



THE EMPLOYMENT TRIBUNAL

Claimant
Mr Robert Slater

Respondent
Phoenix Coaches (NE) Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE by Telephone
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances: Claimant in person

ON 10 November 2020
Respondent Mr K Turner Director

JUDGMENT

The claim of unlawful deduction of wages (holiday pay) is well founded. I order the respondent to repay to the claimant £480.

Reasons (bold print is my emphasis and italics are quotations)

1. The claimant, born on 22 May 1960, presented a claim for “holiday pay” on 1 September 2020. He was employed as a coach driver from 15 July 2019 until 27 June 2020 on a zero hour contract, ie not guaranteed any exact working hours. His daily rate of pay was £80.

Relevant Law

2. Claims for holiday pay may be brought under the Working Time Regulations 1998 (WTR) or the Employment Rights Act 1996 (the Act) in which section 27 defines wages as including any sums payable to a worker in connection with his employment or other emolument referable to his employment, whether payable under his contract or otherwise and includes holiday pay.

3. Section 13 provides

(1) *An employer shall not make a deduction from wages of a worker employed by him*

(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 (after deductions), 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.*

The effect is that if an employer pays a worker less than is properly payable under his contract that is deemed to be a “deduction”. The phrase “properly payable” means properly payable under his contract. Agarwal-v-Cardiff University held a tribunal does have jurisdiction to construe a contract to see what was payable and when, but no tribunal can find an unlawful deduction on the basis a worker “deserved” some payment he is not **entitled** to receive.

4. Terms of contracts are **express or implied**. If express they may be ambiguous. Rules set out by Lord Hoffman in Investors Compensation Scheme-v-West Bromwich Building Society are helpful in resolving ambiguity from which I will quote selectively :

(1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude the parties must, for whatever reason, have used the wrong words or syntax.*

(5) *The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention **which they plainly could not have had**. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201:*

". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

5. Statute may require terms to be implied into a contract **contrary** to express terms but normally that is not allowed but terms can be implied to fill in things left unsaid. The common reasons for implying terms into a contract are:

5.1. To give effect to Custom and Practice which subsists generally in an industry.

5.2. To give "Business Efficacy" to a contract which without the implied term. would be practically unworkable.

5.3. The remaining two, which overlap to an extent are (a) to reflect the conduct of the parties during the contract to the extent it shows they both must have understood what happens in practice was what both always intended to happen and (b) to insert terms which are obviously what the parties intended but failed to say, sometimes called the "officious by-stander test" . That test means if such a person had asked at the time the contract was made whether the parties understood a certain payment was due, **both** would have answered " But of course ! " .

6. Although in this case it is easier and fairer to view the claim as one under the Act, the WTR is relevant because to quote Lord Hoffman they are part of the *relevant background*. Regulation 14 WTR says when a worker's employment is terminated during the course of his leave year, and on the date on which the termination takes effect ("the termination date"), he has taken of less than the leave to which he is entitled **in the leave year** under regulation 13 and regulation 13A his employer shall make him a payment in lieu of leave in accordance with a formula set out . The leave year may be agreed a relevant agreement (defined as being an agreement **in writing**). Regulation 15 sets out rules enabling a worker to take leave on such days as he may elect by giving notice to his employer subject to any requirement imposed on him by his employer not to take such leave, on particular days. It sets out the length of notice

each must give but in ss (5) says that may be varied or excluded by a relevant agreement. In short a worker must give twice as many days notice as the number he wishes to take (eg to take 2 days he must give 4 days notice)

7. In a case called NHS-v-Larner the Court of Appeal had to decide in what circumstances a worker, who had not taken paid annual leave in the relevant leave year because of absence from work on long-term sick was entitled to a payment in lieu. Lord Justice Mummery said the answer depended on the interpretation and application of Article 7 of the Working Time Directive ("the Directive"). The WTR, which implemented Article 7, must, if it is possible to do so, be interpreted and applied compatibly with it. In my view so should the Act.

8. Both the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) found for the claimant. Both held NHS Leeds had made unlawful deductions from her wages and had acted in breach of the WTR. In the Court of Appeal Mummery LJ said

" Entitlement to paid annual leave and to payment in lieu on termination of employment matter a great deal to employers and workers alike. Both sides need to know where they stand, preferably without having to go to the Court of Appeal, or all the way to Luxembourg, to find out how the law works. 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 and this case will be more simply explained to the parties if I deal with it purely as unlawful deduction of wages thus avoiding having to consider areas of European Law other than as part of the overall context. In Larner the leave year ran from 1 April to 31 March in each year and the contract prevented carry forward of any annual leave *"unless in exceptional circumstances and a written request has been submitted and approved."*

9. Article 7 of the Directive provides :-

"1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and /or practice.

2. The minimum period of annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

10. The European Court of Justice (ECJ) described this as a *"particularly important provision of social law from which there can be no derogation."* Nothing in it expressly states a worker, who wants to take paid annual leave or wants to carry it forward to a later leave year, has to make any form of request to the employer in order to secure entitlement.

11. Regulation 13(9) says the basic four weeks leave may only be taken in the leave year in respect of which it is due, and may not be replaced by a payment in lieu except where the worker's employment is terminated. The length of paid leave was increased in 2007 by the introduction of regulation 13A, which confers an entitlement to additional annual leave of 1.6 weeks and regulation 13A(7) says *"A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due."*

12. The main ECJ cases are Stringer-v-Revenue & Customs and Schultz-Hoff-v-Deutsche Rentenversicherung Bund 2009 ICR 932. They concerned workers not taking annual leave

because they were on sick leave and in receipt of sick pay. The ECJ held the purpose of paid annual leave is to enable a worker to enjoy rest, relaxation and leisure. It said *"It must therefore be held that a worker, who ...is on sick leave for the whole year and beyond the carry-over period laid down by national law, is denied any period giving the opportunity to benefit from his paid annual leave": [44]. National legislation providing for the loss or extinction of the right in such circumstances at the end of the leave year and/or the carry forward period laid down by national law would undermine the social right directly conferred by Article 7(1): and "...with regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship"*

13. In Pereda-v-Madrid Movilidad 2009 IRLR 959 the worker became ill at the point when he was to take paid annual leave. If he wanted, he could take paid annual leave while off sick, but he was unable or unwilling to do so. After his recovery he made a request for a new period of paid annual leave. The ECJ held he was entitled to take paid annual leave at a period outside sickness leave, even if that fell outside the relevant leave year, if he had not had an opportunity to exercise the right to take paid annual leave in the pay year. In the EAT in Larner Bean J, as he then was, said

*"17...the result of Stringer and Pereda is that there is no distinction between the two cases [Mr Pereda's and the claimant's]. [The claimant] was signed off sick for the whole of the pay year 2009-10. She is therefore **presumed** not to have been well enough to exercise what the Luxembourg court has described as her "right to enjoy a period of relaxation and leisure," so, as a matter of law, contrary to what a layman might have thought, she did not have the opportunity at any time during 2009-10 to take her annual leave. Instead, she had the right to have her leave entitlement under Regulation 13 carried over to the following year; and she had that right, in my view, without having to make a formal request for the leave to be carried over. The right to be paid for that annual leave crystallised on the termination of her employment, as it happens, only a few days after the end of the pay year.*

18. The position might be different in the case of a fit employee who fails to make any request for leave during the whole of a pay year. He or she might then lose the right to take annual leave, certainly if the contract so provides, because that worker, unlike [the claimant], has in the words of the Court in Pereda "had the opportunity" to exercise the right to leave."

14. In the Court of Appeal Mummery LJ approved that and said, if necessary, it would be possible to interpret the WTR so as to be compatible with Article 7 by reading into regulation 13 (9) the words in italics

"Leave to which a worker is entitled under this regulation may be taken in instalments, but-

(a) it may only be taken in the leave year in respect of which it is due, *save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave.*"

Although no reliance was placed on the conditions of employment by either side in Larner, His Lordship said even if they provided for the making of a request, such a contractual condition would have to yield to the provisions of general law in Article 7 and the WTR.

15. In King-v-The Sash Window Workshop Ltd Mr King worked on a commission-only contract' and when he took annual leave, it was unpaid. Upon termination of his employment

relationship, he sought to recover payment for his annual leave for the entire period of his engagement. The Court of Appeal referred several questions to the ECJ including *If the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so **but for the fact that the employer refuses to pay him for any period of leave he takes**, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it?*

16. The ECJ re-iterated Article 7(1) was a provision from which no derogation was permitted and must be regarded as a particularly important principle of EU social law. Member States must ensure compliance with the right to an effective remedy. The ECJ said it had previously been called upon in *Schultz-Hoff* to rule on a worker's right to paid annual leave which he was unable to exercise until termination of his employment relationship **due to reasons beyond his control**, specifically because of illness, adding it was for reasons beyond his control Mr King did not exercise his right to paid annual leave before his retirement. It said the Directive does not allow Member States either to exclude the existence of the right to paid annual leave or to provide for the right to paid annual leave of a worker, who was prevented from exercising that right, to be lost at the end of the reference period and/or of a carry-over period fixed by national law. A worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu under Article 7(2) of Directive. That was not confined to workers who had been prevented from exercising their right to paid annual as a result of sickness. It said *unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences.*

17. The ECJ said the Directive may not be interpreted restrictively. Indeed, if it were to be accepted a worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that directive, which is that there should be due regard for workers' health. It answered the question " *Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods **because his employer refused to remunerate that leave.***

The Facts in this case

18. The claimant agreed when he would take holidays with the traffic manager, Mr Chris Wright. He says he did not know what the leave year was or that if he did not take his entitlement by the leave year he would lose it. The majority of dates were accepted without any problem. However, 3 requested days (Friday 10 January 2020, Friday 17 January 2020 and Friday 28 February 2020) were declined. On asking why he was told he did not have enough holiday entitlement but he says, and I find, he did.

19. He drove an overseas tour to Italy from 13 to 23 February with a co-driver. He says this was "on the understanding" he could take accumulated annual leave on his return. During the tour Mr Wright told him they were going to be short staffed and could only honour holiday for one driver. The co-driver received his holiday entitlement but shortened by 3 days, due to staff shortage. The claimant was not given any leave. Mr Wright admitted he was still entitled to the

leave. When he asked to take it Mr Kenneth Turner, a director, refused because he did give 14 days notice, as required by his contract.

20. His last shift was Monday 16 March then he was furloughed from Monday 23 March. On leaving in June he presumed he would be paid his annual leave in full as the Government had advised companies to carry forward annual leave entitlement for 2 years. Mr Turner said this was not the case and as he had not used his 2019/2020 holiday entitlement by 31 March he had lost it. The claimant believes he has a shortfall of 7.666 holiday days. He says he never received a copy of his employment contract, despite requesting this, but I find he probably did among a pile of other documents given to him when he started

21. The response says, and I accept, the holiday year runs from 1 April to 31 March and holiday is accrued at 2.333 days per month pro rata for part months. In holiday year 2019 / 2020 the claimant accrued 19.83 days holiday and used 11.75 days leaving a remaining unused entitlement of 8 days at the end of 2019/2020. In holiday year 2020/2021 he accrued 7 days holiday up until his leaving date of 27 June and was paid in full for 9 days up to that date, being five the employer told him to take and four public holidays .

22. Mr Turner says upon commencement the claimant did sign various documents (APPENDICES 4 to 8) and the contract of employment clauses 14 – 17 entitled 'Holidays' says what Mr Turner describes as "a known fact among all employees and made clear throughout the year in general communications with staff all holidays must be taken by the end of March as any unused holiday will not be carried forward." The holiday request form says 14 days' notice is required of a requested holiday day (APPENDIX 9) but that is not part of any relevant agreement as far as I can see. **The appendices which were received by post at the Tribunal today have been scanned to me and the contract finishes at clause 11 on one page and the next starts at clause 23. Mr Turner accepted that was an error on the respondent's part because a double sided document was not copied fully**

23. Mr Turner agrees the claimant did take holidays when work was not available mainly in-between UK tours he was driving, some were granted at short notice as a gesture of goodwill to enable him to use his holiday entitlement before the end of the holiday year. As he was on UK tours and receiving gratuities from the passengers which he would not have earned if he had taken holidays he chose not to take holidays in busy periods. He requested the remainder of his holidays when he returned from Italy giving less than the required notice and after his work for that period was already planned but as Mr Turner says "it did not fit with our plans and the required notice was not given so they were not granted". He denies the claimant only undertook the Italy tour on the understanding his holidays would be honoured and doing this Italy tour was part of his duties so, had he refused to do the tour his employment would have been terminated at that point. His co-driver on that tour had completed a holiday request form in plenty of time and had his holidays approved to start on his return to the UK. No further communications were received from the claimant regarding holidays whilst he was on Furlough at 80% of his pay from 23 March until he told Mr Turner he was leaving in June.

My Conclusions on Holiday Pay

24. I have written a great deal about the European Law position but in this case I do not have to deal with "re-writing" domestic law to align it with EU law. I have only to construe a contract. I have no difficulty in accepting the contract **in normal circumstances** can require an employee to give 14 days notice and to take his leave in the leave year or lose it.

25. At the start of this calendar year, the claimant should have known that by the end of March he would have had to take, or lose, 8 days leave. He asked to take three days before going to Italy but they were **refused**, I find for business reasons, that is to help the respondent. Had he refused to go to Italy, he would have been dismissed. On his return on 23 February he had enough time left to give notice and fit in his leave before he lost it. He did not purely because the respondent was short staffed and needed him to work. Then came lockdown.

26. In short, the respondent has refused requested days knowing the claimant would have lost them. Even if the wording of the contract is as clear as Mr Turner says, in order to give it business efficacy there would have to be an implied term to deal with the sequence of events which arose this year, short staffing, refused leave then lockdown which meant , as said in King he was unable to take them **due to reasons beyond his control**, in that leave year . If an “officious bystander” had asked whether in those circumstances leave would have been agreed to be carried forward, in my judgment, both parties would have said “But of course!” .

27. On the respondent’s analysis of the eight days carried forward two were taken leaving 6 to be paid for . $6 \times £80 = £480$

Employment Judge T.M. Garnon
Date authorised 10 November 2020