Case Number: 3306694/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs H Karim	**v**	Debenhams Retail Limited

Heard at: Cambridge Employment Tribunal **On**: 19 November 2019

Before: Employment Judge Johnson

Appearances
For the Claimant: In person
For the Respondent: Mr T Sheppard

JUDGMENT

1. The Claimant's claim of unpaid annual leave succeeds insofar as it complies with the Deduction from Wages (Limitation) Regulations 2014 and subject to the deduction of the ex gratia payment made by the respondent on 21 December 2018.

2. The case will be listed for a remedy hearing on a date to be advised in order that the balance of the unpaid holiday pay due to the claimant can be calculated.

REASONS

Introduction

1. This is a claim which has been brought by a claimant who is employed by the respondent retail business as a sales assistant in their Cambridge store. She has worked in this role since 26 October 2005 and remains in employment with the respondent.

2. On 25 February 2019 the claimant presented a claim following a period of early conciliation from 4 February 2019 until 20 February 2019. The claim relates to holiday pay which she believes the respondent has failed to pay her since 2012 when her contract changed to what was described by the respondent as a 'Peak Hours' contract.

3. The claimant did not request holiday and holiday pay from her employer following her change to the Peak Hours contract 2012 until November 2018. The claimant says that she only became aware of her entitlement to holiday and holiday pay following a conversation with a colleague. The respondent's Human Resources ('HR') team have made an ex gratia payment to her which had taken into account the holiday pay they believe she should have received for the 18 months prior to the raising of this issue with them. The claimant is unhappy that she has not received all of the holiday pay which she believes that she is entitled to going all the way back to 2012 when the Peak Hours contract began.

4. The respondent argues that the claimant is out of time in respect of her claims for historic holiday pay. It believes that in making the ex gratia payment, it had done more than it was legally required to do when faced with a claim of this nature.

The Issues

5. Can a claim of holiday pay be brought as part of an unlawful deduction of wages claim?

6. Effect of The Deduction from Wages (Limitation) Regulations 2014 on limitation of the period of claim for untaken leave?

7. What leave period could she claim for taking into account issues of limitation?

8. Does the ex gratia payment made by the respondent to the claimant following her complaint being raised with HR in November 2018 affect the amount of holiday pay which the claimant can claim?

9. How much pay/what leave period is outstanding to be paid to the claimant?

The Hearing

10. The claimant attended the hearing in person and without representation. She was supported by two family members but she conducted her own advocacy in this case. She was the only person who gave witness evidence in support of her case.

11. The respondent relied upon the witness evidence of Miss L Buchanan who is a HR business partner with the respondent.

12. The respondent had prepared a bundle of documents which was 46 pages in length and contained the proceedings, the claimant's contract of employment, a policy relating to the management of this contract and various pay details. A short, supplemental bundle provided details of the shifts that the claimant had worked while she was employed on the Peak Hours contract.

13. The hearing was originally listed as a hearing of 1 hour's duration. However, due the complexity of the issues being raised and the need to hear witness evidence, I allowed the hearing to be extended for a further hour. While this additional time, allowed the witness evidence to be heard and for final submissions to be given, there was insufficient time available to provide a judgment on the day.

Findings of Fact

14. The claimant commenced her employment with the respondent on 26 October 2005 at their Cambridge store and was originally working 8 hours per week with typically 2 shifts of 4 hours each. She told me that she was aware at that time that she could claim annual leave and said that she thought she was allowed 4 weeks leave each year. She said that in this role, she had to ask her line manager when she wanted to take some leave and he or she would remind her of how much leave she had remaining. As the claimant was working every week, it is understandable that she recognised her entitlement to leave and the need to request it when she wanted to take time off work.

15. On 2 December 2012, the claimant's contract with the respondent changed to a 'Peak Hour Contract'. This was effectively a zero hours contract and did not involve set hours each week. It was explained during the hearing that this contract allowed stores to manage busy times such as Christmas and to offer Peak Hour staff hours of work when they were needed. The claimant no longer worked set hours and was under no obligation to accept hours that were offered to her.

16. The claimant said that because this was a zero hours contract, she did not believe she was entitled to claim annual leave. She only became aware that she could do so when a colleague told her on or around 16 November 2018. As the respondent would only provide holiday pay when annual leave was requested, the claimant had not received any holiday since she commenced the Peak Hours Contract in December 2012. She quickly approached the respondent's HR team and sought back pay in respect of all of the holiday pay she believes she should have been paid since December.

17. The respondent argued in its response that it paid the claimant any outstanding holiday from her original 8 hour per week contract when this ceased. This was not challenged by the claimant and the Change to Peak Hour contract form contained within the hearing bundle, indicated that existing holiday pay was calculated and presumably paid following the variation of contract.

18. An issue in dispute between the parties was whether the claimant received a copy of the Peak Hour contract. A copy of this contract was in the bundle and enclosed with a copy letter dated 22 January 2013. It was addressed to the claimant at her workplace location in the Cambridge store, rather than her home address. In the letter, the Sales Manager

Tracey Baker explained that the claimant would continue to have holiday entitlement based upon her length of service, but it would be based upon the number of hours worked during the April to March holiday year.

19. Page 2 of the contract referred to holiday entitlement and confirmed that it *'accrued based on the number of hours worked during the holiday year and paid at your hourly rate of pay at or around the time when the holiday is taken…[f]or every hour worked you will accrue 15.04% holiday entitlement.'* The contract then went on to provide guidelines for taking holiday and explained that upon request, an employee's line manager would confirm accrued holiday entitlement and all leave requests must be agreed with them. It also stressed the importance of employees taking their full entitlement during the holiday year with any leave that is carried over at the end of March, being taken by no later than the end of May.

20. The contract provided for signature by both the respondent and the employee. The copy disclosed by the respondent was unsigned and I did not see any documentary evidence or hear any oral evidence from Ms Buchanan which would indicate that the claimant had received the contract and signed it. While I recognise the obligation placed upon an employee to read and sign contractual documents, I believe that the claimant gave reliable evidence which confirmed that she did not receive the contractual documentation.

21. Ordinarily this might not have had an impact upon whether or not leave was taken. However, the claimant explained that although she knew that she was on a zero hours contract, it was her understanding that this meant she was not entitled to annual leave. She was not a member of a trade union or staff association and there was no evidence provided by the respondent that line management actually kept the claimant informed as to how much leave she had remaining each year and the need to take it before the leave year expired.

22. Ms Buchanan confirmed that The Peak Hour Contract Policy document 2018 was an updated version of earlier documents and in the absence of other documentary evidence, it reasonable to assume that its contents would have broadly remained the same while the claimant was employed under this contract. It is clear that the respondent placed a great deal of responsibility on its line managers to calculate holiday entitlement for their staff and to inform them of what this entitlement was. I found that Ms Buchanan gave evidence in a credible and reliable way and she accepted that line managers had this responsibility and she accepted that it was possible they may not have been as thorough in this task as they should have been. She confirmed that recruitment was an issue in the Cambridge store and it may well have been the case that the claimant's line management was not as stable as it should have been.

23. While Ms Buchanan was clear in her opinion that the responsibility to manage holiday rested not only with line management, but with the employees too, I do find that the claimant was unaware of her entitlement to annual leave. This was caused bv the failure of the respondent's

management to ensure that she received a contract of employment and the failure of line management to ensure that the claimant understood how holiday entitlement worked and to keep her informed of what holiday remained untaken.

24. As a consequence, the claimant did not become aware of her actual entitlement to claim annual leave and holiday pay until around November 2018 when another colleague who was not employed on a Peak Hour Contract, became aware the claimant's annual leave entitlement and immediately told her about this. The claimant then raised the issue with her line manager and the respondent's Human Resources team.

25. Ms Buchanan confirmed that the claimant contacted Human Resources on 16 November 2018 and that while they felt that the claimant could not carry over the untaken holiday entitlement, it agreed to make an ex gratia payment equivalent to the holidays she had accrued during the previous 18 months and she was paid a sum totalling £919.88 on 21 December 2018. Although she accepted that she could not be absolutely sure, Ms Buchanan when taken to the Respondent's record of the claimant's working patterns, indicated that this payment would have covered a period of holiday pay stretching back to March 2017.

26. Having looked at the work activity sheets that were including in the bundle of documents, I was satisfied that the claimant was working regularly from the beginning of 2017 until late 2018 when she made her claim. There was a period from late March until May 2017 and between October 2017 and January 2018 when she was not recorded as having worked. Ms Buchanan was unable to provide a precise breakdown of how the ex gratia payment was calculated and I was unable to establish anything further from the documentation which might assist me.

27. Taking into account the limited evidence that was available to me at the hearing, I found that was proportionate and appropriate to adopt a 'broad brush' approach when considering which period of the claimant's recent work history that the 18 month ex gratia payment was applied to. I accept that the ex gratia payment was made by the respondent for the claimant's accrued holiday pay in respect of the 18 months prior to the raising of the issue. As the matter was raised in late November and paid in December 2018, I find that the payment would have been calculated from 30 November 2018. This means that it would have covered an 18 month period from 30 May 2017 until 30 November 2018.

28. The Claimant acknowledges that she received this sum, but maintains that she is entitled to holiday pay in respect of the balance of untaken leave which has accrued since she started as a Peak Hours Employee on 2 December 2012.

The Law

29. Section 13 of the Employment Rights Act 1996 ('ERA') provides that an employer must not make a deduction from a worker's wages employed by her.

30. Following the decision in *Revenue and Customs Commissioners v Stringer* 2009 ICR 985, HL, a failure to pay holiday pay due under the Working Time Regulations 1998/183 amounts to an unlawful deduction of wages contrary to section 13 and identified as 'wages' in section 27(1)(a) of the ERA.

31. Section 23(2) of the ERA provides that a complaint of unlawful deduction of wages shall only be considered if it is presented before the end of a period of 3 months (subject to early conciliation), beginning with the date when the deduction was made. Although in principal, under section 23(3) of the ERA, this could include a number of deductions which form part of a series and in that case, the relevant date for calculating the 3 month period is from the date when the last deduction was made.

32. In the case of *NHS Leeds v Larner* 2012 ICR 1389, CA, the Court of Appeal decided that a worker who had not had the opportunity to take annual leave because of absence through long term sick leave could carry over unused leave from year to year and on termination, claim holiday pay due in respect of previous leave years despite the leave not having been requested or taken at the time.

33. This is complicated by the decision in *Bear Scotland Ltd and ors v Fulton and ors and other cases* 2015 ICR 221, EAT, where the Employment Appeal Tribunal held that a gap of more than 3 months between any two deductions will break the 'series' of deductions and this will mean that any earlier deductions cannot rely upon the later deductions for the purposes of satisfying the time limits provided by section 23(2).

34. In addition to this, the Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322 introduced a two year limit on the backdating of unlawful deduction from wages claims presented on or after 1 July 2015 in respect of those wages such as holiday pay described in section 27(1)(a) of the ERA. This means that a claimant can only claim in respect of a series of deductions going back two years from the date the claim was presented.

Discussion and Analysis

35. This case does involve an unfortunate set of circumstances. The claimant, who understandably believed that her zero hours contract did not include an entitlement to annual leave, was not able to rely upon the respondent's line managers to correct her as to this entitlement and to remind her to take her leave in accordance with the provision of the Peak Hour Contract. This was despite there being evidence that the respondent placed a great

deal of responsibility upon line managers in monitoring annual leave of staff within their teams. This resulted in the unfortunate consequence of the claimant working from 2012 until late 2018 without requesting any leave or holiday pay, until a colleague corrected her.

36. It is acknowledged that the respondent when notified of this misunderstanding sought to pay the sum of £919.88 on 21 December 2018. This ex gratia payment reflected the holiday entitlement for the period ending when her complaint was made to them and which I found to be 30 November 2018 and beginning 30 May 2017. Naturally, the Tribunal must take account of this when considering the claimant's claim.

37. In terms of jurisdiction, the Tribunal can hear claims for holiday pay, but only for the previous two years ending on the date the claim was presented on 25 February 2017. Accordingly, any earlier deductions cannot be heard.

38. While it is acknowledged that the claimant wishes to claim all of the pay in respect of the untaken holiday that has accrued, this does mean that her claim in respect of holiday pay which accrued before 25 February 2017 cannot be considered.

39. This does mean that the ex gratia payment made by the respondent has not taken into account the entirety of this period and the claimant is still entitled to claim the unpaid holiday pay from the respondent for the period between 25 February 2017 and 29 May 2017.

40. I have taken into account the question of gaps between the payments claimed and note from the claimant's work sheets that she did work on enough occasions during that period so that there were no gaps of 3 months or more between each period of work to which annual leave entitlement would accrue.

41. Unfortunately, I do not have sufficient information to calculate what the claimant would have received during the period of 25 February 2017 to 29 May 2017. This is because the claimant did not work regular shifts and I am unable to simply divide the ex gratia payment by 18 in order to calculate a reasonable accurate monthly figure. The unpredictable work patterns which the claimant worked, means that each month would involve different hours of work and accordingly, this matter will have to be considered further at a remedy hearing.

Conclusion

42. Accordingly, it for these reasons that I find that the Claimant's claim of unpaid annual leave succeeds insofar as it complies with the Deduction from Wages (Limitation) Regulations 2014 and subject to the deduction of the ex gratia payment made by the respondent on 21 December 2018.

43. The case will be listed for a remedy hearing on a date to be advised in order that the balance of the unpaid holiday pay due to the claimant can be calculated.

44. In the event that the parties reach an agreement concerning this figure before the hearing takes place, they should let the tribunal know immediately in order that an appropriate order can be made and the hearing postponed.

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Employment Judge Johnson

Date: 13 December 2019

Sent to the parties on: .....

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For the Tribunal Office