Appeal No. UKEATS/0015/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 30th April 2019
At 10.30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

BWSC Generation Services UK — APPELLANT

Mr Alan Taylor — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Owain Rhys James Instructed by: Aible HR Services 27 Mostyn Square Llanishen Cardiff CF14 5FE
For the Respondent	Mr Paul Deans Thompsons Solicitors Berkeley House 285 Bath Street Glasgow G2 4HQ

THE HONOURABLE LORD SUMMERS

1. This appeal arises from a reconsideration Judgment by Employment Judge Henry dated 16 January 2018. The Respondent realised after the full hearing that he had failed to seek payment of unused holiday entitlement. He applied for an order from the Employment Judge and parties were granted an opportunity to make further submissions. The request for payment however exposed a difference of opinion between the parties as to the construction of the Respondent's contract of employment. The Employment Judge on reconsideration agreed that under his contract of employment the Respondent was entitled to payment. The Appellants, his employers, have appealed the Judgment.

2. The parties supplied me with lengthy written arguments. Although I have no doubt that the parties tried their best I did not find them altogether easy to follow. Even after oral argument I was still unclear as to what exactly the parties' interpretation of the relevant clauses of the contract of employment was and how the contract related to the facts of the case. It would have been very helpful if each party had produced a calculation showing how their respective approaches affected their respective calculations.

3. I was referred to a number of authorities including **Investors Compensation Scheme v West Bromwich Building Society 1998 1 WLR 896**, **Wood v Capita Insurance Services Ltd. 2017 UKSC 24, Arnold v Britton [2015] UKSC 36** and **Farmer v Heart of Birmingham Teaching Primary Care Trust UKEAT/0180/15**. None of these cases however articulated any principles that I considered assisted me in interpreting the contract or applying it to the facts of this case. Neither of the parties in their submissions founded on the dicta found in these cases.

4. The Employment Judge found in favour of the Respondent and held that he was entitled to payment of accrued holiday pay. In his opinion Clause 8.2 meant that an employee's holidays had to be taken in time allocated to shifts. Since the Respondent had not taken holidays in the time he had worked he concluded he was entitled to be paid the value of the holidays he had not worked. He did not however provide a detailed exposition of his views. In particular he did not discuss the relationship of Clause 8.2 with Clause 9.4. I have come to the conclusion that he was right. I set out below in more detail why I consider that the Respondent is entitled to payment.

5. The relevant clauses in the contract of employment were as follows –

> 8.2 Your normal hours of work shall be on a shift pattern, operated on a 12-hr working shift to cover a 24/7 rota, based upon a contracted 40 hours per week. The pattern will provide for all required holidays, cover periods and training, although there will be a requirement for flexibility, to ensure operational requirements are met.
>
> 9.1 The Company's holiday year runs from 1 January to 31 December. Your holiday entitlement in a full holiday year is 25 days plus statutory public holidays in England.
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> 9.2 You must give reasonable notice of any proposed holiday dates and these must be agreed by the Company in advance. No more than 10 days' holiday may be taken at any one time unless prior consent is obtained from the Company.

9.3 If for any reason you do not take all of your holiday entitlement in any holiday year, (save as provided in Clause 9.4), the Company shall not make any payment in lieu or carry forward your holiday entitlement to any subsequent year.

9.4 In the years of commencement and termination of employment your basic holiday entitlement will be calculated pro rata. Where on termination of your employment you have taken less holiday than your entitlement (to be calculated on a pro rata basis) you will be paid in lieu on the following basis. 1/260th of your basic annual salary for each day of holiday due to you to make up your entitlement. Where on termination of your employment you have taken more holiday than your entitlement (to be calculated on a pro rata basis) you will compensate the Company on the following basis: 1/260th of your basic annual salary for each day of holiday you have taken in excess of your entitlement.

9.5 Where such termination is pursuant to Clause 12.3 or your resignation in breach of Clauses 5.2 or 12.1, such accrued but untaken holiday shall be based on your statutory minimum holiday entitlement under the Working Time Regulations 1998 only and not on your entitlement under Clause 9.1. For these purposes any paid holiday that you have taken (including any paid holiday on public holidays) shall be deemed first to be statutory paid holiday.

9.6 The Company may with or without prior notice require you to take any outstanding holiday entitlement at times specified by the Company (including without limitation during your notice period).

6. In construing the contract, I consider that the first issue to deal with is to establish the meaning of Clause 9.4. It determines how holiday pay is calculated where an employee has

either commenced or terminated employment in a given year. As it happens the Respondent both commenced and terminated employment in the same year. Both of the contingencies referred to in Clause 9.4 apply in the present case. Clause 9.4 is therefore operative. This Clause purports to set out how holiday pay entitlement is calculated.

7. Two features of this Clause are worthy of note. First it requires "holiday entitlement" that is the contractual holiday entitlement of 25 days plus statutory holidays to be treated as accruing evenly over the course of a year. Second it requires an adjustment where the employee's holidays have been taken in a way inconsistent with pro rata accrual.

8. Thus, if the employee terminated after working six months rather than twelve months, the employee would be entitled to 1/120th of his annual salary multiplied by half his holiday entitlement. If he had (for the sake of argument) a total entitlement to 30 days holiday, 1/260th of his annual wage would be multiplied by 15.

9. As I understood, parties' employees were paid for the shift work they did and in addition were paid holiday pay as a separate component of their remuneration package. Given that Clause 9.4 refers to the need to make a suitable adjustment to wages in a year when an employee joins or leaves the company it follows that the entitlement to holiday pay was paid evenly across the year irrespective of when in fact the employee took holidays. No doubt this was administratively convenient.

10. Here therefore a figure attributable to holiday pay has been paid to the Respondent in each month of his employment. He has suffered no loss in that connection. His loss is that he has not taken holidays that he would have otherwise been entitled to take. The contract ascribes a value to the untaken holiday which is remunerated separately from the correlative right to

holiday pay. Thus the purpose of 9.4 is among other things to deal with the situation where an employee has received holiday pay appropriate to the period of time in employment but has not had the benefit of the holiday itself. Clause 9.4 entitles him to be remunerated for that benefit if he has not taken it up, in the manner prescribed.

11. As I have indicated I did not find the parties' submissions on the way they calculated holiday pay entitlement easy to follow. As I understand it however what they come to is that the Appellants consider that the right to payment under Clause 9.4 only arises when a holiday is taken and not during time worked on shift. The Respondents consider that the value of untaken holidays accrues over the year on a pro rata basis and thus he has a right to payment for the time he worked for the Appellants. I do not think the Respondents' approach is consistent with the approach taken in that Clause 9.4. Clause 9.4 does draw a distinction between days "off rota" or "on rota". These phrases were used extensively in submission. As I understand it the phrase simply refers to periods on shift and off shift. Clause 9.4 assumes that accrual is spread evenly across the year without regard to any other factor. If such a distinction was required I would expect it to be expressly stated as it would be inconsistent with the pro rata approach in Clause 9.4.

12. The Appellants sought to support their approach by reference to the language of Clause 8.2. It states that the shift pattern must "provide for" holidays. What does this expression mean?

13. In my view the Clause is designed to set out the broad principles that underlie the creation and allocation of shifts. The core components are that the shifts will be of 12-hour duration and that the shifts will be organised to cover 24-hour periods Sunday to Saturday. In addition, the employee is obliged to work 40 hours a week. In my opinion the phrase "the pattern will provide for" indicates that in creating and allocating shifts there are matters that

the employer must take account of. This indicates for example that the employer cannot require the employees to engage in training outside the hours allocated to shifts – that would be to demand more of him than his contract requires. Likewise, the employer cannot require an employee to provide cover for other members of staff over and above his contracted hours. The purpose appears to be that of avoiding excessive demands of the workforce. I note that in the final sentence reference is made to the need for flexibility. This indicates that operational requirements may at times frustrate the principles set out in the Clause. Hence Clause 8.2 acknowledges that it may be difficult to accommodate conflicting demands.

14. If this approach is taken to the broad purpose of the Clause the phrase "provide for all required holidays" means simply that the employer should take account of holiday requests. A "required holiday" on this view is not a compulsory holiday such as Christmas but also holiday requests made by the employee as permitted by his contract of employment. If a holiday request is made the employer should seek to accommodate that within the shift.

15. I do not consider that Clause 8.2 deals with holiday pay or has any implications for how pay is allocated. It deals with the allocation of working duties in the shift system. The word "pay" does not appear in Clause 8.2. I do not consider that the word "provide" relates to the payment of wages.

16. In my judgment, when an employee demits employment during a year, Clause 9.4 specifies how holiday entitlement is to be calculated. It deals with situations where holidays have not been used and attributes a value to them. Thus, even if holiday pay has been paid through payroll the Appellants still require to account to the Respondent for the value of the untaken holiday since he has not had the benefit of the holiday itself. This entitles him to an

appropriate adjustment. I do not consider that Clause 8.2 means that an employee should only be paid in the way set out in Clause 9.4 if he has taken a holiday. Or to put it the way the Appellant submitted, his entitlement to this benefit does not arise exclusively in "off rota" periods. In my view Clause 9.4 entitles someone in the Respondent's position to be paid holiday pay plus the enhancement for holidays not taken. If holiday pay has already been paid through the payroll in the period he was employed no payment is needed for that component. If, as I assume, the entitlement referred to in Clause 9.4 has not been paid the Appellants should work out what fraction of the year the Respondent has worked and apply the assumptions set out in Clause 9.4. Since he did not have any holidays in his period of employment he is entitled to a payment that reflects the fact that he did not have the benefit of time off during his employment with the Appellants.

17. In these circumstances I refuse the appeal.