*** *and will be paid accordingly…"*
>
> [Tribunal stress]

30. His Honour Judge Peter Clark considered Regulation 15(5) and held that the company was entitled to not require the employee to work his weeks' notice but give him the week off instead. The employee was not required to work during that week hence the health and safety provisions of the WTR had not been infringed and the policy that sits behind it. He found that the relevant agreement had varied Regulation 15(5) such that the employer was not required to comply with the regulations under 15(2) to (4) and the employee had not had the right to receive the notice set out under 15(4).

31. The Briffa case however involved a clear deeming provision. The wording of the relevant agreement was very clear and definitive. It also related to a defined period in which the employee was to be treated as taking his holiday.

32. I provided the parties with extracts from the IDS Employment Law Handbook Volume 15 Chpt 4 with commentary on the varying the notice requirements under the WTR by agreement which includes reference to a number of authorities include the ET case of **Smith v Npower Yorkshire Limited ET case No. 2500813/12**. The relevant agreement in this case

provided that the worker "*will be required"* to take outstanding holiday during the notice period*.* The Tribunal in that case considered that the contractual wording was no more than a statement of the employee's intentions or expectations and held that although the contract amounted to a relevant agreement, so it was capable of varying the length of notice under Regulation 15(4) it did not dispense with the requirement under Regulation 15(3)(b) for the company to specify the days on which the leave must be taken. While the claimant could be expected to take any outstanding holiday during this notice period neither the employee nor the employer had done anything to bring that about in that case and therefore the claimant was entitled to his accrued leave. This is a first instance decision and thus not binding on this Tribunal but persuasive.

33. The IDS commentary also referred to a case of **Puri v interlinks Ltd. ET Case No. 2200418/2017**. In this case the relevant clause provided that; "*if the employee leaves the company during the holiday year, the company will require the employee to take during his notice period any accrued but untaken holiday entitlement up to the date of leaving*". The Tribunal held that the clause supplanted the notice requirements under Reg 15 (4) which did not require any particular notice to be given. The Tribunal comments in this case, that given the period during which holiday had to be taken was the employee's notice period, the clause could not be sensibly construed as requiring the company to give the claimant notice to take outstanding holiday before it had served him with notice of termination and therefore if it did not remove the Reg 15 (4) notice provisions it would serve no purpose at all. The ET did not consider whether the employer should have specified which days would be treated as holiday under Reg 15 (3)(b), its decision implying that the whole of Reg 15 was displaced by the clause.

Submissions

34. Mr Smith made submissions; he submitted that the 6 April Furlough Letter was a relevant agreement which excluded the requirements of Regulation 15 and therefore the Respondent was not required to comply with the notice provisions or specify the dates that had to be taken as leave.

35. Mr Smith brought with him a copy of the **Supreme Court decision in Russell and ors v Transocean International Resources Limited [2011] UKSC 57** and referred only to paragraph 6 which he asserted supported the Respondent's case. Paragraph 6 of the judgment refers to Regulation 15 containing provisions about how the days when annual leave under the WTR; "are *to be worked out between the worker and the employer, if this has not already been agreed by a system of notices and counter notices."*

36. The Russell case concerned the application of the annual leave provisions of the WTR to offshore workers in the oil and gas industry. The appellants worked offshore so their working pattern was divided into time spent working offshore and time spend onshore. The main issue in the case was whether the statutory holiday entitlement of a group of workers employed on offshore oil rigs was capable of being satisfied by the provision of regular onshore 'field breaks'. The case was concerned with whether the period spent onshore should could towards the workers entitlement under regulation 12, the appellants were arguing that 'annual leave' properly construed means release from what would otherwise have been an

obligation to work, and that the employer could not discharge their obligation to provide them with annual leave by insisting that they take this during periods of field break, when they would not be working normally. The EAT had held that after allowing for compensatory rest to take account of the fact that the appellants worked offshore without a weekly rest period, was more than sufficient to cover the entitlement to annual leave and it did not matter that they would not otherwise be working during those offshore periods. The Supreme Court upheld that decision. The content of the contracts of employment had been determined in the previous proceedings before the EAT and did not feature in the Supreme Court decision.

37. Mr Smith submitted that the Russell decision supports his argument that while the claimant was not working, she could be required to treat that time off as leave. However, that principle is not in dispute, what is in dispute in this case is whether the terms of the Furlough Letter were sufficiently clear to have that effect.

38. Mr Smith also submitted that there were parallels with the the Respondent's case and that the terms of the relevant agreement in **Puri and Interlinks Limited** and that the words "*shall be regarded*" have the same effect as the words "r*equired*" in the Furlough Letter and disapplies Reg 15.

39. The Claimant had no submission she wished to make.

40. I turn now to my analysis and conclusions;

Analysis

41. In the e-mail of 6 April, the Claimant confirmed that she had read the letter seeking in effect to vary the terms of her notice provision. There is a consensus between the parties that there was a contract of employment in existence but unfortunately that has not been produced to the Tribunal and neither party were in a position to give much clarity in terms of what its terms were regarding annual leave and indeed variation of its terms. Nonetheless, the Claimant accepts that she agreed to the terms of that 6 April e-mail and she did not dispute that it was a legally binding agreement. I therefore now turn to the effect of that agreement.

42. Pursuant to Regulation 15, where an employer wants the employee to take their holiday they are required to comply with the requirement to give notice and specify the days on which leave is to be taken which shall be given to the worker before the relevant date.

43. The Respondent's position is that that the Furlough Letter is a Relevant Agreement which removes the obligations under Regulation 15 to give notice or specify the dates on which leave is to be taken.

44. Turning to the terms of the Furlough Letter, it does not specify how much holiday the Claimant has to take, whether she is required to take part of her holiday entitlement or all of it.

45. The Claimant had been on furlough from 21 March and informed that furlough would be *'normally'* a minimum of three weeks. By the time she got the e-mail on 6 April there was only potentially a week left on the furlough scheme. As the Respondent accepted, it did not know how long the furlough scheme was going to last. The Claimant may have been taken off the furlough scheme immediately and had the Respondent done so the Claimant would not have been in position to take all her annual leave unless the effect of the Furlough Letter was to be retrospective, however it does not state that. I find that the Furlough Letter could not operate in the terms that the Respondent suggest it was intended to i.e. that it necessarily required the Claimant to use all her leave and she would be deemed to have done so..

46. The language used in the Furlough Letter is that the employee is *"deemed"* to be on furlough until one of the happening events in paragraph 6. That language is very clear and definitive. The same wording is not used in respect of the annual leave, it states; "*we will require you to take holiday*". It does not say that she is *'deemed'* to be on holiday or that she will be '*deemed*' to be on holiday during a particular period or even for however long furlough lasts.

47. The language that is used in the Furlough Letter in relation to holiday is akin to that which the employer used in **Smith v Empower** and I also find that this type of wording, does no more in reality than create an expectation or intention that holiday is taken during the furlough period however no steps were taken to actually take holiday; the online form was not completed by the Claimant or the Respondent and no other steps were taken.

48. The Furlough Letter also does not address what will happen if the Claimant has not had time to take all her accrued annual leave when the furlough period ends. It does not even make it clear how much of her leave she is "required" to take.

49. The ambiguity around the wording and meaning of the Furlough Letter and what it is attempting to achieve was made clear in the answers that were given by Mr Holliman including in respect of where the Furlough Letter states how much leave is to be taken; *"it does not state how much leave to take – would just be able to take holiday"*

50. The Furlough Letter does not expressly refer to it varying Regulation 15 although that in itself is not fatal, but it is desirable to do so, but that aside I even if the Relevant Agreement were capable of setting aside the requirements of Regulation 15 (3) (c) to give notice, I do not find that it displaces the requirement under Regulation 15(3)(b) to specify the days which will be regarded as holiday.

51. A relevant agreement that is going to vary or exclude the very important notice provisions that are set out in the Working Time Regulations should be clear and unambiguous and I do not accept that terms of the Furlough Letter are.

52. I appreciate the difficulties that the Respondent was facing at the time and had the Respondent considered the matter more carefully and how the arrangements were going to operate in practice, there is no reason in

principle why the Claimant could not have been deemed to have taken leave during the remaining days when she would be on furlough starting with immediate effect or even retrospectively, had she agreed to that. Whatever the uncertainties of the Respondent's businesses they were still required to navigate the rights of the Claimant and consider the WTR.

53. Putting aside the requirements of Regulation 15, the basic contractual effect of the Relevant Agreement did nothing more than create an expectation that some holiday would be taken. The wording did not contain a deeming provision, the basic contractual position pursuant to its terms, was that the Claimant was required to take some holiday without specifying how much and no steps were taken to action that expectation either by the Claimant or the Respondent.

Conclusion

54. I find that the Claimant is entitled to her accrued annual leave of 15.5 days based on her ordinary pay. The Claimant was salaried and it is not in dispute that she earned £68.00 per day. The Claimant did not seek to dispute the Respondent's calculation of £1,054.00 (gross) and that sum is payable to the Claimant

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Employment Judge Broughton

Date 12 March 2021

REASONS SENT TO THE PARTIES ON

16 March 2021

FOR THE TRIBUNAL OFFICE