EMPLOYMENT TRIBUNALS

Claimant: Mr D Jones

Respondent: Phoenix Medical Supplies Limited

HELD AT: Liverpool **ON:** 21 February 2019

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Ms J Welbourne,TU representative
Respondent: Ms Guidiry, solicitor

JUDGMENT

JUDGMENT having been sent to the parties on 27 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. In a claim form received on the 15 October 2018 following ACAS early conciliation between the 16 August 2018 to 16 September 2018, the claimant who had been continuously employed as a purchasing manager between 1 August 1975 and 6 July 2018 when he had been dismissed on the grounds of redundancy, claims he suffered an unlawful deduction of wages when he had been prevented from taking 3-weeks holiday entitlement in the period 1 August 1975 to 31 March 1976.

2. In the claim form the claimant pleads at paragraph 2 that he was “not allowed to take my three weeks holiday until I had completed my first 12-months of service” and was “required to accrue the holidays in that first year.” At paragraph 2 the claimant related how the Working Time Regulations came into force in October 1998 and “I was advised that my holidays from my first year of employment **had been**

banked (the Tribunal's emphasis) and would be paid upon leaving the business". A pleading is a key document and the Tribunal notes that the claimant did not state an agreement had been orally reached at his interview prior to or upon him commencing employment on 1 August 1975, which he now relies upon. The claim form reflects the claimant's case that he was "advised" sometime after the Working Time Regulations had come into force that the accrued holidays would be banked, which strongly suggests there had been no agreement prior to this date. This was an important consideration for the Tribunal.

3. The respondent denies the claimant was contractually entitled to payment of holiday accrued in 1975/1976 on the basis that it could not find any supporting documentation, either by way of payments previously made to other employees who may have continuity of employment extending before October 1998 when the "banking of holidays" was allegedly in force.

Evidence

4. The Tribunal heard evidence from the claimant on his own behalf and on behalf of the respondent it heard from Helen Cheers, whom it found to be a credible witness who could not offer any direct evidence as to what had transpired before October 1998 and it was accepted, despite a comprehensive search for documents, there was nothing found to support the claimant's claim. It found the claimant's evidence was inaccurate and confused as to when he was told that 3 weeks holiday accrued in the first year of employment could be carried over until termination of employment. Two dates have been provided; at interview prior to him commencing employment on 1 August 1975 or twenty-three years later in or around October 1998.

5. The Tribunal were taken to two signed and dated witness statements from Andrew Patterson and David Phillips, the contents of which were disputed by the respondent and there may have been issues as to credibility in respect of one of the witnesses who resigned facing disciplinary allegations that went to the heart of their honesty. The Tribunal gave the statements very little weight, if any, on the basis that their evidence could not be tested on cross-examination. It is noted that Andrew Patterson in his written evidence appeared to confirm that he was told accrued holidays from his first year of employment would be banked and paid upon leaving the business in October 1998 when the Working Time Regulations came into force. It is notable that the written statement signed by David Philips was identical in content and phraseology to that of Andrew Patterson and very similar, if not identical, in a number of paragraphs to the claimant's witness statement, suggesting either collusion or the witness statement was drafted by someone else and used by all three witnesses, which in turn gives rise to credibility issues.

Agreed issues

6. It is agreed between the parties that the issue before the Tribunal was whether the claimant's holiday pay were wages properly payable to him at the termination of his employment.

7. The Tribunal was referred to an agreed bundle of documents and having considered the oral and written evidence, written and oral submissions presented by

the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

Facts

8. The claimant commenced his employment with L Rowland & Co Limited on 1 August 1975 having worked for the company over a period of two weeks in the summer holidays until he was offered a full-time employment contract by Robert Jones, the manager at the time. It is notable in the claimant's witness statement he related how he was "not allowed to take any paid holidays during the first holiday year of my employment" which supports the ET1 Grounds of Complaint and is contrary to his oral evidence on cross-examination. There was no suggestion the claimant entered into an agreement with the respondent via a discussion that took place with Robert Jones at the outset of his employment to the effect that his holidays would be banked and paid on termination of his employment. The Tribunal did not find the claimant's version of events credible as they were not supported by his own pleadings and witness statement. At paragraph 6 of his statement the claimant related how in October 1988 the Working Time Regulations came into force, and this was followed by paragraph 7 when the claimant related "I was advised that the accrued holidays from my first year of employment would be banked and paid upon leaving the business." It a matter of logic and a common-sense interpretation that the claimant was thus "advised" some twenty-three years after his employed had started, and it cannot be the case that an oral agreement had been reached following offer, acceptance and consideration as required for it to become a contractual term of the contract and so the Tribunal found.

9. L Rowland & Co Ltd were acquired by the respondent in November 1998 and the claimant's employment transferred under Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Under Reg 4 of TUPE, the transferee is obliged to take over the employment contracts of those employed in the business immediately before the transfer. There was no reference by the claimant at the time to his belief that three weeks holiday entitlement had been banked, and no documents retained by the claimant or respondent relating to the position prior to and following the acquisition. There exist no payslips, and no evidence of any other employees receiving payment of banked holiday on termination of employment, and the evidence of Helen Cheers on this point was accepted as credible.

10. The claimant's career progressed within the respondent and on 12 June 2000 he was offered the position of general manager, which he accepted at an increased salary. In the offer letter the claimant's holiday entitlement was confirmed, and these accrued on an arrears system. The only written contract is existence is that dated 2 October 2000 signed by the claimant on 13 October 2000 and dated 2 October 2000. The contract expressly provided that "It forms a relevant agreement under the Working Time Regulations **and supersedes any previous such statement or contracts**" [the Tribunal's emphasis). It provided for a holiday entitlement in a holiday year that ran from January to December, long-service holidays and "any holidays not taken at the date of termination will be paid for." The claimant did not raise the issue of the holidays that he could not take in 1975/1976 and his belief that an agreement had been reached to the effect that on termination of his employment

he was to be paid three weeks holiday pay that had accrued in the first year of employment back in August 1975. The Tribunal took the view that had such an agreement been reached the claimant would have sought clarification of this before he signed the contract on 13 October 2000, two years after he had allegedly been informed that holidays from his first year of employment had been banked and would be paid on leaving the business. Giving the contract its common-sense meaning it did not provide for payment of any other holiday entitlement other than that had accrued during the last holiday year of the claimant's employment. There was no contractual right for holidays to be carried over from one year to the next and so the Tribunal finds.

11. The claimant took part in a redundancy consultation following a re-organisation that resulted in his dismissal by reason of redundancy on 6 July 2018. During the consultation period he raised the issue of notice, payments in lieu of notice and "**an additional 6-months holiday as his original contract stated these were accrued after the initial 12 months employment during which there was no entitlement**" (the Tribunal's emphasis). The document signed by the claimant also referred to other benefits in kind to which he was entitled. At today's hearing the claimant, despite signing the document at the time, conceded the reference to 6-months accrued holiday was incorrect, and the mistake was that of his manager David Lea. Even taking into account the fact that the claimant may have been stressed at the meeting, the Tribunal found that throughout the process (for the reasons set put below) he was unclear about what entitlement was due and owing, which suggests uncertainty on his part not only with regard to the length of holiday period that had accrued ranging from approximately 7.5 months to 12 months. The Tribunal did not find the claimant had discharged the burden on him of proving a contractual agreement had been reached and the unlawful deduction of wages had taken place as alleged. The view taken by the Tribunal is supported by the pleadings that contrast substantially with the claimant's oral evidence, coupled with the emails he sent to the respondent during the consultation period when he was represented by an USDAW union representative, Jo Welbourne.

12. In an email sent to the respondent's human resources department ("HR") on 3 July 2018 the claimant wrote "**All I know is that employees prior to 1998 and the WTD had to bank holidays** so you had to work a full 12-months before getting any paid leave in your second year which would have been a basic 4-weeks" (the Tribunal's emphasis). He suggested the respondent checked with Sandra Robert's, who remained employed with the respondent, as she had been employed as assistance personnel manager during the relevant period. It is notable the claimant did not attempt to obtain any information from Sandra Robert's himself, even though his employment did not terminate until 6 July 2018, the effective date of termination. The Tribunal took the view that had agreement been reached either prior or upon the claimant taking up his employed as he now maintains, that fact would have been mentioned in the communications but it is clear "all" the claimant knew related to the aftermath of the Working Time Regulations coming into force, no doubt as a result advice he had received from USDAW during the consultation period.

13. In another email sent on the same date the claimant reiterated "the information that I had received from Jo Welbourne…is that I am entitled to banked holiday pay from the first year of service." It is notable that what the claimant does

not say was that an agreement had been reached prior to him taking up his employment to this effect, unlike the oral evidence today given to the Tribunal.

14. On the 29 June 2018 the claimant emailed HR in which he referred to USDAW "before the working time directive for holiday allowance was introduced in 1998 **I would have banked holidays in my first year of service** with the company so I am actually due extra holiday pay after my termination" (the Tribunal's emphasis). It is notable the claimant used the terminology "I would have" as opposed to "I did bank holidays" and again, there was no reference to any agreement reached prior to or upon the claimant taking up his employment.

15. On the balance of probabilities, the Tribunal accepted submissions put forward on behalf of the respondent by Mr Guidiry that this email reflected the reality of the situation; an agreement had not been reached between the claimant and respondent concerning any carry over of holidays, and USDAW had advised the claimant that prior to the Working Time Regulations coming into force he would have banked the first 12-months holiday as that was common industrial practice at the time. This advice was reflected in the email sent to the claimant from Jo Welbourne to this effect, and whilst the Tribunal is in no doubt that the claimant may not have been paid for any holidays accrued in the first 7.5 months or 12-months depending on what version of the claimant's evidence is correct, given the uncertainties and contradictions in the claimant's oral evidence and pleadings, the Tribunal is satisfied he has not discharged the burden of proving an unlawful deduction of wages took place on the termination of his employment on 6 July 2018 as he is unable to prove, on the balance of probabilities, the wages were properly payable on the basis that he had a legal entitlement to them.

16. In the alternative, the Tribunal also found if the claimant did have a legal entitlement to three weeks accrued unpaid holiday arising either 7.5 months or 12 months after the payment became due and owing either before or after the introduction of the Working Time Regulations, or in the alterative when he entered into the 2 October 2000 contract, the three-month time limit for bring a claim expired many years ago.

The law

17. It is agreed between the parties that the issue before the Tribunal was whether the claimant's holiday pay were wages properly payable to him at the termination of his employment. For wages to be properly payable the claimant must have a legal entitlement to them.

18. The Working Time Regulations 1998 provide that a worker has the right to: be paid during the minimum holiday entitlement conferred by Regs 13 and 13A, and receive a payment in lieu of unused annual leave on the termination of his or her employment. The claimant's claim does not fall within these Regulations.

19. The general prohibition on deductions is set out in S.13(1) ERA, which states that: 'An employer shall not make a deduction from wages of a worker employed by him.' However, it goes on to make it clear that this prohibition does not include

deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b).

20. Section 27(1) ERA defines 'wages' as 'any sums payable to the worker in connection with his employment'. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment' — S.27(1)(a). These may be payable under the contract 'or otherwise'.

21. On behalf of the respondent the Tribunal was referred to the Court of Appeal decision in New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA, in which it was held the term 'or otherwise' does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

22. Claims for failure to pay holiday pay or accrued holiday pay may also be pursued as unauthorised deduction from wages claims under S.23 ERA. The Deduction from Wages (Limitation) Regulations 2014 on claims presented on or after 1 July 2015 i.e. a claimant cannot pursue more than two years' worth of deductions even if the series extends further back then that (see Regulation 2 amending S23 ERA for claims brought on or after 1 July 2015.)

Conclusion; applying the law to the facts

23. The claimant did not have a statutory entitlement to paid annual leave he claims not to have taken between August 1975 and 1976, and the issue is whether a contractual entitlement can be established by the Tribunal who must address the terms of the contract when ascertaining what was properly payable: Delaney v Staples [1991] ICR 331 confirmed by the Court of Appeal in Agrawal v Cardiff University & Others [2018] EWCA 2084. It was agreed that there was no requirement for the Tribunal to consider implying a term into the claimant's contract of employment.

24. An express term of an employment contract may be either oral or written. Establishing an oral term governing payment in lieu of unused leave on termination is a matter of assessing the relevant evidence as to what was said, taking account of any supporting documents. There are none in this case. Given the conflicts in the claimant's stated case, the claimant, with whom the burden of proof lies, is unable to establish on the balance of probabilities, a contractual agreement was entered into allowing him to bank holidays accrued in the first year of employment which would be paid on its termination. There was no satisfactory evidence to back up his assertion that an oral agreement had been made, and given the conflicts in the evidence and pleadings, and the fact that the three witnesses statements filed on behalf of the claimant were similarly drafted using the same phraseology, the Tribunal required supporting contemporaneous evidence of the agreement, and there was none.

25. Where the parties have entered into a contractual agreement regarding payment in lieu of unused leave on termination, there is nothing in the Working Time Directive or the Regulations to limit the amount of pay recoverable. The key issue in this case was whether any contractual agreement had been reached, and the

Tribunal found on the balance of probabilities the claimant and L Rowland & Co had not entered into an oral contract whereby the claimant would be paid for any unused leave — including leave outstanding from his first year of employment— on termination of his employment.

26. With reference to the claimant's unlawful deduction of wages claim the Tribunal has taken into account both parties' written submissions finding the claimant fell at the first hurdle in that he was unable to establish an agreement had been reached to defer the payment of wages and his claim fails on this basis. In conclusion, the claimant has provided inconsistent evidence, the only evidence of any express contractual term is that set out in the offer letter and 2 October 2000 contract which supersedes all other previous contract and agreements, the claimant's claim is not well-founded and is dismissed.

22.3.19
Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

1st April 2019

FOR THE SECRETARY OF THE TRIBUNALS