Appeal No. UKEAT/0376/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SAILISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR D COLEMAN AND OTHERS — APPELLANTS

POLESTAR UK PRINT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR FERGUS McCOMBIE (of Counsel) Instructed by: British Printing Industries Federation Unit 2 Villiers Court Meriden Business Park Copse Drive Coventry CV5 9RN

SUMMARY

WORKING TIME REGULATIONS - Holiday pay

The Appellants worked a complicated shift system. They were paid the same amount each week whether or not they were rostered to work, however many hours they worked and whether or not they were on holiday. The suggestion that they were not being paid in respect of holiday was unsupportable.

HIS HONOUR JUDGE SHANKS

1. This is an appeal against a Decision of Employment Judge Foxwell sitting in the East London Hearing Centre, sent out on 9 September 2014, rejecting a claim by 20 Claimants for unpaid holiday pay.

2. The Claimants, some of whom have dropped out of the appeal, were printers, engineers and electricians working for the Respondent, Polestar UK Print Ltd. They worked on a machine called an M4000 on a complicated shift pattern, which had been agreed between management and unions. The shift pattern involved 12-hour shifts and the following pattern: four days on, two days off, four days on, one day off, three days on, three days off, three days on, 15 days off. That is a five-week shift pattern. It involves working 14 12-hour shifts over 35 days and it involves 15 consecutive days off.

3. I have been shown one representative contract of employment in relation to one of the Claimants. It records, under the heading "shift pattern":

> **"Your hours will be an average of 32.5 [hours] per week on the five shift rotational pattern with rostered holidays. …**

Then under "Rate of pay":

> **"Your salary will be £38,048 per annum (£731.69 per week). …"**

Then under "Overtime", it says:

> **"Overtime rates shall be at time and three quarters, except Bank Holiday cover at double time. The overtime calculator will be based on 32.5 hours [per week]."**

Then under "Holidays" it says:

> **"Your holiday entitlement year is 1 January - 31 December. All annual holidays are built into the shift pattern with the exception of <u>four</u> concessionary days per annum. These concessionary days are for short notice emergency holiday days which may be taken at management's discretion.**
>
> **Bank Holidays will be worked with the exception of Christmas Day, Boxing Day and New Years Day.**
>
> **Holiday pay is not computed on individual average earnings." (contract emphasis)**

The figure of 32.5 hours average per week was based on complicated calculations which gave an annual number of hours which would be worked under the shift pattern of 1,690 and an average weekly number of hours at 32.5 over a full five-year period.

4. The Employment Judge considered those calculations and pay slips and other internal material showing calculations of hourly rates and concluded at paragraph 61 in his Judgment:

> **"I find that those on the M4000 roster are entitled to be paid 1/52nd of their annual salary for each week at work whether on shift, on rest or on holiday and, provided that they have received this, they will have received pay at the rate of a *week's pay* for the period of any annual leave to which they are entitled by statute." (Tribunal's emphasis)**

The finding in relation to their entitlement to be paid at 1/52nd of their annual salary was, in my judgment, a factual finding that was fully justified on the evidence.

5. The right to holiday pay arises under the **Working Time Regulations 1998**. Workers are entitled to four weeks' annual leave and to additional annual leave, which takes the full entitlement up to 28 days. Regulation 16(1) provides:

> **"A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave."**

Then Regulation 16(5) says this:

> **"Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment or remuneration under this regulation in respect of**

> **a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period."**

6. It was accepted before the Employment Judge that an employer is entitled to require his worker or employee to take holidays at times when he or she is not rostered to work. That is at paragraph 12 of the Judgment and is not a matter that is challenged here. In other words, in this case, the employer was entitled to require the Claimants to take their holidays during days when they were not working in the shift pattern. As I have already said, the shift pattern involved 15 consecutive days off in each 5-week period, so one can see that that is not unreasonable.

7. Given that concession the Employment Judge found, as already indicated from quoting paragraph 61, that the Claimants in fact received a week's pay for each week of holiday that they took as they were paid the same weekly amount every week of the year whether they were working or on holiday. I am afraid to say, and I hope I am not being over-simplistic, that really seems to me the beginning and end of the case.

8. However Mr Brittenden has very valiantly attempted to persuade me otherwise this morning. He has referred in particular to a series of cases, **Marshalls Clay Products v Caulfield** in the EAT [2003] IRLR 552 and the Court of Appeal [2004] EWCA Civ 422, **Robinson-Steele v RD Retail Services Ltd** (Case C-131/04, 16 March 2006) in the European Court of Justice, and **Lyddon v Englefield Brickwork Ltd** in the EAT UKEAT/0301/07/CEA.

9. It seems to me that those are all cases where employees or workers were paid only for hours or days that they had actually worked and were not paid during holiday periods. In those cases the employer was seeking to set off part of the hourly or daily rates that the employer paid pursuant to Regulation 16(5) which I have read. Unsurprisingly the courts and the European

Court of Justice in particular say that, if an employer is going to do that, the part of the payment of an hourly or daily rate which relates to holiday and which they seek to set off under Regulation 16(5) must be "transparent and comprehensible".

10. But that, namely seeking to set off part of an hourly or daily rate, is not what we are dealing with in this case. The Claimants are paid each week regardless of whether they work, regardless of how many hours they work, regardless of whether they are on holiday or simply not rostered to work. The Judge was right to say that he did not have to consider the **Marshalls Clay** issue and, in particular, that he did not have to put the contracts in this case into one of the five categories that are mentioned at paragraph 14 of the **Marshalls Clay** decision as reported at [2004] ICR 436.

11. But in any event Mr Brittenden showed me the classification and maintained that the contract in this case is a Category 3. That is described as contracts where the rates are said to include holiday pay but there is no indication or specification of an amount. The categories also include Category 5, which is contracts where holiday pay is allocated to and paid during (or immediately prior to or immediately after) specific periods of holiday. The EAT at paragraph 15 go on to say:

> **"The normal contractual arrangements, whereby employees are paid, for example, monthly, and then make arrangements to take their annual leave and continue to be paid during it, are obviously category 5 contracts. …"**

It seems to me that the contracts in this case are obviously Category 5 contracts, and not Category 3 contracts. As Elias J said in the **Lyddon** case [2008] IRLR 198 at paragraph 13: "Plainly the fifth category is compatible with the obligations under European law." That, it seems to me, is the position in this case.

12. My reading is that the Appellants have, in reliance on some internal documentation, sought to make something much more complicated than it really is, and that the matter is, as I said, a simple one of being paid a weekly amount, whether on holiday or not, in a normal Category 5 contract. In my view there is nothing in the appeal and I dismiss it.