

IN THE INDUSTRIAL TRIBUNAL

Case N° 24/2016

PETER GUSTAFSON

COMPLAINANT

-and-

GIBRALTAR JOINERY and BUSINESS SERVICES LIMITED

RESPONDENT

JUDGEMENT

THE BACKGROUND

The Complainant was on the 29th June 2016, employed by the Respondent on a one year trial basis as a “craft operative (carpenter)”. According to his ETB Employment Contract his terms for “holidays and holiday pay” and “sickness and injury pay” are governed by CATA. The Complainant's ETB contract was subsequently renewed and he continues to this day to be in the employment of the Respondent. Although employed by the Respondent, the Complainant has been on long term sick leave since the 18th May 2015. The Complainant is entitled to 25 days holiday each year.

On the 30th March 2016, the Complainant filed an originating application seeking the payment of “statutory holiday pay for 2015” since he alleged that the Respondent was delaying and/or refusing to pay him the holiday pay to which he was entitled. This action (case N° 9 of 2016) is not the matter currently before this Tribunal, and was disposed of on the 8th July 2016, when I dismissed the case (without passing judgement on the claim) following the Respondent paying to the Complainant a sum of money which equated to the 19.6 days of holiday pay which the Complainant was seeking be paid to him.

On the 29th June 2016, the Complainant wrote to the Respondent requesting three weeks holiday pay for the year 2016. The Respondent replied to the effect that they were consulting their legal advisers on the matter. It would appear that the Complainant took this as being a delaying tactic by the Respondent since, on the 4th July 2016, the Complainant filed the originating application which is currently before me. The Complainant in his originating application appears to be claiming:-

- (i) the payment of wages;
- (ii) the payment of 15 days holiday pay for 2016; and
- (iii) a declaration as to the meaning of written advice given by the union UNITE to the Complainant.

On the 25th July 2016, the Respondent entered a Notice of Appearance. In said Notice the Respondent submits in essence that:-

- (a) no wages are due to the Complainant since he is on long term sick leave and he has exhausted his sick leave entitlement;
- (b) any advice that may or may not have been given by UNITE is irrelevant to the matters at hand;
- (c) the Complainant is only entitled to take 8 days holiday at that point in time; and
- (d) it has no obligation at this time to pay the Complainant said 8 days holiday.

That then is the background to the application that came before me on the 24th October 2016.

THE POSITION OF THE PARTIES

The Complainant's submissions alternated in that at one point his claim was for non-payment of wages, and therefore the whole issue of holidays is an irrelevance, and at another point, his claim was to be paid annual leave without preconditions like any other employee and in accordance with EEC law.

The Respondent, on the other hand, does not dispute that the Complainant is entitled to annual leave but contends that there is no law in Gibraltar requiring an employer to pay an employee holiday pay in lieu of his taking annual leave whilst said employee is on sick leave. The Respondent does not deny that the Complainant will be able to accumulate his annual holiday entitlement from year to year whilst he remains on long term sick leave, and accepts that upon returning to work, or, in the event of his employment terminating whilst still on sick leave, the Complainant would be entitled to be paid at that point his accumulated holiday entitlement in lieu of having taken holidays.

The issue of how much the Complainant would be entitled to be paid in holiday pay if he won his claim was not raised and I have assumed that the parties are in agreement as to the amount involved.

Prior to dealing with these issues I have first of all to consider the point first raised by Mr Martinez on the morning of the hearing. It is a jurisdictional point raised very late in the day, and if Mr Martinez is correct it effectively means that this Tribunal cannot hear and determine the Complainant's claim. To be fair to Mr Martinez, the same point was incorporated in the submissions filed in the afore-mentioned Case N° 9 of 2016 that was dismissed.

JURISDICTIONAL POINT

The Working Time Act, 1999 was brought into force on the 23rd March 2000 in order "to implement in Gibraltar the provisions of Council Directive 93/104/EC concerning certain aspects of the organisation of working time".

Section 20(1) of the Working Time act, 1999 (hereinafter referred to as "the WTA") provides as follows:-

"A worker may present a complaint in the Industrial Tribunal that his employer –

- (a) has refused to permit him to exercise any right he has under –

- (i) section 8, 9, 10 or 11; or
 - (ii) section 16 in so far as it applies where section 8,9 or 10 is modified or excluded ; or
- (b) has failed to pay him the whole or any part of any amount due to him under section 11”.

The reference in this section to sections 8, 9, 10 or 16 of the WTA are references to provisions dealing with daily rest (Section 8), weekly rest periods (section 9), rest breaks (section 10) and compensatory rest (section 16) and are therefore not applicable to the facts of this case. This leaves us with the reference to section 11 of the WTA which is relevant since that section is headed “annual holiday”.

Before turning to section 11, and for the sake of completeness, I refer to section 20(5) of the WTA which provides as follows:–

“Where on a complaint under sub-section (1)(b) the industrial tribunal finds that an employer has failed to pay a worker in accordance with section 11, it shall order the employer to pay to the worker the amount which it finds to be due to him”.

The combined effect of section 20(1) and (5) for the purposes of this case is that if an employer:–

- (i) refuses to permit an employee a right under section 11, or
- (ii) refuses to pay him the whole or any part of an amount due to him under section 11,

then the employee can file a complaint in the Industrial Tribunal and, if the tribunal finds in the employee’s favour, the tribunal can order the employer to pay the employee the amount due to him. So what does section 11 provide?. The drafter of the section certainly appears to have had the proverbial bad day at the office when he put pen to paper since it reads as follows:–

“Annual holiday

- (1) “The following is deleted from paragraph 7(1)(a) of the Employment (Annual and Public Holidays) Order– “for not less than twenty hours”.
- (2) “The following is inserted after “Schedule 2” in paragraph 4(1) of the Employment (Annual and Public Holidays) Order – “and the duration of the annual holiday of part time employees shall be calculated pro rata to the columns headed “5 days or less” in Schedule 2”.
- (3) In the table in Schedule 2 to the Employment (Annual and Public Holidays) Order the words “or less” are deleted in each column headed “5 days or less”.

It seems to me plainly clear that section 11 does nothing more or less than amend the provisions of the Employment (Annual and Public Holidays) Order. It does not per se grant any rights to a worker and/or provide for how much (if anything) is to be paid to such a worker with respect to the right acquired.

This being the case, I ask myself whether one can, through a very broad interpretation of section 11 of the WTA, imply into that section any relevant provision of the Employment

(Annual and Public Holidays) Order. The heading of the section "annual holiday" suggests that the intention of the legislature was for the provision to deal with the question of annual leave but that is the most that can be said. Whilst said heading is part of the Act, and therefore can be considered in construing section 11, and whilst taking note that headings are of very limited use in interpreting a provision due to their necessarily brief and inaccurate nature, it is my opinion that said heading does not assist us in interpreting into section 11 words granting rights to an employee and/or the financial value of such a right.

Paragraph 4(1) of the Employment (Annual and Public Holidays) Order provides that:-

"an employer shall between 1st January and 31st December in each year, allow a holiday to every employee who was employed by him"

but the Order does not, other than in the cases of termination of employment or death whilst in employment (paragraph 6), or, the taking of a holiday in lieu of public holiday (paragraph 9), provide for the payment to the employee of any monies in lieu of his taking up his annual holiday entitlement. Consequently, if the Employment (Annual and Public Holidays) Order does not itself provide for the payment of holiday pay in lieu of an employee's exercising his holiday entitlement in circumstances such as the one we are dealing with in this case, how can it be said that section 11 of WTA has to be given a sufficiently wide interpretation in the case of the Complainant so as to imply into it the non-existent right in the Employment (Annual and Public Holidays) Order to such pay in lieu of holiday. That to my mind is not possible.

Although I was not referred to it by either of the parties I have looked at the various Employment Tribunal (Extension of Jurisdiction) Orders made over the years and have noted that none of the Orders passed refer to public and/or annual holidays or pay in lieu thereof. These orders do not therefore extend the Jurisdiction of this Tribunal to determine claims related to holiday entitlement or payments in lieu thereof. We are therefore left with section 20 of the WTA.

I have also considered whether the heading of the Act, as quoted above, is of any use in assisting the interpretation of section 11 of the WTA. The purpose of the Act is said to be the implementation in Gibraltar of Council Directive 93/104/EC. This directive does provide the right for a worker to have a minimum of four weeks paid annual leave but interestingly it also provides that said paid annual leave cannot be replaced by an allowance in lieu, which in effect replicates what paragraph 4(1) of the Employment (Annual and Public Holiday) Order provides for.

Taking everything into account I am of the opinion that the drafting of the WTA is defective and that in consequence thereof this Tribunal does not have the jurisdiction to hear and determine the Complainants claim. The case is therefore dismissed.

By way of side note I would express the view that the new Employment Act and Employment Tribunal Extension Orders have not cured the defect in the legislation.

In the event that I am mistaken as to the interpretation to be given to the WTA and that therefore the Tribunal has the jurisdiction to hear the Complainants claims, I therefore turn, very briefly and for the sake of completeness to quickly consider those claims.

Two of the Complainants claims can swiftly be disposed of. Firstly, This tribunal does not have the power (under the legislation that applies to this case) to issue declarations, and especially with regard to whether or not advice given by a non-party in the action is legally

correct or not. That claim is dismissed. Secondly, on the Complainants own case, his claim cannot possible be said to be one for wages. The Complainant is on long term sick leave and not receiving any salary and/or social security benefits as he confirmed to me in the course of the proceedings. That being the case how can he be claiming wages? That claim is also dismissed.

We are therefore left with the Complainants claim for the payment of 15 days pay in lieu of holiday entitlement notwithstanding that he is on sick leave.

Holiday Pay

It is agreed by the parties that:-

- (i) the complainant is entitled to 25 days annual leave per annum;
- (ii) in accordance with the terms of his employment, and the CATA agreement which applies to him, the Complainant has to take, if he were to be working, annual leave this year between the 22nd December to the 30th December (ie 5 days);
- (iii) as at the date this matter was heard, the Complainant had accrued for 2016, 20.33 days of annual leave (which has since increased) ; and
- (iv) the provisions of the CATA agreement are of little assistance to the Tribunal in this particular case.

It is not disputed by the Respondent that:-

- (i) if the Complainant is still on sick leave at the end of the calendar year, his then accrued leave will not be lost since the Complainant will be entitled to carry it over and continue to carry it over until either he returns to work or terminates his employment, whichever is the earlier;
- (ii) at the time that the Complainant returns to work or, if he is still on sick leave, terminates his employment, the Complainant will then be entitled to request and be paid his accrued annual leave in lieu of taking such leave.

It is not for this tribunal to consider the reasons why the Respondent does not wish to pay the Complainant any accrued holiday entitlement whilst he is on sick leave; indeed said reasons are irrelevant since this is simply a question of what the Complainant is legally entitled to. It is the Respondent's position that there is no law in Gibraltar requiring an employer to pay an employee his holiday pay whilst the employee is on sick leave.

In the course of his submissions Mr Martinez referred me to the following directives and cases:-

- (i) Directive 2003/88/EC of 4th November 2003 and more particularly Articles 1, 2 and 7 of the Directive (hereinafter referred to as "Directive 2003/88/EC");
- (ii) the cases of Gerhard Schultz - Hoff v Deutsche Rentenversicherung Bund and Stringer and others v Her Majesty's Revenue and Customs (hereinafter referred to as "Joined Cases C-350/06 and C-520/06") and

(iii) the case of *M.H. Marshall v Southampton and South West Hampshire Area Health Authority* (hereinafter referred to as "Case 152/84").

I referred Mr Martinez to the following cases and in consequences thereof he made various submissions on them; namely:-

- (i) *Kigass Aero Components Limited v Brown*; (hereinafter referred to as "Kigass");
- (ii) *Inland Revenue Commissioners v Ainsworth*; and
- (iii) *Pereda v Madrid Movilidad SA.* (hereinafter referred to as "the Pereda case")

I have read all the above-mentioned cases and the directive and have come to the following conclusions:-

1. Directive 2003/88/EC has to date not been transposed into the laws of Gibraltar.
2. The predecessor to Directive 2003/88/EC was Directive 93/104 / EC of 23rd November 1993 and this directive was transposed into the laws of Gibraltar to the extent set out in the Employment (Annual and Public Holidays) Order (hereinafter referred to as "the Order") and the Working Time Act 1999.
3. EEC law is designed to cover the basic four week leave entitlement and is not concerned with protecting such leave as an employee may have which is in excess of that four week period.
4. A workers national law can decide whether or not a worker is entitled to take paid annual leave during sick leave (Joined cases C - 350/06 and C-520/06).
5. If a worker is sick throughout the year, or, if he falls sick in the course of the year without having taken his entitlement, then at the end of that the worker is entitled to carry over his leave to the following year. (Joined Cases C - 350/06 and 520/06).
6. If by law an employee is not entitled to take paid annual leave during sick leave then a worker must be entitled to take the leave at a later date (Joined Cases C - 350/06 and C- 520/06).
7. If a worker on sick leave terminates his employment without having taken his accrued holiday then he must be paid in lieu. (Joined Cases C - 350/06 and C-520/06).
8. If a worker on sick leave returns to work he must be given the option of taking annual leave on his return to work if they so wish (Pereda Case).
9. There is no specific provision in the laws of Gibraltar which requires an employer to pay an employee for any accrued holiday whilst the employee is on sick leave. The issue then is whether the Employment (Annual and Public Holidays) Order can be interpreted in any way to permit an employee to take holiday pay whilst on sick leave. If so, then some or all, depending on the question that arises, of the above-mentioned EC based law does not apply.
10. There is no collective agreement between Unite and the Respondent on the issue raised in this case which necessitates reference to that agreement.

11. Entitlement to annual leave continues to accrue in that particular year whilst an employee is absent through sickness during that year. The Complainant therefore continues to accrue leave whilst he is on sick leave. The rationale for this is that an employee derives his entitlement from being an employee and not from his ability to work or attendance at work.
12. The entitlement to annual leave is regulated by the provisions of the Order and for the purposes of this case the following provisions are relevant.

“ 4(1) Subject to the provisions of this Order an employer shall between 1st January and 31st December in each year, allow a holiday (hereinafter referred to as an “annual holiday”) to every employee who was employed by him for four weeks or more during the twelve months immediately preceding the 1st January in that year (which twelve months period is hereinafter referred to as the “qualifying period”). The duration of an employee’s annual holiday shall be related to the period of his employment with an employer during the qualifying period in accordance with the tables contained in Schedule 2 and the duration of the annual holiday of part time employees shall be calculated pro rata to the column headed “5 days or less” in Schedule 2”.

It is clear from this provision that the entitlement to annual leave arises if the person is an employee employed by the employer for four weeks or more during the twelve months immediately preceding the 1st January in that year. Nothing further appears to be required by the provision and the length of annual leave to which an employee may be entitled to is therein specified.

Paragraph 7(1) of the Order then provides for the circumstances under which a person is to be deemed employed for the purposes of the afore-mentioned Paragraph 4(1). For the purposes of this case the important part of Paragraph 7(1) states the following:—

“7(1). An employee shall be treated as having been employed -

(b) when absent from work -

(ii) during any period of proved incapacity for work due to sickness or personal injury

for the purposes of calculating any period of employment entitled an employee to an annual holiday or to any accrued holiday pay”.

It is clear from this provision that for the purpose of the Order a person who is absent from work due to sickness or personal injury is deemed to be employed during such time and consequently is entitled to annual leave.

There is nothing in the provisions of the Order which requires that, in order to be an employee, some work needs to be done and/or that some attendance at work needs to have occurred.

Turning then to Paragraph 5 of the Order there is introduced a right for the employee to be paid for the leave to which they are entitled:—

“5. An employee qualified to be allowed an annual holiday under the provisions of paragraph 4 shall be paid by his employer in respect thereof, on the last pay day preceding the commencement of such annual holiday, or of each period thereof as the case may be, one day’s holiday pay in respect of each day thereof.”

This being this case, then in my view what triggers the payment of the so called holiday pay is the combination of the right to leave having accrued and of its then being duly sought. In the Complainant’s case he had fulfilled the only requirements which he needed to under the Order for the purposes of his being paid for annual leave taken; he was an employee of the Respondent duly entitled to annual leave and he gave notice that he wished to take that annual leave, and therefore he was entitled to be paid for it. The Complainant’s absence from the workplace and/or his failure to put in any working time due to being on sick leave is no bar to his claim.

In coming to this conclusion I am comforted by the decision of the Employment Appeal Tribunal in the Kigass case. The statutory provisions may not be the same but the principles and the arguments set out in that case resonate with this one.

Consequently, were it not for the jurisdictional point I would have found in favour of the Complainant with regard to his claim for holiday pay. At that point the issue would have arisen as to whether the Complainant should have been paid seven or the fifteen days which he claimed for in the light of the proviso to Paragraph 4(2) of the Order. The point does not need to be dealt with since as stated above I have dismissed the Complainant’s case on the jurisdictional argument.

The issues raised in this case with regard to sick leave/holiday pay and the consequences that arise therefrom for employers and employees merit that the powers that be give serious consideration to the question of whether the legislation currently in place gives effect to what was intended both with respect to the Working Time Act and/or the possible inter relationship between annual leave and other reasons for absence from the work place. These are issues for the legislature and not for this tribunal which has simply sought to interpret the law as it currently stands.

Dated this 20th day of December 2016.



Joseph Nuñez
Chairman