**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4100737/17**

**Held in Glasgow on 19 July 2017**

**Employment Judge: F Jane Garvie**

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| **Mr James Callan Anderson** | **Claimant**<br>**Represented by:**<br>**Mr R Lawson - Solicitor** |
| **Advance Construction (Scotland) Ltd** | **Respondent**<br>**Represented by:**<br>**Mr L Brindle - Company Director** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

1. the respondent made an unlawful deduction from wages in terms of section 13 of the Employment Rights Act 1996 in the amount of £230.77 and the respondent is ordered to pay to the claimant the sum of £230.77 on the basis that this is the gross amount and there will be tax and national insurance to be deducted which can either be dealt with by the respondent making the appropriate deductions or, alternatively, the claimant has an obligation to account to HMRC for the difference between the gross and net sum;

2. the application for an uplift in terms of failure to comply with the ACAS Code of Practice made under Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 by refusing to convene a grievance hearing is refused;

3. in relation to the failure of the respondent to comply fully by not providing all the details required in the claimant's Statement of Particulars as set out in terms of section 1 of the Employment Rights Act 1996, an award of four weeks' pay amounting to £1,916.00 (One Thousand, Nine Hundred and Sixteen Pounds) is made and the respondent is ordered to pay this amount to the claimant and

4. the claimant has paid fees in connection with this claim. In R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances the Tribunal shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the claimant. The details of the repayment scheme are a matter for HMCTS.

## REASONS

### Background

1. In his claim, (the ET1) presented on 4 May 2017 the claimant alleges that the offer of employment which he received from the respondent was set out in a letter of 5 November 2015. He referred to the holidays which were to be provided as specified in that offer letter. The claimant asserts that he took 26 days' annual leave from the start of his employment until 31 December 2016. He specified that he was required to take 2 weeks' leave between 26 and 30 December 2016 and 2 and 6 January 2017. His employment ended on 20 January 2017 and the claimant alleges that a deduction made in respect of unpaid leave amounting to £230.77 amounted to an unlawful deduction from wages within the meaning of Section 13 of the Employment Rights Act 1996, (referred to as the 1996 Act). The claimant alleges that this

deduction was unauthorised. He also sought the sum of £346.15 in respect of 3 days' annual leave which he maintains was carried over to the 2017 leave year. There was no further specification of this latter amount in the Schedule of Loss and it therefore appears that the claimant is no longer insisting on claiming this sum from the respondent.

2. The claimant also refers to a grievance having been intimated by him and that the respondent's failure to convene a meeting has the result that there should be an uplift of 25% on the amount claimed of £230.77 which amounts to the sum of £57.69 to reflect this failure.

3. He further asserts that the respondent failed to issue the claimant with a statement of particulars of employment that fully complied with Section 1 of the 1996 Act.

4. The respondent lodged a response, (the ET3) in which they dispute the claimant`s assertions as to entitlement to be paid the sums set out in the ET1.

5. The parties were informed that a Final Hearing would take place on 19 July 2017 as set out in Notices dated 7 July 2017.

6. Both parties lodged productions.

7. The claimant gave evidence on his behalf and evidence was given for the respondents by Mr Brindle.

**Findings of Fact**

8. The Tribunal found the following essential facts to have been established or agreed.

9. The claimant received an offer of employment dated 5 November 2015, (pages C22 and C23). This was sent to him by email. There was then

further email correspondence between the parties, (R4). The claimant emailed Mr Brindle in response to his email of 5 November 2015 dated 6 November 2015 in which he queried how holidays were calculated. He wanted Mr Brindle to clarify that the proposed holidays were "20 personal plus 9 , 9 stats", (also R4). He also questioned if it was predetermined when holidays were taken in that did everyone have to take 2 weeks during the summer etc or were they to be taken upon request.

10. Mr Brindle replied, (again R 4) as follows:-

> "*Morning Callan*
>
> *The only pre determined holidays are the two weeks at Xmas when the office shuts. Outwith this you are free to take the remaining days whenever suits subject to my approval …. Which isn`t hard to get.*
>
> *Let me know the start date and if you want to wait until January to ensure you get your Xmas holiday pay etc. Let me know and I can accommodate whatever suits you best*."

11. The claimant replied, (again R4) by email of 9 November 2015 accepting the offer of employment and confirming that if Mr Brindle agreed then his start date would be the 5th of January 2016 after the Monday bank holiday. This was acknowledged on 10 November 2015, confirming that the restart following what were referred to as the "winter holidays" would be Thursday, 7, January 2016.

12. The claimant did not receive anything further in writing in relation to terms and conditions of employment. It was accepted that the offer letter failed to set out all the information required in terms of section 1 of the 1996 in that it omitted to deal with subsections (4)(d)(ii), (incapacity for work due to sickness or injury, including any provision for sick pay), (e), (the length of notice which the employee is required to give and entitled to receive to

terminate his contract of employment) and (h), (either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer).

13. The information regarding holidays is set out in the offer letter of 5 November 2015 as follows:-

"*Holidays* *2 Weeks Summer*

*Easter* *1 Week*

*Christmas* *2 Week*

*September* *September weekend*

*May* *Bank Holiday "*

14. On 22 April 2016, (R5) the claimant requested a holiday from 5 to 8 August 2016, amounting to 2 days' holiday for which he sought authorisation for from Mr Brindle. This appears to have been granted. Separately, by email of 21 June 2015, (again R5) the clamant requested leave from 1 to 8 July 2016. This request also appears to have been granted.

15. It is not in dispute that the claimant had 3 days' leave during Easter, 6 days in July, 2 days over a long weekend in August, 10 days in November, 5 days at Christmas covering the period from 26 December to 30 December 2016 and then from 2 to 6 January 2017.

16. The claimant`s employment ended on 20 January 2017, having commenced employment on 7 January 2016.

17. The claimant had indicated his intention to leave the respondent's employment before the start of the Christmas/New Year holidays of

2016/17that is in late December 2016. By then it was too late for the respondent to amend the claimant`s pay for the month of December 2016.

18. The claimant later received a payslip for January 2017, (R6). This set out his salary, car allowance and fixed profit car share with tax, national insurance and employee pension deductions made as well as the figure of £230.77 which is shown as "*unpaid leave*".

19. The claimant by email dated 17 February 2017, (C28) wrote to Mr Dignall of the respondent, explaining he had reviewed his last payslip. He challenged the 2 days that had been deducted from his final pay and referred to his various holidays.

20. He continued by referring to there being 28 days' annual holiday allowance over 12 months which gave him a holiday accrual of 2.3 days per month. He disputed that the respondent was entitled to deduct 2 days. He then set out how he suggested the calculation should be made and from that he indicated that he believed that £168.79 was still due to him. He did not receive a reply.

21. The claimant then sent a reminder dated 23 February 2017, (C27).

22. Mr Dignall replied to him, advising him that holidays accrue in complete months of service not on a daily basis. This was in an email dated 23 February 2017, (C27). The claimant replied on the same date, (also C27) indicating that the claimant and his legal representative were surprised that:-

> "as *Financial Director of Advance Construction you would be of the opinion that it was correct to deduct statutory holiday entitlement accrued between 01/01/17 and 20/01/17*."

23. He indicated that if he did not receive a satisfactory response by 1 March 2017 then he would be forced into taking action.

24. This resulted in a reply from Mr Dignall, (C26) dated 27 February 2017 advising the claimant that:-

> "*Our calculations are correct, if you remain unsatisfied then feel free to pursue any avenue you wish.*
>
> *I won`t be corresponding further*."

25. The claimant then sent a reply, (C26) dated 1 March 2017 as follows:-

> "*Tom/Liam*
>
> *Further to your previous email and in the event that we have failed to reach a satisfactory agreement, I am writing to inform you that I wish to raise a grievance with regards to unlawful deductions which were taken from my final pay without prior written agreement and refusal to pay statutory holiday entitlement which was accrued between 01/01/17 and 20/01/17. Can you please set up a grievance hearing at a date and time suitable for all parties, including my full time trade union official.*
>
> *Please respond within 2 weeks' time by close of play on 15 March 2017."*

26. Separately, the claimant wrote a letter in similar terms to Mr Brindle, (C25).

27. The respondent did not respond to this request,

28. There was also an email dated 18 July 2017 from Mr Brindle to Mr Lawson, (R8). This sets out the respondent's calculation as being that the claimant was entitled to 29.9 days but, having taken 31 days he was due a deduction of 1.1 days and reference was made to the HMRC holiday calendar and that

it was also pro rata on the basis of his claim. The figure of 29.9 days was based on the claimant`s start date of 7 January 2016 to the end date of his employment on 20 January 2017.

29. It was pointed out that the claimant`s car allowance was paid to the end of the month, (31 January 2017) and, based on the time worked in January, should have been subject to a deduction of £150.

30. There was then a calculation showing 1.1 days at £115.38 equivalent to £126.92 and a car reduction allowance of £150, giving a total deduction of £276.92 against the actual deduction shown in the payslip of £230.77.

31. It is appropriate to note that no counter claim was lodged in this case and accordingly the issue of the car allowance which does appear to have been overpaid by the respondent cannot be considered by the Tribunal as it was not specified as a counter claim and no application was made to amend.

32. At the end of the Preliminary Hearing it was clear there was insufficient time available for the representatives to provide their closing submissions. They agreed to provide written submissions. These were provided as agreed by emails dated 7 August 2017. Both Mr Brindle and Mr Lawson provided submissions as making reference various authorities which are set out in their respective submissions.

33. Mr Lawson provided an additional comment on the respondent's submission in relation to the 2 week period of holidays, pointing that the offer of employment did not specify the specific dates of the week Christmas holiday as that period changes from year to year. He continued:-

> "*It is, however, clear that there was a 2 week shutdown at the material time. That the 2 week period of annual leave mentioned in the contractual documentation would coincide with the respondent's period of shutdown is a term that is implied by law on the basis of*

*custom and practice and on the basis that such a term would be obvious (i.e. the `officious bystander` test)."*

34. Mr Lawson confirmed that he had copied that email to Mr Brindle.

35. The submissions are set out below.

**Claimant`s Submission**

36. Submissions as follows:-

Summary of claimant's case

- The deduction made by the respondent of £230.77 in the claimant's pay-slip dated 31 January 2017 constituted an unlawful deduction from wages. The respondent was not authorised to make that deduction. This sum did not constitute an overpayment as the claimant was contractually entitled to receive that sum.

- The respondent failed to convene a grievance hearing in response to the claimant's request and an uplift of 25% should be applied to the sum of £230.77 (i.e. £57.70).

- The respondent failed to comply with its obligation to provide a complete statement of particulars of employment and an award of four weeks' pay amounting to £1,916 should be made in the claimant's favour to reflect that failure.

Contractual position

To the extent it is set out in writing, the contractual arrangement between the parties was contained in a letter entitled 'Offer of Employment' dated 5 November 2015 (C22-23) and an exchange of emails between the claimant

and the respondent in the period 5 to 10 November 2015 (tab 4 of the respondent's bundle).

Insofar as material, these provided for the claimant to receive a salary of £30,000 per annum payable monthly. They provided for a fixed two weeks of holiday around Christmas.

The evidence before the Tribunal is that the fixed two week period that is relevant to the dispute was the weeks beginning Monday 26 December 2016 and Monday 2 January 2017.

It was accepted by Mr Brindle in evidence that the holiday year applicable to the claimant and to all employees was the calendar year. This term is implied into the contract of employment between the parties due to custom and practice as it was reasonable, notorious and certain.

The claimant was entitled to be paid salary to the date of termination of employment. He was contractually entitled to five days of annual leave between 2 and 6 January 2017.

Unlawful deduction

As identified in the pay-slip dated 31 January 2017 (C24), the claimant was paid salary to the date of termination of employment. The respondent, however, made a deduction of £230.77 from that payment. It is not in dispute that this sum represented two days' pay.

It is submitted that the claimant has sustained an unlawful deduction of wages of £230.77 within the meaning of Section 13(1) of the Employment Rights Act 1996. It is clear from the evidence before the Tribunal that this deduction was not authorised to be made by virtue of a relevant provision of the claimant's contract, nor had he claimant previously signified in writing his agreement or consent to the making of the deduction.

Overpayment?

From the representations made by the respondent at the hearing, it would appear that the respondent resists the claim on the basis that the £230.77 deduction was an excepted deduction within the meaning of Section 14 of the 1996 Act. In particular, the respondent's position appears to be that the sum in question constituted an overpayment of wages.

This assertion seems to rely on two factors – (i) the fact that the claimant had taken more annual leave than he was entitled to, and (ii) that the claimant had received more than he was entitled to in respect of car allowance for the month in which his employment ended.

With regard to the first factor, the position adopted by the respondent at the hearing (as also described in an email dated 18 July 2017 at tab 8 of the respondent's bundle) is that the claimant was due 29.9 days' holiday at the date of termination of employment. He had taken 31 days at the date of termination. He had therefore been overpaid by 1.1 days.

This position is predicated on the assumption that annual leave accrued proportionately throughout the year. This assumption is misplaced as the contract between the parties contains no express provision for that to happen. This fact was accepted by Mr Brindle during his evidence.

It appears that confusion may have arisen in the respondent's mind as a result of the statutory entitlement to annual leave conferred by the Working Time Regulations 1998. The respondent has referred to an online HMRC holiday calculator but this relates to statutory holiday entitlement only.

No claim is advanced under the Working Time Regulations 1998. That legislation provides, of course, for an irreducible minimum entitlement to

leave which can be, and often is, supplemented by leave provided for in an employee's contract. Regulation 17 of the 1998 Regulations states:-

> *"Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provisions of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable."*

In the present case, the claimant relies upon his contractual entitlement only. Any statutory entitlement under the 1998 Regulations can and should be ignored by the Tribunal.

Notwithstanding that, one authority sheds some light on the respondent's argument that the sum in question constituted an overpayment, namely *Hill v Howard Chapell* EAT/1250/01. This case concerned a situation where an employee's employment was terminated during the leave year and as at the date of termination she had taken more leave proportionately than she was entitled to in that leave year. The claim was brought under Section 13 of the 1996 Act and under the 1998 Regulations. The judgment of the EAT (at paragraph 7) was:-

> (*5) In our judgment the position is as follows. The Appellant was entitled to and did receive wages for the 15 days holiday taken during her employment. Credit for the extra 5 days holiday pay will only arise where there is express provision made in a relevant agreement. In those circumstances an exception is made under Section 13(1) ERA; the deduction of excess holiday pay from his/her final wage entitlement is authorised by a relevant provision of the workers contract and/or he has previously signified in writing his agreement or consent (by the relevant agreement) to the making of the deduction. Section 14(1) ERA is immaterial whether or not there is a relevant*

*agreement. There is no "overpayment" of holiday pay. The worker is entitled to paid holiday, up to 20 days per annum, under Regulation 16(1). It is only where there is a relevant agreement providing for credit to be given to the employer for excess holiday taken that Regulation 14(4) permits the employer to recover the excess payment in accordance with Section 13(1) ERA.*

*(6) We cannot accept that there is to be implied a term of the contract allowing for the deduction of excess holiday pay in circumstances where such an implied term is inconsistent with the statutory scheme of the regulations and Part II ERA.*

*(7) The result may seem inequitable. Under Regulation 14, a worker who has taken less than his proportionate entitlement to leave in the holiday year is entitled to pay in lieu of the "lost" holiday without more. Regulation 14(2). The employer cannot recover excess holiday pay absent a relevant agreement covering the position. However this is nothing new; it is entirely consistent with the effect of Section 13(1) ERA; see for example Potter v. Hunt Contracts Ltd [1992] ICR 337.*

Having regard to the clear principle articulated in this judgment, the Tribunal is invited to find that there was no overpayment to the claimant within the meaning of Section 14 of the 1996 Act.

Turning to the second factor mentioned above, namely the car allowance, this matter is not raised in the response form. No application to amend the response form has been made. Accordingly, this is not a matter on which the respondent should be permitted to rely.

In any event, the car allowance payment to which the respondent now asserts the claimant was not entitled was paid in the same pay-slip as the deduction that is at issue in this case. It cannot, therefore, be the case that the £230.77 or a proportion of that represented a deduction to reflect an overpayment of car

allowance. If that was the case, why would the figure in respect of 'Car Allowance' on the pay-slip not simply be reduced? It appears that the respondent has attempted to justify the deduction after the event by relying upon this factor. The respondent should not be entitled to relief by virtue of Section 14 of the 1996 Act in these circumstances.

Lastly on this argument, it must be noted that if the car allowance issue was unrelated to the £230.77 deduction as averred, then even on the respondent position there has been an unlawful deduction from wages given that there was a deduction of two days' wages yet the respondent's calculation is based on the claimant taking "*31 days holiday so [the claimant] is due a deduction of 1.1 days*".

In the circumstances described, the claimant has sustained an unlawful deduction from wages for which he seeks a declaration under Section 24 of the 1996 Act and an order requiring the respondent to pay him this sum.

Uplift

Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 states–

> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
>
> *(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b) the employer has failed to comply with that Code in relation to that matter, and*

*(c) that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%*

Schedule A2 includes claims under Section .23 of the 1996 Act but also claims under The Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994 (SI 1994/1624) which grants jurisdiction to the Tribunal to hear claims involving breach of contract only after termination of employment. The section therefore envisages post-termination grievances. Separately, the EAT did not have difficulty regarding a letter of resignation as constituting a letter of grievance in the context of the preceding legislation in the case of *Shergold v Fieldway Medical Centre* which was highlighted by EJ Garvie.

These factors, combined with a plain reading of the relevant section, suggests that there is no reason for an uplift not to be payable in the situation of a grievance being raised following termination of employment.

In the present case, the respondent clearly failed to comply with the ACAS Code of Practice on Discipline and Grievance by failing to convene a grievance hearing following receipt of the claimant's grievances. This failure was unreasonable. The respondent has raised various issues during the Tribunal proceedings that could have been and ought to have been articulated during a grievance hearing. Had that occurred, it may be that a resolution could have been achieved without the need for these proceedings. It should be borne in mind that the respondent is a large employer with an HR function.

In all of the circumstances, an uplift of 25% on the £230.77 deduction should be applied.

Statement of Particulars

A statement of particulars of employment that complied with Section 1 of the 1996 Act was not issued to the claimant. In particular the statement provided did not contain the information required by Section 1(4)(d)(ii), (e) and (h). Under section 38 Employment Act 2002, the Tribunal must award two week's pay and it may make an award the higher amount of 4 weeks' pay if it considers it to be just and equitable to do so.

*Costco Wholesale UK v Newfield* UKEAT/0617/12 is one of the very few appellate authorities that refers to awards made under Section 38 of the 2002 Act. In that case, the employer argued that the Tribunal had erred in making an award at the higher level as it had failed to take into account the fact that the employer provided a comprehensive employee handbook. The employer also submitted that it was an irrelevant consideration that the employer was a large company. The EAT disagreed with those submissions (se paras.45-46). The "*massive 90-page handbook*" referred to in the judgment presumably contained various pieces of information that fell within the information required to be given under Section.1 ERA. This could be described as partial compliance with the Section 1 requirement. Notwithstanding that, the EAT did not criticise the Tribunal for making the higher award.

What can also be taken from this authority is that the size of the employer is a relevant factor. According to the ET3, the respondent in this case employs 1800 people. The Tribunal heard evidence of the respondent having a dedicated HR function. Despite that, there has been no explanation offered by the respondent for its failure to issue a statement of particulars containing the required information.

In the circumstances, the Tribunal should award the higher amount of 4 weeks' pay.

37. In addition the email of 7 August 2017 commented on the respondents submission.

**Respondent's Submissions**

38. Submissions as follows:-

CONTRACTUAL POSITION

It is accepted the terms of the Contract between the Claimant and Respondents is contained in the Offer of Employment dated 5 November 2015. These are the express terms of the Contract. The inter relationship between express and implied terms is set out in McBryde The Law Contract in Scotland, Third Edition, paragraphs 9-08 – 9-11.

Paragraph 9-10 states "When a term is implied in the particular circumstances of contract, or as a matter of custom or usage, the issue is the presumed intention of the parties, and so the express terms have a primary".

Accordingly, one requires to look plainly at what the Contract provides. The Contract specifies in regard to holiday "Two weeks summer; one-week Easter; two-week Christmas; September weekend; May bank holiday". (Note the singular is used for May).

We accept that in terms of the Working Time Regulation, that Regulation 17 provides that the employee can "take advantage of whichever right is in any particular respect more favourable". In this instance, the Claimant has elected to rely solely on the terms of the Contract and therefore the only issue before the Tribunal is the correct interpretation of what the Contract

provisions are both express and implied and how these apply in all the circumstances of this case.

We refer to the book Contract of Employment by Douglas Brodie published in 2008 in particular Chapters 601-606 in regard to mutuality of obligations.

As stated at paragraph 606 referring to the case of Banks of East Asia v Scottish Enterprise it states "where the view was taken that the law does not regard each and every obligation owed by one party as being necessarily and invariably the counterpart of every obligation by the other. The question is said to turn in the circumstance of the case".

As has been repeatedly stated in various cases it is a matter for the Tribunal to interpret the Contract and determine what it means.

The sums apparently withheld would only be a deduction if there was an entitlement to payment by the Claimant. Put another way what would be the employees' entitlement to payment in the particular circumstances of this case.

The evidence at the Tribunal was that the interpretation of the Contract in relation to "Christmas Two Week" was that the practice would be for the business to close from Christmas Day to the end of the year; and thereafter for the first week in January. Clearly that contradicts the terms of the Contract and there is no mention whatsoever in the Contract of any period of holiday as at New Year and/or January.

Plainly if this is an interpretation relied on by both parties then we would invite the Tribunal to make that conclusion. Were it otherwise then there is no holiday entitlement in January at all and hence the withholding of wages would not be a deduction. We submit that it would be inequitable to imply into a Contract a term allowing the employee a week's holiday in January, if

there was no corresponding implication of the general mutuality of obligations.

Accordingly, what was the Claimant's entitlement to holidays as at January 2017. According to the implied terms of Contract his entitlement would be one-week holiday. That however is subject to the provision of interpretation of the Contract in regard to the mutuality of obligations between the employer and employee.

It is accepted that there is no provision in terms of the Contract which states that there would be an entitlement by the Respondents to make a deduction from wages in any contractual circumstances. However, that is dependent entirely whether what has occurred is in fact a deduction notwithstanding that it appears ex facia to be shown as a deduction in terms of the Employers Wage Slip for January 2017.

The Tribunal require to place a proper interpretation of the legal obligations between the parties and to identify what were the extent of the legal obligations and rights that existed. In this instance, the clear implication of the Contract was that the entitlement to leave only accrued if there was a mutuality of obligation. Consequently, the only obligation to make payment of the wages would be the counterpart arising to the Respondents in regard to the obligation upon the Claimant to continue to be in employment.

If this could be put by way of a simple example. If the Claimant started work with the Respondents on 1 December 2016 and had two weeks paid leave over Christmas and New Year 2016/17 and left his employment on the 9 January 2017. Would he therefore still be entitled to payment of two weeks holiday in terms of the Contract.

Mr Anderson handed his notice in on the last day of business in 2016 after all December salaries and bonus payments had been made to him and therefore no deduction for holidays taken beyond his entitlement could have

been deducted for time owed. Mr Anderson himself in correspondence to Advance Construction outlined the fact he had taken more holidays than his contractual entitlement.

The Working Time Regulations cannot be referred to as definitive of the parties' rights if the Contract is in excess of the minimum if the matter is based purely on contract. Accordingly, the deduction would be one which would fall within Section 14(1) (a) of the Employment Rights Act 1996 because it relates to an overpayment of wages. In this instance, what the Respondents have in fact done is in one view to assimilate the total holiday entitlement of the worker per annum as being 29 days and therefore that would equate to .56 days per week or .11 days per day worked. Insofar as the employee was employed from 3 to 20 January a period of three working weeks that would equate to 1.67 days but in respect of which the Claimant had had 5 working days holiday and consequently was only entitled to a payment in respect of 1.67 days.

Whilst a failure to pay wages due can amount to a deduction the Tribunal must first determine whether there was any such entitlement. If no such entitlement to wages arose then there is no deduction.

Secondly, if there was a deduction then this is an excepted provision in terms of Section 14(1) as previously described on the basis that no entitlement arose because of the mutuality of obligations.

GRIEVANCE AND UPLIFT

It is not disputed that a Tribunal can make an uplift if there is a failure to follow the Statutory Grievance Procedure by a figure up to 25%. However there has to be a breach of the Grievance Procedure prior to the section being invoked.

The Tribunal appear to refer to the case of Shergold v Fieldway Medical Centre decided by the EAT on 5 December 2005. However, the facts and circumstances in that case are markedly different. The employee had given notice to terminate her employment on 31 October and her employment terminated in the December. Accordingly, she was still an employee at the time he raised the grievance.

The Code of Practice by ACAS refers to "employee and employer". At the time, the grievance was raised the Claimant was no longer an employee and therefore fell out with the terms of the Code of Practice. It was clearly accepted that the grievance related to the time when he was an employee, however it was raised after he had ceased to be an employee. Consequently, there was no legal obligation on the Respondents to convene a meeting in terms of the regulations.

Even if they were wrong in that submission it is a matter within the discretion of the Tribunal to consider whether in the circumstances an uplift should be made and to what extent. The Respondents and the Claimant dealt with the query. They plainly had markedly different views as to what had happened and what the legal effects were. These were the same matters that were canvassed at the Tribunal. Consequently, if we are wrong and the Tribunal find the claim for deductions is properly established then in that event we would submit that the Tribunal should make no uplift in all the circumstances as in practical terms the issues between the parties is still those which lie between them and therefore an uplift would not be appropriate. Further if appropriate it should be a token uplift.

FAILURE TO PROVIDE STATEMENT AND PARTICULARS OF EMPLOPYMENT.

It is accepted that the letter of 5 November 2015 does not constitute a full statement of particulars as is required in terms of Section 1 of 1996 Act, as certain matters are missing from it.

The right to make an award only arises if the Claimant is successful in terms of their claim. Section 38(2)(a) provides

"If in the case of proceedings by which this section applies-

a. The Employment Tribunal finds in favour of the employee, but makes no award to him in respect of a claim in which the proceedings relate…

b. Make an award of the minimum amount to be paid by the employer to the employee and may, if it considers, it just and equitable in all the circumstances award a higher amount instead"

Accordingly, to engage this provision the Employment Tribunal must make a finding in favour of the employees. If it does not do so no award is made.

If it does do so then in that event the Section is engaged and a minimum of two weeks' pay must be awarded.

In regard to making an award greater it is on the basis of just and equitable.

The case of Costco Wholesale UK v Miss Z Newfield is completely different. That case centred on the question of Miss Newfield being uncertain as to what her contractual Terms and Conditions actually were in regard to hours of work.

There were no other Terms and Conditions other than those contained in a 90-page booklet.

In this particular case, the dispute focuses exclusively on the interpretation of a contractual provision which was provided. The Contract sets out most of the statutory requirements with the exception of a few which are not relevant to this case. In that respect, it is non-compliant. Insofar as the

Contract focuses the issue between the parties in broad measure then in that event there would be no justification for exercising the just and equitable provision to increase the award to four weeks' pay and therefore in the event that the Respondents are unsuccessful in relation to these proceedings only the minimum should be awarded of two weeks.

39. In addition to the written submission the respondents provided copy of the reference to contract of employment by Douglas Brody in relation to mutuality of obligation.

40. Mr Lawson provided copies of the authorities to which he referred, namely ***Costco Wholesale UK –v- Ms Z Newfield UK/EAT/0617/12/AN***. There is reference there to the issue in relation to failure to provide written particulars in terms of Section 38 of the Employment Act 2002.

41. He also provided a copy of ***Ms R S Hill –v- Howard Chapel EAT/1250.01*** and the interaction between the former Wages Act provisions contained now in Part II of the Employment Rights Act 1996 (the 1996 Act) and the Working Time Regulations 1998 (the Regulations).

**Relevant Law**

42. The 1996 Act at Section 1 sets out the requirement to provide a statement of initial employment particulars. As indicated above the offer letter did not set out all these requirements.

43. Section 13 sets out the right not to suffer unauthorised deductions.

> "***13 Right not to suffer unauthorised deductions***
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker`s contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section `relevant provision`, in relation to a worker`s contract, means a provision of the contract comprised –*

*(a) in one or more written terms of the contract of which the employer has given the work a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker`s wages on that occasion."*

44. Section 14:-

"***14 Excepted deductions***

*(1) Section 13 does not apply to a deduction from a worker`s wages made by his employer when the purpose of the deduction is the reimbursement of the employer in respect of -*

*(a) an overpayment of wages, or*

*(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,*

*made (for any reason) by the employer to the worker*."

45. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 states:-

*"(1) This section applied to proceedings before an employment tribunal relating to a claim by an employer under any of the jurisdictions listed in Schedule A2.*

*(2) If, in the case proceedings to which this section applies, it appears to the employment tribunal that –*

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies.*

*(b) the employer has failed to comply with that Code in relation to that matter, and*

*(c) that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

46. Schedule A2 includes claims under Section 23 of the 1996 Act and under the Employment Tribunal (Extension of Jurisdiction) (Scotland) Order 1994 which gives jurisdiction to a Tribunal to hear a claim, including breach of contract only after termination of employment.

47. Section 38 of the Employment Act 2002 states:-

> "***38 Failure to give statement of employment particulars etc***
>
> *(1) This section applied to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.*
>
> *(2) If in the case of proceedings to which this section applies –*
>
> *(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and*
>
> *(b) when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change),*
>
> *the tribunal must, subject to subsection (5) make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances award the higher amount instead.*
>
> *(3) If in the case of proceedings to which this section applies –*

*(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and*

*(b) when the proceedings were begun the employer were in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996,*

*the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.*

*(4) In subsections (2) and (3) –*

*(a) references to the minimum amount are to an amount equal to two weeks` pay, and*

*(b) references to the higher amount are to an amount equal to four weeks` pay.*

*(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*

*(6) The amount of a week`s pay of an employee shall –*

*(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996, and*

*(b) not exceed the amount for the time being specified in Section 227 of that Act (maximum amount of week`s pay).* "

**Deliberation & Determination**

48. The Tribunal was grateful to the parties for providing such detailed written submissions.

49. The first issue for determination is whether there was, as the claimant asserts, an unlawful deduction from wages of £230.77.

50. As indicated above, the respondent did not submit a counter claim and therefore any argument in relation to whether they had overpaid the car allowance cannot be considered by the Tribunal.

51. it was not in dispute that the respondent had deducted this amount of money and the Tribunal noted carefully all that was said by the respondent in relation to their argument as to why they were entitled to deduct this sum in terms of Section 14(1) of the 1996 Act as, in their view, it related to an overpayment of wages. Against that, the Tribunal gave careful consideration to all that was submitted by Mr Lawson. In relation to argument about the alleged unlawful deduction the Tribunal noted that the claim is not advanced under the Working Time Regulations 1998 although there is reference in the submission to Regulation 17 regarding minimum entitlement to leave which, as indicated by Mr Lawson, can be supplemented by leave provided for in an employee`s contract.

52. However, it was pointed out that, in this case, the claim is based on the contractual entitlement. Mr Lawson referred the Tribunal to the Employment Appeal Tribunal`s decision in ***Hill –v- Howard Chapel*** (see above). The reference to paragraph 7 at sub paragraphs 5-7 is significant.

This reads:-

"(*5*) *In our judgment the position is as follows. The Appellant was entitled to and did receive wages for the 15 days holiday taken during her employment. Credit for the extra 5 days holiday pay will only arise where there is express provision made in a relevant agreement. In those circumstances an exception is made under section 13(1) ERA; the deduction of excess holiday pay from his/her final wage entitlement is authorised by a relevant provision of the workers contract and/or he has previously signified in writing his agreement or consent (by the relevant agreement) to the making of the deduction. Section 14(1) ERA is immaterial whether or not there is a relevant agreement. There is no "overpayment" of holiday pay. The worker is entitled to paid holiday, up to 20 days per annum, under regulation 16(1). It is only where there is a relevant agreement providing for credit to be given to the employer for excess holiday taken that regulation 14(4) permits the employer to recover the excess payment in accordance with* section 13(1) ERA.

(*6*) *We cannot accept that there is to be implied a term of the contract allowing for the deduction of excess holiday pay in circumstances where such an implied term is inconsistent with the statutory scheme of the regulations and Part II ERA.*

(*7*) *The result may seem inequitable. Under regulation 14, a worker who has taken less than his proportionate entitlement to leave in the holiday year is entitled to pay in lieu of the "lost" holiday without more. Regulation 14(2). The employer cannot recover excess holiday pay absent a relevant agreement covering the position. However this is nothing new; it is*

*entirely consistent with the effect of section 13(1) ERA; see for example Potter v. Hunt Contracts Ltd [1992] ICR 337."*

53. In this case the Tribunal has concluded that it is bound to find that there was no overpayment to the claimant within the meaning of Section 14 of the 1996 Act since the decision of the Employment Appeal Tribunal in Hill is binding on this Tribunal.

54. As indicated above, while reference was made to the car allowance this was not specified in the response form and no application was made to amend and bring a counter claim in relation to the breach of contract claim.

55. The Tribunal concluded that Mr Lawson was correct in his submission that it cannot be the case that £230.77 or a proportion of that represented a deduction to reflect an overpayment of car allowance. Had it been then the car allowance figure would presumably have been reduced. The Tribunal was not satisfied that the respondent was entitled to the relief which it seeks in terms of Section 14 of the 1996 Act.

56. In all the these circumstances, the Tribunal concluded that there was an unlawful deduction and accordingly the claimant is entitled to the underpayment of pay of £230.77 which was not paid to him and which amount to an unlawful deduction from wages. However, that underpayment appears to be in relation to gross rather than net pay. Accordingly, while the Tribunal has concluded that the respondent must pay to the claimant the sum of £230.77 this represents the gross amount and accordingly there will be tax and national insurance due on that sum. Either the respondent will have to calculate the tax and national insurance payable and deduct this from the gross sum of £230.77 or it will be for the claimant to account to HMRC for the difference.

57. If the respondent and the claimant wish to discuss this further it would, of course, be open to the respondent to pay the net amount after deduction of

tax and national insurance but this is a matter for the parties to discuss. So far as the Tribunal is concerned, the award made is £230.77 being the gross sum claimed.

58. Turning to the issue of an uplift, the Tribunal was not satisfied that the clamant is entitled to the uplift of 25%, namely £57.69 in relation to a failure to comply with the ACAS Code of Practice.

59. The Tribunal concluded that given the grievance was not submitted to the respondent until after the claimant's employment had ended, the respondent's failure to arrange a grievance meeting is not relevant. The Tribunal was not satisfied that the position was the same as set out in ***Shergold –v- Fieldway Medical Centre*** where the resignation included a letter of grievance. In this case, the uplift cannot apply where the grievance was submitted as it was some time after the employment had ended. Accordingly, the application for the 25% uplift is refused.

60. Turning next to the statement of particulars, it is not disputed by the respondent that they had failed to provide the information required at Section 1(4)(d)(ii) and (e) and (h). Accordingly, the Tribunal must make an award in terms of Section 38 of the 2002 Employment Act.

61. The Tribunal gave careful consideration to the decision of the Employment Appeal Tribunal in ***Costco Wholesale UK***, (see above). In that case, there was a detailed handbook but it was held that there had been only partial compliance with Section 1 and the Employment Appeal Tribunal did not criticise the Tribunal for making the higher award of four weeks' pay.

62. The Tribunal noted that it is suggested that another factor to take into account is the size of the respondent's business. This respondent currently employ 1800 people. There is also a dedicated HR Department but no explanation was provided by the respondent as to why it failed to issue a

statement of particulars setting out all the required information in terms of Section 1 of the 1996 Act.

63. Accordingly, the claimant seeks the higher amount of four weeks pay.

64. The Tribunal has discretion as to whether to award the maximum figure and, as indicated, four weeks is sought.

65. The Tribunal noted all that was said and concluded that it would be appropriate in this case to award the four weeks sought, that is four x £479 giving the figure of £1,937. It did so given the respondent is a large employer and the position is not dissimilar to *Costco i*n that while the respondent did not refer to a detailed handbook it was apparent that there was a dedicated HR Department. This is not a small employer and it is to be hoped that the respondent will take the opportunity to ensure that in future statements of particulars of employment will comply fully with the requirements of section1 of the 1996 Act.

66. It therefore follows applying the law to the above findings of fact that the Tribunal has made the awards as set out above and accordingly the claim succeeds.

Employment Judge: F Jane Garvie
Date of Judgment: 16 August 2017
Entered in Register: 17 August 2017
and Copied to Parties