EMPLOYMENT TRIBUNALS

Claimants Mr P Dixon and others (see Schedule)

Respondent: Econ Engineering Limited

HELD AT: Leeds **ON:** 16 to 18 April 2019
30 April 2019
(reserved decision in chambers)

BEFORE: Employment Judge Cox

REPRESENTATION:
Claimants: Mr McHugh, counsel
Respondent: Ms Jeram, counsel

CORRECTED JUDGMENT

1. For the purposes of Section 23(3)(a) of the Employment Rights Act 1996, any underpayments of the Claimants' holiday pay can potentially form part of the same series of deductions, whether the holiday pay be properly payable under Regulation 13 or Regulation 13A of the Working Time Regulations 1998 or the Claimants' contracts of employment.

2. The Claimants' leave under Regulation 13 is the first four weeks' holiday they take in any holiday year.

3. The shift allowances paid to Mr Dixon, Mr Michalewicz and Mr Taylor are to be taken into account for the purposes of calculating their pay for leave under Regulations 13 and 13A of the Working Time Regulations 1998 and their contractual holiday entitlement to the extent that it exceeds that provided for by the Working Time Regulations 1998.

4. The Claimants' bonus payments are to be taken into account for the purposes of calculating the Claimants' pay for leave under Regulation 13 of the Working Time Regulations 1998.

5. The Claimants' bonus payments are to be taken into account for the purposes of calculating the Claimants' pay for leave under Regulation 13A of the Working Time Regulations 1998.

6. The Claimants' bonus payments are not to be taken into account for the purpose of calculating the Claimants' pay for contractual holiday entitlement to the extent that it exceeds that provided for by the Working Time Regulations 1998.

7. The payments Mr Horn, Mr Johnston, Mr Lockwood and Mr Wilsher received for voluntary overtime are to be taken into account for the purposes of calculating the Claimants' holiday pay under Regulation 13 of the Working Time Regulations 1998.

8. The payments Mr Horn, Mr Johnston, Mr Lockwood and ***Mr Wilsher*** received for voluntary overtime are not to be taken into account for the purposes of calculating their holiday pay under Regulation 13A of the Working Time Regulations 1998.

9. The payments Mr Horn, Mr Johnston, Mr Lockwood and ***Mr Wilsher*** received for voluntary overtime are not to be taken into account for the purposes of calculating their pay for contractual holiday entitlement to the extent that it exceeds that provided for by the Working Time Regulations 1998.

10. The issue of remedy will be decided at a Hearing on 9 July 2019.

REASONS

1. The Claimants presented claims to the Tribunal alleging that the Respondent had calculated their holiday pay incorrectly and had therefore made a series of unauthorised deductions from their wages, contrary to Section 13 of the Employment Rights Act 1996 (the ERA). They argued that their shift allowances, bonus payments and overtime payments should have been taken into account when calculating their holiday pay under Regulation 13 and/or Regulation 13A of the Working Time Regulations 1998 (WTR) and/or under their right to further paid holiday under their contracts of employment.

2. The parties agreed that the calculation of holiday pay due under Regulation 13 WTR needed to be construed where possible in line with the Claimant's rights to holiday pay under the Working Time Directive (WTD), as interpreted by the Court

of Justice of the European Union (CJEU). In relation to the calculation of holiday pay under Regulation 13A WTR, the parties agreed that the Claimants had normal working hours and that their holiday pay should therefore be calculated by reference to the rules on calculating a week's pay in Sections 221 to 223 ERA (Regulation 16(2) WTR). The Claimants' right to further paid holiday under their contracts of employment needed to be determined according to normal contractual principles.

3. In these reasons, the three sources of the Claimants' holiday entitlement are referred to as "Regulation 13 leave", "Regulation 13A leave" and "contractual leave".

4. During the Hearing, the issues between the parties narrowed. The Tribunal therefore gives its reasons only for the decisions it made on the matters that had not been formally conceded or remained actively contested.

Issues relevant to time limits

5. Two preliminary matters needed to be decided that were relevant to the time limits for bringing the claims.

6. A complaint of unauthorised deductions must be made before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or, where there has been a series of deductions, the date of the last deduction in the series (Section 23(2) and (3) ERA). (The Claimants did not argue that it was not reasonably practicable for them to present their claims in time, so the Tribunal did not need to decide whether it should exercise its discretion under Section 23(4) ERA to hear the claims if they had been presented out of time.)

7. In Bear Scotland Limited and others v Fulton and others UKEATS/0047/13, the Employment Appeal Tribunal (EAT) decided that if there is a gap of more than three months between two deductions they cannot be part of the same series. The time for bringing a claim therefore runs from the date of the last deduction before any gap of more than three months begins.

8. The Respondent argued that the underpayment of the Claimants' Regulation 13 leave, Regulation 13A leave and contractual leave should be viewed as three distinct types of underpayment, so that an underpayment in relation to one type of leave could not be viewed as a part of a series with an underpayment of either of the other types. Any gap of three months or more between two instances of underpaid Regulation 13 leave or Regulation 13A leave or contractual leave should therefore start the clock running for a claim in relation to that type of underpayment.

9. The Tribunal did not accept that argument. Applying the EAT's interpretation of the meaning of a "series" in Bear Scotland, it concluded there was a sufficient similarity of subject matter between all the alleged underpayments of holiday pay to amount to a series of deductions for the purposes of Section 23(3)(a) ERA, regardless of the particular legal source of the right in respect of any particular underpayment.

10. The second issue that had a bearing on time limits was how each period of holiday should be designated, in terms of the three types of leave. As the payment due for each type of leave might differ according to its legal source, this could affect whether and when there had been an underpayment forming part of a series of deductions.

11. The Tribunal accepted that various approaches to this issue could be adopted, each of which would have its own merits and drawbacks, in terms of practical application and effect on the rights of worker or employer. The Claimants argued that the periods of leave that the Respondent directed them to take during its summer and winter production shutdowns should be viewed as their Regulation 13 leave, but could not assist the Tribunal with why that should be the case.

12. There was no appellate authority on this point that the Tribunal was bound to follow. The EAT did indicate, however, in Bear Scotland that a worker should be viewed as taking their Regulation 13A leave after their Regulation 13 leave in any leave year. The EAT having expressed a view on the point, the Tribunal was content to follow its indication. On that basis, it concluded that the first four weeks' holiday the Claimants took in their holiday year (which ran from 1 August to 31 July) should be viewed as their Regulation 13 leave for the purposes of calculating their holiday pay.

Shift allowance

13. During the Hearing the Respondent conceded that the shift allowance that Mr Dixon, Mr Michalewicz and Mr Taylor were paid should be taken into account for the purposes of Regulation 13, Regulation 13A and contractual leave.

Bonus payment: the facts

14. The Respondent argued that bonus payments should not be taken into account for the purposes of Regulation 13, Regulation 13A or contractual leave.

15. There was scant documentary evidence relating to the bonus, and some of the documents that were in the Respondent's possession were not disclosed until the Hearing itself.

16. The Introduction to the Respondent's Employee Handbook states:

> Section 2 of this Handbook contains further details of your terms and conditions of employment and, together with your Statement of Particulars and any offer letter, forms your Contract of Employment. Should there be any conflict between these documents, the terms of any offer letter shall prevail.

17. There was no reference to the bonus in the Respondent's standard offer letter or in any of the Claimants' Statements of Particulars that were disclosed.

18. Section 2 of the Handbook contained this provision:

> 2.5 Bonus Scheme
> All employees agree to be bound by the rules of the Production Time Saved Bonus Scheme. See booklet reference admin/bonus-latest date issue.

19. At the Hearing, the Respondent said that it had been unable to locate a copy of the booklet referred to. It did, however, produce copies of two documents. One was headed "Production Staff Bonus Scheme Time Saved" and labelled "August 1997 edition". The other was headed "Administration of production time saved bonus scheme – April 2000". The introduction to the apparently earlier document stated: "As a result of experience gained from September 1991 to August 1994 the Bonus Scheme has been updated and improved", indicating that the operation of the bonus scheme might have begun in September 1991. It seemed likely that these documents related in some way to the bonus scheme referred to in clause 2.5 of the Handbook. Their contents were similar but not identical and complex. It was not possible for the Tribunal to interpret them without the assistance of oral evidence. The oral evidence that the Tribunal heard indicated that neither document reflected the way in which the bonus scheme had in fact been operated in the years leading up to these claims. In their arguments to the Tribunal, the Claimants did not refer to either document as being relevant to the calculation of their holiday pay.

20. Section 2 of the Handbook also included a provision entitled "2.17 Staff Bonus Scheme". This described a bonus that was an addition to basic salary and referred to an individual earnings target. The Claimants work in various departments on the production side of the Respondent's business. They are paid an hourly wage rather than a salary and there was no evidence from any source that their bonus was calculated by reference to an individual earnings target. The Tribunal concluded that Clause 2.17 was a reference to a bonus scheme that might have applied to non-production staff within the business but was not applicable to the Claimants and therefore not relevant to its deliberations in relation to these claims.

21. The Tribunal heard oral evidence from two witnesses for the Respondent on how the bonus scheme operated in practice in the years leading up to these claims: Mrs Shepherd, Finance Manager, who joined the Respondent in September 2014, and Mrs Clare, Accounts and Human Resources Assistant, who joined in March 2017. On the basis of their evidence, the Tribunal found the following facts in relation to the way in which the bonus operated in practice in recent years.

22. The Respondent is a manufacturer and hirer of winter maintenance vehicles such as gritters and salt spreaders. The Claimants all work in the production side of the business. They are paid a weekly wage based on an hourly rate of pay. They are paid their basic and overtime pay and shift allowances weekly. Monthly in arrears, they are also paid a bonus. This takes the form of an hourly supplement for each and every hour they worked the previous month, whether basic or overtime.

23. In practice, the bonus was set each year for the year ahead after a discussion between the Respondent's Service Parts Administrator and its Operations Director. They set target figures on a sliding scale for "contribution per day" for the coming 12 months and the hourly bonus rates that would apply if actual "contribution per day" reached particular points on that sliding scale.

24. The actual "contribution per day" was calculated by first identifying the total profit the business made that month. Total profit was income from sales of new machines and spare parts, less the costs of materials and production labour costs, plus the value of stock produced for hire less the value of any parts that had had to be scrapped or remade/reworked. That monthly total profit figure was then divided by the number of production days in the month to produce the contribution per day. The applicable bonus figure was then identified by reading across from the target figures on the sliding scale. So, for example, in November 2016, the actual contribution per day was £29,099.32. That figure exceeded the £28,777 point on the sliding scale of targets, which led to a bonus figure of £1.16 per hour. If the actual contribution per day had exceeded the next point on the sliding scale of £29,657, the applicable bonus rate would have been £1.20 per hour.

25. There was then a final step in the process to identify the bonus rate that would actually be paid. The Production Manager made a broad-brush assessment of the productivity of each team involved in the production process. If he considered that the team was working to the expected level of productivity, the applicable bonus rate would be multiplied by 80% to produce the bonus rate payable. If the team was working above or below expectations, the applicable rate would be multiplied by one or two percentage points above or below that. So, for example, in November 2016, the team involved in welding on day shifts was assessed at 79% and were paid a bonus rate of 79% x £1.16 = £0.92. The "metal prep" team was assessed at 80% and were paid a bonus rate of 80% x £1.16 = £0.93. Those employees involved in support roles in the production department whose work

did not directly affect productivity, such as cleaner, were always paid their bonus at 80% of the applicable bonus rate.

26. The slight adjustments above and below 80% caused discontent amongst the production workforce. Some considered that there were individuals in a team awarded a higher bonus who were not in fact working as hard as they were. In January 2018, therefore, the Respondent decided to pay the bonus at 80% of the applicable rate for all production employees.

27. If the business did not meet the target contribution, then no bonus was paid to the production staff for that month. There were occasions in February and March 2018, on the other hand, when the Directors decided to increase the applicable bonus rate above that indicated by the sliding scale because the company had had a profitable year.

28. In summary, the bonus rates were set annually and depended upon the overall performance of the company and in particular the sales it had achieved. Sales depended on the level of demand for the business's products, which was affected by market conditions, the weather and the effectiveness of the company's sales and marketing activity. Although each individual Claimant's efforts contributed to the generation of the products that enabled the Respondent to deliver on the sales that contributed towards the target "contribution per day", the bonus depended on the performance of the company overall. The work of an individual Claimant might affect the value of parts that needed to be scrapped or re-worked in any month, but that was an insignificant element in the calculation of the "contribution per day" and hence the bonus calculation. Whilst until January 2018 the bonus depended to a very minor degree on the performance of the team in which an individual worked, that was also an insignificant element in the bonus calculation. There were employees working in the production department who made no direction contribution to producing the business's products who nevertheless received the bonus.

Conclusions on contractual nature of bonus

29. The Claimants entered into their contracts of employment on various dates between June 1983 and July 2011. Although the scant individual contractual documentation that was produced did not refer to the bonus, the Tribunal was satisfied from the references in the Introduction and Section 2 of the Staff Handbook that the Claimants' entitlement to bonus payments, whatever that entitlement might be, was intended to be, and was, incorporated into their contracts as a contractual entitlement.

30. Because the Tribunal saw no documentary evidence that assisted with how that contractual entitlement was to be construed, it had to infer what the parties agreed the terms of the bonus would be from the way in which the bonus scheme

was operated in practice. From that, the Tribunal concluded that the Respondent had discretion, to be exercised on an annual basis, as to where to set the sliding scale of targets for "contribution per day" and the corresponding applicable bonus rates for the coming year. Once those targets and rates were set as a result of that exercise, the Claimants became contractually entitled to paid 80% of the applicable bonus rate as an enhancement to their hourly rate of pay, payable monthly in arrears. Until January 2018 the bonus rate payable was subject to a minor adjustment, at the production manager's discretion, based on the overall performance of the team in which they worked.

Bonus payments: conclusions on Regulations 13 and 13A leave

31. In order to decide whether the Claimants' bonus payments needed to be taken into account when calculating Regulation 13 leave, the Tribunal needed to apply the CJEU case law on the right to payment for WTD leave.

32. In British Airways plc v Williams and others [2012] ICR 847and Lock v British Gas Trading Ltd [2014] ICR 813 the CJEU ruled that WTD leave must be paid at the same rate as a worker's "normal remuneration". It must include any aspect of a worker's remuneration that has an "intrinsic link" with "the performance of the tasks which he is required to carry out under his contract of employment".

33. The Respondent argued that there was no intrinsic link between the work the Claimants did under their contracts and the bonus payments, as the bonus payments depended on the performance of the company overall or, to an insignificant degree, on the work of their team, not on their own work. The Tribunal did not accept that argument. As the EAT pointed out in Dudley Metropolitan Borough Council v Willetts and others UKEAT/0334/16, the overarching principle endorsed by the CJEU in Williams and Lock was that workers must receive their normal remuneration during their WTD leave. The Claimants invariably received these bonus payments as an enhancement to their pay for each and every hour that they worked. It is difficult to see how the bonus could be viewed as anything other than part of their normal remuneration.

34. In any event, even if the Tribunal's conclusions on the impact of the WTD were incorrect, it was satisfied that the Claimants were entitled to have their bonus payments taken into account as part of their week's pay for the purposes of Regulation 13 as a matter of domestic law. From the Tribunal's findings in relation to the contractual nature of the bonus payments, it followed that for each Claimant the bonus payments were part of the "amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week" for the purposes of calculating their week's pay under Section 221(2) ERA and hence their holiday pay under both Regulations 13 and 13A (Regulation 16(1) WTR).

Bonus payments: conclusions on contractual leave

35. The documentary evidence relating to the Claimants' contractual leave was scant. The Statements of Terms of Employment that were disclosed and the Employee Handbook referred only to "paid holiday" entitlement; they did not explain what "paid" means.

36. The Tribunal therefore had to interpret their contractual entitlement to "paid holiday" in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the contract was formed (Investors Compensation Scheme Limited v West Bromwich Building Society (No. 1) (1998) 1 WLR 896).

37. The Tribunal accepted that a reasonable person would have construed "paid holiday" as meaning that the Respondent would pay what was lawfully due, including what might be due under a statutory provision. In relation to holiday entitlement that the Claimants had been granted over and above their statutory rights under Regulations 13 and 13A WTR, however, there was no minimum level of holiday pay that the Respondent had to observe; it was entirely a matter of what was offered and accepted at the point of recruitment.

38. Because of the lack of documentary evidence on what "paid holiday" meant, the Tribunal decided to infer the parties' understanding of its meaning from the way in which the Respondent operated its holiday pay in practice. In practice, the Respondent did not include the Claimants' bonus payments in their holiday pay and did not consider itself under any legal obligation to do so. For many years the Claimants accepted without challenge that their holiday pay was calculated without taking into account their bonus payments and the Tribunal was satisfied that the Claimants also understood their entitlement under their contracts to be to holiday pay at the level of their normal basic pay.

39. The Claimants argued that the Tribunal should construe their contracts as giving them the right to the same level of holiday pay as they had under Regulation 13 or 13A. That argument was based on a comment the EAT made in Flowers and others v East of England Ambulance Trust UKEAT/0235/17. In that case the EAT was construing a contractual provision that defined how the Claimants' holiday pay should be calculated. The EAT concluded that the clause should be interpreted as including overtime pay. In reaching that conclusion, the EAT said that "it makes obvious sense for the contract to march in step with the WTD as far as possible" and the WTD entitled the Claimants to have overtime pay included in their holiday pay.

40. The Tribunal did not read the EAT's comment in Flowers as meaning that an individual's contractual right to holiday should always be construed in the same

way as their right to holiday pay under Regulation 13 or Regulation 13A. In any event, the facts in Flowers were different from the facts in these claims in significant and relevant ways. In Flowers the EAT was interpreting a contractual provision that defined how holiday pay should be calculated. There was no such definition clause in this case. Further, in Flowers the Claimants were employed by an "emanation of the State", and therefore had directly enforceable rights to holiday pay under the WTD that needed to be taken into account, whereas these Claimants are employed by a private sector employer.

41. In conclusion, the Tribunal decided that the Claimants' holiday pay for contractual leave in excess of that provided for in the WTR was to be calculated without reference to their bonus payments.

Overtime payments

42. Mr Horn, Mr Johnston, Mr Lockwood and Mr Wilsher received overtime pay. This overtime was purely voluntary, in the sense that the Respondent was not obliged to offer it and they were not obliged to work it if it was offered.

43. The Respondent accepted that these Claimants' overtime payments should be taken into account when calculating their payment for Regulation 13 leave.

44. These Claimants' position was that overtime pay should also be taken into account when calculating the Claimants' pay for Regulation 13A leave. The statutory provisions, however, state otherwise. The Claimants had normal working hours, that is, they were entitled to overtime pay when employed for more than a fixed number of hours in a week (Section 234(1) ERA). Their normal working hours were that fixed number of hours (Section 234(2) ERA). The amount of their week's pay, and hence their holiday pay, was the amount payable to them if they worked throughout their normal working hours (Section 221(2) ERA). That did not include overtime payments.

45. The Claimants argued that their overtime pay should also be taken into account when calculating their pay for contractual leave, again relying on the EAT's comment in Flowers that "it makes obvious sense for the contract to march in step with the WTD so far as possible". The Tribunal rejected that argument, for the same reasons as set out in paragraphs 35 to 40 above. It was satisfied that the Respondent intended, and the Claimants accepted, that their contractual holiday would be calculated without taking into account overtime payments.

Remedy

46. The parties made substantial progress during the various adjournments in the Hearing towards agreeing the dates of the Claimants' holidays and the payments

paid and potentially due to them. They were therefore hopeful that, once they had the Tribunal's decision on the legal issues, they would be able to settle the amount of compensation without the need for a remedy Hearing. The Tribunal wishes them well with that exercise.

Employment Judge Cox
Date: 8 May 2019

Schedule of claimants

1810094/2018 Mr P Dixon
1810095/2018 Mr N Horn
1810096/2018 Mr M Johnston
1810097/2018 Mr P Lockwood
1810100/2018 Mr G Taylor
1810103/2018 Mr D Wilsher
1811041/2018 Mr M Michalewicz