



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Dimaline

Respondents: Mitchells and Butlers Retail Ltd

Heard at: Hull **On:** 7 January 2019

Before: Employment Judge Knowles

Representation:

Claimant: In person

Respondents: Miss Laughton, Solicitor

RESERVED JUDGMENT

1. The Claimant's claim to enforce a COT3 settlement concerning her holiday entitlement is dismissed upon withdrawal.
2. The Claimant's claim that she has suffered unauthorised deductions from wages is well founded.
3. Remedy is to be determined.

RESERVED REASONS

Evidence

1. I heard evidence from the Claimant.
2. On behalf of the Respondent, I heard evidence from Miss S Wood (First Line Support Manager – HR and Payroll) and Mr M Atwood (General Manager of the Norland, the Claimant's place of work).
3. The parties produced a single bundle of documents.

Issues / preliminary matters

Case No: 1810970/2018

4. The Claimant's claim originally included a claim to enforce a COT3 settlement concerning her holiday leave entitlement. That claim was withdrawn by her 21 December 2018 by email. Judgment has been entered to that effect.
5. During her evidence the Claimant complained that she had never received an updated contract of employment following her request for flexible working which reduced her working week to 14 hours per week. That is not part of her claim and no application to amend the claim has been made. I make no further comment on this evidence.
6. The Claimant's claim is unlawful deduction from wages, a claim that the provisions of Section 13 of the Employment Rights Act 1996 (ERA) have been breached.
7. Reduced to its bare minimum, the Claimant claims that she has a contract stipulating that her normal working hours are 14 per week. However, when she is paid sick pay or holiday pay for a week she is usually paid less than 14 hours pay. Also, her working pattern is 3 days a week. But the number of hours on each day is not the same.
8. The Respondent pays whichever day she takes at her average pay for the last 12 weeks ignoring any holiday pay in that period.
9. This means that her pay for a relevant week is further below 14 hours if the day she has booked off is her longer working day.
10. The Claimant states that the same applies and makes the same complaint in relation to sick pay.
11. This issue in this case is what is properly payable when the Claimant takes her holiday or sick leave.
12. The parties agreed that there was insufficient time to consider remedy. Indeed evidence and submissions took up the allocated time and judgment on liability was reserved.

Findings of fact

13. I made the following findings of fact on the balance of probabilities.
14. It should be noted that the parties appear largely to agree the relevant factual context to this claim. Neither party cross examined the other's witnesses. There is no dispute as to fact. This case concerns whether what is taking place in fact meets the law.
15. I did consider witness evidence from the Claimant, in the form of her detailed email to the Respondent 2 January 2019, pages 125(ii) to 129 in the bundle of documents.
16. A copy of the Claimant's contract of employment is contained in the bundle of documents at pages 24 to 28 in the bundle of documents. This states under the heading Hours of Work:

“Your normal hours of work will be 16 [the parties agree this is now 14] hours per week. The Company reserves the right to reduce or extend, with reasonable notice, your normal hours of work or to transfer you to other shifts having regard to the general level of trading and the demands of the business and subject to the Working Time Regulations 1998.”

17. Under the heading Holiday Entitlement the contract states:

“Holiday pay is calculated by averaging actual pay received over the previous 12 weeks worked or number of weeks worked if less than 12 weeks”.

18. Examples of how the Claimant's holiday pay has been calculated by the Respondent are provided at pages 57-59. These show that the last 12 weeks' pay are considered. Holiday pay is ignored, meaning that in a week when the Claimant is on holiday leave pay for those days is not counted. However, to arrive at a daily rate nor are the days of holiday leave counted. The Claimant normally works 3 days per week over 12 weeks meaning 36 days. If the Claimant took three days of holiday leave over a 12 week reference period, then the claimant's pay only for working days is included, but that is divided by 33 days rather than 36. The Respondent does this so that the holiday pay calculation uses only days of work.

19. Hours worked are captured through a time capture system when the Claimant clocks in on or off the till. Time is captured to a 100th of an hour, and pay is paid to the resulting fraction. This means that there are regular weeks where the Claimant's pay is based on working 13.86 or 13.96 hours, to quote a couple of examples. Sometimes the Claimant's working hours are 14 hours, but the parties accept that this is where the Claimant has forgotten to clock in or out and her manager has inputted her 14 hours week in place of an incomplete record. This may benefit the Claimant (under the Respondent's system) where she in fact worked a fraction of her normal working week.

20. The Respondent states that the Claimant's normal working hours are not 14 per week but are variable and the refer to weeks where she has been paid for more than 14 hours, for example 18 or more hours. However the Claimant disputes that she ever works more hours than 14 in any week, and states that this would impact her carers allowance so she is not prepared to work more than 14 hours in any week. She accepts that the Respondent's records show more hours some weeks, such as the 18 I have noted, but that this is only where errors have been made and corrected in arrears. Her evidence in this respect has not been challenged and I find on the balance of probabilities that the Claimant does not vary her working hours by working additional hours because of the reason she has given, her carers allowance.

21. The Claimant's sick pay is calculated on the same basis as holiday pay. The Claimant's contract of employment is silent on how sick pay is calculated. The parties agree that the Claimant is entitled to 10 weeks sick pay in any consecutive 12 month periods due to her period of continuous service. The Respondent notes that sick pay is discretionary

under the contract because it provides for a unilateral right to amend or withdraw the scheme at its absolute discretion. The contract simply refers to a right to sick 'pay' but there is nothing as to what that means.

Submissions

22. The Claimant submitted that her case is that she should receive her normal working hours pay, 14 hours, for a week's leave or pro-rata for a day of leave whereas she received less. She states that this is due to her holiday earnings being removed from the 12 week average.
23. The Respondent submitted that they were entitled to utilise the 12 week averaging scheme provided by the legislation (Section 224 ERA 1996) because the Claimant's working hours varied according to her attendance at work. She is not entitled to pay when she is not working nor should periods not at work, when she works less than 14 hours, be counted in her holiday pay calculation. The Respondent has a right to vary her normal working week and it does vary through her time actually in work. The Respondent quoted Bear Scotland (see the Law below) which they state applies if you work less hours. Article 7 provides a right to be paid annual leave for a pro-rated period. Normal remuneration means that normally received. The Claimant receives pay for the time she actually works through time capture and fractional pay. The Claimant received sick pay on the same basis and the calculation is correct.

The Law

24. The Employment Rights Act 1996 (ERA 1996) sets out the right not to suffer unauthorized deductions from wages as follows:

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 worker 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 to the worker in*

writing on such an occasion.

- (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.*

25. Section 27 sets out provisions as to the meaning of wages as follows:

27 Meaning of "wages" etc.

- (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,*
 - (b) *statutory sick pay under Part XI of the M1 Social Security Contributions and Benefits Act 1992...*

26. Chapter II of Part XIV of the ERA 1996 sets out provisions as to a week's pay as follows:

221 General.

- (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.*
- (3) *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 vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of 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.*

(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.*

(5) *This section is subject to sections 227 and 228.*

27. Section 222 sets out provisions applicable where remuneration varies according to time of work.

28. Section 223 covers calculations setting out that only hours worked and pay for those hours are taken into account, and that in fixing the 12 week reference period no account is taken of weeks during which no remuneration was payable, and under subsection (3) that in relation to work done outside normal working hours premium payments are to be ignored as if the work was done in normal working hours. The effect of subsection 3 is that if the 12 week average is engaged, overtime would only be counted at ordinary time pay rates.

29. Section 224 covers 12 week averaging where there are no normal working hours.

30. Section 234 provides that:

34 Normal working hours.

(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).*

31. The Working Time Regulations provide for pay in respect of periods of leave under the regulations as follows:

Payment in respect of periods of leave

16.—

(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 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).*
- (3) *The provisions referred to in paragraph (2) shall apply—*
 - (a) *as if references to the employee were references to the worker;*
 - (b) *as if references to the employee's contract of employment were references to the worker's contract;*
 - (c) *as if the calculation date were the first day of the period of leave in question; and*
 - (d) *as if the references to sections 227 and 228 did not apply.*
- (4) *A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration").*
- (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.*

32. In *Bear Scotland & Others v. Fulton & Others* UKEATS/0047/13/BI it was held that:

*67. Though it is the effect of the interpretation rather than the precise words which matters, a conforming interpretation is best expressed by amending regulation 16(3)(d) of the Working Time Regulations to insert the following italicised [highlighted in bold here] words, as the Tribunal in *Freightliner v Neal* thought appropriate, and as the Secretary of State for Business Innovation and Skills regards as permissible, namely:*

*"(d) as if the references to sections 227 and 228 did not apply and, **in the case of the entitlement under regulation 13, sections 223(3) and 234 do not apply**"*

33. The reference to regulation 13 is to 4 weeks leave provided by the Working Time Directive, as opposed to the remaining 1.6 additional leave provided for under the Working Time Regulations.

34. In ***New Century Cleaning Co Ltd v Church*** 2000 IRLR 27, the Court of Appeal held the phrase 'properly payable' suggested that some legal — but not necessarily contractual — entitlement to the sum in question was required. Morritt LJ found that this was confirmed by S.27(1), which

defines wages as 'any sums payable to the worker in connection with his employment ... whether payable under his contract or otherwise'. He did not believe that the words 'or otherwise' extended the ambit of 'sums payable to the worker in connection with employment' beyond those to which the worker has some legal entitlement.

35. In **Agarwal v Cardiff University and anor 2018 EWCA Civ 2084**, the Court of Appeal confirmed that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

Conclusions and remedy

36. I draw the following conclusions as to what is properly payable for the purposes of Section 13 of the ERA 1996.
37. In relation to holiday pay, the Claimant received on average less than 14 hours pay for her working week because the Respondent pays pay to the 100th of an hour during which the Claimant is clocked in. Whilst I appreciate that the Respondent may find precise time capture systems useful in administering time and attendance, there appears to me to be no corresponding contractual provision concerning pay. The Respondent appears not to have changed contracts of employment to allow for fractional pay at 100th of an hour.
38. The Claimant has normal working hours for the purposes of Section 221(2). Those hours are 14 per week as set out in her contract.
39. I do not accept the Respondent's argument that the right of variation covers or provides to them a right to vary hours of work fractionally to the 100th of an hour. The contractual right to vary covers changes to working hours on notice where the Respondent wishes to vary the contract. There may be limitation as to the extent in law that the Respondent may be able to rely on this clause to make material changes to a fundamental term such as normal working hours, however that is not an issue in this matter. There is no evidence that notice has ever been served to vary the working hours to permit the Respondent to reduce hours to the 100th of an hour for the purposes of pay. The Claimant has normal working hours and these are 14 hours per week as clearly stated in her contract.
40. The Respondent has referred me to averaging provisions in Section 221(3) on the basis that the Claimant's pay does vary with the amount of work done. I think this is a misplaced argument. Her present pay does not vary with the amount of work done, she is not a piece worker. She has a flat hourly rate of pay.
41. The Respondent has referred me to Section 222 where remuneration varies according to time of work. Again, the Claimant's remuneration does not vary according to time of work, she has no entitlement to shift payments or anything denoting a different rate for certain times of the day or night. She has a flat hourly rate of pay.

42. The Respondent has referred me to Section 224 which covers employment in respect of which there are no normal working hours. In my conclusion the Claimant's contract provides expressly for normal working hours of 14 hours per week and Section 224 is not engaged.
43. In my conclusion, whilst it is not part of the Claimant's claim, the Claimant is suffering unauthorized deductions from wages in the form of deductions of fractions of an hour where she clocks off the Respondent's tills. She has normal working hours and for each of those hours she attends work is entitled to be paid. If the Claimant leaves slightly before her shift finishes that is a matter that the Respondent can take action upon. However, that action cannot be a reduction in pay for a worker with normal working hours.
44. Because the fractional pay system founds holiday pay, and is being operated in a manner that is detrimentally reducing the Claimant's pay, there is in my conclusion an unauthorised deduction in holiday pay so far as this takes place.
45. In my conclusion the Respondent's arguments concerning their compliance with UK and European Law are misconceived. There is in any event nothing to prevent the Respondent contractually committing to more generous pay systems for holiday pay purposes. One of the problems in this case is that the Respondent is not meeting the Claimant's contract of employment, and the provisions of the ERA 1996, in relation to her underlying weekly pay by deducting fractions of an hour where she has 'clocked off'. They do not have that right under their contracts of employment or under the legislative framework in relation to her weekly pay therefore any holiday pay based upon that will be incorrectly calculated from the outset.
46. I am not certain of the impact of paying the Claimant for her normal working week would have if the Respondent then recalculated its 12 week average. I suspect that it may resolve matters from the Claimant's perspective. The Claimant is incorrect in suggesting that ignoring holiday pay in the 12 week average reduces her earnings for the period and therefore her holiday pay. However, her holiday days are not included in calculating the average therefore the Respondent is not gaining though adding the days of holiday into the equation but ignoring the pay.
47. I do however accept the Claimant's argument that holiday pay should be included from a contractual perspective because the contract refers to 'pay' and does not exclude holiday pay. I have reservations as to whether (had the Respondent not deducted fractions of an hour from weekly pay) this particular aspect of her claim will have caused any loss, but the purpose of this judgment is to look at liability only. To the extent that there is calculated to be any loss caused by ignoring holiday pay and leave in the 12 week average, then her argument is well founded. Pay under the contractual 12 week average should not exclude holiday pay or holiday leave days because there is no express provision for it to do so.
48. I consider the Respondent's references to European Law and UK legislative provisions permitting their practices as somewhat of a red-herring in the sense that even were they well founded and permitted a

lesser rate of pay than is provided for by the contract, the contractual higher rate would nonetheless be properly payable.

49. I give 'pay' its ordinary meaning for the purposes of sick pay as well. The Respondent does not challenge that it should utilise the same calculation as for holiday pay. Sick pay when it is paid is not being paid at the rate the Respondent is obliged to pay because they base it on average pay and there is an inherent unauthorised deduction in weekly pay. There is no evidence that the Respondent has ever exercised the right to amend or withdraw its sick pay provisions, which may in any event be subject to legal limitations given that pay is a fundamental term of the contract of employment.

50. In my conclusion, the Claimant's claim that she is suffering unauthorised deductions from wages is well founded.

Employment Judge Knowles

Date: 27 February 2019

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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