EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: S/4106998/2018 and S/4106999/2018

Held in Glasgow on 2 November 2018

Employment Judge: David Hoey

Mr J Jhammat and Mrs P Kaur	**Claimants** **In Person** **Mr J Jhammat (Leading)**
Newcross Healthcare Solutions	**Respondent** **Represented by:** **Mr D Mullen – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimants having already received holiday pay to which they are entitled, the claims for holiday pay are dismissed.

REASONS

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1. This case called for a final Hearing. Both Claimants were in attendance (with Mr Jhammat leading). The Respondent was represented by Mr Mullen. This case had been subject to previous case management. Written witness statements had been provided by the relevant witnesses and a table had been prepared setting out what was sought and why, with the Respondent providing their response.

2. This was a claim for holiday pay. As the Claimants both remained in employment, the claim was brought as an unlawful deductions claim in terms of section 13 of the Employment Rights Act 1996. The parties had agreed that it was necessary to lead evidence given the issues that were in dispute, which essentially amounted to the system by which holidays were taken and how payment was made. The Claimants were employees with a contract of employment that guaranteed them a minimum number of hours' work each year and they were (allegedly) paid "rolled up" holiday pay.

3. The Tribunal heard from both Claimants and for the Respondent, Ms Baker (HR Manager), Ms Armstrong (Manager) and Ms McAlonan (Team Leader). Given the Respondent's solicitor had travelled from England, the Tribunal sat beyond the normal sitting time to conclude submissions. The parties produced a folder with 324 productions which were accepted by both parties as authentic.

Issues to be determined

4. The parties had agreed that the issues to be determined were whether the Respondent's system of rolling up holiday for in respect of both Claimants complied with the legal requirements set out in the authorities such that the sums that were paid (by way of the rolled up provision) could go towards discharging the sums due to the Claimants for their annual leave entitlement and whether any sums were accordingly due to the Claimants.

Findings in fact

5. The Tribunal makes the following findings in fact based upon the evidence presented to the Tribunal.

6. The Respondent provides care to sick and vulnerable people, either directly or by supplying care staff to others. The Respondent has an HR team and employs approximately 7,500 staff.

7. Mr Jhammat joined the Respondent on 9 January 2018 as a support worker.

8. Mrs Kaur joined the Respondent on 15 November 2016 as a healthcare worker/care worker.

9. Both Claimants attended an induction process at which they were advised as to how their work would be carried out. Mr Jhammat's induction was on 9 January 2018 and Mrs Kaur's induction was in November 2016.

10. At the induction, the staff go through a checklist. Both Claimants went through this checklist upon completion of the induction process. Part of that document refers to "paper work" and the employee is asked to tick to confirm they received copies of certain documents. Both Claimants ticked each box, confirming they received a copy of their contract of employment (signed) and correct rates of pay. Under working procedures, the checklist asks the staff to tick that they discussed a number of items. Both Claimants ticked to say they had discussed payment and time sheet processes and recording availability. Both Claimants signed their induction checklist.

11. At induction both Claimants received and signed their contracts of employment. These contracts contain the same substantive clauses.

12. Clause 4 sets out a basic number of hours per year. The employee agrees to make themselves available to work for the Respondent for at least this minimum number of hours per year. For both Claimants this was 337 hours.

13. Clause 6 is headed “Rates of Pay”. There are a number of relevant definitions:

> “Basic Pay” means “your rate of pay for any Assignment”. It is stated as being equivalent to Reference Pay less any adjustments.
>
> “Reference Pay” means the amount used for the purposes of calculating benefits in the contract which states that “The Reference Pay for any Assignment shall be notified to you prior to that Assignment as an amount per hour or per day as the case may be”.

14. Clause 6.2 states that during an Assignment the worker receives Basic Pay, Travel Expenses and any NPP Allowances (certain allowances paid to workers).

15. Clause 6.3 states that “Rates of Reference Pay for any Assignment are maintained for information only and are determined by the Employer by reference to the profession within which you work and the particular client for whom you work on an Assignment”.

16. Clause 6.11 states that “Your Reference Pay which should at all times be kept confidential by you, is set out in a separate document “Hourly Rates of Pay“ which will be provided to you from time to time. The current version is available from your local branch.”

17. Clause 7 is entitled “holidays” and states that the holiday year runs from 1 April. Clause 7.2 states:

> “You will be entitled to four weeks (28 days) annual holiday as provided for in the Working Time Regulations 1998. Because you do not work a

> set number of days each week this entitlement is expressed in days for ease of calculation. One week's holiday is equal to 7 days of your entitlement. Holidays for each week of leave will be calculated in accordance with clause 7.4. Your entitlement to 28 days holiday includes bank and public holidays."

18. Clause 7.4 states that "You will be paid for any holidays you take in accordance with this clause. You will be paid a sum equivalent to an additional 12.07% of your Basic Pay in each period and this will be detailed on your payslip."

19. Also issued during the induction process were Rate Cards (which was the "Correct rates of pay" to which reference is made on the induction checklist). Both Claimants received cards that set out the rates applicable at the time they were engaged in relation to the work they would be carrying out.

20. These cards set the rates applicable for each client and were broken down into basic hourly pay rate and holiday pay giving a total hourly rate (the combination of both). The rate varied depending upon the time of the work and the role being carried out.

21. These rate cards were issued at the induction but were not subsequently issued to the Claimants (when, for example, the rates changed).

22. The rate cards were kept at the local office.

23. Pay slips were issued to both Claimants that set out the sums paid to the Claimant for the relevant period. At the right hand side of the pay slip (at the top) "gross pay to date" was set out, followed by "Tax to date" and then "Paid holiday hours for the year to date". The last entry ("Paid holiday hours for the year to date") had a figure in Pounds Sterling (with no breakdown as to how this sum was calculated). Beneath that entry was "Hours worked for this

period" and the number of hours followed by Mileage for this period (and the number of miles).

24. In the middle of the payslip was a table with the booking reference number, date of activity, description (e.g. hours or mileage), place where work was done, a column stating whether the entry was taxable or not, an entry stating "Rate" (with a figure), an entry for "Total Hours" and a figure and then "Total paid" and a figure. This was totalled with tax deducted being set out.

25. Each Claimant received payslips with the relevant sums included.

26. An application ("app") called "HealthForceGo" was introduced in 2017. This was used by the Claimants to electronically confirm assignments that they wished to work. That initially showed timesheets only. Upgrades were then issued which showed pay that was earned.

27. On 8 August 2018 the App was updated to show holiday pay that was earned for each assignment. There was a glitch in the system when it was altered since if workers looked at previous assignments that they had worked, the App showed holiday pay as nil.

28. There was no set process for the taking of holidays as such. Unlike permanent staff, who ordinarily require line manager consent to take holidays, as both Claimants worked variable hours on days convenient to them, they were essentially available for work or not.

29. Those workers such as the Claimants indicate whether they are available or unavailable for work. When a worker is unavailable for work, they may be on holiday but equally may be working for another employer or carrying out other activities. The Respondent periodically monitors that system which is how they manage the holiday position for those workers who have contracts such as the Claimants.

30. While there was no express provision as to the process for taking leave, it was possible for the Claimants to have asked to take leave (whether by email or verbally). The Claimants had not expressly asked to take any annual leave until 31 August 2018. Both Claimants had, however, been unavailable for work for periods during their employment up to that point. Both Claimants had also received pay for each hour that they had worked which included a sum in respect of holiday pay as set out above.

31. On 30 April 2018 Mr Jhammat asked to be paid for 2 periods of alleged holiday - £226.17 in respect of 2017/2018 holiday entitlement (of 20 hours 56 minutes) and £127 in respect of 2018 holiday entitlement (10 hours 1 minutes).

32. On 30 April 2018 Ms Kaur asked to be paid for 3 periods of alleged holiday - £358.30 in respect of 2016/2017 holiday entitlement (of 36 hours 3 minutes), £619.36 in respect of 2017/2018 holiday entitlement (60 hours 16 minutes) and £40.35 in respect of 2018 (3 hours 37 minutes).

33. The Respondent refused the foregoing applications on the basis that the claim was only for pay and not in respect of holidays as such. These claims were for sums of money rather than for actual periods of leave that had been requested or taken.

34. On 31 August 2018 Mr Jhammat requested 40 hours' holiday and claimed £392 (based on a notional rate of £9.80 an hour). The Respondent maintained Mr Jhammat had been paid holidays due to him via the rolled up holiday pay arrangement and the sum paid to him by way of holiday pay had exceeded his statutory entitlement. He was not therefore due any sums for that period of leave.

35. On 31 August 2018 Ms Kaur requested 40 hours holiday and claimed she was due to be paid £426.40 in respect of that leave (based on a notional hourly rate of £10.66 per hour). The Respondent claimed the sums paid already to

Ms Kaur by way of rolled up holiday pay exceeded the sum due for this period of leave and so no further sums were due.

36. Both Claimants knew they could have asked to take annual leave (even if such an approach was somewhat artificial given their contractual status).

37. Mr Jhammat's average weekly pay for the last 12 weeks during which remuneration was payable up to his last request for holidays (on 31 August 2018) was £232.25 (£2787.05 divided by 12).

38. Mr Jhammat had received holiday pay in the sum of £453.87 for the holiday year (up to 1 August 2018) with no leave having been requested or taken prior to the leave request on 31 August 2018.

39. Ms Kaur's average weekly pay for the last 12 weeks during which remuneration was payable up to her last request for holidays (on 31 August 2018) was £190.71 (£2288.56 divided by 12).

40. Ms Kaur had received holiday pay in the sum of £914.77 for the holiday year (up to 1 August 2018) with no leave having been requested or taken prior to the leave request on 31 August 2018.

Observations on the evidence

41. Each of the witnesses gave evidence to the best of their recollection and abilities. The only real dispute in the evidence was whether the Claimants had been given rate cards in relation to the rates of pay. Both Claimants denied having received this. The witnesses led by the Respondent were clear in stating that the Claimants had been given their rate cards.

42. The Tribunal accepted the evidence led by the Respondent in this matter. The induction process was carefully set out and both Claimants signed the

induction checklist which confirmed that they had received the rate cards. The Claimants had also signed their contracts of employment which set out how holiday pay was to be calculated.

43. The Tribunal was satisfied that the Claimants had both been given the rate cards that applied at the date of their induction and that they had received an explanation as to how pay is calculated.

44. It is not perhaps surprising that the Claimants have little or no recollection of this given the amount of information that was communicated to them during the start of their new employment.

45. The remaining relevant issues were, by and large, agreed. In particular the Tribunal had asked the parties to confirm that the sums in question were agreed to avoid uncertainty as to calculations. The Tribunal accepted the sums set out within the Schedule at pages 306 to 309 as accurate.

The Law

46. The law in this area stems from the Working Time Directive and is found in the Working Time Regulations 1998 which, so far as relevant to this case, in summary comprise:-

- Regulation 13 which sets out the entitlement to annual leave, namely 4 weeks per year.

- Regulation 13A which sets out the entitlement to the additional leave period of 1.6 weeks a year. Regulation 13A(3) states that there is a maximum aggregate entitlement of 28 days.

- Regulation 14 deals with the calculation of pay where holidays have accrued but is only applicable at the end of employment.

- Regulation 16 sets out the entitlement to paid annual leave. Regulation 16(2) states that sections 221 to 224 of the Employment Rights Act 1996 shall apply to calculate what a week's pay is. Regulation 16(5) states that any contractual remuneration paid to a worker in respect of holidays goes towards discharging any liability to make a payment in respect of holiday pay that arises in terms of the Regulations.

47. Sections 221 to 224 of the Employment Rights Act 1996 provides the calculation method for working out what a week's pay is. Section 224 deals with the situation where there are no normal working hours and states that an average requires to be taken of each of the last 12 weeks during which remuneration was payable.

48. The difficulty in this case is that the position in relation to so-called 'rolled-up' holiday pay has had a challenging journey within the courts. The mechanism for the taking of and paying for holidays does not work easily where the worker does not work normal hours at normal rates. A "week's pay" has no real meaning for workers in these situations and therefore calculating 5.6 week's holiday is not straightforward.

49. These are different ways of seeking to ensure workers without fixed hours are paid for (and receive) holidays. One arrangement involves employers making 'rolled-up' hourly or weekly contractual payments to their workers which expressly include an element of holiday pay, and then making no additional payments when their workers actually take leave. There has been much debate as to whether this method of paying holiday pay accords with the Regulations. This is because a worker is not necessarily paid a sum of money when they are on leave since they have already received the payment. This has not been an easy issue for the courts to determine.

50. In **MPB Structures Ltd v Munro** 2004 ICR 430, the Court of Session held that rolled-up arrangements are void under Regulation 35 as limiting the effect

of the Regulations. The Court also held that payments made under such arrangements do not discharge an employer's liability to pay statutory holiday pay. Thus the workers were entitled to be paid for the holidays they had taken (irrespective of the payments the employer had already made in the rolled up arrangement).

51. The Employment Appeal Tribunal (sitting in England) later that year, however, considered the issue. In **Marshalls Clay Products Ltd v Caulfield** 2004 ICR 436 the Employment Appeal Tribunal disagreed with the Court of Session and held in essence that rolled-up payment is acceptable so long as the element of holiday pay is genuine and certain safeguards are in place.

52. The Court of Appeal (2004 ICR 1502) disagreed with the Court of Session's decision in **MPB Structures Ltd v Munro** that rolled-up payments did not satisfy the requirements of the Directive. In its view, it was by no means clear that a provision that discourages workers from taking holiday when they would otherwise have sought to do so is contrary to European law.

53. In **Robinson-Steele v RD Retail Services Ltd** 2006 IRLR 386 the European Court emphasised that the entitlement of every worker to paid annual leave is an important principle of European law from which there can be no derogations. Workers must receive a payment with regard to holiday pay that is additional to the payment received for work done. It is unlawful for an employer simply to designate part of the remuneration that a worker already receives for work done as holiday pay.

54. The Court considered whether rolled-up payments can be lawful and considered that payment must continue throughout the statutory holiday period. The European Court held that rolled-up holiday arrangements amounted to a breach of the Directive but stated that the Directive did not preclude employers setting off genuine holiday payments paid under the rolled-up arrangement against a worker's entitlement to payment when leave is actually taken. Such sums had to have been paid "transparently and

comprehensibly as holiday pay". The burden is on the employer to prove such transparency and comprehensibility.

55. The European Court stated that Member States were required to take appropriate measures to achieve compliance with the Directive which some interpret as meaning the comments about allowing set off were not intended to allow employers to set off payments made for all time coming.

56. Domestically the law was not changed. There is, however, some further case law within the UK to consider.

57. In **Smith v AJ Morrisons** 2005 ICR 596 the Employment Appeal Tribunal stated that, for an employer to be given credit for rolled-up holiday payments, "there must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked". This would best be evidenced by:

- the provision for rolled-up holiday pay being clearly incorporated into the contract of employment
- the amount allocated to holiday pay being identified in the contract and preferably also in the payslip, and
- records being kept of holidays taken and reasonably practicable steps being taken to ensure that workers take their holidays.

58. In **Lyddon v Englefield Brickwork Ltd** 2008 IRLR 198 the Employment Appeal Tribunal (sitting in England) held that payments forming part of a worker's rolled-up pay were, in the facts of that case, made 'transparently and comprehensibly' with regard to holidays and were therefore capable of being set off against the worker's entitlement to holiday pay.

59. In that case the claimant had been given no detail as to the rate of the holiday pay, nor how it was to be calculated. He had not been given written particulars

of employment. However, his pay packet showed the amount of holiday pay that had been added to his basic wage. The claimant's employment had lasted 17 weeks during which time he had taken some holidays (for which no extra payment was made). It was only after his employment ended that he argued he had not received holiday pay due to him.

60. The Employment Tribunal referred to the European Court's judgment and held that the key question was whether the payment of rolled-up holiday pay had been implemented 'transparently and comprehensively'. On the facts the Tribunal was satisfied that it had. This was because (1) exact sums with regard to holiday pay were identified in the pay packets, (2) the claimant had accepted payment on that basis with no challenge; and (3) the claimant had accepted without challenge the lack of any extra payment during leave.

61. On appeal to the Employment Appeal Tribunal the claimants argued that no credit should be given for the rolled up holiday payments. The main basis for this argument was that for rolled-up holiday pay to be set off against a worker's statutory entitlement, the precise amount of salary referable to such entitlement had to be identified in the worker's contract (it was alleged).

62. The Employment Appeal Tribunal noted that it was accepted that there was a contractual agreement for the claimant's wage to include a sum referable to holiday pay. The issue was whether there was a contractual agreement as to the amount of salary so allocated. On the facts the Employment Appeal Tribunal held there was such an agreement. Even although there had been no express reference to this, the claimant knew that there would be a sum allocated to holiday pay. It was plain that this sum was calculated according to an established system.

63. The Employment Appeal Tribunal pointed out that the guidelines set out in **Smith v AJ Morrisons and Sons Ltd** were only guidelines. They were not an exhaustive set of criteria which had to be satisfied in order for rolled-up holiday pay to be set off.

64. They key question is whether a transparent and comprehensible agreement had been made with regard to holiday pay.

65. In short therefore the current legal position is that rolled-up holiday pay arrangements are contrary to European law but if the system is "sufficiently transparent and comprehensible", sums paid to the worker by way of rolled-up holiday pay are capable of being set off against what was actually due (in carrying out the normal 12 week averaging exercise to calculate a week's pay under sections 221 - 224 of the Employment Rights Act 1996).

66. A few days after the Hearing finished, on 6 November 2018, the Court of Justice of the European Union issued its decision in **Max-Planck-Gesellschaft v Tesuji** C684-16 which considered the question of taking of annual leave, including what happens if the employer fails to provide adequate information about such leave. The Court held that a worker does not automatically lose annual leave solely because he did not apply for leave. An employer is under an obligation to provide adequate information to allow the worker to take such leave (the onus being on the employer to prove this was done). The parties were given the chance to make written representations on this case and its relevance to the issues.

67. This case deals with the carrying forward of holidays and does not change the law in relation to rolled up holiday pay but does provide a useful reminder of the principles underpinning the law in this area.

Submissions

Submissions for Claimants

68. Mr Jhammat maintained that neither Claimant had been given a copy of the rate sheets and the first time they saw these documents was during the Tribunal process. He maintained they were not produced during the induction process.

69. He also argued that there was no process for asking for or taking holidays and as such the attempt to pay rolled up holiday pay was invalid.

70. He referred to para 16 of **MPB Structures Limited** (which was at page 195 of the bundle). He quoted from para 16 of the Lord President's judgment:

> "In our view the arrangement set out in the form of contract which applied to the respondent's employment, which expressly provided for the rolling up of holiday pay purposed to exclude the operation of regulation 16(1). It follows that para 1.5 was, for this purpose, void. If so, it follows, in our view that the respondent's rate of pay did not to any extent qualify as discharging any liability of the appellant in respect of holiday pay under regulation 16(1). It also follows that the respondent's claim in respect of holiday pay remains unsatisfied. If it were otherwise it would be possible, in effect, for an employer to defeat the intention of the Regulations and the Directive that payment for annual leave should be in association with the taking of that leave."

71. Thus it was submitted the Respondent's approach to roll up holiday pay in the current case did not discharge liability to pay holiday pay – even if it were included in the contract.

72. Mr Jhammat said that the App did not improve the position since holiday pay was not clear even when the App was in place. He argued that the contract makes it clear that the rate of pay does not include holiday pay. There can be no transparency. He argued that the Respondent changed the App to make the position clearer which showed that the previous position was not compliant.

73. To be effective there needed to be transparency in the payslip and in the contract. Neither exists in this case. Other than the rate cards (which were not

received) there is no mention of holiday pay rates. The contract or pay slip should clearly have the rate broken down.

74. Mr Jhammat also argued that the whole system of rolling up holiday pay prevents the Claimants from taking their holidays and is void. He relied upon **Marshalls Clay Products Limited v Caulfied** 2004 ICR 436 @437B which states that:

> "*Per incuriam*. In order to minimise the risk of any contractual remuneration not qualifying under regulation 16(5) and avoidance under regulation 35(1) (a) the rolled up holiday pay must be clearly incorporated into the individual contract of employment and thus expressly agreed; (b) the allocation of the percentage or amount of holiday pay must be clearly identified in the contract and preferably in the payslip; (c) it must amount to a true addition to the contractual rate of pay; (d) records of holidays taken must be kept; and (e) reasonably practicable steps must be taken to require the workers to take their holidays before the expiry of the holiday year."

75. It was argued that paras (a) to (e) were not satisfied.

76. Mr Jhammat also argued that the fact that they had not asked for holidays did not mean the Claimants were not entitled to holiday pay.

77. He submitted that the value of his claims are those as set out above and in the table at pages 290 and 291. He also noted that a grievance had been lodged about the period up to May but the sums were outstanding.

78. In short Mr Jhammat accepted that no request for specific holidays had been made except in relation to the requests on 31 August 2018 but argued there was no facility for the taking of leave. The sums he sought were set out in the Schedule at pages 306 to 309).

79. In his written submission following the Hearing, Mr Jhammat argued that **Max-Planck-Gesellschaft v Tesuji** C684-16 supported the Claimants' position that they had not been able to take their leave as there was no formal process for taking leave and so their claims should succeed.

Submissions for Respondent

80. Mr Mullen began by setting out what was accepted. Both Claimants entered into and accepted the contract of employment. The pay slips for both Claimant set out a sum in respect of holiday pay. Whether or not that was sufficiently clear and transparent, however, was in dispute.

81. It was accepted that both Claimants had asked for holidays in August and taken holidays in September. The Respondent disputed that a valid request for holidays had been made in April as that was not a request for holidays but instead a request to be paid holiday pay. He maintained that a condition of being paid holidays was that holidays be taken.

82. Mr Mullen stated that it was accepted that both Claimants had gone through an induction process. He submitted that the holiday pay approach had been explained during the induction process and the rate cards were issued. It was inconceivable he said that the Claimants would not be told what they were paid and how this worked at the induction meeting.

83. He argued that while the Claimants deny receiving the rate cards the evidence pointed to the Claimants having received these documents. They were included in the packs issued at induction. These cards clearly showed the breakdown of the rate of pay and holiday pay.

84. There was a dispute about what the app shows. The Respondent's position was that prior to 8 August 2018 the App did not show any amount for holiday pay. From 8 August 2018 the App showed the amount of holiday pay per assignment (along with the amount earned). A glitch had meant that if a

worker looked at previous assignments it showed nil against holiday pau but prior to that date holiday pay did not feature in the app in any event.

85. Mr Mullen argued that it was wrong to say that there was no procedure to take holidays since both Claimant did ask for holidays. They could have (and should have) sought holidays in order to be entitled to be paid for them.

86. He argued that the contractual position was clear. Clause 7.2 says that each worker gets 28 days holiday. Clause 7.4 sets out how this is paid. Clause 6 sets out basic pay and refers to the rate sheet. Clause 7.4 explains that holiday pay will be 12.07% on top of the hourly rate.

87. Even if the Tribunal were to find that rate sheets were not issued to the Claimants, Mr Mullen argued that the contract clearly said that the hourly rate received by the Claimants for each hour worked would have 12.07% holiday pay included within it. The contract is clear as to basic pay.

88. He then referred to **Lyddon v Englefield Brickwork Limited** 2008 IRLR 198 which postdates **Marshalls Clay**. In that case Mr Mullen points out that there was no clarity on the facts as to what the rate of holiday pay was since no written statement had been issued. The workers in that case were told that their pay included holiday pay (see paragraph 27 of the judgment). At para 14 of the judgment the President of the Employment Appeal Tribunal makes reference to the **Marshall Clay** decision and the guidance that was issued. That was guidance only and not prescriptive.

89. Even if updates are not issued with regard to changes in the rates, staff were told of the % increase which could easily be worked out.

90. Mr Mullen made reference to **Robinson Steel's** case (and referred to the Advocate General's Opinion 2006 IRLR 386). At paragraph 66 reference was made to rolled up holiday pay and how it is "the fairest and least complicated method" to pay holiday pay for casual workers. It was noted in that para that

there was no reason why sums paid could not be set off. The practical difficulties were set out at para 67.

91. Mr Mullen argued that the position under Scots law (and European law) was clear: It is not open to the Employment Tribunal to rewrite the law. The tribunal should accept that set off of the sums paid is sufficient to discharge the liability for holiday pay, even if rolled up holiday pay is by itself not compatible with the Directive requirements.

92. It was argued that the payslip is sufficiently transparent since each month contains what was paid by way of holiday pay. There is no requirement for total transparency – the guidance referred to above was just that (guidance).

93. Mr Mullen noted that it was permissible to claim holiday pay as part of a series of deductions. Specific days need to be requested for payment to be due. There was no such specification in respect of the holidays in April (albeit there was for the August request). A request for holidays needs to be made before the entitlement to be paid for holidays arises.

94. Mr Mullen maintained that **Sash Windows** 2015 IRLR 348 dealt with a different point, namely termination of employment and where the worker had been told that he was not entitled to holidays. In this case Mr Mullen argued that the Claimants could have sought holidays (and did) and therefore the requests for payment were not valid, since they were not a request for leave.

95. In relation to the requests for leave that were made, on 31 August 2018, the amount was set out in the tables at pages 306 to 309. In short, the Claimant had already received sums in excess of those to which they were entitled.

96. Mr Mullen submitted that if holidays are not taken, they cannot be carried forward. He submitted that the Tribunal should only consider the holidays falling due in the current holiday year.

97. In his written submission, Mr Mullen stated that **Max-Planck-Gesellschaft v Tesuji** C684-16 did not change the law in relation to rolled up holiday pay. While such an approach remained incompatible with European law, set off was permitted. It was conceded that the Respondent had failed to encourage the Claimant to take annual leave but this only meant that such leave was not lost (and did not affect the matters before the Tribunal).

Claimants' response

98. Mr Jhammat in response argued that **Sash** (*supra*) was relevant and in point (see page 150). He argued that there was no procedure for taking holidays. He referred to page 154 @ para 62 which supported his position that the approach adopted was not compliant.

Discussion and Reasons

99. The key question in this case is whether the arrangement for rolling up holiday pay was sufficiently transparent and comprehensible because if it is not, the system of rolling up holiday pay would not be compliant with the law.

100. Mr Mullen relied upon **Lyddon v Englefield Brickwork Ltd** 2008 IRLR 198 particularly since in that case the rate of holiday pay had not even been communicated to the individuals. In his submission given the facts, as he submitted, in this case, the Tribunal ought to find that the legal requirements pertaining to holiday pay had been satisfied. If the system applied by the Respondent did comply with the legal principles, the sum paid by way of rolled up holiday pay could be applied to the sums due to the Claimant in discharge of its liability to pay holiday pay to the Claimants.

101. **Lyddon v Englefield Brickwork Ltd** 2008 IRLR 198 is a useful starting point to determine the issues underpinning this case, namely whether the Respondent's practice of rolling up holiday pay for the Claimants was compliant with the rules.

102. The key facts in this case before the Tribunal as to the holiday pay arrangement are as follows:

103. The Claimants accepted a contract of employment that confirms holiday pay will be rolled up (and how it will be calculated).

104. The Claimants were given rate cards that set out the specific amount of basic pay and the holiday pay element paid on top of the basic rate.

105. There was no express procedure for the taking of holidays for workers such as the Claimants as such – they were essentially available or not available for work.

106. Their pay slips contain a sum that is the total holiday pay that has been paid to date but contains no breakdown as to how that sum has been calculated.

107. The App latterly showed the pay and holiday pay referable to the assignment.

108. The Claimants could take holidays and did so.

109. With regard to the *per incuriam* comments in **Marshalls Clay Products Limited** and their application in this case:

(a) the rolled up holiday pay was clearly incorporated into the individual contract of employment and thus expressly agreed;

(b) the allocation of the percentage or amount of holiday pay was clearly identified in the contract and referred to in the payslip (albeit on a running total basis);

(c) it was a true addition to the contractual rate of pay.

The issues that concern the Tribunal are the latter 2 points set out in that case, namely

(d) records of holidays taken must be kept; and

(e) that reasonably practicable steps must be taken to require the workers to take their holidays before the expiry of the holiday year.

110. There were no records kept as to what (if any) holidays the Claimants took (other than the payslips containing the information set out above). While it was open for the Claimants to ask to take holidays (and both did latterly) there was no evidence of any clear holiday record being kept or of any attempt to encourage the Claimants to take their holiday entitlement. The Respondent did, however, have a system to monitor the availability of workers. The Respondent's records allowed them to ensure, for example, no worker was attending work 52 weeks a year.

111. The Employment appeal Tribunal in **Lyddon** noted that the points above were only guidance and not prescriptive rules. At para 30 Elias, P said:

> "It follows that we do not accept that the Tribunal was in error in failing to follow the guidelines enunciated in *Smith*. It is important to emphasise that the principles there set out are only guidance. The fundamental question is whether there is a consensual agreement identifying a specific sum properly attributable to periods of holiday. We are satisfied that this requirement was met in this case. *Smith* sets out the best way of satisfactorily evidencing that an appropriate and transparent agreement has been made. We respectfully agree with those guidelines. It is obviously desirable that the sum or a formula for calculating it should be identified in writing in advance of the worker starting work. But the case does not purport to lay down an exhaustive set of criteria which have to be satisfied before a tribunal can properly reach the conclusion that there is a clear and transparent contractual term."

112. The issue in that case was whether or not the approach that was taken was sufficient, where the specific rate of holiday pay had not been expressed. In this case, the Tribunal has accepted that the Claimants were expressly told

of the rate of pay (and the calculation method) and were given rate cards that expressly showed how holiday pay would be made up. Pay slips referred to the running total by way of holiday pay.

113. The issue is whether the failure to positively require workers to take holidays and the failure to clearly set out, in each case, the breakdown of holiday pay for each hour, renders the approach non-compliant with the law.

114. The Tribunal has considered the submissions of both parties and carefully examined the evidence before the Tribunal and the authorities in this area. The approach taken by the Respondent was unlawful since rolling up of holiday pay is contrary to European law. That is conceded by the Respondent.

115. The fact that the rolling up of holiday pay is unlawful is not, however, the end of the matter since the next question is whether the Respondents are entitled to credit the sums they paid way of holiday pay towards their liability to pay holiday pay.

116. The Tribunal has decided to prefer the submissions of the Respondent in this regard and hold that the sums paid to the Claimants by way of rolled up holiday pay should be taken into account in assessing whether or not the Claimants are due any sums. In other words, the holiday pay that was paid to the Claimants needs to be identified and compared with what is due. If the sums paid to the Claimants by way of rolled up holiday pay is less than their entitlement to holiday pay, the balance would be due. If the sum paid exceeds the entitlement, no further sums are due.

117. The Claimants knew what was due by way of holidays and how this was to be calculated. The Claimants knew that for each hour they worked they would be paid an element of holiday pay. They knew from their payslips the amount of holiday pay they had been paid during the year, and latterly, via the App, how much holiday pay was included in each assignment. They also knew that they

could ask the Respondent to "go on holiday". They had done so. There was therefore a facility for the taking of holidays.

118. The Respondent did not have clear records as to what holidays such workers took (leaving aside the holiday pay information contained within the payslips). Nevertheless the Respondent did check the hours their staff, such as the Claimants, were available and the hours they were unavailable. It was open to the Claimants to ask to take specific times as holidays. They did so in respect of the latter request.

119. On balance the Tribunal has decided, that in all the circumstances in in particular given the authorities in this area, the criteria of transparency and clarity are met and the Respondent is entitled to set off what it paid by way of rolled up holiday pay to the Claimants against the sums due to the Claimants for their annual leave.

Sums due

120. In light of the Tribunal's decision above, the next question is to identify what, if anything, is due by way of holiday pay to the Claimants. There are separate periods for which holiday pay is sought and the Tribunal will deal with these in turn.

121. Mr Jhammat claims 20 hours 56 minutes in respect of the 2017/2018 holiday year. He accepted that he did not request leave during that year. While he denied that there was a process for the taking of annual leave, he was aware that he could have asked to take leave, notwithstanding the artificiality of such an approach. The Claimants could have asked to take leave during that holiday year but they did not. On that basis, the Tribunal finds that there is no entitlement to be paid for leave since no leave was, as such, requested. Entitlement to holiday pay is conditional upon leave being requested/taken. In any event Mr Jhammat was paid holiday pay for the entirety of that year.

122. In relation to the 2018 holiday year, he seeks payment for 10 hours 1 minute holidays. Again this relates to payment on its own, rather than payment for specific holidays taken or requested by the Claimant. For the foregoing reasons, the sums sought are not due from the Respondent. This is a request for money rather than a request for holiday pay for specific leave that was requested. In any event Mr Jhammat received holiday pay for each hour he worked in this period. If the employment had ended, Regulation 14 would require a calculation to be carried out as to entitlement to leave and payment therefor, but the Claimant's employment continues.

123. The position differs, however, in relation to the period of leave sought on 31 August 2018 (40 hours). Mr Jhammat specifically asked to take holidays for this period. He is entitled to be paid for those holidays. Even although the rolling up of holiday pay is contrary to European law (and thereby Scots law), the Respondent is entitled to credit for the sums that were paid to the Claimant in assessing holiday pay for that period.

124. He sought 5 day's leave which amounts to 40 hours. Mr Jhammat seeks 40 x £9.80 an hour (£392). Mr Jhammat had in fact received £453.87 by way of holiday pay up this period. The authorities require that sum to go towards discharging his entitlement. As he had received a sum in excess of the sum due, his claim for holiday pay fails.

125. Ms Kaur claims 36 hours 3 minutes in respect of the 2016/2017 holiday year. She also claims 60 hours 16 minutes for the holiday year 2017/2018 and 3 hours 37 minutes for the holiday year 2018.

126. She accepted that she did not request leave during these periods. The Claimant could have expressly asked to take leave during that holiday year but did not. On that basis, the Tribunal finds that there is no entitlement to be paid for leave since no leave was, as such, requested. Entitlement to holiday pay is conditional upon leave being requested/taken. In any event Ms Kaur was paid holiday pay for the entirety of that year.

127. The position differs, however, in relation to the period of leave sought on 31 August 2018 (40 hours). Ms Kaur specifically sought leave. She is entitled to be paid for those holidays. The Respondent is entitled to set off the sums that were paid to the Claimant against her entitlement.

128. She sought 5 day's leave which amounts to 40 hours (and sought £426.40 being 40 x £10.66). An average week's pay (taking an average over the last 12 weeks when remuneration was payable) for that period was £190.71. The Respondent is entitled to credit for the sums already paid to Ms Kaur by way of holiday pay. From the figures presented to the Tribunal, the Claimant had already received the sum of £914.77 by way of holiday pay. As she had therefore received a sum of holiday pay in excess of that to which she is entitled, her claim for holiday pay fails.

129. It is clear that the sums paid to the Claimants by way of holiday pay (albeit in a rolled up form) were in excess of that to which they would be entitled by applying the statutory calculation at the time leave was requested for the periods in question. That is not necessarily a surprising outcome given the calculation used by the Respondent to account for holiday pay, 12.07% of each hour's pay, accords with the approach that was previously recommended by ACAS. The figure was arrived at by dividing 5.6 (the annual holiday entitlement) by 46.4 (52 weeks less 5.6 weeks) which results in 12.07%.

Observations

130. As the authorities show, the Respondent should seek to ensure that it encourages workers to take their relevant annual leave and that there is a clear system for so doing. The Tribunal recommends that a system be devised whereby the Respondents can ensure that workers do take a proper break from work and use their annual leave entitlement accordingly.

131. The Tribunal wishes to thank the parties for their assistance in progressing matters and in their handling of the issues that arose.

132. The claims are accordingly dismissed.

Employment Judge: David Hoey
Date of Judgment: 17 January 2019
Entered in register: 19 January 2019
and copied to parties