



THE EMPLOYMENT TRIBUNALS

Between:

Claimant: Mr N Higgs

Respondent: Rapiscan Systems Limited

Hearing at London South on 12 June 2018 before Employment Judge Baron

Appearances

For Claimant: The Claimant was present in person

For Respondent: Glenn Gaselee - Consultant

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claim be dismissed.

REASONS

- 1 The reasons for the judgment were provided at the hearing, but I am setting them, out in writing principally for the benefit of the Claimant.
- 2 In the claim form ET1 which was presented to the Tribunal on 5 March 2018 the Claimant had ticked the box to indicate that he was making a claim for holiday pay. In section 8.2 of the claim form the Claimant referred to regular overtime not having been included in the calculations of holiday pay. After the issuing of the claim the parties had very helpfully cooperated with each other and I was provided with a fairly comprehensive bundle.
- 3 The Claimant provided schedules from 2014 to 2017 setting out the extra holiday pay to which he said he was entitled. He agreed that two half days needed to be added to the schedule for 2017, but otherwise the dates were agreed. Although denied in the Grounds of Resistance Mr Gaselee confirmed that the Respondent now accepted that the Claimant had been working overtime with sufficient regularity so as to entitle him to the extra holiday pay referred to below, but there was an issue as to jurisdiction. The precise calculations were not agreed but that has proved not to be material.
- 4 There are two areas of law which are relevant. The first is that of entitlement to holiday pay, and the calculation of it, and the second relates to the jurisdiction of the Tribunal. I will deal with each in turn.

- 5 The Working Time Directive (2003/88/EC) has been put into effect in the UK by the Working Time Regulations 1998.¹ Those Regulations must therefore be interpreted in accordance with European law insofar as possible. Regulation 30 transposes into domestic law the right to four weeks' leave provided for by the Directive. In addition the United Kingdom has provided for a right to additional leave in regulation 13A. The additional leave is 1.6 weeks. It was agreed between the parties that the Respondent's leave year was the calendar year. It was also agreed that the Claimant's contractual entitlement was 35 days, and also statutory holidays.
- 6 Neither the Directive nor the Regulations make any reference to statutory holidays. The reason is obvious. Many employments require the employees to work on some or all statutory holidays. The entitlement is based on weeks. On the basis of a five day week the Claimant was entitled to twenty days' leave under regulation 13, eight days under regulation 13A, and also a further seven days under his contract.
- 7 The first issue is which days of leave which the Claimant took fell into which category. That issue was addressed but not definitively answered by Langstaff J in *Bear Scotland Ltd v. Fulton* [2015] IRLR 15 EAT. In paragraph 82 he opined that regulation 13 leave was the leave taken first and regulation 13A leave was the last in the year. Langstaff J was only there considering the difference between leave under each of regulations 13 and 13A, and the question of further contractual leave did not arise. I do not consider that that makes any difference.
- 8 While technically not binding on the Tribunal great respect must be paid to the opinion of Langstaff J. The point had been fully argued because the Employment Judge who heard the case at first instance had decided that the employee had the right to choose the category of leave on each occasion. That was held to be incorrect. I conclude that the first twenty days of leave in each leave year fall within regulation 13, and so they attract any higher leave pay which may be due by reason of an employee working regular overtime.
- 9 Mr Gaselee calculated that on that basis the last day of regulation 13 leave before the presentation of this claim was 21 September 2017. The Claimant did not dispute that date and I agree with it. It was agreed that monthly salary payments were normally paid on 24th day of each month. Therefore the 'extra' payment for 21 September 2017 should have been paid on 24 September 2017, or 24 October 2017 at the latest.
- 10 The next question is that of jurisdiction. If the Tribunal does not have the jurisdiction to consider a claim then that is the end of the matter, whatever the merits of the claim might be. Section 23 of the Employment Rights Act 1996 contains the relevant provision:

23 Complaints to employment tribunals

- (1) A worker may present a complaint to an employment tribunal—

¹ The 2003 Directive replaced Directive 93/104/EEC.

- (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)), . . .
- (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
- (b)
- (3) Where a complaint is brought under this section in respect of—
- (a) a series of deductions or payments, or
- (b) ,
- the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
- (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
- 11 On the basis of a payment being due on 24 September 2017 the time limit expired on 23 December 2017, or on 23 January 2018 if the date for payment was 24 October 2017. The claim form ET1 was presented to the Tribunal on 5 March 2018. A claimant does obtain the benefit of an extension of time by reason of the ACAS early conciliation procedure in certain circumstances. However, contact must be made with ACAS under that procedure within the primary three month period. The Claimant contacted ACAS on 14 February 2018, and the certificate was issued on the same day. By then the time limit had expired and so the extension of time provisions do not apply.
- 12 The question then arises as to whether it was reasonably practicable for the Claimant to have contacted ACAS within the three month time limit. The Claimant and his colleagues were first alerted to the issue when they received their payslips on 20 December 2017. An extra amount shown as holiday pay was included. The parties agreed that after questions had been raised an email was sent to the Claimant and others in late December 2017 or early January 2018 explaining the reason for the payment. I did not have that email before me. There was then a staff meeting on 25 January 2018 when the matter was discussed further.
- 13 I will accept that it was not reasonably practicable for the Claimant to have taken any steps to make a claim before the issuing of the December payslip. While the general point raised in *Bear Scotland* had received considerable publicity that was primarily among lawyers, employers and trade unions. Therefore I have to decide whether the claim was presented within a reasonable time after the expiry of the time limit.
- 14 The Claimant told me that at some stage he made enquiries on the internet and that he became aware of the three month time limit, which he thought ran from the receipt of the December payslip. He could not be more precise about the date.
- 15 In my judgment the Claimant did not take steps to present his claim within a reasonable time after the expiry of the time limit. He could have made enquiries via the internet in early January 2018. He had by 14 February

2018 at the latest become aware of his right to make an application to the Tribunal because he commenced the early conciliation process on that date. However, although the certificate was issued on the same day the Claimant waited for nearly a further three weeks before presenting the claim.

- 16 I conclude therefore that the Tribunal does not have the jurisdiction to consider the claim, and it is dismissed.

Employment Judge Baron

Date: 13 June 2018