EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL –BY CVP**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

BETWEEN:	**MR. A SALEBAN**	**CLAIMANT**
	AND	
	MITIE LIMITED	**RESPONDENT**

ON: **14TH September 2020**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr K Wilson, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant is entitled to 28 days leave calculated in accordance with Sections 221-224 of the Employment Rights Act 1996.
The Respondent is ordered to pay the Claimant for an additional 12 days leave. If there is a dispute as to the amount to be paid in satisfaction of this Judgment, the case will be listed for a remedy hearing by CVP (video link) as soon as practicable.

REASONS

1. In this case the Claimant claims an additional 12 days holiday for the holiday year 2019/2020. He asks to be paid for 28 days holiday calculated by reference the average of hours worked in the 12-week period immediately prior to the commencement date of his holiday, in accordance with sections 221 to 224 of the Employment Rights Act. The

Respondent's case is that the Claimant is only entitled to 16 days paid holiday, which is the pro rata proportion of holiday to which he is entitled as he does not work full time.

2. I heard evidence from the Claimant's line manager, Mr Hussain and from the Claimant himself. I had a bundle of documents.

The facts.

3. The Claimant works as a Security Officer for the Respondent. He works shifts of varying lengths at three different sites for the Respondent. His hours of work can vary from one site to another. The Claimant is not contracted to work any set number of hours per week, nor is he guaranteed to receive any minimum number of hours per week. The Claimant will mark himself available for work on the Respondent's workplace system, although he is not guaranteed to get all the shifts for which he makes himself available

4. The Claimant transferred to the Respondent from The Shield Guarding Company Limited under the provisions of TUPE. When he first transferred to the Respondent he was working, on average, 42 hours a week. He received 28 days paid holiday. For personal reasons he did not work for the Respondent during 2018. Since March 2019, for his own reasons, the Claimant has reduced the hours of work that he undertakes for the Respondent. For the holiday year April 2019 -31st March 2020 he worked an average of 2 to 4 days per week on shifts that vary between eight and 14 hours. He generally works weekends, and some other shifts during the week to cover periods of absence or sickness.

5. In 2017 the Claimant was successful in a case for holiday pay brought against the Respondent. The Employment Tribunal ordered that the Respondent should recalculate the Claimant holiday pay entitlement using an average of the previous 12 weeks' pay on each occasion and that the Claimant was entitled to 28 days annual leave.

6. The Claimant's contract provides that he is entitled to 5.6 weeks holiday and that "part-time staff will accrue on a pro rata basis." Paragraph 6 of the Staff Handbook (60) provides that the Claimant's leave entitlement will be calculated in accordance with sections 221 to 224 of the Employment Rights Act. Despite the wording of the contract, as to part-time accrual this cannot override the Respondent's statutory obligations.

7. The Respondent's holiday year runs from 1st April to 31st March. In 2019 Claimant took 16 days paid holiday. His further request for additional holiday was refused on the basis that he had used up his annual entitlement, which was 16 days. It is the Claimant's case that he is entitled to a further 12 days, as he is entitled 28 days holiday in accordance with the Working Time Regulations. Mr Hussain's evidence, which I accept, was that the Claimant was been paid for 16 days holiday using his

average remuneration in the 12-week period prior to the date of each holiday requested.

8. The Claimant says, however, that he is entitled to 28 days holiday and not 16 days.

9. Mr Wilson, who appears for the Respondent explained (as this was not in the witness statement of Mr Hussain) that he was instructed that, in the holiday year 2019/2020, the Claimant had worked 143 days out of a possible 254 working days. He had therefore worked 56.3% of working days that would have been worked by his full-time equivalent. In order to calculate his entitlement to paid leave the Respondent applied that percentage to 28 (the leave entitlement of a full time equivalent) so that the Claimant was entitled to 15.76 days, which the Respondent had rounded up to 16 days. Mr Wilson acknowledges that, on that basis, the Respondent could not definitively calculate a worker's entitlement to paid leave until the end of the leave year, once the number of days worked was known. However, the Respondent would generally be able to calculate the anticipated number of days to which a worker was entitled earlier on in the year, by looking at a worker's general pattern of work in the preceding months.

10. I accept that explanation, though it is unfortunate that this does not seem to be an explanation that was provided to the Claimant.

Relevant law

11. Regulation 13 of the Working Time Regulations is headed "entitlement to annual leave". Subsection (1) provides that *"subject to paragraph (5) a worker is entitled to 4 weeks annual leave in each leave year".* Regulation 13A confers an entitlement to "additional annual leave" expressed as amounting to 1.6 weeks. There is no reference in that section to any principle of pro rata.

12. Regulation 16 is headed "Payment in respect of periods of leave". Regulation 16(1) provides that a worker is entitled to be paid in respect of any period of annual leave to which is entitled under Regulations 13 and 13A at the rate of a week's pay in respect of each week of leave.

13. Regulation 16(2) provides that sections 221 to 224 of the Employment Rights Act 1996 shall apply for the purposes of determining the amount of a week's pay for the purposes of the Regulation. This requires the employer to calculate holiday pay by reference to the worker's average remuneration during the 12 weeks prior to the calculation date. In this case I accept that the Respondent has in fact done this – though they have limited the number of days holiday to which the claimant is entitled to 16 as set out above.

14. In Heinemann and anor v Kaiser GMBH 20013 ICR the ECJ has held that calculating a worker's entitlement on a pro rate basis does not infringe EU

law. However, in Harpur Trust v Lesley Brazel 2019 EwCA Civ 1402 the Court of Appeal confirmed that the Directive does not require the principle of pro-rating and that member states may introduce provisions that are more generous. Attempting to build a pro rating requirement or system of accrual into the Regulations would not be an exercise in statutory construction but the substitution of an entirely different scheme.

Submissions

15. The issue in this case is not what the Claimant was paid when he was on holiday but what his holiday entitlement was. To that extent, on behalf of the Respondent Mr Wilson submits, forcibly, that Regulation 16 is irrelevant to the Claimant's claim. Regulation 16, he submits, says nothing about the number of days or weeks to which an employee is entitled. It is only about payment. Regulation 16 refers back to Regulation 13 and sets out the method of calculation in respect of any period of annual leave to which he is entitled.

16. Mr Wilson acknowledges that Regulation 13 does not specifically provide for the principle of pro rata but submits that this must be implicit. It is up to the Respondent how they wish to give effect to the pro rata principle. The Respondent had calculated his leave entitlement as 16 days because he had worked .56% of a full time equivalent.

Conclusions

17. I have considerable sympathy for the argument put forward by Mr Wilson. It does seem to provide a fair method of calculating holiday entitlement for workers who do not work full time or regular part-time hours. Many employers have calculated the annual leave entitlement for atypical workers by using a 12.07% accrual rate, but that method has been thrown into doubt by the Court of Appeal in Harpur as set out below.

18. Regulation 13 and 13A of the working time Regulations provide an entitlement to 5.6 weeks of paid leave. There is no reference to pro rata. In the IDS Handbook on Working Time the authors say this. "*The advantage of expressing leave entitlement in weeks rather than days is that there is no need to clarify that entitlement is pro-rated for part-time workers. This is because the value of a week's holiday in terms of days or hours will naturally vary according to the length of the worker's normal working week. Accordingly, while a part-time worker is entitled to the same number of weeks' leave as a full-time worker, the entitlement expressed in terms of days will be less. So, for example, a worker who works half time, or 2.5 days a week, has the same entitlement is a worker who works five days a week – 5.6 weeks, however, this corresponds to half the number of days that the full-time worker may take; 14 working days a year…. The statutory holiday entitlement of typical and contingent workers with variable hours such a short time, zero hours and term time only workers, is likely to be less straightforward."*

19. Read literally Regulations 13 and 13A would appear to allow 28 days holiday to be provided for all workers even if they work less than full-time or less than a whole year.

20. Perhaps common sense would suggest that those who are working less than full-time should accrue holiday on a pro rata basis. Not to do so would give them an unfair advantage over those working full-time. Mr Wilson suggests that the legislation does not provide any means of calculating entitlement to paid holiday on a pro rata basis and this means that the employer may calculate the holiday entitlement of an irregular or zero hours contract worker by whatever method they chose. The method chosen by the Respondent was a fair way to do so.

21. There is much merit in that. I note that the accrual approach has been endorsed by the CJEU. I would have been persuaded by Mr Wilson's argument, but I consider that I am bound by the Court of Appeal's decision in the Harpur Trust v Lesley Brazel 2019 EwCA Civ 1402.

22. In that case the Claimant worked around 10 to 15 hours per week, and those hours only during term time. Her contract provided that she was entitled to 5.6 weeks paid holiday. Her employer calculated the amount of holiday pay to which she was entitled by using an accrual rate of 12.07%. She was paid by way of holiday 12.07% of her total remuneration. The rationale for this is that for a full-time worker 5.6 weeks represents 12.07% of working year of 46.4 weeks (i.e. 52 weeks -5.6 weeks). It is the approach used by the government in its online calculator and has the support of ACAS guidance.

23. However, in Harpur, the Court of Appeal held that this was not an appropriate way to approach the payment of paid leave, which should be calculated in accordance with sections 222-224 of the ERA, notwithstanding that this might seem to unduly favour those who worked less than full-time because they would receive a higher proportion of their full year hours as holiday pay than full-time workers.

24. Although Harpur was not cited to me during the hearing, Mr Wilson's submission was that Mr Saleban's case was not about how to calculate the amount paid to the Claimant (which was dealt with by Regulation 16), but was about his entitlement to leave under Regulation 13 and 13A.

25. I accept that Harpur was, in theory, about the way of calculating holiday pay, rather than the number of days to which she was entitled, but in my view, this is a distinction without a difference. As a teacher who worked only in term time, Ms Brazel had significantly more time off work than 5.6 weeks. The issue was how many of those days would be "paid". She had been paid 12.07% of her total remuneration, which would necessarily limit the number of days for which she received pay to less than 28 days. Instead, she received the remuneration that equated with a lesser, but pro rata, number of days. The Court of Appeal held that this did not accord with the Working Time Directive.

26. This is what the Respondent has done here. It has paid Mr Saleban his pro rata number of days. It is the 12.07 % principle expressed differently.

27. The Claimant works irregular hours. He is not obliged to work on any days. It could be said that on the days he does not work he is "on holiday". For him, the issue is for how many of those days should he be paid.

28. At paragraph 73 of Harpur the Court of Appeal said "On any natural construction the WTR make no provision for pro rating. They simply require, as the Claimant says, a straightforward exercise in identifying a week's pay in accordance with the provisions of sections 221-224 and multiplying that figure by 5.6. Attempting to build in an accrual or pro rating system would not be an exercise in construction but the substitution of an entirely different scheme."

29. I note however that permission to appeal Harpur to the Supreme Court has been given. It may be that the Supreme Court overturns Harpur but until then I consider that Harpur is binding on me and that accordingly the Claimant is entitled to 28 days holiday a year calculated in accordance with sections 221-224.

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Employment Judge Spencer
16th September 2020

JUDGMENT SENT TO THE PARTIES ON

16/09/2020

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FOR THE TRIBUNAL OFFICE