THE EMPLOYMENT TRIBUNALS

Claimant Mr Lee Purvis

Respondent Oil NRG Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS **ON 22 August 2019**
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For the claimant in Person
For the respondent Mr Peter Kitchen Operations Manager

JUDGMENT

The claim, as put under Regulations 16 and 30 of the Working Time Regulations 1998 (WTR) is withdrawn, but , as a claim of unlawful deduction of wages under Part 2 of the Employment Rights Act 1996 (ERA) is well founded. I order the respondent to pay to the claimant £ 267.86 gross of tax and national insurance.

REASONS (bold print is my emphasis)

1. The claim form in part 8 ticks the box " I am owed holiday pay ". It was presented on 29 December 2018 by the claimant on behalf of himself and 5 other claimants but those 5 have since withdrawn and their claims been dismissed. Early Conciliation (EC) was commenced on 10 December 2018 and ACAS issued the EC certificate on 11 December.

2. The essence of the claim is the respondent always paid basic pay only during periods of holiday, and had never been prepared, until August 2018, to include a sum for voluntary overtime regularly worked. According to the claim form, Mr Kitchen said at a meeting on 31 August 2018, the respondent was prepared to include average overtime in holiday pay for 20 days of leave per year going forward. This much the claimant accepts. The first pay date from which holiday pay included an element for overtime was 28 September , which covered holiday taken in August. Mr Kitchen said the respondent would also pay arrears of underpaid holiday since 1 January 2018 on condition employees signed a letter saying that was accepted in full settlement . The claimant is the only one who has decided to pursue a claim to hearing. He left the employment in January 2019.

3. His claim is for holiday pay paid in the past to be increased to take into account average overtime for up to two years preceding presentation. Such a claim could be framed as unlawful deduction of "wages" (which includes holiday pay) under Part 2 ERA **and/or** under

Regulations 16 and 30 WTR. After a preliminary hearing in June 2019, when Employment Judge Morris explained this, the claimant, rightly in my view, elected to bring his claim under the ERA , but the WTR are irrelevant to it. Employment Judge Morris wrote
.. the parties were clearly alert to what they described as being the change in the law and, without naming it, they alluded to the decision in Bear Scotland v Fulton [2015] IRLR15 and I drew their attention to the recent decision in East of England Ambulance Service NHS Trust v Neil Flowers and Others [2019] EWCA Civ 947 and the principles it contained.

4. Employment Judge Morris recorded issues which included
In respect of the "period in question" referred to above, did the claimant present his complaint to the Employment Tribunal within the period of three months after the date of payment of the wages to the claimant from which he asserts the deduction was made?
If not, was there a series of deductions the last of which was within that period of three months?
If not, was it not reasonably practicable for the complaint to be presented before the end of the period of three months and, if so, was it presented within such further period as the Tribunal considers reasonable?

5. Mr Kitchen said today the respondent is a part of a group of companies most of which are based in Ireland, There, many employers doubt voluntary overtime should be included in the calculation of holiday pay. Mr Kitchen asked I send out reasons to record what we discussed at much greater length today so other people could see the present state of the law. On that point, I adopt the pellucid judgment of Lord Justice Bean in Flowers. Although its facts are complicated by two features, (i) the respondent being a public sector employer and (ii) the claimants having contractual as well as statutory claims, the clear message for all employers is they must take into account non-guaranteed and voluntary overtime worked in the preceding three months when calculating holiday pay. In practical terms, it is often difficult to do individual calculations on the overtime each employee worked for a period before he takes his holiday, but from documents I saw today this respondent appears to have managed. Therefore for holidays taken on or after 1 August 2018 the respondent, albeit belatedly, is paying what the law of the UK , shaped by European law, requires. All case law sets out in theory what the law has always been, but until a Court states it clearly , it is often the source of argument In a leading law journal , IDS Brief, published in May 2019 is an article entitled "Annual Leave-**Hot Topics**" which debated this and other points. Only a month later, Flowers was decided.

6. In NHS Leeds-v-Larner , Mummery LJ said "*The rule of law, in its practical application in the workplace, should ensure that, as far as possible, the legal rules are certain, clear and accessible* ***by the people for whom the rules were made****. It does not help them for the courts to complicate the law and to make it even more difficult to work out what it is and* ***what it means in practice"*** . I could not agree more, so I will try to keep these reasons as simple as possible. Having started the hearing by saying to Mr Kitchen that what the respondent was doing now was correct and what it should always have been doing, the major remaining issue for determination was how far back the claimant could claim underpayments . Recent EU cases eg King v Sash Window Workshop Ltd [2018] IRLR 142 Max-Planck-Gesellschaft v Shimizu C-684/16 and Kreuziger v Land Berlin C-619/16 deal

with employers who have not allowed workers to have paid leave where backdating of unpaid holiday pay due under Reg 13 can go back over the whole period of employment . However, this is not such a case, so they do not help the claimant.

7. Section 13 ERA , which prohibits deductions from wages , includes
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion .., the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

It is clearer for unrepresented parties to think of " deduction" as meaning " underpayment ".

8 . Section 23 includes

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

(a) that his employer has made a deduction from his wages in contravention of section 13

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint".

The parties agreed I cannot consider underpayments before January 2017, but can I go back even that far?

9. Section 24 adds

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of ***any deduction*** *made in contravention of section 13,*

(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

This does not enable me to award interest, or compensate the claimant for time off work spent in pursuing this case.

10. The problem facing the claimant comes from these provisions of s s23 ;
*(2) Subject to subsection (4), an employment tribuna**l** shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions ..,

the references in subsection (2) to the deduction are to the last deduction in the series ..

(3A) Section … 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

11. Langstaff J in Bear Scotland-v-Fulton said :
Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link.
I accept Ms Rose QC's submission that the precise force of the word, common though it is, has to be understood in the legislative context. That is one in which a period of any more than three months is generally to be regarded as too long a time to wait before making a claim. The intention is claims should be brought promptly. I doubt, .. the draftsman had in mind a deduction separated by a year from a second deduction of the same kind would satisfy the temporal link. It would have been perfectly capable of justifying a claim at the time, and within three months of it. Whereas when considering a series, as when considering whether there has been "conduct extending over a period" (the analogous provision in the Equality Act 2010) some events in the series may take colour from those that come either earlier or later, or both, so that the factual similarities can only truly be appreciated when a pattern of behaviour is revealed, the essential claim here is for payment in a sum less than that to which there is a contractual entitlement. The colour of such a deduction is, though not inevitably, at least likely to be clear within a short time after it occurs, if not at the time.
Since the statute provides that a Tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made… I consider Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.

12. I believe this is what prompted Employment Judge Morris to write in his orders in June:
7. In regard to the above, I make the following observations for the guidance of the parties:
7.1 in respect of a series of deductions, a gap of more than three months between any two disputed payments will break the series;

7.2 in any event, claims in respect of a series of deductions are limited to a maximum period of two years ending with the date of the presentation of the complaint: see section 23(4A) of the Act.

13. The correctness of this aspect of Bear Scotland has been doubted by many academic commentators **but it is binding authority on me**. In acase I decided recently, involving not holiday pay but allegedly underpaid commissions, the point resulted in the claimant being unable to be awarded many thousands of pounds because there was a greater than three month gap in the series of alleged underpayments of commission.

14. In this case, the claimant had prepared a very good written witness statement and attached payslips for 2017 and up to August 2018. From a perusal of those I was able to see that on average he worked 8.9 hours of overtime per week. When I looked in preparation for this hearing at the documents on file, one showed the claimant took no holiday at all in January-March 2018 inclusive The claimant agreed this. At the hearing Mr Kitchen produced the claimant's holiday chart which showed the first leave day he took in 2018 was 3 April. There was therefore a greater than three month gap after the underpaid leave for which the claimant claimed in 2017. In 2018 he took 4 days in April and 3 at the end of July immediately before, with effect from 1 August, his holiday pay included overtime. At the time of the hearing, I could see no way in which I could award any underpayments in 2017 due to the ruling in Bear Scotland. Neither could the claimant nor his father-in law who accompanied and helped him

15. Mr Kitchen said he had been advised to argue the gap between the holiday the claimant took at the end of July was greater than three months before he brought his claim so the claimant could not even recover for the 4 days in April and 3 at the end of July, because the whole claim had been presented out of time, and it was reasonably practicable for it to have been presented in time. I tend to agree with the latter point. However for the holiday he took from 27 July to 10 August 2018 he appears to have been paid on 28 September The way in which the due date for presentation of claims is extended to allow for early conciliation in my view meant that if there was an underpayment on or after 11 September the claim would be in time.

16. Then came another area of controversy. The Bear Scotland and Flowers cases only require voluntary overtime to be included in the calculation of regulation 13 leave. Reg. 13 WTR implements the European Union (EU) Working Time Directive (WTD) and entitles every worker to four weeks per year annual leave. For a five day per week worker, that converts to 20 days. In the UK normally there are 8 bank holidays per year. Reg 13 A does not implement any EU directive, but grants workers an additional 1.6 weeks annual leave. For a five day per week worker that converts to 8 extra days. The declared thinking of the government at the time was to give UK workers 20 days plus 8 bank holidays. However, the legislation does not express Reg13A| leave **to be** the bank holidays. That is how this respondent is treating them in that it still pays flat rate only for bank holidays. Decisions of employment tribunals are not binding on any other tribunal but both myself and my retired colleague Employment Judge Buchanan have had to address the question of which type of leave is being taken in cases where, unlike the present one, the undertaking functions and

workers regularly work on bank holiday eg healthcare, security, the emergency services and many large retail outlets. In those cases we both decided that in any leave year the Reg13 leave was taken first, followed by Reg13A leave and lastly any contractual entitlement in excess of that. However, in a case where as here the business generally shuts on a bank holiday and none of the workers work, an argument , the bank holiday should be treated as the Reg13A leave would have considerably more merit,

17 I then noted from the holiday chart small marks on certain dates which Mr Kitchen confirmed were the bank holidays. Whether any series was broken and the time limit points would depend for its result upon in what category of leave I viewed two bank holidays taken in May. This claimant tend to take his leave in " blocks", while others take the occasional day or two more often. The historical problem Mr Kitchen was trying to address in August 2018 was that he wished to treat all workers fairly irrespective of when they had taken leave and when bank holidays happened to fall.

18. After we discussed the issues and I gave the parties time to talk to one another,' they chose to reach agreement rather than embark on risky points. I commended that decision and both gave written consent to the judgment I have made above. I wish I could give more definite guidance on the time limit points , but unless and until either a higher Court decides them or Parliament enacts clear rules , I cannot.

TM Garnon Employment Judge
Date signed 23 August 2019 .