



THE EMPLOYMENT TRIBUNALS

Claimant: Mr G J Berryman

Respondent: Secretary of State for Justice

Heard at: North Shields **On:** 16 April 2018

Before: Employment Judge Arullendran

Representation:

Claimant: Ms H Winstone of Counsel

Respondent: Mr A Crammond of Counsel

JUDGMENT

The judgment of the Employment Tribunal is as follows:-

1. The claimant's claims for holiday pay and the unauthorised deduction of wages are well-founded.
2. The respondent is ordered to pay to the claimant the sum of £794.95 which is a gross payment. The claimant shall be liable for any deductions of tax and national insurance thereon as requested by the Inland Revenue, should the respondent fail to make such deductions by way of the PAYE scheme.

REASONS

1 The issues to be determined by the Employment Tribunal were as follows:-

- 1.1 Are any of the claimant's claims out of time?
- 1.2 Did the claimant work voluntary overtime, if so when, and how much?
- 1.3 Should the claimant's holiday pay be calculated by reference to the sums received by him as wages during the 12 week period prior to any holiday date?

- 1.4 Has the respondent failed to pay to the claimant his holiday pay under regulation 30(1)(b) of the Working Time Regulations?
 - 1.5 Has the respondent failed to pay wages properly payable to the claimant?
 - 1.6 Has the respondent made a series of deductions contrary to sections 13 and 23 of the Employment Rights Act 1996?
 - 1.7 If any of the claims succeed, how should any claims to which the claimant may be entitled be calculated?
- 2 I heard witness evidence from the claimant, Phillip Mellish – People Hub Manager and Peter Dawson – Reward Manager and I was provided with a joint bundle of documents consisting of 182 pages. This matter was listed to be heard over 2 days, but the evidence and submissions were completed in one day and the parties requested an oral decision to be announced at the end of the first day, on the understanding that the written reasons would be slightly more detailed than the oral reasons. Counsel for the claimant asked for written reasons to be provided prior to the decision being announced.

3 **The facts**

- 3.1 These findings of fact are made on the balance of probabilities on the evidence placed in front of this Tribunal.
- 3.2 The claimant began his employment with the respondent on 24 October 1988 and is employed as a Prison Officer at HMP Durham. The claimant receives 41 days leave per year which consists of 30 days of annual leave and 11 privilege days. The claimant applies for five weeks of his annual leave in advance in August or September each year and the remaining leave can be applied for with two days to 12 weeks' notice. The claimant's normal working pattern consists of an average of 39 hours per week over a number of shifts which vary from week to week. The respondent provides additional working hours to its employees outside normal working conditioned hours as set out in the policy document at pages 56-59 of the bundle and this is called payment plus. Payment plus is paid at a fixed rate per hour for additional hours worked in specified circumstances and these are listed on page 56 as:-
 1. To staff a bedwatch.
 2. To staff a constant observation.
 3. To staff a Category A escort over and above the profiled staffing level.
 4. To staff new accommodation and to cover temporary staff in post vacancies against the target staffing figure, where authorised by the Area Manager.

- 3.2 In the first instance the respondent will seek volunteers to carry out the duties under payment plus but if sufficient volunteers are not available the management have the ability to assign workers to specific duties as required and this can be seen at page 56 of the bundle, at paragraph 7. The employees volunteering for payment plus activities place their names on an availability register and the respondent ensures fair and equitable distribution of payment plus activities by offering them to the employees with the least amount of such activities on their record first. The employees have the right to opt in and opt out of payment plus as they wish but, once a commitment has been made and a specific job accepted, the employee will be expected to fulfil that role. Employees have the right to take TOIL (time off in lieu) in respect of any duties they undertake under payment plus or to receive the payment plus as an addition to their wages at the end of each month in which they have submitted such claims. There is a suggestion by the respondent that an employee might bank all of his or her payment plus and submit it in one go rather than on an ongoing monthly basis, but no evidence has been presented to this Tribunal to show that this is in fact the case. The claimant has never submitted his payment plus claims in such a way and his evidence is that the officers are not allowed to submit their expenses any later than 3 months after they have been incurred and he has submitted his payment plus claims on a monthly basis.
- 3.3 The claimant has undertaken payment plus activities for the respondent in respect of volunteering for items 1. and 2. as listed on page 56, i.e. bed watch and constant observation. The claimant says that he would not normally perform these duties as he is employed at Band 4 and these duties are usually carried out by Band 3 Prison Officers, but there are insufficient Band 3 officers to carry out the amount of work required by the respondent. However, it is common ground, as set out at paragraph 12 on page 57, that only additional hours worked outside the employee's scheduled shift will attract the payment of payment plus hours. The respondent contacts volunteers for payment plus via e-mail and text messages and the claimant says that between 27 November 2017 and 9 April 2018 he has received 69 e-mails and 88 text messages asking for volunteers. The claimant says that, although he has had the option to take TOIL for his hours worked under payment plus, it is common knowledge that it is not possible to take time off from the prison and he has taken the monetary payments as an addition to his normal wages instead.
- 3.4 The claimant has produced copies of his payslips from April 2016 to May 2017 at pages 28-36 of the bundle and details of the holidays taken by the claimant in 2017 can be seen at page 54. The claimant did not receive any payment plus payments in April, May and June 2016 but he did receive the payments in the following months up to and including May 2017. The claimant has produced a schedule of his payment plus activities from 2 July 2016 to 23 September 2017 and this can be seen at page 53 of the bundle.

- 3.5 The claimant took his first 20 days of annual leave between the periods 21 March 2017 to 5 June 2017 which were all paid at the claimant's basic rate of pay which he receives for working 39 hours per week.
- 3.6 The claimant raised a grievance with the respondent on 3 August 2017 on the basis that his holiday pay from March to June 2017 should have been calculated on the average of the actual pay he received in the 12 weeks prior to each holiday and this can be seen at page 40 of the bundle. The respondent replied to the claimant's grievance on 11 August 2017, which can be seen at page 51 of the bundle, rejecting the grievance because "the current pay policy does not allow for these amendments" and the respondent stated that its decision to pay the claimant at the basic rate was in line with the national policy.
- 3.7 The claimant was paid for the 20th day of his annual leave for 2017 on 30 June 2017 and he entered into early conciliation with ACAS about this issue on 12 September 2017. ACAS issued the early conciliation certificate on 19 October 2017 and the claimant submitted his claim to the Employment Tribunal on 17 November 2017.
- 3.8 The claimant's schedule of loss can be seen at pages 179 to 180 of the bundle. The claimant has calculated the underpayment of holiday pay on the basis of his average earnings in the 12 week period prior to each holiday and claims that the respondent failed to pay the correct amount of holiday pay in the following sums:
- 21 March 2017 £69.52
 - 23 March 2017 £69.52
 - 28 March 2017 £96.37
 - 17 April 2017 £63.65
 - 16 May 2017 £48.20
 - 5 June 2017 £447.69
 - Total = £796.95
- 4 The respondent relies on a skeleton written submission which is not produced here in its entirety but it has been considered in full and submits that there is no contractual entitlement for the claimant to be offered or to receive payment plus and therefore any payments he has received in the past would not amount to normal remuneration for the purposes of regulation 16 of the Working Time Regulations 1998 or the definition of a week's pay within sections 221-224 of the Employment Rights Act 1996. The respondent submits that payment plus does not fall within section 234 of the Employment Rights Act 1996. The respondent relies on the definition of normal working hours in the cases of **Bamsey v Alban Engineering and Manufacturing Plc [2004] ICR 1083** and **Bear Scotland Limited v Fulton & Another [2015] ICR 221** and submits that those cases were concerned with non-guaranteed overtime and not voluntary overtime. The respondent also submits that the decision in **Dudley Metropolitan Borough Council v Willett & Another UKEAT/0334/16** does not preclude the Employment Tribunal from relying on section 234 of the Employment Rights Act 1996 as that case involved an Article 7 claim which this case does not. The respondent submits that the payment plus hours worked are not intrinsically

linked to the claimant's employment. Further the respondent submits that there is no pattern of work, the hours and payments are not sufficiently regular or recurring, they are not over a sufficiently long period of time and they are not sufficiently settled to justify inclusion within normal remuneration. The respondent submits that the claimant did not receive payment plus in April, May or June 2016 and therefore there is no pattern or regularity. The respondent submits that the rationale within the case of **Dudley** for employees receiving overtime in their holiday pay calculations was to avoid discouraging employees to take their holidays. However, in the present case the claimant had the option of taking TOIL instead of receiving a payment and this would have adequately compensated him in terms of rest breaks and, as such, there would have been no question arising of the proper calculation of holiday pay. Further, the respondent submits that it would be very difficult for the respondent to monitor, track and formulate a system to calculate holiday pay at the unpredictable rate that payment plus produces. The respondent submits that the claimant's claim prior to 13 June 2017 are time barred as the claims have been presented more than three months after the date of the holiday pay was paid contrary to regulation 13(2) of the Working Time Regulations. Plus, with regard to section 23 of the Employment Rights Act 1996, the respondent submits that there needs to be a sufficient factual and temporal link for it to amount to a series of deductions. With regard to remedy, the respondent submits that the pay is required to be calculated based upon a reasonable reference period and must be net of deductions. The respondent does not agree with the reference period of 12 weeks or the amounts calculated in the claimant's schedule of loss, but does not offer an alternative figure for the reference period or the calculation of the holiday pay.

- 5 The claimant relies on a written skeleton submission the contents of which are not produced here in full but have been considered in their entirety and submits that it is settled law that holiday pay should be calculated upon the average remuneration over the previous 12 weeks. The claimant refers to the respondent's policy and guidance at pages 165-167 of the bundle which state that voluntary overtime should be included in holiday pay calculations. The claimant submits that the overarching principle is that employees should not be discouraged from taking their annual leave and therefore payment plus should be included in the calculation. The claimant submits that regulation 16 of the Working Time Regulations 1998 provides annual leave to be paid at the rate of a week's pay which is ostensibly determined by sections 221-224 of the Employment Rights Act 1996. Section 221(3) and section 222 of the Employment Rights Act 1996 permits the averaging of pay over the previous 12 weeks where the remuneration varies according to the time of work. The claimant relies on the cases of **Bear Scotland Limited** and **Dudley** and submits that voluntary overtime should be included in normal remuneration and, unless staff opt out, they are automatically included for payment plus duties and that all the duties are intrinsically linked to the role of a Prison Officer. With regard to the time issue, the claimant submits that it was not reasonably practicable to submit a claim at the end of each of the claimant's holiday periods and he did so timeously at the end of the statutory 20 days and that time should be extended as the claim was submitted within a reasonable period thereafter. In the alternative the claimant submits that there was a series of deductions from the

claimant's wages which are all of the same "colour" and therefore the claim was submitted in time, relying on the guidance in **Bear Scotland Limited**. The claimant's skeleton argument incorporates the claimant's position should he wish to claim backdated holiday pay prior to March 2017, but Ms Winstone indicated at the beginning of the hearing that the claimant would not be pursuing an amendment to his claim or this argument.

6 **The law**

6.1 I refer to regulation 13 of the Working Time Regulations 1998 which states that "... a worker is entitled to four weeks' annual leave in each leave year" and regulation 16 which states that "(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave. (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modification set out in paragraph (3)."

6.2 I refer to sections 221-224 of the Employment Rights Act 1996, which relates to the definition of normal working hours and how to calculate remuneration where the amount of remuneration varies with the amount of work done. I refer to section 234 of the Employment Rights Act 1996 which states "(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."

6.3 I am grateful to Counsel who have referred to the relevant case law and, in particular, Ms Winstone who has produced copies of the relevant case law, including **Bear Scotland Limited v Fulton & Another [2015] ICR 221** and **Dudley Metropolitan Borough Council v Willett & Another UKEAT/0334/16**.

7 Applying the relevant law to the facts I find that, having sight of the ACAS early conciliation certificate, the claimant did indeed submit his claim in time in respect of his holiday pay which was paid by the respondent on 30 June 2017 and I note that the parties are agreed upon this point. As to whether it had been reasonably practicable for the claimant to submit his claim earlier in respect of the payments from March 2017 onwards, I find that there is no evidence in front of me as to why such claims had not been submitted in time and, therefore, I find that, under the Working Time Regulations 1998, the remainder of the claimant's claims, from March 2017 to May 2017, were not submitted in time and that it had been reasonably practicable for the claimant to have submitted them in time. However, in terms of whether there has been a series of deductions by the respondent, contrary to section 23 of the Employment Rights Act 1996, I find that all of the alleged non-payments of holiday pay for the holidays taken in each month from 21 March 2017 to 16 May 2017 are of the same character and there is a sufficient factual and temporal link for them to amount to a series of

deductions and I am guided by the decision in **Bear Scotland Limited** in this finding. On that basis, as the claimant's last claim is in time, I find that all of the alleged deductions fall to be considered as part of a series of unauthorised deductions under sections 13 and 23 of the Employment Rights Act 1996 and they are not time barred.

- 8 The respondent has not presented any evidence or alleged that the claimant did not work the hours he says he did between December 2016 and March 2017, which is the reference period he has refers to in his schedule of loss, and I find that he did undertake the duties which attracted the payment plus payments, as claimed. Although the respondent has sought to call this "payment plus" as opposed to overtime, it essentially amounts to voluntary overtime as the claimant can opt in and opt out as he wishes and the duties which have been undertaken, such as bed watch and constant observation, are duties that a Prison Officer would normally undertake, albeit under Band 3. It seems to me wholly unfair that, if the claimant was still employed at Band 3 and regularly undertook bed watch and constant observation on a day to day basis, the payment plus work would be regarded as overtime as part of his normal duties, but because he is now employed at Band 4 the respondent argues that the duties would not be "intrinsicly linked" to his contractual requirements. This cannot be right. I note that the EAT found in **Dudley** that the reference to an "intrinsic link" test in the ECJ's judgment in **British Airways Plc v Williams and Others ECJ 2012 ICR 847** had not been intended to place a restriction on the overarching principle that holiday pay must correspond to normal remuneration and that voluntary overtime should not be excluded as it risked fragmenting pay into smaller components which reduced the amount of holiday pay payable and discouraged the taking of holidays. Therefore, although it is not an essential requirement for the payment plus earnings to be intrinsicly linked in order for them to be included in the calculation of holiday pay, I find that the duties in the instant case are in fact intrinsicly linked to the claimant's role as a Prison Officer. I do not accept the respondent's argument that the payment plus is not sufficiently regular or recurring over a sufficiently long period of time or that it is not sufficiently settled so as to justify inclusion within normal remuneration. Although there may be periods where the claimant does not carry out any payment plus duties, such as when he is absent from work, the payslips he has produced at pages 28-39 do show that he is undertaking these duties with sufficient regularity for it to be part of the claimant's normal work for which he is normally remunerated. This is not a case where the extra work is rarely available or is perhaps undertaken once or twice a year. I note that the EAT found in **Dudley** that a payment is 'normally' made if paid over a sufficient time on a regular basis, even if it is only one week per month or one week in five. Applying the guidance in **Dudley**, I find that the payment plus duties, and the payments the claimant has received as a result, are not very rare and therefore should be included in the calculation of the annual leave payments.
- 9 Having made the above findings, I am guided by the principles in **Bear Scotland Limited** and find that the reference period of 12 weeks is the correct period to be applied in this case and, therefore, I find that the claimant's holiday pay should have been calculated by reference to the sums received by him as wages during the 12 week period prior to each holiday. I note the respondent's position that

this is creating a difficult situation regarding the mechanics of such a calculation for the workforce but, unfortunately, that cannot be the basis for this Tribunal coming to a different finding, just for the sake of ease. The respondent is already obliged to take into account other payments, including overtime payments, when calculating the first 4 weeks of statutory holiday pay (as set out in the respondent's policy on holiday pay and voluntary overtime on pages 165 to 167 of the bundle) and it is a matter for the respondent as to how they deal with this issue in practice.

- 10 Thus, I find that the respondent has failed to pay to the claimant his holiday pay under regulation 30(1)(b) of the Working Time Regulations 1998 and, although five of the payments are time barred under the Working Time Regulations, they are not so barred under the Employment Rights Act 1996. I find that the respondent has failed to pay wages to the claimant which were properly payable from 21 March 2017 to 30 June 2017, as set out in the claimant's schedule of loss. As the respondent has not challenged the calculation of the claimant's claim to holiday pay or wages as set out in the schedule of loss, which is based on the 12 week reference period prior to each holiday, I find that the claimant's claim for holiday pay and the unauthorised deduction from wages is well-founded and the respondent is ordered to pay to the claimant the sum of £794.95 which is a gross award and the claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon, should the respondent fail to make such deductions as part of the PAYE scheme.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE

ON

.....29 April 2018.....

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