Case No: 2202457/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr C. Carranza**
Respondent: **ISS Mediclean Ltd**

Heard at: **London Central** **On:** **5,6,7 March 2019**
Before: **Employment Judge Goodman**

Representation
Claimant: Mr R. O'Keefe, trade union representative
Respondent: Mr. G. Baker, counsel

RESERVED JUDGMENT

1. The unfair dismissal claim fails.
2. The claim of detriment for asserting an infringement of holiday pay rights fails.
3. The claim in respect of holiday not taken succeeds. It is declared that the claimant was and is entitled to take a further 49 days of accrued holiday, to be paid when he takes it at the rate that would have been paid had he been able to take it in the relevant holiday year, the calculations to be made at a remedy hearing if not agreed. There is no award of compensation for untaken leave under regulation 30(3)(b) of the Working Time Regulations 1998.
4. The claim for underpayment of holiday in 2018 succeeds and the respondent is ordered to pay the claimant £237.36. Claims for earlier underpayment are out of time.
5. The claim for unlawful deductions from wages in 2018 succeeds. The amount is to be determined at a remedy hearing if not agreed. Other claims for unlawful deductions from wages do not succeed.

REASONS

1. The claimant has been employed by the respondent as a cleaner at the Chelsea and Westminster Hospital from July 2011. The claims before the tribunal arise from disputes about his pay, hours and holiday.

2. The claims have evolved. By the start of the hearing they were:

   (1) Claims of unlawful deductions from wages:
   (a) short payment by one hour per shift from December 2016 to August 2018
   and
   (b) underpayment from December 2017 when the claimant's working hours reduced.
   (2) A claim for underpaid holiday from July 2011.
   (3) A claim for untaken holiday from July 2011.
   (4) Claims of detriment (by reducing his working hours) in 2015, 2016 and 2017, for complaining of his contracted hours or holiday payments or both.
   (5) Unfair dismissal when his hours were cut in December 2017. It was disputed that this was a dismissal.

3. The issues in these claims include consideration of whether some claims are out of time, or part of a series.

4. The essential dispute underlying the unfair dismissal and underpayment claims is what was the term of the contract of employment as to hours of work.

5. The evolution of the claims is relevant. A claim for underpaid holiday was presented on 24 December 2017 (2208202/17- the first claim), the claimant having been paid for holiday at 15 hours per week only, when he usually worked many more hours, and was normally remunerated proportionate to hours worked. When it came to a hearing before Employment Judge Baty on 23 April 2018, the claim was withdrawn, as the respondent had in fact paid the claimant for the underpayment from May to December 2017 in his December 2017 pay packet. In the meantime, from January 2018 his hours of work had substantially reduced, and there was a new claim, (presented a few days before the hearing), of detriment for asserting his right to proper holiday pay, unfair dismissal, and untaken (as against underpaid) holiday. There was also a claim for underpaid holiday pay before May 2017. The first claim was not however dismissed on withdrawal, so as to avoid any difficulty with res judicata in the new claim.

6. The second claim (this one) was presented on 19 April 2018, an early conciliation certificate having been issued 20 March. He then applied to amend it on 29 April. The respondent filed a response on 31 July. There was preliminary hearing before Employment Judge Segal QC on 3 September 2018, when the claims were listed for hearing in March 2019 and most of the proposed amendments were permitted. The claimant was ordered to give further information, filed on 4 October 2018. The respondent then filed an amended response on 29 October 2018. The claim disallowed by Judge Segal was for historic underpaid contractual (as against statutory) holiday pay.

7. There was a case management discussion on 14 January 2019 which listed an open preliminary hearing on 22 January to consider whether claims should be struck out because out of time or having no reasonable prospect of success. At that hearing Employment Judge Neal held that the issues (including the time issues) required the hearing of evidence, so they remain for decision at this hearing.

Conduct of Hearing

8. By the Employment Tribunals Act 1996 as amended, the claim of detriment requires hearing by a three person panel; the other claims by judge alone. The parties consented in writing to the detriment claim being heard by judge alone, as permitted in section 4(3)(e).

Evidence

9. The tribunal heard evidence from **Carlos Carranza**, the claimant, who was assisted by a Spanish interpreter, though he has a grasp of basic English and would answer in English when he could and resort to Spanish when necessary. As it was wholly unclear whether he was familiar with the content of his unsigned witness statement of 62 paragraphs written in English, it was read to him in Spanish by the tribunal-appointed interpreter in open tribunal, before cross examination. This took 50 minutes.

10. For the respondent, evidence was given by **Kogo Bamba**, their general manager at the hospital from November 2016.

11. There was an agreed bundle of documents. The claimant then produced several relevant, and hitherto undisclosed, documents on the second hearing day. It was said they had been misplaced behind some books when the trade union (United Voices of the World) had moved office last year and had only been found during the adjournment on the first day. Two, dated 2013 and 2016, were very relevant to the contracted hours dispute, as they stated the claimant was employed on 37.5 hours. There was also a batch of pay queries for the year 2017, all signed 7 November 2017, and said to have been given to the respondent. The documents were admitted to evidence despite the late and odd circumstances of disclosure, and despite the respondent's protest, but subject to the caveat that their evidential value would be assessed with some care where the respondent disputed authenticity and had not had the opportunity to investigate with the purported writers and recipients.

Factual Findings

12. On 8 July 2011, shortly after his arrival in the UK, the claimant was interviewed by the respondent and offered work at the hospital. His name was entered on the payroll on 14 July 2011, which is treated as his start date, but he did not in fact work any hours until Tuesday 26 July when he worked an evening shift.

13. The respondent wrote to him on 8 July 2011 setting out the terms of engagement. It is headed "casual worker – agreement." It states: "your work will be on a casual as and when required basis". His status is said to be that of a casual worker, not an employee. When on an assignment, he will be remunerated at the prevailing rate for the job, and only paid hours actually worked. He will be paid subject to statutory deductions by bank transfer weekly or fortnightly. Hours of work would be agreed with his manager prior to the commencement of any assignment, and subject to 2 hours notice of termination. The company is not obliged to offer work, and he is under no obligation to accept it if offered. There is provision for holiday pay pro-rated to hours worked in any 12 weeks, using 7 hours to represent a day's holiday. In

other words, it is a classic zero hours contract.

14. The claimant says he has never seen it. The copy produced by the respondent is not signed by him. He did sign an engagement form on 14 July, which records information needed for payroll, and he says he had some training that day in cleaning and health and safety.

15. On his pleaded case, the claimant met with a supervisor called Michael (who translated from English to Spanish) and the manager, Peter da Silva, who said words to the effect of "we can do you a contract of 3 hours 1700 to 2000, but then you will have full time and overtime if you want because in hospital we have plenty of work". That meant a morning shift, which is 7.5 hours a day, and weekend work too. He says that he signed not the casual contract, but a contract which specified he was to work 1700-2000 (the evening shift), so 3 hours a day or 15 hours per week. Neither side has a copy of this contract. He was also told that in three months or so he would get a full-time contract.

16. In this workplace, "full-time" hours means 37.5 hours per week.

17. The Claimant says that after being at work for a week or so, Peter DeSilva told him to attend at 07:00: "from tomorrow, you will work in the mornings".

18. Payroll records show that he worked two evening shifts on 26 and 29 July, then a Saturday and Sunday – 7.5 hours each – and then in August hours varying from 4.5 to 11 hours daily. If he worked a weekend there was a short day in the week to provide compensatory rest. In September and October 2011 he worked full days and more, as well as weekends. At the start of November, hours reduced, but then recovered to full-time or more.

19. The payroll record has a column for contracted hours and another for actual hours. From 26 July 2011 the claimant is shown as having 3 contracted hours every weekday (the evening shift), except for two weeks in September when they are stated as 9.5 per day before reverting to 3 per weekday, and staying at 3 to the present. There are just a couple of entries of 7.5 (one for a Saturday), which could a payroll clerk entering actual hours in this column by mistake. The "contracted hours" column supports the claimant's account that he was given a written contract for 1700-2000 in July 2011. A casual worker would only have actual hours.

20. The claimant says that he was sent to work in different wards and departments as part of the projects team, to provide cover for absence, and at weekend to do deep cleaning. He would attend each morning and be sent off to wherever he was needed that day. He was told on Friday or Sunday what the "allocation" was for the following week. On the evening shift he had regular places of work, first operating theatres and then endoscopy, where he still is.

21. The claimant says he approached Peter da Silva in November 2011 to ask about a full-time contract as he was about to take holiday, and had heard he would only be paid for three hours a day when absent. He was told he would have one "soon". The claimant says he was one of about 15 with short hours contracts but working much longer hours. Others, he says, had full-time contracts and did overtime at weekends, and non-contracted hours were called "overtime".

22. The respondent has disclosed a standard contract dated 23 March 2012, recording 14 July 2011 as the commencement date. It provides for 15 hours per week and 22 days holiday per year. It is unsigned and is not mentioned by the claimant in his witness statement, but it does correspond in hours to the contract he says he received in July 2011 (see 14 above). The conditions of service are set out in an attached document. On hours it states: "your contracted working week is as shown in the statement which appears earlier in this booklet and is the exclusive meal breaks." Further, "you may be required from time to time to undertake work in overtime as business demands require it for which payment will be made at your basic hourly rate". It adds: "where you are required to undertake work out of hours and/or at weekends, then payments for hours worked at such times will be made to you at the rate of your normal base hourly rate, plus one quarter of your base hourly rate". Work 'out of hours' means 2200 - 0600 Monday to Friday. There is double time for work on public holidays.

23. In July 2012, the claimant says, he asked again about his contract. He describes how a whole group of the three hour a day cleaners were given contracts and told this was "a new contract…better for everyone". The claimant says he signed there and then without reading it. On payday, when he got reduced pay, he found out it was for the same number of hours per week, but without additions for unsocial hours payments. A colleague said as he had signed it he could not dispute it.

24. The respondent disputes that the claimant was ever offered full-time hours of work.

25. Regrettably there are no payment records in the bundle, so it is not possible to check whether or when enhanced rates were paid, and whether they were withdrawn as the claimant suggests happened in July 2012. There are pay slips only for 2011 and the very end of 2017, and 2018, and these sets show enhanced rates paid for weekends and (public) holidays in all those years. As the claimant did not work a night shift in those periods, this corresponds to the terms of the March 2011 contract in the bundle.

26. In 2012, 2013 and 2014 he continued working long hours on weekdays and weekends, with a day off in the week. He tended to take holiday in blocks. For holiday he was paid contracted hours only – 3 hours per day.

27. He took very little holiday in these years – none in 2011, only 15 days of his 28 day allowance in 2012, only 18 days in 2013.

28. The claimant says in July 2013 he asked again about a full-time contract and his managers, Peter da Silva and Pablo Diego, said they would speak to head office.

29. In December 2013 someone called E. Ansemat signed a form supporting an application for the claimant's wife (who is Bolivian) to join him in the UK as the family member of an EEA national - the claimant holds a Spanish passport, though originally from Peru. On such an application the Home Office want to be satisfied the EEA national is exercising treaty rights (working) in the UK. In answer to: "number of hours worked each week" is entered 37.5. Documents can be submitted with this form as evidence of employment. The box for

payslips, rather than the employment contract, has been ticked. At this stage the written contract issued to the claim ant was for 15 hours. The respondent does not know who the signatory is, and at more than 5 years' distance and no notice has understandable difficulty checking. I do not take this as evidence that the respondent had agreed the claimant had a contract to work 37.5 hours. It is not untruthful, in that he was then working at least 37.5 hours per week, usually much more, but it does not represent that he had a contractual right to 37.5 hours per week.

30. In May 2014, when he had taken leave, he noted he was still paid leave at 3 hours per day only, and challenged it. He was told by Pablo Diego: "Latins are hard-working but they complain a lot". If he was not happy he could just work his contracted hours. From then on when he turned up in the morning he was told he was not on the allocation. The records show that from then until 11 August 2014 he had no weekday morning shifts though he did work weekends. The claimant says shifts only resumed when he spoke to a catering manager and said his wife was expecting a baby next month (and so, presumably, he needed the money).

31. When the baby was born he did not attend work from 3-17 September, though he worked one intervening weekend. He was paid for these leave days only for his three contracted hours, and went to see another manager, Elizabeth Douglas about it. He says he was told if he complained he could just work contracted hours, and for the next week he was just working the evening shift. Then, after two weeks of long hours, he was not on morning shifts until 24 November 2014, and was told Pablo had taken him off the allocation. He made many phone calls to get an allocation. He says in January 2015 he saw Elizabeth Douglas again. He asked for "stability of work", and complained that whenever he complained he was punished by being taken off the allocation. He says that from then on he was "sacked" from the morning shift, and did not work it again until August 2015, when he was told that due to an impending inspection they needed morning cleaners. He was moved to catering and cleaned public areas.

32. At the end of 2015 his mother was unwell, and he took his family to Peru for 6 weeks on return, at the start of 2016, he complained again only being paid for 3 day during the holiday absence, and was again removed from some morning shifts. Another child was born on 21st of February 2016 and he took leave from them to 4 March 2016. Again he complained that he was only paid 3 hours per day for this period, and he said that over the next 2 months he was taken off the morning allocation from time to time, though "through my persistence", he says, he was able to get back onto it by attending each morning. His previous pattern (weekday mornings, evenings and weekends, with a morning shift off to compensate for the weekend working) then resumed.

33. There is another disputed document in the form of a letter dated 20 May 2016 on letter head mentioning both the hospital trust and USS Facility Services, addressed "to whom it may concern", stating that the claimant has worked as a healthcare catering assistant from July 2011 and "the employee is employed full-time on a 37.5 hours per week contract". It is signed by Nicole Nunes, Interim Hostess Manager at the hospital. It was used to obtain a bank loan. The respondent says that on their HR records Ms. Nunes was not then a manager,(though is on the records as one from June 2016) and would not

have had authority to issue a contract or alter the claimant's terms. They also say that this was not ISS letterhead. In the absence of any other evidence about what letter head was used by ISS in 2016 I make no finding as to whether it has been in some way faked to resemble an authentic letter. I accept that this letter may have been prepared by a junior ISS manager with goodwill towards someone who was working long and consistent hours, but someone who did not have authority to alter the claimant's contract terms or bind the respondent. As evidence of whether he in fact had a full-time contract in 2016 – or earlier- it is neutral.

34. At the end of 2016 he took paid and unpaid leave from 26 September to 4 November to visit his mother in Peru. He then continued to work to the same pattern. He says it was because he knew it was better to stay quiet about only being paid for holiday at 3 hours daily.

35. Mr. Bamba's evidence is that allocations in 2016-17 were done by Mr. Ewerton Soares, and he instructed him not to allocate morning shifts to the claimant when he failed to turn up for work. The examples he gives, cross checked against the payroll record, are for December 2016, when he is marked absent without leave one day, followed by one missing morning shift, August 2017 (same), September 2017(I day absent without leave, 2 missing morning shifts) and December 2017 (18 December absent without leave, then 2 missing morning shifts).

36. In May 2017 he met the union (UVW) representative in connection with a claim that his brother Alex, who worked in the same hospital, was making against the respondent. The nature of the claim is not known, but in the bundle is a contract for Alex from this date for 37.5 hours. The claimant says he discussed a complaint about his holiday pay.

37. On 26 November 2017 his union representative wrote to the respondent on his behalf complaining that he worked far longer hours than 15 hours per week, but was only paid for 15 hours when on holiday. It was said that the respondent employed cleaners and caterers who worked far in excess of full-time as a matter of course under written contracts that purported to be for a few hours a day. The claimant's work history showed that "his contractual provision for 15 hours a week is a sham". The respondent was asked to make a proposal for (payment of) unpaid holiday pay by 8 December 2017, and to bring his written terms into line with the reality of the working relationship, failing which he would institute proceedings in employment tribunal.

38. The Respondent replied saying they would work out the claimant's holiday pay on the basis of hours actually worked for the past 2 years, with reference only to the 20 days a year to which European Court decisions applied. He would then be paid the difference. Later emails show a payment of £1310 gross, £894.29 net, was paid to the claimant for underpaid holiday on 22 December 2017. There is no record that the trade union was told this was being done. The payment appears in the claimant payslip for 29 December 2017 as "basic adjust", separate from holiday pay for the period; it is unlikely that anyone would understand from the payslip that this was payment of a back claim for underpaid holiday. The claimant's evidence was that he thought this payment ("basic adjust") was to do with pay queries he had raised at the beginning of November 2017, possibly earlier, though this evidence is obscure, because there is nothing in his otherwise detailed

witness statements about raising pay queries (written forms handed to the manager), whether in November 2017 or earlier; it is the copies of these forms that were disclosed on day 2 of the hearing. The tribunal concludes that this adequately explains why the claimant and his union representative did not understand until the ET3 response to the claim for underpayment of holiday pay that the respondent had conceded the claim and paid it.

39. The Claimant says he was expecting to work on Boxing Day, but the taxi did not turn up to collect him, and his name was not on the taxi list. His payroll records show that Christmas Day and Boxing Day were marked as "bank holiday lieu days", and he then worked 11 hour shifts for the next three days. This does not appear to be any retribution for claiming an additional holiday payment through his trade union, rather, a misunderstanding about when he was due to work.

40. The claimant says that on 19 December 2017 he heard that no one was going to be allocated any morning shifts. In fact he did work morning shifts on 21 and 22 December, and on 6, 7, and 13 January 2018 (all weekend days). Since that date he has only worked his contracted 3 hours each evening, sometimes 4 hours.

41. The claimant's case is that this is a dismissal in fact if not in name, alternatively that by this hours cut he is subjected to detriment for claiming additional holiday pay. The respondent's case is that on renewal of the cleaning and catering contract with Chelsea and Westminster NHS Trust, they did not tender for deep cleaning work. As a result they have substantially fewer working hours available. Mr Bamba's evidence about this was not challenged by the claimant's representative. Nor was he challenged about the system for allocating extra hours among casual, part-time and full-time staff. In the bundle is a dispute notice dated 15 January 2018 prepared by Chelsea and Westminster NHS Trust about whether deep cleaning was in fact included in the specification, ISS having stated that they are not priced for deep cleaning in the bid, the Trust maintaining it was included. Some such deep cleaning work was eventually carried out in October 2018 as dispute resolution. This and the absence of challenge indicates that Mr Bamba's evidence about the fall in hours is not fanciful, and corresponds to the claimant's evidence that "no one" now got morning shift work. Thus there is no evidence that the claimant was getting special treatment from January 2018.

42. The claimant's trade union representative raised a grievance about the cut in hours on 9 February, and on 21 February asked for a grievance meeting. This was arranged for 12 March 2018, but in the event Mr O'Keefe said there was no point attending, and it did not take place. Instead the second (this) claim was presented to the tribunal.

Relevant Law and Submissions
Discussion and Conclusions

43. The clams will be discussed each in turn, starting with the underlying issue as to the term of the contract as to hours of work.

What was the term of the Contract as to Hours?

44. A contract of employment is a bargain agreed by the parties, the terms of which may be oral or written, sometimes a bit of both. There may also be implied terms - whether at common law, where it is matter of consideration of the evidence party's intentions, particularly where a party seeks to say that a written term is not what was agreed, or had been varied - or by statute, for example, minimum notice, or gender equal pay.

45. The requirement of the Employment Rights Act 1996 that employers provide a written statement of employment particulars means that in most employment cases the essential terms are written down, although to understand how they operate in practice it may be necessary to refer to oral evidence, or evidence of how the contract was conducted, or other documents such as an offer letter, or a handbook, or standard terms.

46. The Claimant argues that the written contract was a sham, relying on **Autoclenz Ltd v Belcher and others (2011) UKSC 41.** In that case the dispute was whether claimants were self-employed, workers, or employees. The written contract provided that neither side was obliged provide their services, but it was held on the facts that self- employment was not the reality of the relationship, and the drafting of the clause about mutual obligation was mere window-dressing. Here, the Claimant says that in reality the contract was to work the morning, evening and weekend shifts, as agreed orally with Peter Da Silva in July (or possibly August) 2011, and that the written contract limiting mutual obligation to the three-hour evening shift 5 shifts a week, was a sham.

47. The Respondent replies that claimant's conduct was inconsistent with such an oral agreement. In the disputes that occurred over the years about what he should be paid when absent on holiday or paternity leave, he never asserted that he had an oral agreement with Peter da Silva to work more than 15 hours, and in fact protested to Elizabeth Douglas that he wanted stability of employment, not that that was what he already had, as a matter of (oral) contract. Further, he did not rely on any oral agreement with Mr Da Silva when his trade union representative wrote about holiday pay in November 2017, or in the claim form presented to the tribunal in December 2017, which just complains about holiday pay, nor in the initial version of the claim form in this claim, in April 2018.

48. Unlike **Autoclenz**, this is not a dispute about whether the claimant was in reality self-employed or employed. The casual contract in the bundle can be set aside, because whether or not the claimant received it, the respondent seems always to have treated him as an employee contracted to work 3 hours per day, or 15 hours per week, as shown in the time records, and as shown in the practice of paying him holiday at 3 hours per day. Nor is there any real dispute that he signed a contract for 15 hours, although when he did this - whether in July 2011, March 2012, or July 2012 (the July dates being the claimant's evidence, and March 2012, the date of the document) is not clear. Whenever it was, the dispute is about whether the real agreed term of the contract was for 15 hours per week or for a longer period. It is important here that the claimant pleaded case is that there was an express oral term "that entitled him to be offered a minimum 11.5 hours (a day) 5 days a week", alternatively, that there was an oral variation of the existing 15 hours a week contract. It is not pleaded as a contract for 37.5 hours.

49. How should the conversation with Peter Da Silva be construed? Unsurprisingly, for a conversation said to have taken place more than 7 years ago, the witness is no longer available. On the claimant's side, at that stage his English competence will have been very limited indeed, and required an interpreter, and it is possible that he missed anything said as to what was voluntary and what was compulsory. Saying that it was available may not have been saying that it was required. For example, if it was said "from tomorrow you can work mornings" may imply opportunity, not obligation, but "from tomorrow you will work mornings" may imply obligation.

50. The *practice* of what happened is consistent with the claimant working voluntary overtime. The contract provides that over time was paid, and sets out various enhanced rates for payment, depending on when it was worked. There is no clear or written obligation on the employer's part to offer overtime. It is important whether the parties understood that the claimant was obliged to work overtime. The fact that he did do those hours routinely in practice does not mean that the employer was obliged to offer it, or that he was obliged to do it. In many workplaces, such hybrid contracts are traditional: there is a contract for core hours, whether part-time or full-time, where the employee must make himself available for work, and the employer must pay for those hours when he is available, then an agreement that if overtime hours are available the employee may choose to work them(voluntary overtime) and sometimes a requirement that if overtime is required the employee must work it (compulsory overtime). There is usually some agreement as to the rates at which those hours will be paid, sometimes provision for what happens once an overtime offer is accepted. The (voluntary) overtime arrangement is akin to a zero hours contract, in that neither side is under obligation until the work starts, but when it does, the agreed terms apply to that work. A part-time contract with added over time is not unusual; many such contracts provide that premium rates are not earned until the part-time worker has worked as many hours as a full-time worker.

51. Reinforcing the view that this (core hours plus voluntary overtime) was the reality is the fluctuation in the number of hours worked, particularly in 2011, the fact of the claimant's protests over the years, and the evidence that he would turn up in the morning and be told where to go, or sometimes be turned away. There was insufficient evidence about whether on the days he did not work the morning shift he had in fact attended and been turned away, or had chosen not to come. Further, he did not say that he needed a written contract to reflect the reality of what had in fact been agreed with Peter Da Silva. He protested that he needed a further contract to give him stability in his expected hours. The fact that he routinely worked long hours does not mean that both sides were obliged to offer and work them, and many bank workers, who are not obliged to work if they do not want to, routinely work long hours week after week and month after month. That does not of itself convert them into employees who must be offered work. The evidence other than his working pattern is not consistent with mutual obligation.

52. I discount the 2013 and 2014 documents. There is insufficient evidence that they were prepared by people with authority to vary a written contract, or that they are evidence of anything other than the claimant was in practice working long hours regularly and needed some evidence of steady work to show he was financially sound.

53. In my finding, the contracted hours were 15 hours per week, and the rest was overtime, whether or not paid at a premium rate. That was the offer which he accepted. The claimant may consider this exploitative and unfair. Such flexibility of workforce hours is advantageous to an employer, as he can use the overtime worked to cover for absence for sickness and holiday, or to carry out project work for limited periods, without committing to these hours for any particular individual long-term, while the employee bears all the risk if there no longer the need for additional hours, as he faces an unwelcome cut in income, but it is not of itself or for that reason unlawful.

54. I add that the pleaded claim as amended is that the respondent was to offer 5 x 11.5 hours days, not that the claimant was obliged to work them. This does not conform to business reality, but in any event, if there was such a one-sided commitment on the part of the employer, it is something which given the size of the employer, is likely to have been reduced to writing.

Unfair Dismissal

55. Had the claimant had a contract to work more than 15 hours, the sudden and permanent reduction of hours (and therefore pay) to that level in January 2018 may well have been a termination of the old contract , followed by a new contract on the shorter hours, and so a dismissal, which in the circumstances of this case will have been procedurally unfair, but as I have found that there was no term as to hours as he contends, he was not dismissed, and is still employed on the contracted hours, though no longer working the substantial overtime as hitherto. The claim fails because there is no dismissal.

Detriment in relation to the Working Time Regulations

56. Section 45A of the Employment Rights Act 1996 provides “a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker ….(f) alleged that the employer had infringed such right”, being “a right conferred on him” by the Working Time Regulations 1998 (WTR).

57. This claimant was complaining about his pay when taking annual leave. Under the WTR he had a right to be paid during annual leave. What was the correct amount of a “week’s pay” is to be determined by reference to sections 221- 224 of the Employment Rights Act, and **Bamsey and others v Albon Engineering (2004) EWCA Civ 359** concerned overtime payments. It is now clear that the WTR must be interpreted to mean “normal remuneration”, rather than contracted hours alone.

58. Section 45A (2) states:

> “it is immaterial for the purposes of subsection (1)… (f) –
> (a) whether or not the worker has the right, or
> (b) whether or not the right has been infringed,
> but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith”.

59. In respect of the complaints of detriment at various times before December 2017, the respondent argues that when the claimant protested about only getting 3 hours pay per day while on holiday, this was not a complaint that the

respondent had breached the Working Time Regulations. Rather it was a request for more hours. Nor was there any suggestion from the claimant that the respondent was breaking the law. It did not amount to a complaint that his right been infringed. As for detriment, the respondent says that there have been periods when the claimant did not get the hours he was used to working, but there was no causal link, and that he rationalised backwards that this was detriment because he had protested.

60. In my finding, it cannot have been the case that Parliament, when providing protection for workers who wanted to assert their rights under the WTR, even if mistaken as to their rights, should require them to state the section, or even that it was unlawful. When so many workers are without trade unions or access to informed advice on their rights, it cannot have been intended that they should specify that the law has been breached, let alone chapter and verse, if that is in fact what they are saying. I have not been taken to any case law on this section, but there is much on the similar protection for public interest disclosures to the effect that the worker need not spell out precisely what made the wrongdoing wrong, subject to saying enough to establish that his belief in it was reasonable. I recognise that protection of disclosures requires a "disclosure of information tending to show" wrongdoing in the various section 43B categories, rather than that rights have been infringed. Was the claimant saying his rights had been infringed when, without actually referring to statute, regulations or section number, he said that his holiday was underpaid and he could not live on that amount? The matter the claimant raised did concern a breach of the right to be paid for statutory leave. He said he could not live on 15 hours a week. If he said he wanted more hours, it was a follow up to the respondent asserting that he only he had the right to be paid for contracted hours when on leave; he was countering that in that case he should be given a written contract that reflected the hours he usually worked. The timing of the complaint indicates that the claimant was in fact complaining that his holiday pay should reflect his actual earnings, whether or not he was aware of the detail of the Working Time Regulations or the definitions of week's pay in the 1996 Act, let alone the ECJ jurisprudence. If he did not know his rights, his employer did or should have done, and even if the employer thought he was wrong about calculation of the amount of holiday pay, they knew that was what he was complaining about. They could have told him he was not entitled to more than15 hours per week and left it that.

61. Was he subjected to detriment for doing so? On his account, he was. The patterns following his protests in 2014, 2015 and 2016, (though some of these appear in fact to have been protests about the rate of pay when on parental leave, and detriment under section 47C is not claimed and it is not clear whether some of his absence for the children's births was claimed as holiday rather than parental leave) and the account of the conversations is telling. He was taken off the "allocation" of morning shifts by way of overtime because he made a nuisance of himself about the pay rate when absent. The respondent has not explained why the work fell off at those times, for months and weeks, when on the claimant's account others did work then. This can be contrasted with Mr Bamba's evidence of what occurred in 2017, which indicates that morning shifts were not allocated for a day or so if the claimant had been absent without leave, and so unreliable, which tallies with the hours records. This explanation accounts for the shifts he lost in 2017, but could not account for the far more substantial periods of exclusion from morning shifts after taking holiday or parental leave. If the claimant's account is correct (and it has

the ring of truth, absent explanation) it is a shocking but plausible example of what happens to non-unionised low paid workers who dispute their entitlements, and why statutory protection from detriment is necessary.

62. This brings us to the time issues. The respondent has not adduced evidence from any of those named by the claimant in the disputes of 2014-16. That could be because, like Peter da Silva, they are no longer employed.

63. Section 48 (3) of the Employment Rights Act provides that complaints of detriment should not be considered "unless presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates, or, where act is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint resented the end of that period of 3 months".

64. What is "reasonably practicable" for enforcement of rights conferred by the Employment Rights Act is a tough test. Unlike the "just and equitable" test under the Equality Act, it has to be shown what in practice stopped the worker from presenting a claim in time. Case law recognises that this time limit may in practice bar good claims, but time limits are there for a purpose, and are recognised to be in the interests of justice. Given that this detriment claim concerns a Europe-derived right, it should be noted that European law ackowledges the need for national time limits, some of which are less than three months. It is not argued that that there was anything in practice barring the claimant from bringing a claim, other than not knowing he could do so, or from seeking advice. In this connection it was established on the evidence that the trade union UNISON, which organised many hospital workers, had an office on site, and the claimant knew about it. The claimant said that Latin workers (as he described himself) did not find the union helpful.

65. It is argued on the claimant's behalf that the detriments to which he was subjected were a series of similar acts or failures, and that time should run from the last of them, which is the cut in all morning hours from January 2018.

66. It falls then first of all to examine whether it is shown that the claimant has been subjected to detriment on grounds of the claim made by Mr O'Keefe in the underpayment of holiday pay letter of November 2017. It is the case that the claimant lost morning shifts from January, but all the evidence tends to support the respondent's explanation that this was nothing to do with the claimant's dispute, and everything to do with the revised contract with the Trust not including deep cleaning. The dispute is documented, the witness was not challenged, and the claimant himself says the cut applies to many more than himself. As for other shifts in December, the evidence tends to show that the claimant was not rostered for Boxing Day, he did get other morning and weekend shifts after the November complaint, and he may have not had one or two after his return from holiday, as seems to have occurred regularly, and is likely to have more to do with whether he was known to be available for those shifts rather than any dispute about pay. The evidence does not show he suffered detriment (by loss of shifts) on grounds of raising a dispute in November 2017 about the rate of pay for holiday.

67. That being the case, if there was a series of similar detriments, it ended on 8 April 2016. The claim was presented nearly two years out of time. It is not

necessary to consider whether there was a series, and I was not taken to any case law on what is a series in this connection, save **Bear Scotland v Fulton (2015) ICR 221** , which is against the claimant. On the facts of this case, any series of detrimental actions must be related to the protest he made. I would not hold that because from time to time he protested about the calculation of pay when absent, that makes them a series. The series was the pattern of deprivation of opportunity to work morning shifts after a protest, which deprivation had a clear end point (when he was restored to the allocation of morning shifts), at which point he had three months to take a claim to the employment tribunal.

68. The detriment claims fail because out of time. The tribunal does not have jurisdiction.

Untaken holiday

69. The ECJ considered the position with regard to holiday not taken in **The Sash Window Co Ltd v King (2018) IRLR 142.** In that case a tribunal found that a man who had been working as self-employed was found to be a worker. For seven years he had not been paid for holiday, and he had not taken all his holiday in each year because he could not afford it. A claim for unpaid holiday pay for when he had taken holiday was settled – this preceded the decision in Bear Scotland, and the 2014 Limitation regulations restricting back pay in unlawful deductions claims to two years. The question of what to do about untaken holiday, given the restriction in the regulations from rolling untaken holiday over year on year, was referred to the ECJ, which found that where the employer did not provide an "adequate facility" for holiday, it must pay in lieu of all that untaken holiday when the contract ended. The case did not discuss time limits. It was held that a worker need not take his holiday to claim for it later (as at termination).

70. In the cases about paying holiday at normal remuneration rates (the underpayment cases), it was held in **Williams v British Airways plc (2012)ICR 847**, **Lock v British Gas Trading (2014) ICR 813,** and **(2017) ICR 1,** and **Dudley MBC v Willetts (2018) IRLR 1152** that this was so as not to deter workers from taking holiday**.** Payment in lieu is forbidden so as to ensure that employees actually take holiday. Payment on termination has been explained as enabling the worker to take a paid break before starting a new job, although in the ECJ November 2018 in **Stadt Wuppertal v Bauer; Volker Willmeroth v Brossman,C-569/16 and C-570/16,** decisions on payment of untaken leave to the workers' widows after death in service, upheld claims for payment even where the workers had gone to enjoy eternal rest. In this case, the claimant does, at any rate in earlier years he had children or before his mother was ill, seem to have been deterred from taking holiday because when he did he was only paid for 15 hours, a sharp cut from his normal earnings. It seems a case that requires a declaration at least that he is entitled to take leave accrued and untaken in earlier years because the respondent would not pay "normal remuneration" and so was not, in the words in **King**, providing an "adequate facility".

71. The claimant urges an award of compensation for failure to provide an adequate facility. Regulation 30(3) provides that where a compliant of (inter alia) the right to paid holiday is well-founded, it shall make a declaration to

that effect, and make an award of compensation. The claimant relies on **Fuss v Stadt Halle (2011) 1 CMLR 37**, a case concerning remedy for a breach of the 48 hour limit on weekly hours. It was held that there must be an effective remedy for an infringement, and that exceeding the 48 hour limit "in itself cased workers to suffer detriment since their safety and health were thus adversely affected". There is no guidance as to the nature or level of award. I drew the attention of the claimant's representative to the decision of the EAT in **Santos- Gomez v Higher Level Care (2018) IRLR 440**, to the effect that a claim for holiday pay is analogous to a claim in contract, for which damages for injury to feelings cannot be awarded. No other case was cited, but following the hearing I have noted **Grange v Abellio, UKEAT/0304/17**, an appeal against an award of compensation for failing to allow rest breaks, which upheld the award on the basis that there was evidence of personal injury, a permissible ground for award, rather than injury to feelings, which is not. There was no evidence from this claimant, however informal, in his otherwise detailed witness statement, that could amount to personal injury for not taking his holiday in earlier years, and although the European court suggests that some injury must have occurred, I do not feel able to assess an award without some indication of how it affected him, as would be expected in order to asses injury to feelings. The ECJ decision in **Fuss** indicates that there should be some award to provide effective remedy, but in the light of UK law on personal injury I must have some evidence, if only some mention from the claimant himself, about the effect of untaken holiday on his health, and I have none. I conclude that I have nothing from which to assess an award. If I were assessing an award for personal injury I should have regard to the limitation period of three years from the injury, or the date the claimant knew of actionable injury, if later. As the claim was presented in early 2018, in 2015 only three days were untaken, and only a day each in 2016 and 2017, so any injury that is in time may been very small.

72. A declaration that the claimant is now entitled to take in the current leave year his holiday accrued but untaken in previous years is appropriate. An award of pay in lieu of untaken leave is not. Working from the schedule of loss, there are 14 days from 2011, 13 days in 2012, 10 in 2013, 7 in 2014, 3 in 2015, 1 in 2016, and 1 in 2017, 49 days in all.

73. The injustice for the claimant is that he is now able to take the leave when working 15-20 hours per week, when before he would usually have been paid for it (depending on the average for the years in question) at a higher rate. I am restricted in making an award of underpayment for holiday he has taken (see on) but an effective remedy for not taking leave at all because it was so low paid is to order that when it is now taken, he should be paid the rate he would have received had he taken it in the year in question. I am not able to make the calculation, because it will involve calculating his average remuneration for the reference period, and I have not been provided with payment information for most of the years in question. I propose to set a remedy hearing when the calculation can be made. It may be that the parties can agree the amounts to be paid as and when the claimant takes the leave, so removing the need for a further hearing.

74. It was suggested by the respondent that I should apportion the leave as between the 20 European days (regulation 13) paid at the normal remuneration rate, and the 8 UK days (regulation 13 A), but as regulation 15 in general allows a worker to decide when he takes leave, and as regulation

17 allows him to take advantage of the more favourable right as between contractual leave and statutory leave, I will leave it that the claimant can elect that he whatever leave he did take was UK leave first, so what is left is regulation 13 leave, at normal remuneration.

75. The respondent argues that the claimant is statute barred from claiming for untaken leave. It is argued that he could have asked for permission to carry it over, and then brought a claim when refused. In the light of **King**, which was clear that if there was no "adequate facility" it was not for the worker to first taken the leave and then claim for it, and did not discuss time limits at all, I decline to make this finding. The contract specifically provides that leave cannot be carried over year on year. This places the onus on the worker in a way which the ECJ in **King** found unacceptable. It is reinforced by **Shimizu v Max Planck Gesellschaft (CJEU, 6.11.18)**, and **Kreuziger v Land Berlin (CJEU 6.11.18)** cases on untaken leave in the context of German law preventing payment in lieu if untaken on termination, holding that it is important to avoid a situation where the burden of ensuring that the right to paid annual leave is exercised rests fully on the worker". The burden is on the employer to show that he drew the right to take all leave to the workers' attention, "accurately and in good time", "encouraging him" to take it, recognizing that "the worker must be regarded as the weaker party in the relationship", and it is important to avoid a situation where the burden of taking leave fully rests on the worker, and the employer may as a result "take free of the need to fulfill its own obligations by arguing that no application for paid annual leave was submitted by the worker. This burden on the employer has not been discharged, and the claimant is not barred from a remedy because in the face of a contractual "use it or lose it" provision, he did not challenge it and bring a tribunal claim at the end of each leave year.

Underpaid Holiday Pay

76. That raises the next claim and issue, which is underpayment for leave he did take. His claim for underpayment in 2017 has been paid. The claimant argues that in the light of **King,** the 2014 Limitation Regulations (restricting arrears to two years) should be set aside, and **Bear Scotland** (gaps in dates of claim over three months long not forming part of a series) is not good law. At the outset I mentioned to the parties that I had recently heard argument on a test preliminary point on these issues and gave the reference for the decision. In closing, each formally adopted the arguments used by workers and employers respectively in that case, without significantly developing them. That being the case, I hold that the claimant cannot overcome these difficulties in respect of his claims for underpayment of leave he actually took in earlier years, for the same reasons as those set out in **Battan and others v Lloyds Bank and others, 2200055/2018**, which can be found on the public register of employment tribunal decisions, https:// www.gov.uk/employment-tribunal-decisions.

77. That being the case, I do not address the argument that by the rule in **Henderson** the claimant cannot bring this claim because he could have brought it in the first claim which was withdrawn when the respondent paid at the end of December 2017.

78. By amendment of claim at the start of the hearing, the claimant brings a further claim for underpayment of holiday taken from 12 January 2018 to 11

January 2019, when holiday was paid at 15 hours per week when in fact he worked 20 hours per week (a four hour shift rather than a three hour one). In an amended claim, it is treated a s presented at the date of amendment. Having regard to **Bear Scotland**, any series is broken by gaps exceeding three months. This means that only the claim for holiday 23 November 2018 to 28 December 2018 is in time. There is no evidence to counter the claimant's assertion that he worked a regular 4 hour shift or that he was paid for holiday at 3 hours. The amount awarded is £237.36.

79. I comment that it is disturbing that the respondent, a large employer, continues to pay contractual rather than normal remuneration for holiday so long after the well publicised cases on the proper level of remuneration for holiday, and did so even after settling this employee's claim on this very point. It is to be hoped this decision will prompt a check in payroll that calculations are being made correctly, otherwise there may be many tribunal claims against the respondent for relatively small sums made by low paid workers to whom these sums are significant.

Unlawful deductions

80. The first if these claims is for an hour unpaid on a daily shift from December 2016 to August 2017.

81. Unlawful deductions claims are brought under the Employment Rights Act. They must be brought within three months of the deduction, and if there is as series of deductions, from the date of the last in the series. The claim was presented several months out of time therefore; further even if brought in the first (December 2017) claim it would have been out of time. The tribunal only has jurisdiction if the claimant can show it was not reasonably practicable to present the claim in time. This is not shown. The claimant was in contact with the representative in connection with his brother's case from May 2017. He was raising pay queries about this at the beginning of November 2017. He was still in time then to present a claim, and he was aware of the alleged short payment. The claim fails because the tribunal does not have jurisdiction.

82. By amendment there seems to be a claim that from January 2018 the claimant has worked four hours per shift but only been paid for three. Unfortunately, the schedule of loss does not state this loss separately from the claim that he was entitled to be paid a much more substantial number of hours. The respondent does not defend the point on principle, but puts the claimant to proof of the lost amounts. On the face of it this claim is in time, being a series if deductions, but I cannot assess the loss. That is postponed to the remedy hearing, unless the parties can agree and pay the sums due in the meantime.

83. The second of these claims is brought as an alternative to the unfair dismissal claim: if the contract was not terminated by the cut in hours, it has continued, but, it is argued, the employer is in breach by failing to pay for all contracted hours. Given the decision that there was no contractual right to be provided with work over 15 hours per week this claim too fails. There is a further refinement. It is argued that there was an implied term that the claimant would make himself available for work, and that the respondent would then offer a reasonable amount of work, either the amount of hours he was required to be

available, or the average over the 6 weeks worked up to 19 December 2017. To the date of hearing, this is £18,422.67. The claimant relies on **Devonald v Rosser and Sons (1906) KB 728.** In that case the workers were paid on piecework. They were held to have neen entitled to notice of termination and the question arose how to assess damages in the notice period when they did not have any work to do and be paid for. It was held that to give business effect to the contractual term as to notice there must be implied a term that they would receive average remuneration measured over the last six weeks. The problem is now met by the sections in the Employment Rights Act about calculating a week's pay, but the claimant argues that on withdrawal in December 2017 of the additional hours he would have worked had it been available the claimant is entitled to be paid at an average of his previous overtime earnings. I do not accept that argument, because there was no contractual right to work overtime even of the claimant made himself, nor was there (unlike the plaintiff Mr Devonald) any contractual provision to give notice to end the opportunity to work overtime, which might result in a calculation of what that notice might be worth in money terms, had the work been provided.

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Employment Judge Goodman

Date 20 March 2019

JUDGMENT SENT TO THE PARTIES ON

25 March 2019

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FOR THE TRIBUNAL OFFICE