EMPLOYMENT TRIBUNALS

Claimant Mr M Bell

Respondent Argos Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields ON 8th January 2018
EMPLOYMENT JUDGE GARNON
Appearances
For Claimant in person
For Respondent no attendance

JUDGMENT

I make a declaration that the respondent
(a) made an unlawful deduction of £195.33 from the wages of the claimant for the two weeks commencing 13th and 20th August 2017
(b) failed to pay the claimant the sum due under Regulation 16 of the Working Time Regulations 1998 SI 1998/1833 (WTR) for that period.
I make no order for repayment because section 25(2) of the Employment Rights Act 1996 (the Act) applies and under Reg 30(5) of the WTR no sum remains due as at the date of this judgment .

REASONS (bold print is my emphasis unless otherwise stated)

1. Introduction and Issue

1.1. The claim, presented on 8th November 2017, is of unlawful deduction of wages, and/or failure to pay the appropriate amount for annual leave. Part 2 of the Act, containing the law on unlawful deduction of wages, has certain time limitation periods during which claims must be brought, as do the WTR. The claimant started employment on 30th April 2017 and claims one underpayment for leave taken in August. Allowing for Early Conciliation, the claim for that is well within time.

1.2. The claimant's earnings include a substantial element of "overtime", a concept which I will explain later. The respondent accepts the claimant was paid when on leave only for his contracted hours. Since Bear Scotland Limited-v-Fulton [2015] ICR 221 (*Bear Scotland") held most overtime should be included in computing annual leave payments,

failure to include such hours in the calculation of his holiday pay is likely to be unlawful . I must decide whether it is, as well as by how much he has been underpaid.

1.3. The respondent has chosen not to attend because it has recently recognised the claimant was underpaid for his holiday in August 2017 and for one subsequent day's leave in October. It has made payment for those days but apparently not for leave days taken at Christmas. By email on 5th January 2018 the claimant wrote to the Tribunal :

I refer to your most recent email detailing that the respondent does not need to attend the hearing. The respondent, Argos Ltd refused to pay until 4 days prior to hearing date therefore they are not obliged to attend??

Can i ask why the hearing should be held with only myself in attendance surely that defeats the object. It is obvious to see that they have no wish to proceed with their internal investigation in to holiday entitlements until they are pushed by the government to do so. Hence every member of staff who is on a minimum contract has this process to go through everytime they take holidays. Why?? I ask, this is a law. At the end of this month i am going to have to go through this process all over again to get what i am rightfully owed, that is not right.

Argos are a big organisation whether they are owned by Sainsburys or a business in their own right, they are being allowed the chance to exploit their employees. Absolutely shocking! I work to pay my bills and keep my family yet the money is being kept back by the company.

My intentions are pretty clear this should be a countrywide case as employees are not being paid holidays correctly or they are being dissuaded from taking holidays, as they dropped down to minimum hours which unfortunately they cannot afford.

In summary, this email is to highlight the huge flaws and to question my attendance at the hearing

1.4. I explained to the claimant today I can only decide the case before me. The claimant is concerned he will, in his words, "*have to go through it all again*" in relation to his Christmas leave . By giving **full reasons** for this judgment, I hope that can be avoided.

2.The Facts

2.1. When the claimant started he was told his hours of work were 15 per week but he would be expected to work such shifts as were notified on a rota issued 2 or 3 days before the start of every working week. This would usually be more than 15 hours. He was given a single sheet of paper setting out his terms of employment. He does not have it and cannot recall if the 15 hours were described as a guaranteed minimum.

2.2. His claim relates to pay weeks 33 and 34. He has kept a meticulous record on his computer of the hours he worked in weeks 21 to 32 inclusive The average worked is 27.75 hours per week. He has never worked 15 hours. The least is 19.5 and the most is 36. As his holiday pay was based on 15 hours he has been underpaid by 25.5 hours for

the two weeks in question. His pay rate was £7.66 per hour so the underpayment is £195.33. The payment made to him recently equates at least to that sum after deductions of tax and National Insurance. In the current leave year, he has yet to take more than 20 days leave.

3.The Law

3.1. Section 13 of the Act starts:

(1) An employer shall not make a deduction from wages of a worker employed by him....

3.2. Subsection (3) says

(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.

3.3. Section 27(1) (a) says

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, **holiday pay** or other emolument referable to his employment, whether payable under his contract **or otherwise**,

The emboldened words would encompass sums payable by virtue of legislation defining, or case law clarifying, what should be paid during holiday periods .

3.4. Whenever the law provides an event is to be "treated as" something (another word is " deemed " to be something), it is , as explained in a different context by Lord Bingham in Celtec-v-Astley , because otherwise the event is not , or may not, be that "something". In this case, the underpayments are "deemed "deductions.

3.5. Section 23 includes

(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13

3.6. Section 24 includes

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of **any deduction** made in contravention of section 13.

However, s 25 (3) says

An employer shall not under section 24 be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, in so far as it appears to the tribunal that he has already paid or repaid any such amount to the worker.

3.7. Regulation (Reg) 16 of the WTR provides

(1) 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.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, …

(5) 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 of 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.

3.8. Regulation 30 includes

(1) A worker may present a complaint to an employment tribunal that his employer—

(b) has failed to pay him the whole or any part of any amount due to him under regulation .. 16(1).

3.9. Section 221 of the Act includes
(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.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

By this definition the claimant's pay did not vary with the amount of work done. Section 222 does not apply on the facts of this case.

3.10. Section 224 includes

(1) This section applies where there are **no normal working hours** for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

3.11. Section 234 includes

(1) Where an employee is entitled to **overtime pay when employed for more than a fixed number of hours in a week** or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case—

(a) the contract of employment **fixes the number, or minimum number, of hours** of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b) that number or minimum number of hours exceeds the number of hours without overtime,

the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

3.12. In a different type of annual leave case, NHS Leeds-v-Larner , Mummery LJ said

The rule of law, in its practical application in the workplace, should ensure that, as far as possible, the legal rules are certain, clear and accessible by the people for whom the rules were made. It does not help them for the courts to complicate the law and to make it even more difficult to work out what it is and what it means in practice.

The effect of section 234 is difficult to follow. A main issue in this case is what is a "week's pay" as defined in the Act . That depends on whether there are "normal" working hours , and if so what they are. Long ago, and not in the context of holiday pay, the Court of Appeal in Tarmac Roadstone -v-Peacock 1973 ICR 273 held that only "overtime" which the employer is obliged to provide and the employee is obliged to work is included in normal working hours. This line was followed in the context of holiday pay by the Court of Appeal in Bamsey-v-Albon Engineering 2004 ICR 1083. That begs the question "what is "overtime". Logically it means, in my view, time worked above a contractually fixed minimum number of hours.

3.13. A doctrine of law known by the Latin name " stare decisis" which means "standing by what has been decided". An Employment Tribunal (ET) is the sole arbiter of fact, but in matters of law if the Employment Appeal Tribunal (EAT) the Court of Appeal or the Supreme Court says what the law is on a point **necessary** to its decision, that utterance is called the "ratio decidendi" ("ratio" for short) of the case . Every ET must follow that , even if it disagrees with the reasoning . In giving judgment, the higher court may make observations about matters of law which are not necessary to its decision which are called " obiter dicta" ("obiter" for short). An ET is not compelled to follow these but they are often "persuasive" of what the correct interpretation of the law should be. In matters of European law, at risk of over-simplification, all domestic Courts and Tribunals must follow the Court of Justice of the European Union (CJEU).

3.14. Article 7 of the EU Working Time Directive (No.2003/88) provides Member States must ensure workers have the right to at least four weeks' paid annual leave. It does not

specify how holiday pay should be calculated, theoretically leaving this to national legislation or practice. Reg 13 implements Article 7. Under the WTR in its original form Reg 13 gave every worker an entitlement to four weeks annual leave. In 2007 Reg 13A was added to provide for additional leave which, for leave years after 1st April 2009, is 1.6 weeks. Reg 13A was inserted by the Working Time (Amendment) Regulations 2007 and is a purely domestic provision providing 8 days additional leave each year for a five day per week worker (as the claimant is). It reflected the number of public and bank holidays in a calendar year, but does not oblige leave to be taken or granted on those specific days . There are thus three types of leave, Reg 13 which must be paid in accordance with European law, Reg 13A which must be paid in accordance with domestic, but not European, law, and additional contractual leave which need only be paid at the rate the parties agree. There is none of the last type in this case.

3.15. in British Airways–v- Williams [2012] ICR 847("Williams") and later in Lock-v-British Gas (Lock) CJEU held European legislation required certain elements of pay other than basic pay for contracted hours to be included in the calculation of the pay received when on holiday. The WTR was a health and safety measure. If workers are paid less when on holiday than when working it will deter them from taking leave. Reg 16 and the relevant provisions of the Act as to what must be included in holiday pay are, on the face of it, inconsistent with the decision in Williams.

3.16 In Bear Scotland Ltd v Fulton the EAT, departing from Bamsey , held that where non-guaranteed overtime was paid with sufficient regularity to amount to normal remuneration it forms part of a worker's normal remuneration and must be taken into account when calculating holiday pay **under the Directive**. Furthermore, the EAT held the WTR can be interpreted to achieve this result. Whether truly "voluntary" overtime – i.e. where there is no obligation on either side – should be included in holiday pay was not dealt with definitively. Bear Scotland was heard with two other cases I will call simply Hertel and Amec on 30 July – 1 August 2014 with judgment on 4th November 2014.

3.17. The EAT in Dudley Metropolitan Borough Council v Willetts 2017 IRLR 870 upheld the decision of an employment tribunal that purely voluntary overtime was paid in such a manner, and with sufficient regularity, to be considered part of workers' **normal remuneration**. Accordingly, the payments fell to be included in the calculation of statutory holiday pay for the four weeks' annual leave under Reg 13 of the WTR. Mrs Justice Simler noted Williams had set down the overarching principle that holiday pay should correspond to 'normal remuneration', so as not to discourage workers from taking leave. The division of pay into different elements (such as normal hours or " overtime" pay) cannot affect the worker's right to normal remuneration while on leave. For a payment to count as 'normal', it must have been paid over a sufficient period of time on a regular or recurring basis. This is a question of fact and degree for the tribunal. Items which are not usually paid or are exceptional do not count for these purposes. The EAT said that if pay for work which is 'normally' undertaken, albeit voluntarily, were excluded it would amount to an unnecessarily narrow interpretation that risked fragmenting pay into different components to minimise holiday pay, and therefore deterring the taking of holiday. As Simler P commented, employers could set artificially low basic hours and

categorise other working time as 'voluntary overtime' so as not to count for holiday pay purposes. This was a real risk in view of the current proliferation of zero-hours contracts.

3.18. A decision of one ET does not "bind" another. However, when a point has been thoroughly argued before one ET, its judgment is "persuasive". On 9th December 2015 in Carrick-v-Nissan Motor Manufacturing (UK) Ltd Case No 2500469/15, Employment Judge Buchanan had before him two experienced Counsel. The claim was for underpaid holiday pay brought under the Act and the WTR .The "order of leave point" was fully addressed. There was no express contractual provision providing which days in any year were to be taken as Reg13 leave, Reg13(A) leave or contractual leave. Employment Judge Buchanan examined paras 82 and 83 of Bear Scotland and said

.. it is important to know when Regulation 13 leave is taken and when Regulation 13A leave is taken. In the 1998 Regulations the Regulation 13A leave is referred to as "a period of additional leave"……. I choose to follow the highly authoritative, albeit obiter, guidance of Langstaff J in Bear Scotland on this matter which is to the effect that absent any contractual provision to the contrary, the leave under Regulation 13 precedes the leave under Regulation 13A in each year. How is that to be achieved in this case? … I prefer to achieve the result advised by Langstaff J in Bear Scotland through the rules of statutory interpretation and defining the words "additional leave" in Regulation 13A to mean leave which supplements the Regulation 13 leave and to imply, in the absence of any agreement by the parties to the contrary, that something which is supplemental to the Regulation 13 leave follows the Regulation 13 leave.

3.19. I was not bound to follow Employment Judge Buchanan, but I did in Strozda -v- Addison Motors Ltd 2500650/15 because I fully agreed the only workable and sensible solution is to say the first 4 weeks of each leave year are Reg 13 leave, the next 1.6 weeks are Reg 13(A) and any additional entitlement purely contractual. It is only in respect of Reg 13 leave that workers are entitled to be paid the elements which European law requires to be included, as decided in Bear Scotland , and Willetts.

4. Conclusions

4.1. I echo Mummery L.J.'s sentiments in Larner to the effect that it is regrettable the UK law is so difficult to apply in practice especially in the light of the binding authority in Bamsay. Under the Act, the concept of a "week's pay" where a worker's earnings vary with overtime, or commission , often involves looking at a 12 week reference period. The difference this arbitrary period makes to the result depending on whether the calculation date comes at the end of a plentiful overtime or high commission earning period (commonplace in many employments which have seasonal variations) can be huge.

4.2. On a plain English interpretation of the word "normal" , it is hard to see how the claimant's normal hours can be 15 when in fact he has **never** worked 15. On that basis , he has no normal working hours and his week's pay , even under UK law, would be the average of the last 12 weeks ie 27.75 x £7.66 = £212.56. However, s 234 as interpreted in Bamsey would reach a different figure. Only Parliament can change the statute and

only a higher court can declare the ratio in Bamsay to be inapplicable in current times. As and when the claimant comes to take Reg 13A leave, there will be the issues to argue. However, he claims today in respect of Reg 13 leave only.

4.3. I stress the EAT's decision in Willetts does not set down a principle that all voluntary overtime must be included in the calculation of holiday pay. A one-off shift of overtime would clearly not amount to part of a worker's normal remuneration. In this case I have no hesitation in finding 15 hours was never worked, and voluntary overtime was the norm. The claimant's method of calculating "**normal remuneration"** by reference to hours worked over the 12 weeks preceding the leave is in this case a fair and sensible average approach. It does not have to be in accordance with the domestic legislation. Whether in different circumstances a longer or shorter period of averaging is permissible for either the employer or employee, is an argument which may have to be aired in another case.

EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9th January 2018