Case No: 2208177/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Kevill**
Respondent: **Astrea Asset Management Limited**

Heard at: **London Central** **On: 11 February 2019**
Before: **Employment Judge Goodman**

Representation
Claimant: Mr D. Reade Q.C.
Respondent: Mr S. Devonshire Q.C.

RESERVED JUDGMENT

1. The claim for holiday pay succeeds. The respondent is ordered to pay the claimant £11,383.40.

2. **By consent**, the respondent is ordered to pay the claimant £33,230.77 compensation for failing to consult about a transfer.

REASONS

1. The issue at this hearing was whether the claimant was entitled to be paid for 5 days holiday untaken when he was dismissed on 29 September 2017. . The amount in issue is £11,383.40.

2. The facts are not in dispute. The issue was the overlap of statutory holiday provisions with the claimant's contractual right to paid holiday.

3. The hearing had been listed to decide other remedy issues. The only other relevant issue was assessment of the award for failing to consult, but the parties had been able to agree the figure – subject to appeal of the liability judgment – and this is thus recorded here.

Contractual Provisions for Holiday

4. Under the terms of the claimant's contract, he was entitled to take 30 days per

annum (clause 9.2).

5. Next, by clause 10.1: "you are entitled to all public and bank holidays in England and Wales in addition to your holiday entitlement under clause 9 and will be paid for each public or bank holiday". That makes 38 days over the year.

6. The leave year ran from 1 January, and by clause 9.4 leave was to accrue at 2.5 days per month "for each complete month of service in the year you…leave employment, rounded up to the nearest half day".

7. So by contract, if this clause applies to both clause 9 and clause 10 holiday, the parties have agreed he was entitled to 26 days to termination. That agreement was reached before the hearing, when counsel for the claimant had now identified that some were public holidays. The claimant had in fact taken 21 days in all, 6 public holidays and 15 other days.

8. The claimant's contract provided, at clause 9.5, that on termination of employment: "you are entitled to payment in lieu of any unused holiday entitlement unless your employment is terminated by the Company for gross misconduct." There is no corresponding provision in clause 10.

9. By letter of 25 September the respondent did terminate the claimant's employment for gross misconduct. The reasons given in the letter are summarised in paragraph 76 of the reserved judgment and reasons sent to the parties on 13 December. (A corrected judgment was sent on 7 February; the corrections concerned the numbering of the four claimants, not the substance of the reasons). The respondent relies on this provision, and argues that if that is right, nothing is due.

Working Time Regulations 1998 (WTR)

10. Under statute, workers are entitled to 28 days paid holiday per annum, 20 days pursuant to the EU Directive in regulation 13 and another 8 days by UK addition in regulation 13A. Although 8 days corresponds to the UK's public holidays, this is not stated in the regulations, and if workers are away from work on public holidays this counts against their accrued proportion of the 28 day annual total of holiday. Days accrue by the month. By regulations 13(6)(a), 13A (6), the leave may only be replaced by payment in lieu on termination. On termination an amount is payable for leave untaken, proportionate to the current leave year – regulation 14.

11. Although claims for statutory holiday can be made under section 30 of the WTR, following the decision in **Ainsworth v HMRC** they can and usually are made under the unlawful deduction from wages provisions of the Employment Rights Act. That requires the tribunal, in respect of both statutory and contractual holiday, to decide whether an amount was "properly payable" - section 13(3) - and "wages" includes "any..holiday pay..referable to his employment whether payable under his contract or otherwise" – section 27(1)(a).

12. Of the statutory 28 days, the claimant was due 21 days by termination, and as he had taken 21, if there had been no greater contractual allowance, nothing was outstanding.

Interaction of Contractual and Statutory Holiday

13. Regulation 16(1) entitles the worker to be paid for annual leave at the rate of a week's pay as defined by statute, and then goes on in 16(4) :

> "A right to payment under paragraph (1) does not affect any right of the worker to remuneration under his contract ("contractual remuneration") and paragraph (1) does not confer a right under that contract".

Regulation 16 (5) states:

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

14. Regulation 17 states:

> "where during any period a worker is entitled to rest period, rest break or annual leave both under provision of these regulations and under a separate provision (including the 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 whatever right is, in any particular respect, the more favourable".

15. Regulation 35 provides:

> "any provision in an agreement (whether a contract of employment or not) is void insofar as it purports - (a) to exclude or limit the operation of any provision of these regulations… or (b) to preclude a person from bringing proceedings under these regulations before an employment tribunal."

16. In **Witley Men's Club v Mackay (2001) IRLR 595**, it was held that a clause in a collective agreement removing the right to pay for untaken leave on termination if dismissed for gross misconduct could not, because of regulation 35, remove his right to pay in lieu on termination. The collective agreement need not refer to statutory holiday - "holiday within regulation 14(3)" – for it to be brought within the regulation barring contracting out.

17. That case concerned 26 days outstanding on termination, at a date when the statutory entitlement was 20 days, so it is likely that the other 6 days derived from the collective agreement, but there is no discussion on whether a contracting-out provision was invalid for leave in excess of the statutory provision was not argued. Paragraph 10 states only that regulation 14 must be construed within its statutory context of a statutory minimum period of annual leave, and does not mention that on the facts the claim was for more than the statutory minimum.

18. In **Beijing Ton Ren Tang (UK) Ltd v Wang UKEAT/0024/09** there was an oral contract to pay 30 days annual leave, to be paid in lieu if untaken. The real issue in that case was whether a term of the contract that annual leave could be rolled over until termination (and then paid in lieu), which is

more favourable than the statutory "use it or lose it" rule, was valid. It was held that nothing in the Working Time Directive (pursuant to which the use or lose it rule was made) forbids more than the current year's leave being paid on termination, as it enables the worker then to take paid leave before starting another job, and that was confirmed by the ECJ in **Stringer v HMRC (2009) IRLR 213,** which concerned employees unable to take leave because off sick long-term.

Reconsideration Judgment 6 February 2019

19. The decision on liability issues sent to the parties was the subject of an application for reconsideration, because the question of the effect of clause 9.5 was on the list of issues (while reserving the question of how many days had been taken or were outstanding to the remedy hearing), but it had been overlooked, and there had been no decision on the point.

20. I reviewed the application under rule 72 and concluded it should be reconsidered. I also set out the decision which would have been reached had it not been omitted, and the reasons for it. The process under rule 72 requires that after preliminary consideration whether the claim has a reasonable prospect of being reconsidered in the interest of justice, there is a hearing unless the parties agree to dispense with it. It permits a provisional view to be expressed. As the only point was that a decision had not been made on an issue which was already the subject of written submissions, I proposed to depart from the process and make the decision without a further hearing, in the interest of finality and saving costs. I added that any additional representations a party wished to make could be taken at the hearing as an application to reconsider the reconsideration decision. This course was taken in the hope that if other remedy issues had fallen away, the amount of holiday might be agreed, and there would be no need for a remedy hearing at all. The decision was sent to the parties on 7 February 2019.

Submissions

21. The claimant's case is:

(1) The tribunal found that although the respondent purported to dismiss for gross misconduct, that was not found to be the reason for the dismissal, which was the transfer of undertaking. It follows that clause 9.5 was not engaged.

(2) It is a debt, not damages, so any misconduct found on his part is not a defence – **Boston Deep Sea Fishing v Ansell (1888) 39 ChD 33**, where misconduct was discovered after the dismissal.

(3) There was a further argument on the reconsideration judgment on holiday pay, about the overlap between statutory and contractual holiday pay. It is argued that **Witley and District Men's Club v Mackay (2001) IRLR 595** held that a disqualifying provision was void for both statutory *and* contractual holiday pay, because on the facts of that case, the claimant had taken all the relevant statutory pay. **Beijing Ton Ren Tang (UK) Ltd v Wang (2009) UKEAT/0024** was about more favourable rights, where

regulation 35 of WTR was never engaged because it is only engaged when the operation of WTR is cut back. So regulation 35 (which in effect excludes the contractual provision for non-payment in cases of gross misconduct) did not apply to contractual holiday pay any more than it does to statutory holiday pay. Reliance was placed on the days of holiday involved in that case appearing to exceed the statutory minimum for the year.

(4) The claimant can elect and does now elect to take contractual holiday after taking his statutory holiday, and by operation of regulations 16 and 17 of WTR he could do so, subject to his employer's right to direct when he took leave, which had not been exercised in this case. That means anything untaken on termination was statutory leave, which cannot be cut back by operation of regulation 35.

(5) Finally, it was argued that as a matter of fact the claimant had taken 6 of the 8 public holidays for the year before termination; clause 9.5 is about clause 9 leave, not clause 10 leave, so these days must be omitted from the calculation when allocating holiday accrued pro rata, or overlap with statutory leave, or entitlement lost on termination for gross misconduct. This argument was only advanced on the morning of the hearing.

22. The respondent replied:

(1) The claimant's points (1) (2) and (3) were resolved by the reconsideration judgment, which had held that regulation 35 did not render clause 9.5 void, and that it was engaged. Clause 9.5 did not concern the statutory reason for dismissal; it looked at the contractual justification for dismissal, namely misconduct. If there was such justification, then the amount is forfeited by clause 9.5. It was clear on the facts found that the respondent had it in mind when it came to dismiss.

(2) The claimant's point (4) is a novel and artificial argument, never put in opening or closing, nor in the list of issues, and they cannot now raise it, relying on **Scicluna v Zippy Stitch (2018) EWCA Civ 1320.** They refer the Tribunal to the EAT decision in **Bear Scotland Ltd v Fulton (2015) ICR 221**, in which it was proposed *obiter* that of the total 28 day allowance in WTR, EU leave (20 days) would be taken before UK leave (8 days), and discussing this, the author of Harvey suggests Tribunals take a "sensible approach". It is argued this does not support a retrospective election on the part of the employee as to which leave is taken when.

(3) It is also argued that regulation 17 allows a worker to choose whether he can take the better contractual provision (here, being able to choose which leave he takes when), and he could therefore have taken advantage of the more favourable regime, but forfeited that by his misconduct.

Discussion

Reconsideration

23. In the original grounds of claim, paragraph 36 pleaded: "at the date of his dismissal, the claimant had 11 days of accrued untaken annual leave. The claimant's contract provides for the claimant to receive payment of accrued

untaken holiday following termination of employment. This sum is payable to the claimant by the. .. respondent, but no such payment has been made".

24. Paragraph 38 then states that failing to make the payment is an unlawful deduction from wages.

25. The response pleaded; "as to the claim for accrued but untaken holiday pay", was a dispute about what holiday had or had not been taken, no information on holiday had been provided by transferor to transferee. Clause 9(5) does not feature.

26. The list of issues as it stood at the start of the liability hearing included:

"4.1: were any of the claimants owed pay for outstanding untaken holidays by (the respondent) at the date of their dismissals, and if so, (1) on what grounds (2) for what periods and (3) in what amounts? "

27. The written submissions concerned the application clause 9.5 on gross misconduct. Oral submissions did not go further, perhaps unsurprisingly as so many and varied issues had to be covered in the time.

28. Scicluna is a decision of the court of appeal, holding (in relation to an argument by the respondent that there was an issue whether there was an implied term that a deferred payment only became payable if the company was in funds, though not on the agreed list of issues), that if an issue was not on the agreed list, "it was not necessary to decide it." A list of issues was: "the road map by which the judge was to navigate his way to a just determination of the case".

29. The list of issues did not apportion issues between the liability and remedy hearings. It was understood to be agreed that the question of what was owed for holiday was for the remedy, and the final submissions concerned clause 9.5 (and whether there was gross misconduct). In this respect any argument that the interests of justice require a reconsideration of an additional argument that clause 9.5 did not apply because the claim was in debt, not damages, is not made out. It could have been identified on the list of issues. It could have been identified at the hearing where it was to be decided. It could have been argued in final submissions; it was not. Nor does it concern the number of days due or taken, which was reserved to the remedy hearing. **Scicluna** is clear that tribunals need not decide what is not identified as an issue. It is not shown that it is in the interests of justice to go at it another way.

30. In any case, it is not clear that the argument that it is a debt and not damages defeats the claim. The contractual claim is based on clause 9, with its provision for monthly accrual and payment on termination unless dismissed for gross misconduct. The debt arises from clause 9. Clause 9 includes that the debt is not payable if dismissed for gross misconduct, and it is not here used as a defence to a damages claim but an integral part of the contractual provision from which the debt arises.

31. As for the reason for dismissal, the finding as to the employer's reason in statute is a factual one. In contract, the Tribunal must hold whether there was in fact gross misconduct, not whether an employer reasonably believed

there to be misconduct. Although for reasons already given it was held the transferee always intended to dismiss the claimant, and that the transfer was the reason for termination, the tribunal also held, in its findings on contributory conduct, that the claimant's behavior was repudiatory of the contract (paragraph 177), that is, gross misconduct, and that was the reason the respondent gave for dismissing him. If this reasoning is thought unsound, it is a matter for appeal rather than reconsideration. I am told an appeal has been lodged, but I have not seen the notice.

32. As for the argument that **Witley** held that regulation 35 excluded both the statutory provision *and* any better contractual provision, it is not clear from the reasons that this was what it decided. The discussion is about the WTR. The decision does not identify that it was dealing with claim for anything other than the statutory right. The argument was not made in final written or oral submissions. It is not obvious that a restriction on contracting out of the statutory right also operates to restrict a better contractual right. **Wang** was about a contractual improvement – allowing unused leave to be rolled over and paid (in the expectation it would then be taken, in contrast to paying someone during the contract instead of taking leave) on termination. It did not operate to reduce the statutory right.

What Holiday was Outstanding on Termination?

33. I turn to examine the question of what leave is outstanding on termination on which clause 9.5 might bite, that being an issue that was reserved for the remedy hearing.

34. A hitherto unexamined complication was the separation of clause 9 holiday pay, 30 days, subject to forfeit if untaken on termination for gross misconduct, from clause 10 pay for public holidays, with no provision for forfeiture. The claimant had taken all the public holidays as they fell due that year, 6 by the date of termination. Does regulation 17 about choice of the more favourable apply to exclude these days from computation of outstanding statutory leave, immune from forfeiture for misconduct?

35. There was no evidence from the claimant on whether he had elected to take any particular leave as statutory leave or contractual leave, nor would I have expected it, as it would be an entirely artificial exercise for any employee entitled to more than the statutory minimum to have to identify what days he was taking when at the time it would make no practical difference. Under the terms of this contract it would not occur to either side that this was necessary. It might be relevant if contractual holiday was paid at basic rate, when statutory holiday pay has to be paid inclusive of regular additions making up "normal remuneration", but not here. It only became a relevant question on termination when he was not paid the holiday.

36. Regulation 17 does not state when a worker must choose which right is more favourable, and in a case like this he may not know at the time which is more favourable. I cannot read that regulation as requiring him to decide at the time, and it is compatible with making his election when computing what is owed at termination, when it becomes apparent that there is sense in the question.

37. The respondent argues he made no election in his grounds of claim, or set

out his case in a list of issues, but “how many outstanding” was identified as an issue, and reserved to this hearing; there was no more refined list of issues for this hearing, and it unusual to have a more refined list of issues on such a question. It is a point argued in written submissions for the hearing, so the respondent had the opportunity to prepare an argument to meet it, unlike **Sciluna**.

38. Applying that to this case, he has taken 6 days public holiday, which he can take as clause 10 leave, not subject to forfeiture. They are also on the face of it not calculated pro rata to termination – they fall due when they fall due, and if he had left at some other time of year he would not be able to claim for anything not taken. Although the statutory entitlement includes 8 days over the 20 days provided in the EU directive, which corresponds to public holidays, there is no requirement that they are taken on public holidays, nor is there any right to take them then. Other than public holidays he has taken 15 days. As under contract they are forfeited for gross misconduct, he presumably elects to count those toward his statutory entitlement, which on termination was 20 days pro rata. That leaves the five days claimed.

39. Accordingly the claim for 5 days holiday pay on termination outstanding succeeds.

40. On the election argument, the claimant in written submission argued in any case that leave already taken (21 days) could all be counted as taken from his contractual entitlement of 26 days to termination, not subject to forfeiture because it had been taken, leaving 5 days to come from his statutory allocation. The fact that 6 of them came from his public holiday not subject to forfeiture reinforces the conclusion that this election must be right.

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Employment Judge Goodman

Date 19 February 2019

JUDGMENT SENT TO THE PARTIES ON

21 February 2019

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FOR THE TRIBUNAL OFFICE