



## EMPLOYMENT TRIBUNALS

**Claimant**  
Mr J Law

**Respondent**  
TEF Transport Ltd

**Heard at:** By telephone  
**Before:** Employment Judge Davies

**On:** 17 June 2020, 1 July 2020

### Appearances

**For the Claimant:** In person  
**For the Respondent:** Mrs L McGlaughlin

## RESERVED JUDGMENT

1. The judgment given orally on 17 June 2020 is set aside.
2. The claim for unauthorised deduction from wages by failing to pay the Claimant his full holiday pay up to and including 7 June 2019 was not brought within the time limit in s 23 Employment Rights Act 1998. It was reasonably practicable to do so. The Tribunal therefore does not have jurisdiction to deal with this part of the claim.
3. The claim for unauthorised deduction from wages by failing to pay the Claimant his full holiday pay on 13 September 2019 is well-founded and succeeds. The Respondent shall pay the Claimant **£94.80** gross. The Claimant is responsible for the payment of any tax and National Insurance.
4. The Claimant's application for a preparation time order is refused.

## REASONS

### Technology

1. This hearing was conducted by telephone as previously ordered by EJ Jones. The form of remote hearing was A (Audio). It was not practicable to hold either a face to face or a video hearing but all the issues could be dealt with by telephone. All parties had a hard copy of the agreed hearing file, Mrs McGlaughlin's witness statement and my case management order dated 5 March 2020.

### Introduction and reconsideration

2. On 17 June 2020 there was a hearing to decide about Mr Law's claim for underpaid holiday pay against his former employer, TEF Transport Ltd ("TEF").

Mr Law represented himself and Mrs McLaughlin represented TEF. They both gave evidence. The issues were complex, neither party was legally represented and the hearing was being held by telephone. I therefore decided that both witnesses should make an affirmation at the start of the hearing and that they should each give evidence about different aspects as we went along. I gave them the chance to ask each other questions.

3. At the end of the hearing I gave my oral judgment. In outline I found that there was a series of deductions going back more than two years. There were no gaps of three months or more between deductions. Mr Law was therefore able to claim for unauthorised deduction from wages during the period of two years ending with the presentation of his claim. I awarded him £1050.15 gross.
4. Mrs McLaughlin requested written reasons. When I came to draft the written reasons, it appeared that there was one gap of three months between deductions, because on one occasion bank holiday pay had in fact been correctly paid in accordance with the Working Time Regulations. There was no deduction on that occasion. I had not noticed this at the hearing and the parties did not point it out. I therefore proposed to reconsider the judgment I had given orally. The reconsideration hearing was held by telephone on 1 July 2020.
5. At the reconsideration hearing, Mr Law and Mrs McLaughlin agreed that there was a three-month gap between deductions. There was a deduction on 13 September 2019. The bank holiday on 26 August 2019 was paid at the correct rate on 6 September 2019, so there was no deduction on that occasion. The next deduction going back was on 7 June 2019. The gap between 7 June 2019 and 13 September 2019 was more than three months.
6. Mr Law extremely fairly said that he did not want to take advantage of the fact that nobody had spotted that there was no deduction on 6 September 2019. He said that the law should be properly applied. I decided that it was necessary in the interests to revoke my oral judgment given on 17 June 2019. If there was no three-month gap, the Tribunal claim relating to the whole series of deductions was brought within the time limit. If there was a three-month gap, the claim relating to deductions before the gap was not brought within the time-limit. It would not be fair to TEF to have to pay the whole amount deducted during a two-year period, without any consideration of the time limit or whether time should be extended.
7. I explained that I would revoke my earlier judgment. I then heard further evidence from Mr Law about why he did not bring his Tribunal claim sooner. Mr Law and Mrs McLaughlin put forward their arguments about whether the time limit should be extended.
8. I should like to record my thanks to Mr Law and Mrs McLaughlin for their approach to this claim. Neither was legally represented and this is a surprisingly complex area. There was the added complication of being unable to have a hearing in person. They prepared all the papers and calculations in a clear and organised way, and they were courteous, respectful and fair during both hearings.

## The issues

9. At the preliminary hearing in March I set out the list of questions the Tribunal would have to decide in order to determine Mr Law's claim. They were:
  - 9.1 On what dates did Mr Law take holiday or a bank holiday?
  - 9.2 When was he paid for each holiday or bank holiday?
  - 9.3 How much was he paid for each holiday or bank holiday?
  - 9.4 Was he paid the correct amount for each holiday or bank holiday?
    - 9.4.1 Which were his European holidays?
    - 9.4.2 What was his average normal pay, including regular overtime or other regular payments, in the 12 weeks before each of those holidays?
    - 9.4.3 Was his holiday pay for each of his European holidays based on that average?
    - 9.4.4 Which were his UK holidays?
    - 9.4.5 Did he have normal working hours?
    - 9.4.6 If so, what was his week's pay for those normal working hours, calculated using s 221-223 of the Employment Rights Act 1996?
    - 9.4.7 If he did not have normal working hours, what was his week's pay calculated using s 224 of the Employment Rights Act 1996, i.e. what was his average weekly remuneration for the 12 weeks before each holiday?
    - 9.4.8 Was his holiday pay for each of his UK holidays based on his correct week's pay?
  - 9.5 Was there a series of deductions from Mr Law's wages because of underpaid holiday?
  - 9.6 Were there any gaps of more than three months between deductions that break the series?
  - 9.7 If there was a series of deductions, on what date were the last wages from which such a deduction was made paid?
  - 9.8 Did Mr Law bring his Tribunal claim within three months (plus Early Conciliation extension) of that date?
  - 9.9 For any part of the claim that was not brought within the time limit, was it reasonably practicable to do so?
  - 9.10 If not, did Mr Law bring his Tribunal claim within a reasonable period?
  - 9.11 What was Mr Law's holiday year?
  - 9.12 How much holiday had he accrued (earned) in the holiday year when his employment ended?
  - 9.13 How much had he taken?
  - 9.14 If he had not taken it all, was he paid for it instead when his employment ended?
  - 9.15 If not, how much should he have been paid for it?
  - 9.16 When should he have been paid for it?
  - 9.17 Did he bring his Tribunal claim within three months (plus Early Conciliation extension) of that date?
  - 9.18 Was it reasonably practicable to do so?
  - 9.19 If not, did Mr Law bring his Tribunal claim within a reasonable period?

## Findings of fact

10. I have made the following findings of fact. Mostly, there was no dispute.
11. Mr Law worked for TEF as an HGV driver. He started on 5 June 2017.
12. His contract specified an hourly rate of pay for the first 50 hours worked per week. There was a higher rate for overtime worked at the request of the employer for hours worked in excess of 50 hours per week and a higher rate for Sundays.
13. The contract said this about hours of work and holidays:

### 5. Hours

There are no normal hours of work, the actual hours worked will be as required to complete your duties, but your actual hours are expected to be approximately 50-60 hours per week. It is expected that you will be able to finish your work within your normal hours. However, you may be required to work additional hours if it is necessary for the proper performance of your duties. The employer reserves the right to vary your hours in order to meet the needs of the business.

### 6. Holidays

Full-time employees are entitled to 20 days' holiday per year in addition to recognised Bank/Public Holidays. ...

Rules as to holidays and holiday pay are set out in the Employee Handbook provided with this statement. One week's holiday pay will consist of 50 hours at your basic rate.

For the purposes of the application of statutory holiday entitlement under the Working Time Regulations, you agree that the holiday section of this statement and the Employee Handbook will be held to be a "relevant agreement."

14. I was not shown any pages from the Employee Handbook.
15. The contract did not guarantee 50 hours' work per week but Mrs McGlaughlin agreed that normally Mr Law would work 50 or more hours per week. She identified one week in which he had worked fewer hours. Given this and given what the contract says about overtime pay, I find that Mr Law's basic hours were 50 hours per week.
16. Although the written contract I saw did not deal with this, Mr Law and Mrs McGlaughlin agreed that under his contract Mr Law was to be paid £50 per bank holiday. That meant he was paid 10 hours per day at his basic rate for 20 days' holiday and £50 for the 8 bank or public holidays.
17. Mr Law was also contractually entitled to a night out allowance of £20 if he was working away from home overnight. This was meant to cover expenses for an evening meal and breakfast, washing facilities and the upkeep of bedding in the cab. It is a tax-free sum under HMRC rules, provided that it does not exceed £26.17. I accept that Mr Law was entitled to this payment if he was away overnight and that drivers would not do this work for TEF if they did not get the

night out allowance. But, Mr Law agreed that it was meant to cover the additional expenses that were caused by being away overnight. He did have to pay for an evening meal and breakfast in those circumstances and sometimes for washing or laundry. I find that the night out allowance was genuinely intended to cover Mr Law for out of pocket expenses caused by being away overnight. If he was not working and was on holiday, he would not incur those expenses.

18. Mr Law and Mrs McGlaughlin agreed about the dates on which Mr Law took holiday, the dates he was paid for those holidays and how much he was paid. They were as follows:

| First day of holiday | Length of holiday | Date paid | Average hours including overtime previous 12 weeks | Calculation of gross pay based on those hours £ | Actual gross pay paid £ |
|----------------------|-------------------|-----------|--|---|-------------------------|
| 9/10/17              | 5 days            | 20/10/17  | 61.98  | 575.79  | 450                     |
| 11/12/17             | 5 days            | 22/12/17  | 60.21  | 557.20  | 450                     |
| 26/2/18              | 5 days            | 9/3/18    | 56.58  | 519.09  | 450                     |
| 28/5/18              | 4 days            | 8/6/18    | 41.70  | 382.81  | 360                     |
| 8/10/18              | 5 days            | 19/10/18  | 60.70  | 562.35  | 450                     |
| 15/10/18             | 5 days            | 26/10/18  | 59.30  | 547.65  | 450                     |
| 25/2/19              | 5 days            | 8/3/19    | 56.50  | 518.25  | 450                     |
| 2/9/19               | 8 days            | 13/9/19   | 56.50  | 829.20  | 734.40                  |

19. The last payment included (under)payment for the holiday that Mr Law had accrued but not taken when his employment ended. Mr Law and Mrs McGlaughlin also agreed about the dates on which Mr Law took bank holidays and the dates he was paid for those holidays. They were as follows:

| Bank holiday | Date paid |
|--------------|-----------|
| 28/8/17      | 8/9/17    |
| 25-26/12/17  | 5/1/18    |
| 1/1/18       | 12/1/18   |
| 29/3/18      | 6/4/18    |
| 2/4/18       | 13/4/18   |
| 27/5/18      | 8/6/18    |
| 27/8/18      | 7/9/18    |
| 25-26/12/18  | 4/1/19    |
| 1/1/19       | 11/1/19   |
| 19/4/19      | 26/4/19   |
| 22/4/19      | 3/5/19    |
| 6/5/19       | 17/5/19   |
| 27/5/19      | 7/6/19    |
| 26/8/19      | 6/9/19    |

20. Mrs McGlaughlin said that they had taken advice since these proceedings were started. They realised that they had not been paying holiday pay correctly in accordance with the Working Time Regulations.

21. She now agreed that if the bank holidays were treated as the additional leave (UK leave) that Mr Law was entitled to under Regulation 13A of the Working Time Regulations, he should have been paid £91.80 for each bank holiday. Mr Law was therefore underpaid by £41.80 gross for each bank holiday apart from the last one. The last one was paid at the correct rate because the Respondent changed its policy in August and started paying for bank holidays at the same rate as it paid for other holidays. Mr Law was not at work by the time that payment was made. His employment ended on 1 September 2019.
22. Mr Law went on holiday for two weeks when his employment ended. He started a new job on 7 October 2019. He says that when he started the new job, his holidays were paid differently and he realised that what TEF had done was illegal. He contacted the Citizens Advice Bureau. He had to wait a bit for an appointment. He saw them at the end of November. They told him about his holiday pay rights and about the time limit for bringing a claim. He emailed TEF to a general email address and did not get a reply. He contacted ACAS to start Early Conciliation on 6 December 2019 and his Early Conciliation certificate was issued on 16 December 2019. He presented his Tribunal claim on 23 December 2019.
23. I asked Mr Law about why he did not bring a Tribunal claim sooner. His holiday had been underpaid since he started work in 2017 and he said that as soon as he saw his payslips he could see the difference between what he was paid when he worked and what he was paid when he took holiday. He said that he “had his suspicions” and that there was talk in the yard about it “not being right.” People were talking about the fact that you should not lose all this money when you took holiday. Mr Law said that this was just talk and he couldn’t confront his employer unless he had the facts. He also said that if he had spoken to his employer he would have been told that he was paid as per the contract and he could take it or leave. However, he did not actually ever speak to his employer about his holiday pay. I asked him about whether he did anything to find out “the facts” at the time when he had suspicions about his holiday pay. He did not. Given that he went to the Citizens Advice Bureau after he started his new job, I asked him why he did not speak to them sooner. He said that he could only get an appointment on a week day when he worked. It was not clear if he had actually tried to get an appointment at the time. I asked Mr Law if he had access to the internet. He said that he did and he does use the internet. I asked him whether he could have tried to find out “the facts” about his rights to holiday pay online, maybe by looking at the Citizens Advice Bureau website, or ACAS or gov.uk. He said that he could have and he did not know why he hadn’t.

### **Legal principles**

24. Holiday pay rights are governed by the Working Time Regulations 1998 and the European Union Working Time Directive. To recover underpaid holiday pay dating back over some time, a worker needs to bring a complaint of unauthorised deduction from wages under s 23 Employment Rights Act 1996.
25. Workers are entitled to 4 weeks’ holiday (20 days) because of European law. I will call those “European holidays.” Workers are entitled to another 1.6 weeks (8 days) because of UK law. I will call those UK holidays. For European holidays, holiday pay should be based on a worker’s normal pay, which might include

regular overtime or other regular payments: *British Gas Trading Ltd v Lock* [2017] ICR 1 (CA). Payments that are intended exclusively to cover occasional costs arising at the time the worker performs the tasks required by the contract are excluded from normal remuneration: *British Airways plc v Williams* [2012] ICR 847, ECJ. The Tribunal should not undertake too close an analysis of whether the allowance exactly matches the costs incurred. The focus should be on whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs: *British Airways plc v Williams* [2012] ICR 1375, SC.

26. For UK holidays, holiday pay should be based on the contract or, if more, a week's pay as defined in the Employment Rights Act. If a worker has normal working hours a week's pay is, in general terms, the amount payable for working normal working hours at the basic rate of pay. If a worker does not have normal working hours, a week's pay is, in general terms, their average weekly remuneration over the previous twelve weeks.
27. A Tribunal claim for unauthorised deduction from wages has to be brought within three months (plus Early Conciliation extension) of the date the relevant wages were paid. If there was a series of deductions each time the person took holiday, the claim has to be brought within three months of the date the last relevant wages were paid. The Tribunal has to decide as a matter of fact whether there was a series of deductions, by looking at whether the deductions were sufficiently linked in time and as a matter of fact. However, if there is a gap of more than three months between deductions, that will break the series: *Bear Scotland v Fulton* [2015] ICR 221, EAT.
28. Workers cannot recover for underpaid holidays if the relevant wages were paid more than two years before the date the Tribunal claim was made: s 23(4A) Employment Rights Act 1996.
29. If any part of the claim was not brought within the time limit, the Tribunal can in some circumstances extend the time limit. It will have to decide whether it was reasonably practicable for the worker to bring the claim in time. If not, it will decide whether it was brought within a reasonable period.
30. Reasonably practicable means something between "reasonable" and "physically possible": see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. It is a question of fact for the Tribunal whether it was reasonably practicable for the complaint to be brought in time. The Tribunal should consider all the relevant factors, including why the person failed to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether and if so when, the claimant knew of his rights; whether the employer misrepresented any relevant matter to the employee; whether the claimant has been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time: see *Palmer and Saunders*.
31. If the Tribunal finds that it was not reasonably practicable for the claim to be brought in time, it must then consider whether it was brought within a reasonable period after the time limit expired. The Tribunal must consider the reasons for the

delay and decide objectively what period should reasonably be allowed for the proceedings to be started. The Tribunal must have regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months.

**Applying the law to the facts**

32. The dates on which Mr Law took holiday and bank holidays, the dates on which he was paid and the amounts he was paid are set out above.
33. I decided that Mr Law's bank holidays should be treated as his UK holidays and the other 20 days should be treated as his European holidays. Neither he nor TEF thought about which holidays should be which when Mr Law started working for TEF. However, the contract clearly separates out bank holidays and the other 20 days' holiday. There did not seem to me to be any rational basis for saying that Mr Law should be treated as taking his European holidays first in each holiday year. But there was a clear basis for saying that the bank holidays should be treated as his UK holidays. Bank holidays *are* UK holidays, not European ones. Given that the bank holidays were to be taken on the day and that the contract treated those 8 days differently for payment purposes, I find that the proper interpretation is that they should be treated as the UK holidays and the other 20 days should therefore be treated as the European holidays.
34. The only dispute about Mr Law's pay for his European holidays was whether his out of pocket expenses and night out allowance should be included in the calculation of his average normal pay. I find that they should not. The *British Airways* cases I have mentioned above make clear that out of pocket expenses are not included. Where there is a fixed allowance like this, I have to decide whether it was genuinely intended simply to cover out of pocket costs incurred when Mr Law was working. I find that it was. It was a modest sum, below the HMRC tax-free threshold. Mr Law did have to pay for breakfast and dinner and sometimes for parking costs and laundry. He only got the night out allowance if he was working away overnight. In all those circumstances, I find that the night out allowance was genuinely meant just to cover actual costs of being away overnight. Therefore, it should not be included in the calculation of normal remuneration for holiday pay.
35. Mr Law agreed with Mrs McLaughlin's calculations of the shortfall in his holiday pay if the out of pocket expenses and night out allowance were excluded. He was underpaid every time he took European holiday. The underpayment is the difference between the last two columns in the first table above. On 13 September 2019 the underpayment was £94.80.
36. For bank holidays, Mr Law and Mrs McLaughlin agreed that Mr Law should have been paid £91.80 per bank holiday, based on a basic 50 hour week. He was underpaid by £41.80 for every bank holiday except the last one.
37. There was a series of deductions from Mr Law's wages because of underpaid holiday. I decided that the UK and European holiday all formed the same series, because although the calculations were different, on each occasion TEF underpaid Mr Law because it did not calculate his holiday pay in accordance with Regulation 16 of the Working Time Regulations. In fact, nothing turns on whether



there is one series of deductions, or whether the UK and European holidays should be treated separately.

38. There was a gap of more than three months between the deduction on 13 September 2019 and the deduction on 7 June 2019. That breaks the series.
39. Mr Law brought his complaint relating to the wages paid on 13 September 2019 within three months (plus Early Conciliation extension) of that date. That part of the claim was brought in time.
40. However, for the series of deductions that ended on 7 June 2019, Mr Law should have brought his claim (or contacted ACAS to start Early Conciliation) by 6 September 2019. He did not do so. This part of the claim was not brought within the time limit. There is no Early Conciliation extension, because the time limit for bringing this part of the claim had expired before Mr Law contacted ACAS. The claim was brought about 3 ½ months late.
41. I find that it was reasonably practicable for Mr Law to bring a claim about the earlier series of deductions by 6 September 2019. What happened after that is not relevant at this stage. I accept that Mr Law did not know for sure what his holiday pay rights were and did not know about the time limits. What I have to decide is whether that lack of knowledge was reasonable. I find that it was not. He knew about the difference between his wages when he worked and what he was paid when he went on holiday from the first time he took holiday. There was talk in the yard about this not being right and Mr Law had his suspicions. He did not speak to his employer because he thought he needed to know the facts before doing so, but he did not do anything to find out about his rights. He could very easily have found out by looking online at the Citizens Advice Bureau website, or ACAS or gov.uk. He uses the internet. He could not explain why he did not look. In those circumstances, I find that it was reasonably practicable for him to find out about his rights and bring a Tribunal claim within the time limits. That means the time limit cannot be extended for him to bring this part of his claim.
42. This means that Mr Law cannot recover the earlier underpayments of holiday pay, even though TEF was not meeting its obligations to pay its workers the holiday pay to which they were legally entitled. I can understand that this may not seem fair to him, but the test I have to apply is whether it was reasonably practicable for him to bring his claim in time.
43. If I had to decide whether he brought this part of his claim within a reasonable period after the time limit expired on 6 September 2019, I would have found that he did not. The delay was more than the time limit itself. He found out for sure on 7 October 2019 that TEF had been underpaying him, but he did not bring the claim for another 2 ½ months. He could have found out about his rights and how to bring a claim online. He did not need to hear back from TEF to be able to do that. Even after he had spoken to the Citizens Advice Bureau and found out about the time limits, it was almost another month before the claim was presented. It was not reasonable for it to take so long until this part of the claim was presented.

**Preparation time order**

44. At the end of the hearing on 17 June 2020 Mr Law asked for an order that TEF pay his costs of bringing these proceedings. He has not had legal advice, so that would be a preparation time order. I refused his application. I did not agree that TEF had behaved unreasonably in defending his claim. In his claim form he did not say how much he was asking for. He just said that his holidays were not paid correctly. When he did provide some calculations, he initially did them in the wrong way (quite understandably). It was not until after the preliminary hearing in March, when I explained what was needed, that he carried out the right calculations. Even then, he included out of pocket expenses and the night out allowance. TEF accepted at that stage that they had underpaid Mr Law, but there was a disagreement about the precise amount. There was also the issue about the time limit. It was reasonable for TEF to defend the claim in the way it did in those circumstances. That means I cannot make a preparation time order.

**Employment Judge Davies  
2 July 2020**