Case Nos: 2303623/2017
2300945/2018

EMPLOYMENT TRIBUNALS

Claimants:	**Ms A Hayford**
	and
	Mr K Biddle
Respondent:	**P & O Ferries (Jersey) Limited**
Heard at:	**Ashford**
On:	**13th, 14th, 15th, May 2019** **and in chambers on 16th, 17th and 20th May 2019**
Before:	**Employment Judge Pritchard**

Representation
Claimants: Mr L Harris, Counsel
Respondent: Mr C Glyn QC

RESERVED JUDGMENT

The Claimants' claims are not well-founded and are dismissed.

REASONS

The claims

1. The Claimants each seek declarations and compensation under Regulation 22 of the Merchant Shipping (Hours of Work) Regulations 2002 as amended ("The Regulations"). The Claimants allege that the Respondent failed to permit them to exercise the right to annual and additional leave under Regulation 12 and/or that the Respondent failed to pay them for accrued but untaken annual leave upon the termination of employment. The Respondent resists the claims.

2. With effect from 17 March 2014, Regulation 22 was added to the Regulations under the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014 and gave jurisdiction to Employment Tribunals to consider claims under Regulation 12. Each Claimant claims compensation for 38 days untaken annual leave in the period commencing 17 March 2014

and ending on the dates their employment terminated: Ms Hayford willing to give credit for 12.5 days per annum in the period 17 March 2014 to 1 March 2015; Mr Biddle willing to give credit for 14 days per annum from 17 March 2015 when he started a one week on/one week off work pattern.

The issues

3. Following a preliminary hearing held on 18 May 2018 in relation to Ms Hayford's case, Employment Judge Wallis noted in her case management order:

> *The parties had agreed the following issues:-*
>
> *3.1. What is the Claimant's entitlement to paid annual leave pursuant to regulation 15 of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018?* [The Tribunal was informed that this should refer to Regulation 12 of the Regulations].
>
> *3.2. Is the Claimant entitled to carry over periods of annual leave from one year to the next and specifically from March 2014 to August 2017?*
>
> *3.3. Had the Claimant taken any leave from March 2014 and if so how much?*
>
> *3.4. Was the Claimant paid in respect of her annual leave?*
>
> *3.5. If she did not take any annual leave, but was in fact paid any annual leave payment, is the Respondent entitled to set off any sums paid to her in respect of annual leave as against the claim which she makes?*
>
> *3.6. In so far as it is alleged that the exercise of the right should have been permitted (or in the case of a period of annual leave or additional annual leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made before 11 July 2017, is the claim out of time?*
>
> *3.7. If so, was the claim presented within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before 11 July 2017?*
>
> *3.8. The Respondent asserts, but the Claimant disagrees, that there is a further issue namely that given the time limits, should the Claimant be allowed to amend her claim so as to be able to seek a payment in respect of holiday pay from 17 March 2014. The resolution of that issue affects the framing of issues 2 and 3?*

4. It was agreed that the same issues arise in respect of Mr Biddle's claim.

5. The Claimants bring their claims under Regulation 22 only: the Tribunal is not

required to consider the claims as unauthorised deductions from wages or as breaches of contract.

The hearing and the evidence before the Tribunal

6. At the commencement of the hearing, counsel for the parties provided the Tribunal with their skeleton arguments.

7. The Tribunal was provided with a bundle of documents to which the parties variously referred together with two bundles containing legal authorities, the parties referring to those authorities contained within the core bundle only. Following a brief preliminary discussion with the parties, the Tribunal used the remainder of the first day as a reading day.

8. On the second day of the hearing, the Tribunal heard evidence. The Claimants gave evidence in person together with Lee Davison (Branch Secretary of RMT Dover Shipping Branch). The Tribunal also heard from the Respondent's witnesses: Andrew Shaw (Head of HR, IR, ER – Shore and Continental Europe); Peter Capon (HR Manager Fleet at relevant times); Grant Laversuch (Head of Safety Management and DPA at relevant times); Tim Springett (Policy Director for the UK Chamber of Shipping); and Claire Shepherd (Commercial Manning and Scheduling Manager at relevant times).

9. On the third day of the hearing, the parties made oral submissions, Mr Glyn speaking to his skeleton argument and Mr Harris amplifying his written submissions and making reference to his skeleton argument.

10. The Tribunal used the remaining allocated time to deliberate and formulate this judgment.

Findings of fact

11. The P & O Ferries' group operates scheduled ferry services in three sectors: Short Sea (Dover to Calais); North Sea (Hull to Zeebrugge and Europoort); and Irish Sea (Larne to Cairnryn/Liverpool to Dublin).

12. The Respondent employs seafarers to work as crew on P & O vessels in the Short Sea sector. All employees below officer rank are described as Ratings. The Respondent recognises the National Union of Rail, Maritime and Transport Workers (RMT) for the purposes of negotiating terms and conditions of employment for Ratings. Any variations to terms and conditions agreed between the Respondent and the RMT are expressly incorporated into Ratings' contracts of employment.

Ms Hayford's employment

13. Ms Hayford's employment with the Respondent commenced on 1 July 2003. At relevant times she was employed as an Assistant Steward on the Spirit of Britain, a ferry sailing between Dover and Calais in the Short Sea Sector. Ms Hayford returned from maternity leave in May 2007 to work on a part-time basis working 12 hour shifts.

14. As at 17 March 2014, Ms Hayford was employed on a part-time basis working half of the hours required under the Respondent's "1800 Hours Contractual Terms and Conditions for Onboard Services Ratings".

15. The 1800 Hours contract provides, insofar as relevant:

> ***DEFINITIONS OF TERMS USED IN THIS CONTRACT***
>
> *TIME OFF/LEAVE* *There is no distinction between TIME OFF OR LEAVE which is any time not on a Company vessel on account of the Company or otherwise on Company business*
>
> ***5 SALARY AND METHOD OF PAYMENT***
>
> *5.1.1 The Annual Salaries take account of all conditions of service. They are set at a level that completely covers the total work content of the job to which it applies including TIME OFF/LEAVE, except where additional payments are specifically mentioned in these terms and conditions.*
>
> *9.3 TIME OFF/LEAVE*
>
> *9.3.1 ROSTER PATTERNS will be drawn up by Management and will be compiled in accordance with the operational requirements of the vessel and business need.*
>
> *9.3.2 Rosters will incorporate blocks of TIME OFF/LEAVE. Normally during the period March to September inclusive blocks of TIME OFF/LEAVE will not exceed one week. Ratings should not commit to any arrangement (e.g. Costly holiday bookings), until the Head of Department has confirmed the dates for leave.*
>
> *9.3.3 Ratings will be rostered on TIME OFF/LEAVE at Management discretion and in accordance with the operational requirements.*
>
> *9.3.4 Ratings remain on pay during periods of time off/leave.*
>
> ***APPENDIX A – FLEXIBLE ANNUAL HOURS SALARY***
>
> *Annual salary based on 1800 hours for Flexible Annual Hours Ratings*

16. Schedule A of Ms Hayford's personal contract states:

> *Schedule A –* *Pay, Hours of Work and Annual Leave*
>
> *Salary* *£8,198.00 per annum*
>
> *Hours of Work* *900.0 per year*
>
> *Annual paid leave* *12.5 days per Leave Year*

The Salary is consolidated and all-inclusive. It is set at a level which covers the total work content of the appointment for the annual hours of work and also the annual paid leave

17. In 2009, the P & O group commenced a harmonisation exercise in relation to the North Sea and Irish Sea sectors which resulted in seafarers being granted 28 days' paid annual under their terms and conditions of employment. The entitlement to paid annual leave was accepted and agreed by the RMT.

18. The ongoing harmonisation process was thereafter applied by the Respondent to those employed in the Short Sea sector. In October 2014, following negotiation with RMT which had carried out a ballot of its members, agreement was reached between the Respondent, P & O Ferries Limited and the RMT that On-Board Services Ratings would be employed under agreed terms and conditions, insofar as it is relevant in this case, in accordance with Agreements C or E.

19. All seafarers were briefed by the Respondent about the contractual changes. Among other things, they were informed that Ratings employed on 1800 hour contracts would move to 2,022 hour contracts. They were also informed that because the Regulations required leave to be identified, 28 days' leave would be identified in the 2,022 hour contracts.

20. Ms Hayford commenced maternity leave on 1 January 2015. In early 2015, she became employed under the terms of Agreement C which provides, among other things:

Schedule 1

Pay Scales

As effective up to & including 31 December 2017

Where the Ratings continuous service date is before 1 January 2015

Assistant Steward *£19,994.53*

(a) The salaries shown above cover the total work content of the job to which they apply including Paid Annual Leave, except where additional payments are specifically mentioned in the Terms and Conditions of Employment or this Schedule.

21. Schedule 2 provides:

10. Annual Duties and Hours of Work

a. The Rating is required to work flexibly in accordance with operational requirements in accordance with his/her Roster for the time being or as required in accordance with these terms and conditions of employment and to fulfil his/her Annual Hours commitment.

b. The Year for accounting of the Annual Hours is the calendar year 01 January to 31 December.

c. The Rating's Annual Hours balance will flow through from one Year to the next.

d. …

e. Positive annual hours balances

(i) Ratings who accumulate on ongoing positive annual hours balance may elect to cash them in at the Ancillary Rate.

(ii) The request to cash in Annual Hours should be made to the Head of Department.

(iii) Where the positive annual hours balance exceeds 100 hours any hour in excess of 100 hours will automatically be paid out through the payroll system at the Ancillary Rate.

f. Negative Annual Hours balances

(i) A Ratings with a negative Annual Hours balances is expected to work this off and may be rostered for additional Hours of Work to achieve this.

11. Working System

a. In the Working Year the Rating is required to work 2022 Annual Hours (which equates to 168½ twelve hour duties) an has an entitlement to 336 hours Paid Annual Leave (28 twelve hour days). For Ratings working less than a full time equivalent these hours will be adjusted pro rata.

b. A record will be kept of Annual Hours worked and Paid Annual Leave taken.

(i) The Master is responsible for ensuring that monthly timesheets are correctly completed and submitted. An Officer to whom s/he has delegated the task will ensure that the Rating has an appropriate opportunity to check his/her personal entries on it.

16. Pay

a. During employment:

i The Rating will be paid the Salary

ii The Salary is all-inclusive. There are no additional payments unless expressly provided for in these Terms.

iii Salary is paid in equal monthly instalments in arrears by direct credit transfer …

iv Salary is inclusive of pay for Paid Annual Leave and Bank Holidays

b. On termination of employment:

i General

1. *Where the number of hours worked or credited exceeds the pro rata accrual up to the effective date of termination of employment the salary equivalent of the excess will be paid.*

2. *Where the number of hours worked or credited falls short of the pro rata accrual up to the effective date of termination of employment the salary equivalent of the shortfall will be owed or reimbursed by the Rating and may be recovered by the Employer in whole or in part by deduction from salary.*

3. *Hours balances paid or recovered will be at the Ancillary Rate.*

4. *Any compensation for the statutory minimum paid annual leave which has accrued but not taken as Paid Annual Leave will [be] in accordance with applicable legislation.*

21. Training, meetings or other Company/Employer work

Training

b. S/he will be required to participate in onboard training programmes as required and may be required to attend training courses away from his/her Vessel.

c. When a Rating attends a training course on a day that would otherwise have been a planned working day then s/he will be credited with Annual Hours in accordance with his/her Roster.

d. When a Rating attends a training course on any day that would otherwise have been Time Off s/he will be paid for the hours spent undergoing training at the Training Rate subject to a minimum of 4 hours up to a maximum of 10 hours per day.

22. Paid Annual Leave

a. The Salary covers all work undertaken by the Rating and also Paid Annual Leave and Bank Holidays.

b. Rostered Paid Annual Leave

i Ratings are entitled to 336 hours (28 x12 hour days) Paid Annual Leave per Year.

ii One days Paid Annual Leave will equal 12 hours paid at the Hourly Rate. Part days Paid Annual Leave are not permitted.

ii The Head of Department will be responsible to ensure that the Paid Annual Leave is Rostered and taken within the Year.

iii Ratings' Rosters will be compiled equitably to ensure that, so far as is possible, there is a reasonably even distribution of Paid Annual Leave throughout the Year.

iv On days allocated as Paid Annual Leave the Rating shall not, save in cases of extreme emergency and with the Rating's consent, be liable for Recall, nor shall s/he be liable to attend for training nor to undertake any other duties or other employment obligations.

v To ensure that Paid Annual Leave is fully utilised in each Year, shore management reserve the right [to] designate days as the Rating's Paid Annual Leave. In such cases, not less than seven Calendar days before the commencement of the Paid Annual Leave period the Rating will be informed [of] the proposed designation and have the opportunity to identify any personal preference.

46. Pro rata working

a. Where a rating is contracted to work part time on these Terms entitlements will be pro-rated according to the Rating's contracted Annual Hours on the formula

$$\text{Pro rata entitlement} = \text{Full time entitlement} \times \frac{\text{Ratings Contracted Annual Hours}}{2022}$$

22. Appendix A to the agreement includes the following definitions:

Annual Hours	*See clause 11.a*
Hours of Rest	*The time in a Duty Period outside Hours of Work, but excluding Short Breaks*
Paid Annual Leave	*See clause 22.b*
Hourly Rate	*Salary ÷ 2,358*
Time Off	*Any time not working on behalf of the business of the Vessel but excluding Paid Annual Leave*
Year	*The calendar year 1 January to 31 December*

23. Upon her return to work from maternity leave on 5 August 2015, although employed under the terms of Agreement C, Ms Hayford continued to work on a part-time basis with the same contractual requirement to work 900 hours per

annum and with the same contractual paid annual leave entitlement of 12.5 days.

24. Seafarers working under Agreement C are known as "travellers" meaning that they would usually come on and off the vessels on a daily basis rather than live on board. This was the case with Ms Hayford. As to the times when she would work, Ms Hayford discussed with her On-Board Services Manager the hours she was prepared to work and, subject to the Respondent's operational requirements, she was rostered accordingly. This gave Ms Hayford a great deal of flexibility as to when she worked. She found it convenient that she could arrange her working time around child-care commitments. She describes these favourable working arrangements as working under a "mum's contract". If the Respondent requested Ms Hayford to work when not rostered to do so, she would do her best to accommodate the Respondent but understood she could refuse to do so. On occasions, Ms Hayford might be asked to attend product sales training when not rostered to work for which she would be paid; Ms Hayford understood however that she could not be required to attend training during periods when she was not rostered to work. The Tribunal finds that such requests made of the Claimant to attend training courses were likely to have been infrequent. Ms Hayford was able to take rest from her duties when she was not otherwise rostered to work and did not feel her health and safety was affected by these working arrangements.

25. Ms Hayford accepts that she was paid her contractual entitlement to leave within her salary.

26. A selection of Ms Hayford's pay slips referable to her service under Agreement C show that she had used up some of her annual leave entitlement. The entitlement of 150 hours (12.5 days x 12 hours) was reduced to show a residual entitlement. The Tribunal accepts Ms Hayford's evidence that she had not requested annual leave on those occasions and did not know why the reductions had been applied. The Tribunal finds it more likely than not that the Respondent made notional reductions to Ms Hayford's annual leave entitlement to record a reduction to the entitlement. This is consistent with the Respondent's position that Agreement C was, insofar as it applied to Ms Hayford, such that annual leave would be taken during periods when she was not otherwise working.

27. On 19 July 2017, Ms Hayford resigned on notice, her employment ending on 31 August 2017.

<u>Mr Biddle's employment</u>

28. Mr Biddle commenced employment with the Respondent on 31 October 2012. As at 17 March 2014, Mr Biddle was employed under the Respondent's Commercial Manning Contract as an Assistant Steward working on board the Spirit of Britain. Like Ms Hayforth, Mr Biddle came on and off the vessel on a daily basis. The terms of the Commercial Manning Contract provided no guaranteed hours of work – it was a zero hours contract under which Mr Biddle was paid on an hourly rate for the hours he worked. The Commercial Manning Contract provides:

9.5 ANNUAL LEAVE

9.5.1 Ratings are entitled to 4 weeks' (28 days) rostered PAID ANNUAL LEAVE per leave year and pro-rata for part years worked.

9.5.2 ROSTER PATTERNS will be compiled equitably by the OBS CREW TEAM to ensure that, as far as is possible, the Rating will receive one week of rostered PAID ANNUAL LEAVE in each Quarter of the LEAVE YEAR.

9.5.3 For each day of rostered PAID ANNUAL LEAVE the rating will receive 12 hours' payment at their substantive rate.

29. Payment for annual leave was thus "rolled up" within the hourly rate.

30. On 1 October 2014, Mr Biddle became employed under Agreement E. Like the Commercial Manning Contract, this was a zero hours contract providing for an hourly rate of pay for the hours worked. Again, payment for annual leave was "rolled up" in the hourly rate. The Agreement provides:

5. Hourly rate and method of payment

5.2 The gross HOURLY RATE of Pay is fully consolidated. It takes account of all conditions of service and is set out at a level that completely covers the total work content of the job to which is applies.

9. Paid Annual Leave

9.1 Payment for Paid Annual Leave is consolidated into the Rating's gross consolidated pay as a Paid Annual Leave Supplement. It is paid to the Rating as part of the HOURLY RATE of pay as in Schedule 1.

9.2 The Paid Annual Leave which has accrued due for HOURS OF WORK is taken in instalments immediately following the HOURS OF WORK in which it has accrued.

9.3 The Rating is not entitled to any additional or further payment when taking Paid Annual Leave.

9.4 The intention of the preceding provisions is that Paid Annual Leave which has accrued to date is paid for and taken at the first opportunity, so that:

9.4.1 A Rating has no Paid Annual Leave outstanding and due to him when he next goes on board a Vessel to undertake HOURS OF WORK; and

9.4.2 On termination of employment a Rating will have been paid for all Paid Annual Leave due to him. He therefore has no entitlement to any payment in lieu for paid annual leave accrued due but not taken.

31. On 1 January 2015, Mr Biddle became employed under Agreement C.

32. From about 17 March 2015, Mr Biddle commenced a pattern of working 12 hour shifts while living on board the ship for one week followed by one week off the ship, although he would work extra days on occasions as and when it was requested. The Tribunal was told that this arrangement was more akin to employment under Agreements A and B, the provisions of which do not concern the Tribunal in this case.

33. Because Mr Biddle was now working on a week on/week off basis, he was treated as part of the core team on the Spirit of Britain. He was given his work rota in advance detailing his shifts for the rest of the year. If he wished to book specific leave for that year, he would submit a leave chit at the end of the preceding year. Because Mr Biddle was being treated as a Rating working under Agreement A or Agreement B, he was permitted to take 14 days of his 28 days' contractual annual paid leave entitlement during rostered time, the remainder during times when he was not rostered. Mr Biddle thus worked on the ship for 24 weeks each year with additional days as requested.

34. Mr Biddle accepts that he was paid for annual leave in accordance with his contract. He also accepts that was granted paid annual leave for two weeks in each leave year when leave was rostered.

35. Mr Biddle raised a number of grievances which were not upheld. He resigned with effect from 4 December 2017. His subsequent appeals were not upheld.

36. The Tribunal was referred to a report of the Marine and Coastguard Agency ("MCA") together with a Maritime Labour Certificate issued by the MCA under the Marine Labour Convention 2006 ("MLC") confirming that having carried out an inspection, the annual leave entitlement for all seafarers working on the Spirit of Britain was in accordance with current requirements.

37. In respect of all the employment agreements referred to above, the Respondent's leave year ran from 1 January to 31 December.

Concise statement of relevant law and other materials

38. The Maritime Labour Convention 2006 ("MLC") provides:

Regulation 2.3 – Hours of work and hours of rest

Purpose: To ensure that seafarers have regulated hours of work and hours of rest

> *1 Each Member shall ensure that the hours of work or hours of rest for seafarers are regulated.*
>
> *2 Each Member shall establish maximum hour or work or minimum hours of rest over given periods that are consistent with the provisions in the Code.*

Standard A2.3 – Hours of work and hours of rest

1 For the purpose of this standard, the term:

(a) hours of work means time during which seafarers are required to do work on account of the ship;

(b) hours of rest means time outside hours of work; this term does not include short breaks.

2…

3 Each Member acknowledges that the normal working hours' standard for seafarers, like that for other workers, shall be based on an eight-hour day with one day of rest per week and rest on public holidays. However, this shall not prevent the Member from having procedures to authorize or register a collective agreement which determines seafarers' normal working hours on a basis no less favourable that this standard.

Regulation 2.4 – Entitlement to leave

Purpose: to ensure that seafarers have adequate leave

1 Each Member shall require that seafarers employed on ships that fly its flag are given paid annual leave under appropriate conditions, in accordance with the provisions in the Code.

2 Seafarers shall be granted shore leave to benefit their health and well-being and consistent with the operational requirements of their positions.

Standard A2.4 – Entitlement to leave

1 Each Member shall adopt laws and regulations determining the minimum standards for annual leave for seafarers serving on ships that fly its flag, taking proper account of the special needs of seafarers with respect to such leave.

2 Subject to any collective agreement or laws or regulations providing for an appropriate method of calculation that takes account of the special needs of seafarers in this respect, the annual leave with pay entitlement shall be calculated on the basis of a minimum of 2.5 calendar days per month of employment. The manner in which the length of service is calculated shall be determined by the competent authority or through the appropriate machinery in each country. Justified absences from work shall not be considered as annual leave.

Guideline B2.4 – Entitlement to leave

Guideline B2.4.1 – Calculation of entitlement

1 Under conditions as determined by competent authority or through the appropriate machinery in each country, service off-articles should be counted as part of the period of service.

2 …

3 The level of pay during annual leave should be at the seafarer's normal level of remuneration provided for by national laws or regulations or in the applicable seafarers' employment agreement. For seafarers employed for periods shorter than one year or in the event of termination of the employment relationship, entitlement to leave should be calculated on a pro-rata basis.

4 The following should not be counted as part of annual leave with pay:

(a) public and customary holidays recognized as such in the flag State, whether or not they fall during the annual leave with pay;

(b) periods of incapacity for work resulting from illness or injury or from maternity, under conditions as determined by the competent authority or through the appropriate machinery in each country;

(c) temporary shore leave granted to a seafarer while under an employment agreement; and

(d) compensatory leave of any kind, under conditions as determined by the competent authority or through the appropriate machinery in each country.

Guideline B2.4.2 – Taking of annual leave

1 The time at which annual leave is to be taken should, unless it is fixed by regulation, collective agreement, arbitration award or other means consistent with national practice, be determined by the shipowner after consultation and, as far as possible, in agreement with the seafarers concerned or their representatives.

2 Seafarers should in principle have the right to take annual leave in the place with which they have a substantial connection, which would normally be the same as the place to which they are entitled to be repatriated. Seafarers should not be required without their consent to take annual leave due to them in another place except under the provisions of a seafarers' employment agreement or of national laws or regulations.

3 If seafarers are required to take their annual leave from a place other than that permitted by paragraph 2 of this Guideline, they should be entitled to free transportation to the place where they were engaged or recruited, whichever is nearer their home; subsistence and other costs directly involved should be for the account of the shipowner; the travel time involved should not be deducted from the annual leave with pay due to the seafarer.

4 A seafarer taking annual leave should be recalled only in cases of extreme emergency and with the seafarer's consent.

Guideline B2.4.3 – Division and accumulation

1 The division of the annual leave with pay into parts, or the accumulation of such annual leave due in respect of one year together with a subsequent period of leave, may be authorized by the competent authority or through the appropriate machinery in each country.

2 Subject to paragraph 1 of this Guideline and unless otherwise provided in an agreement applicable to the shipowner and the seafarer concerned, the annual leave with pay recommended in this Guideline should consist of an uninterrupted period.

39. Recognising that sea transport was a sector excluded from Directive 93/104/EC, (the Working Time Directive ("WTD")), and adopting the standards of the relevant provisions of the MLC, Clause 16 of the Annex of Directive 1999/63/EC, as amended by Directive 2009/13/EC, provides:

Every seafarer shall be entitled to paid annual leave. The annual leave with pay entitlement shall be calculated on the basis of a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

40. Clause 2 provides:

For the purposes of this Agreement:

(a) The term 'hours of work' means time during which the seafarer is required to do work on account of the ship;

(b) The term 'hours of rest' means time outside hours of work; this term does not include short breaks;

41. Clause 4 provides:

Without prejudice to Clause 5, the normal working hours' standard of a seafarer is, in principle, based on an eight-hour day of rest per week and rest on public holidays. Member States may have procedures to authorise or register a collective agreement which determines seafarers' normal working hours on a basis no less favourable than this standard

42. Clause 5 allows either for limits to be placed on hours of work or for minimum hours of rest to be provided.

43. In exercise of the powers conferred by the European Communities Act 1972, the European Directives referred to above were transposed into domestic law

by the Regulations which now provide:

2 Interpretation

…

"hours of rest" means time outside hours of work and does not include short breaks;

"hours of work" means time during which a seafarer is required to do work on the business of the ship

…

12 Entitlement to annual and additional leave

(1) An employed seafarer is entitled to paid annual leave that is to be calculated on the basis of two and half days for each month of employment in the leave year and pro rata for incomplete months.

(2) An employed seafarer is entitled to additional paid leave of eight days in each leave year and pro rata for incomplete years.

(3) Leave to which a seafarer is entitled under this regulation –

(a) may be taken in instalments; and

(b) may not be replaced by a payment in lieu, except where the seafarer's employment is terminated.

(4) Justified absences from work shall not be considered as annual leave for the purposes of paragraph (1).

(5) For the purposes of this regulation, "justified absences from work" include an absence authorised by any enactment, contract between the seafarer's employer and the seafarer, collective agreement or workplace agreement or by custom and practice.

12A Shore leave

The shipowner and the master must ensure that shore leave is granted to seafarers to benefit their health and well-being where consistent with the operational requirements of their positions.

13 Entitlements under other provisions

Where during any period a seafarer is entitled to hours of rest or paid leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking hours of rest or paid leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.

22 Remedies

(1) An employed seafarer may present a complaint to an employment tribunal that the seafarer's employer –

(a) has refused to permit the exercise of any right that the seafarer has under regulation 12(1) or 12(2); or

(b) has failed to pay the seafarer the whole of any part of any amount due to the seafarer under regulation 12(1) or (2).

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented –

(a) before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a period of annual leave or additional leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Regulation 22A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph 2(a).

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal –

(a) must make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the seafarer.

(4) The amount of compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –

(a) the employer's default in refusing to permit the seafarer to exercise the seafarer's right, and

(b) any loss sustained by the seafarer which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a seafarer in accordance with regulation 12(1) or (2), it must order the employer to pay the seafarer the amount which it finds to be due to the

seafarer.

22A Extension of time limits to facilitate conciliation before institution of proceedings

(1) In this regulation –

(a) Day A is the day on which the seafarer concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before institution of proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the seafarer concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(2) In working out when the time limit set by regulation 22(2)(a) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set out regulation 22(2)(a) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the employment tribunal by regulation 22(2)(b) to extend the time limit set by paragraph (2)(a) of that regulation is exercisable in relation that time limit as extended by this regulation.

43 Merchant Shipping Notice ("MSN 1842") was issued by the MCA, an executive agency of the Department of Transport, providing guidance on the Regulations. Among other things, the guidance states:

Part time employed seafarers will also receive pro-rated leave entitlements under general principles.

44 The Tribunal was referred to the following cases in submissions:

Bianca Brandes v Land Niedersachsen EU: Case C-415/12

Coleman v Polestar UK Print Ltd UKEAT/0376/14

Greenfield v The Care Bureau Ltd EU: Case-219/14; [2016] ICR 161

Alexander Heimann and Konstantin Toltschin v Kaiser GmbH EU: Case C-229/11

Hein v Albert Holzkamm GmbH & Co EU: Case C-385/17

KHS AG v Schulte EU: Case C-214/10; [2012] IRLR 156

Lydon v Englefield Brickwork Ltd [2008] 198

Russell v Transocean International Resources Ltd [2011] UKSC 57; [2012] ICR 185

The Sash Window Workshop Ltd v King EU: Case C214/16; [2018] IRLR 142

Tribunalul v Dicu EU: Case C-12/17

British Airways v Williams EU: Case-155/10; [2012] ICR 847

Zentralbetriebsrat der Landeskrankenhouser Tirols v Land Tirol EU: Case C-486/08

Brazel v The Harpur Trust UKEAT/0102/17

Discussion and conclusion

Ms Hayford's application to amend her claim

44 The Tribunal first considers Ms Hayford's application to amend her claim. Employment Judge Wallis noted the following in her case management order:

> *In a letter of 22 January 2018 the Claimant's representatives explained that the claim was to cover the period from 2014 until the date of termination. A decision about whether a formal application to amend was necessary was left until the final hearing at the request of the parties. The Respondent did not anticipate objecting to any amendment application about this, but reserved its position on the time point. It was agreed that any such application or time point should be considered at the full merits hearing, as there were other time points to consider.*

45 In the event, the Respondent does object to the amendment application.

46 The procedural history of Ms Hayford's claim is as follows:

46.1 Ms Hayford's employment ended on 31 August 2017. She commenced ACAS early conciliation on 1 November 2017. ACAS conciliation closed on 10 November 2017.

46.2 Ms Hayford presented her ET1 on 7 December 2017 in which she claimed that the Respondent had failed to pay, or properly pay, payment in lieu of her accrued but untaken statutory and/or contractual leave upon the termination of her employment. The claim appears to be limited to untaken annual leave in 2017.

46.3 By letter to the Tribunal dated 22 January 2018, Ms Hayford's solicitors sought to clarify her claim. It was said to be a claim for unlawful deductions from wages/breach of contract and claimed

payment for 38 days per year from 17 March 2014 until her resignation (she resigned on 19 July 2017 and her employment ended on 31 August 2017). The Claimant's solicitors requested that the clarification be treated as an application to amend if necessary.

46.4 The Respondent presented its ET3 on 13 February 2018 in which, among other things, it resisted the claims stating that Ms Hayford had been paid all monies due to her in accordance with the Maritime Labour Convention 2006 and the Regulations for 2017 and for previous years of employment. In particular, the Respondent denied that the Claimant had an accrued outstanding entitlement of 38 days per year from 17 March 2014 to the Claimant's resignation.

46.5 Ms Hayford's Schedule of Loss served on 28 February 2018 sought payment of 38 days' holiday per year from 14 March 2014 to 31 August 2017.

46.6 The preliminary hearing took place on 18 May 2018.

46.7 In accordance with the case management order, Ms Hayford provided details of the proposed amendment. Those details made it clear that Ms Hayford was claiming accrued but untaken leave as at the date of termination of her employment under the Regulations. She claimed that she did not receive any paid annual leave from the commencement of her employment on 1 July 2003 until her resignation took effect on 31 August 2017. She claimed entitlement to 38 days' paid annual leave in each complete year of employment and averred that untaken leave carried over throughout her employment.

46.8 The Respondent presented its amended response on 19 July 2018. Among other things, the Respondent pointed out that the Tribunal did not have jurisdiction under the Regulations to consider claims referable to any period before 17 March 2014.

47 Applying the principles set out in Selkent Bus Co v Moore 1996 ICR 836:

47.1 The issue as to whether accrued leave entitlement carries over from year to year does not arise in relation to the claim as originally pleaded.

47.2 However, apart from the 'carry over' issue, the essential nature of the amended claim remains the same and the legal and factual issues to be determined remain broadly similar and unlikely to involve substantially different areas of enquiry.

47.3 The time limit for making a claim expired one month after the close of ACAS conciliation, namely 9 December 2017. The claim as originally pleaded was therefore presented in time. The application to "amend if necessary" was made on 22 January 2018. Although the applicability of the relevant time limit is an important factor, the weight of authority suggests that it is not determinative. This might be the

case, for example, as here, where the new claim being brought by way of amendment is so closely related to the claim already the subject of the claim form; see: British Newspaper Printing Corporation (North) Ltd v Kelly 1989 222 CA; Ali v Office of National Statistics 2005 IRLR 201 CA. Also see paragraph 10(1) of the Presidential Guidance on the General Case Management for England and Wales, July 2014.

47.4 As to the timing and manner of the application, the Tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it. In this case, the application for the amendment was made at an early stage in the proceedings, notably before the ET3 was presented. The application to "amend if necessary" was sent to the Tribunal in an attempt to clarify the unclear terms upon which the claim was originally made.

47.5 The main question is whether justice overall to both parties, balancing the hardship to each, requires that the amendment be granted. The Tribunal is not persuaded by the Respondent's argument that if the amendment is granted it will have suffered prejudice because a potential witness is too ill to give evidence and because leave chits are destroyed at the end of the year. As submitted by the Claimant, this prejudice does not stem from the application to amend but rather from the fact that the claims relate to paid annual leave dating back to March 2014. Despite the confused way in which the Claimant's claim was originally pleaded, by the time the Respondent was required to submit its response the claim was tolerably clear.

48 Taking into account all the circumstances, and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, the Tribunal exercises it discretion to allow Ms Hayford's amendment.

49 The Tribunal has considered Ms Hayford's application to amend her claim for good order. However, for the reasons set out below, the Tribunal reaches no conclusion as to whether or not entitlement to paid annual leave under the Regulations carries over from one leave year to the next or, if it does, whether a time limit applies to any period of carry over.

Time limits

50 As to time limits/limitation, similarly the Tribunal has no need to consider the issue. Even if the Claimants were entitled to carry over accrued leave from one year to the next, and the entirety of their claims presented within the statutory time limit, the claims would not succeed for the reasons set out below.

The Respondent's primary submission

51 The Respondent submits that the Claimants' working patterns meant they had

full opportunity to take leave when they were not working. The Claimants, like millions of other workers in the UK, were paid annual salaries in equal portions whether or not they were at work. The Respondent relies on Russell and Coleman. The Respondent submits that it has complied with its obligations under the Regulations and the enquiry should stop there.

When can annual leave be taken?

52 In Russell the Supreme Court held that the employer of offshore gas and oil workers working a pattern of two week offshore/two week onshore was entitled to require its workers to take their leave under the WTR when they were onshore when, for the most part, the workers were free from work-related obligations. The Supreme Court declined to accept the submission that the right to paid annual leave had a qualitative dimension: while it is true that the health and safety of workers lies at the heart of the WTD, there is no indication that it is concerned with the quality of the minimum periods of rest.

53 Under article 2 of the WTD: "working time" means any time during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice; "rest period" means any period which is not working time. In Russell, the Supreme Court noted that definitions in article 2 distinguishes between working time and rest periods and held that the meaning of "leave" in the WTR, in context, is a period, like rest, which is not working time.

54 As paragraph 18 of the recital makes clear, Directive 2009/13/EC complies with the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union and in particular Article 31 thereof which provides that all workers have the right to healthy, safe and dignified working conditions, to a limit on their maximum working time and to weekly and daily rest periods and an annual period of paid leave. The Tribunal accepts the Respondent's submission that the Regulations were "drawn from the same well" as the WTR, namely the Charter of Fundamental Rights, and has no hesitation in concluding that the Regulations should be interpreted in accordance with the general principles enunciated in the jurisprudence of the ECJ/CJEU.

55 The definitions of hours of work and hours of rest in the WTD and those in the Regulations, and the MLC and the Directives from which they derive, bear a similarity (with the necessary changes to apply to work in the sea transport sector).

56 The Claimants in this case were, for the most part, free from work-related obligations when they were not working on board the Spirit of Britain. They were genuinely provided with a break from work. The Claimants submit that the Tribunal must consider the logic of the Respondent's submission that non-rostered time can be considered annual leave because it would mean that a sea-farer at sea for a full year working a week on/week off pattern would still not be entitled to the full 38 days annual leave. However, this is not a case where the Claimants were at sea for a full year working a week on, week off pattern. As their evidence to the Tribunal confirms, their working patterns had no adverse effect on their health and safety. They were genuinely off work and

away from the workplace. The Tribunal notes that Guideline B2.4.2 of the MLC recognises that seafarers have the right to take annual leave in the place in which they have substantial connection and this is the case here. Unless the Claimants' submissions persuade the Tribunal otherwise, the Tribunal concludes that it is bound by the ruling in Russell, the circumstances being analogous and the Regulations having been "drawn from the same well".

57 The Claimants submit that periods when they were not rostered for work were "justified absences from work" under Regulation 12(4) and cannot be considered annual leave. Regulation 12(5) sets out the types of absences which will be justified absences from work. On the one hand, it is tolerably clear that maternity leave, for example, will be an absence authorised by an enactment (and support for this conclusion can be seen in paragraph 4(b) of Guideline B2.4.1 of the MLC). On the other hand, it is less clear how "an absence authorised by contract between the seafarer's employer and the seafarer" is to be interpreted: it would be absurd to interpret this as a reference to annual leave authorised by the contract of employment. In the Tribunal's view, a justified absence from work must relate to an absence from periods when a seafarer might ordinarily be expected to be at work, such as when rostered to do so but otherwise absent for a justified reason. It will not relate to periods when not rostered to work at all.

58 The Claimants submit that that they had not been provided with full entitlement to paid annual leave because the provisions in their contracts in relation to the taking of paid annual leave had not been followed by the Respondent. In particular, the Claimants refer to the fact that annual leave had not always been recorded or designated by the Respondent as set out in the contract. The Tribunal is unable to accept that submission. The question is not whether the Respondent kept full records or designated periods of leave under the contract; the question is whether the Respondent refused to permit the exercise of the right to annual and additional leave under Regulation 12 and/or failed to pay for accrued but untaken annual leave upon the termination of employment. Poor record keeping on the Respondent's part does not lead to the conclusion that the Respondent failed to comply with its obligations under the Regulations.

59 The Claimants also point to Appendix A of Agreement C which states that time off is to be defined as any time not working but excluding paid annual leave. Whatever contractual construction might be adopted in the relation to this provision, it does not detract from the fundamental questions the Tribunal must consider. The provisions of the agreement are otherwise clear in that it sets out the hours to be worked, the annual paid leave entitlement, and the all-inclusive salary.

60 In the Tribunal's view, the Claimants' arguments do not undermine the Respondent's submission that the ruling in Russell should be followed. By analogy with Russell, and for the reasons set out above, the Tribunal finds that the Respondent provided entitlement for annual leave during periods when the Claimants were not rostered to work.

Did the periods when the Claimants were not rostered to work provide sufficient annual leave to comply with the Regulations?

61 The Tribunal accepts that ordinarily (and subject to the pro rata principle discussed below) the Regulations provide an entitlement to 38 days' paid annual leave (2 ½ x 12 + 8) and that the Respondent provided Mr Biddle with 28 days and Ms Hayford 12.5 days. (The Tribunal notes here that no argument was advanced on Mr Biddle's behalf that the zero hours contracts under which he worked did not "roll up" paid annual entitlement within his hourly rate).

62 Given the Claimants' working patterns, it is clear that the number of days when they were not rostered to work greatly exceeded their leave entitlement under the Regulations, howsoever calculated. Both Claimants were off the work roster far in excess of 38 days in each leave year (noting that Ms Hayford was on maternity leave for just over seven months during 2015).

63 The Tribunal concludes that the Respondent did not fail to permit the Claimants to exercise the right to annual and additional leave under Regulation 12.

Has the Respondent failed to pay the Claimants for accrued but untaken annual leave upon the termination of their employment?

64 The Respondent further seeks to persuade the Tribunal that it has discharged its obligation to pay the Claimants for annual leave because they received salaries paid in equal monthly instalments. The Respondent refers to Coleman in which the EAT held that workers on a complicated shift system were properly paid for annual leave in circumstances in which they were paid the same amount each week whether or not they were at work. The Tribunal recognises the merits of submission.

65 However, the Tribunal does not accept that the enquiry should stop there. The Tribunal accepts the Claimants' submission that the circumstances in Coleman were different to the circumstances in the present case. In the present case, the Claimants' salaries were expressly calculated by reference to the number of hours they worked and the number of hours' and days' annual leave to which they were contractually entitled. That set of facts does not feature in Coleman.

66 As the ECJ has made clear, entitlement to annual leave and payment for that leave under the WTD are two aspects of the same right; see, for example: Heimann at paragraph 24; and Williams at paragraph 26.

67 The Tribunal concludes that it is necessary to consider the Claimants' entitlement to leave under the Regulations and then go on to consider whether they were paid in respect of that leave.

What was the Claimants' annual leave entitlement under the Regulations?

68 The Claimants argue that they were entitled to 38 days' paid annual leave regardless of the hours they worked in a leave year; the application of a pro rata entitlement to paid annual leave does not arise because there is nothing in the Regulations or the MLC to suggest that it should.

69 The Respondent referred to the Tribunal to a number of authorities to the effect that the pro rata principle applies to the entitlement to paid annual leave under the Part-time Workers Directive (which makes express provision for the application of the pro rata principle) and, regardless of the application of the pro rata principle under the Part-time Workers Directive, under the WTD.

70 In Greenfield the CJEU set out the purpose of leave as leave from work and that work therefore dictates the pattern of leave; that the calculation of paid annual leave which has accrued must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment. As the Respondent submits, if an employee is not working a full number of days, then he/she should not have the same amount of rest. In Land Tirol the CJEU stated:

> *… it is indeed appropriate to apply the principle of pro rata temporis, set out in clause 4.2 of the framework agreement on part-time work, to the grant of annual leave for a period of employment on a part-time basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds*

71 The principle was re-stated in Brandes. The CJEU also applied the pro rata principle in Heimann. In Maschek, the CJEU held that there was no entitlement to holiday pay as it was not earned by being at work. In Dicu, the CJEU restated that annual leave is leave from work and that:

> *entitlement to paid annual leave must, in principle, be determined is determined by reference to the periods of actual work completed under the employment contract*

72 The Tribunal was also referred to Hein in which the same principles were restated.

73 The Respondent also pointed out the absurdities that would result if the pro rata principle were not to apply: a seafarer contracted to work just one day each month, 12 days in a year, would be entitled to 38 days' paid annual leave. The Claimants referred the Tribunal to Brazel, a case concerned with the computation of holiday pay under the Working Time Regulations 1998 and the associated provisions of the Employment Rights Act 1996 which provide a methodology for calculating a week's pay. The EAT held that entitlement to holiday pay for part-time employees working on zero hours contracts should be calculated in accordance with the statutory methodology and should not calculated by including a pro rata percentage rolled up in the rate of pay. As for the unfairness that might result, the EAT stated that the Part-time Workers Regulations have as their overriding principle the concept that part-time workers are not to be treated less favourably that full-time workers but that there is no principle to the opposite effect.

74 The decision in Brazel does not assist the Tribunal in this case. Brazel was concerned with the way in which holiday pay was to be calculated, not to the amount of holiday to which the employee was entitled with which the Tribunal is concerned at this stage of its reasoning. The EAT's comment about the Part-

time Workers Regulations was made because of the anomalies that may arise as a result of the application of the computation provisions in the Employment Rights Act 1996 and has no relevance in the present case.

75 The Claimants also point to Guideline B2.4.1 of the MLC which states that service "off articles" is to be counted as part of the period of service. The evidence before the Tribunal was that "on articles" referred to a seafarer signing a crew agreement with the ship owner but that such crew agreements were no longer in use. There was no evidence before the Tribunal to suggest that the Claimants were at any time on or off articles such that the Guideline had any relevance to the circumstances of this case. This Guideline, which makes reference to the "period of service", does not in any event assist the Tribunal in determining working time from which entitlement to annual leave can be calculated.

76 The Tribunal concludes that the pro rata principle set out in the jurisprudence of the ECJ/CJEU (and said to be applicable in MSN 1842) should apply in order to calculate entitlement to leave under the Regulations. It cannot be the purpose of the legislation to give rise to absurd outcomes.

77 The provision for paid annual leave set out in Directive 1999/63/EC, as amended, is to be calculated on the basis of a minimum of 2.5 calendar days' per month. Clause 4 of the same Directive provides that the normal working hours of a seafarer is, in principle based on an eight-hour day with one day of rest per week and rest on public holidays. Thus, accepting the Respondent's submission, it can be assumed that a full-time seafarer will work 274 days each year (6 x 52 – 38).

77.1 Mr Biddle worked 168.5 days each year which is 61.5% of the number of days envisaged by the Directive. 61.5% of 38 days is 23.4 days. He was contractually entitled to 28 days, paid at the daily rate for a 12 hour day.

77.2 Ms Hayford worked 75 days each year which is 27.4% of the number of days envisaged by the Directive. 27.4% of 38 days is 10.4 days. She was contractually entitled to 12.5 days, paid at the daily rate for a 12 hour day.

78 The Claimants' contractual entitlements to annual leave accordingly exceeded their pro rata entitlements under the Regulations.

<u>Were the Claimants paid in respect of their entitlement to leave under the Regulations?</u>

79 The Claimants concede that they were paid in respect of their respective contractual entitlements to annual leave. The Respondent provided paid annual leave to the Claimants at their normal level of remuneration and in accordance with the Regulations. Payment for leave put the Claimants in the same position with regards to remuneration as during periods of work.

80 The Claimants exercised their rights to paid leave under their contracts of employment which provided at least the minimum entitlement under the

Regulations. Under Regulation 13 they were entitled to take advantage of that those more favourable rights. The question of set-off, in a strict sense, does not arise.

81 The Claimants' claims accordingly fail.

Summary by reference to the list of issues

82 Mr Biddle was entitled to 23.4 days paid annual leave under the Regulations.

83 Ms Hayford was entitled to 10.4 days paid annual leave under the Regulations.

84 The Tribunal has no need to consider whether the Claimants were entitled to carry over annual leave under the Regulations from one year to the next.

85 Whether or not the Claimants were entitled to carry over annual leave from one year to the next, they took leave to which they were entitled under the Regulations. In Ms Hayford's case, she took the entirety of her annual leave during periods when she was not rostered to work. In Mr Biddle's case, he too took his annual leave when not rostered to work until about 17 March 2015 when he took part of his annual leave entitlement from rostered periods of work.

86 The Claimants were paid in respect of their annual leave. Pay for annual leave was consolidated in their salaries which were paid monthly in equal instalments. The Claimants were paid for annual leave as provided in their contracts of employment.

87 In light of its conclusions, the Tribunal has no need to consider whether the Respondent was entitled to set off sums paid in respect of annual leave.

88 The Tribunal has no need to consider whether or not the entirety of the Claimants' claim were presented within the statutory time limit. Even if they could, the outcome would be the same.

89 Ms Hayford's application to amend her claim is granted as set out above.

Employment Judge Pritchard

Date: 3 June 2019