



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms N Pennycooke

**Respondent:** Belvoir Vale Care Homes Limited

**Heard at:** Nottingham      **On:** Friday 15 June 2018

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

## Representatives

**Claimant:** Mr Lee Bronze, in house counsel

**Respondent:** Ms Flora Mewies, Solicitor

## JUDGMENT

1. By consent the complaint of unauthorised deduction from wages succeeds. The Respondent will pay to the Claimant the gross sum of £279.00.
2. The complaint of non-payment of holiday pay fails and is dismissed.

## REASONS

1. In her claim form presented to the Employment Tribunal on 4 January 2018 Ms Pennycooke makes two complaints. The first is that the Respondent made an unauthorised deduction from her wages in the sum of £279.00 gross. The second is that they failed to pay holiday pay for either the holiday year 2016/2017 or the holiday year 2017/2018. The unauthorised deduction from wages claim was conceded by the Respondent at the start of the hearing. The holiday pay claim was unquantified and time was given to Mr Bronze, who represents Mrs Pennycooke, to quantify it and for the parties to discuss possible settlement. However, all that could be agreed was the nature of the claim.

2. Mrs Pennycooke worked for the Respondent from 27 October 2016 to 8 August 2017. The Respondent's holiday year begins on 1 April. Her contractual hours were 36 per week but she worked some voluntary overtime. The parties were able to agree that for the holiday year ending on 31 March 2017 Ms Pennycook had accrued 86 hours of holiday entitlement but had taken none. That figure was calculated on the basis only of her contractual hours. She was also seeking an additional 6 hours based on the voluntary overtime which she had worked.

3. For the holiday year beginning on 1 April 2017 it was agreed that she had taken all her accrued holiday calculated on the basis of her contractual 36 hours a week. The claim in respect of this holiday year was therefore limited to an additional 5 hours at £7.75 an hour based on her voluntary overtime. All hours which Mrs Pennycooke worked whether contractual or overtime were paid at £7.75 an hour.

4. Mr Bronze acknowledged that the claim in respect of the holiday period ending 31 March 2017 could not succeed unless Mrs Pennycooke could satisfy me that she was prevented from taking holidays by the Respondent, her contention being that she was refused annual leave in that period. However, when Ms Pennycooke gave evidence she said that the problem arose from shortage of staff. Management were not saying holidays could not be taken, only that the staff needed to sort out amongst themselves who could take holiday when. Documents in the bundle showed her only requesting 3 days' leave in this period which was refused on the basis that others were already taking leave on those days. On the basis of Mrs Pennycooke's own evidence, there was clearly no ban by the Respondent on employees taking leave. She simply failed to take her leave during the holiday period ending 31 March 2017 and in consequence she loses any rights in respect of it.

5. So far as the additional payment is concerned Mr Bronze relies on (although he failed to produce a copy of) the judgment of the Employment Appeal Tribunal in **Bear Scotland Limited and Others v Fulton and Others** (UK EAT S/0047/13/BI). He submits that following **Bear Scotland** all overtime falls to be reflected in holiday pay. That is his only submission and he does not seek to persuade me that an alternative case can be made on the basis of either the Regulations (the Working Time Regulations 1998 (SI 1998/1833) or the Working Time Directive (93/104/EC)). **Bear Scotland** does not help Mr Bronze. There is a crucial factual difference between that case and this, namely that the claimants in the **Bear Scotland** case worked overtime which under the terms of their contract was compulsory.

6. The relevant provision of the Regulations is reg 16 which deals with the calculation of payment in respect of periods of leave. It provides so far as material:-

- (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13... at the rate of a week's pay in respect of each week of leave.
- (2) Sections 221 to 224 of the [Employment Rights Act 1996] shall apply for the purposes of determining the amount of a week's pay for the purposes of this regulation...

Sections 221 to 223 of the 1996 Act fall under the cross heading "employments with normal working hours". Section 221 provides so far as material:-

- (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

7. Mrs Pennycooke had a contract of employment with normal working hours. The amount which she was paid did not vary with the amount of work done during normal working hours, nor did it vary if the hours in the day when she worked changed. She was therefore always paid the same sum for working her normal hours. There is no provision in either the Working Time Regulations or sections 222 to 224 of the 1996 Act which allow her to bring into the calculation purely voluntary overtime worked on an irregular basis.

8. The Respondents have therefore paid the Claimant her full entitlement to holiday pay and this claim fails and is dismissed.

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Employment Judge Macmillan  
Date: 13<sup>th</sup> July 2018

JUDGMENT SENT TO THE PARTIES ON

16 July 2018

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FOR THE TRIBUNAL OFFICE