EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106969/2020 (V)

Held in Dundee by CVP on 26 January 2021

Employment Judge Murphy (sitting alone)

Mr K Bates	**Claimant** **In Person**
Amberstone Security Limited	**Respondent** **Represented by** **Ms G Locke -** **Group HR Business** **Partner**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £261.60 in respect of an underpayment of wages representing 2.5 days' pay deducted on 15 June 2020.

2. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £271.54 in respect of wages relating untaken holiday accrued between 5 February and 31 March 2020.

3. The Claimant's claim for the sum of £96 in respect of unpaid bonus in the month of May 2020 is dismissed.

4. The sums awarded at items 1 and 2 above are expressed gross of tax and national insurance. It is for the Respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

REASONS

Issues to be determined

1. The Claimant brought claims for

    a. underpaid wages relating to 2.5 days worked between 12 and 15 May 2020. The Respondent deducted £261.60 from the Claimant's pay on or about 15 June 2020 in respect of these days.

    b. accrued untaken holiday in the period from 5 February to 31 March 2020 which was not paid in lieu on the termination of the Claimant's employment on 11 May 2020.

    c. Unpaid bonus for working at the Amazon site in Dundee in relation to 4 shifts worked by the Claimant in May 2020. The Claimant originally claimed £25 per shift but confirmed at the hearing the correct figure was £24 per shift.

2. The Respondent's Ms Locke raised the question of time bar during the hearing. However, she withdrew this argument and acknowledged that, because the limitation period ran, not from the date of termination of the Claimant's employment, but the date(s) of the payment of wages from which the alleged deduction(s) were made, the claim had been brought in time.

3. The issues for determination by the tribunal are:-

    a. Was the deduction of £261.60 authorized by a relevant provision of the Claimant's contract of employment for the purposes of section 13(1) of the Employment Rights Act 1996 ("ERA")?

    b. Did the Respondent fail to pay the Claimant the whole or part of any amount due to him under Regulation 14(2) of the Working Time Regulations 1998 ("WTR") in respect of accrued untaken annual leave?

c. Was the claimant entitled to bonus for working at the Amazon site in May 2020 and did the Respondent's failure to pay such bonus amount to an unauthorized deduction under section 13 of ERA?

Findings in Fact

4. The tribunal made the following findings in fact.

5. The Claimant was employed by the Respondent as a security guard from 5 February to 11 May 2020. He was initially employed at a basic rate of £8.50 per hour, rising to £8.72 per hour in April 2020.

6. The Respondent issued a document headed 'Formal Offer of Employment'; on headed 'Principal Statement of Terms and Conditions of Employment' ("the Statement"); and a copy of the Respondent's Handbook to the Claimant via email on 5 February 2020. The Claimant received these documents and applied his electronic signature via DocuSign on the same date.

7. The Claimant generally worked 12 hour shifts and his regular shift pattern was four days on followed by four days off. He occasionally worked additional hours. He was posted to the Amazon site in Dundee.

8. In or about March 2020, one of the other security guards employed by the Respondent, who also worked at the Amazon site, told the Claimant that they would be getting paid a productivity bonus of an additional £2 per hour for attending at the site. The individual who informed the Claimant of this was not employed in a managerial role and was understood to be simply relaying information he'd heard, directly or indirectly, from management. The Respondent did not inform the Claimant in writing or otherwise of any conditions attached to eligibility for the bonus, or the period over which it would be payable.

9. The bonus was paid to the Respondent by Amazon to incentivize attendance of the Respondent's security guards at their site in the early period of the Covid pandemic. The Respondent, in turn, paid the bonus to the Claimant and his colleagues for hours

worked at the site. The bonus was applied to all the Claimant's shifts thereafter apart from his final four shifts at the Amazon site in May 2020.

10. Unknown to the Claimant at the time, the Respondent's relevant account manager, responsible for liaising with Amazon, had agreed with Amazon that Amazon would pay the Respondent the bonus to pass on to their employees on a monthly basis, but that only those employees who had worked throughout the whole of any given month would be eligible to receive bonus in that month. This was in line with Amazon's aim of promoting strong and sustained attendance.

11. Prior to commencing employment, the Claimant was interviewed by a manager called Gordon Dixon. The interview took place in January or February 2020. The date of the interview was disputed between the parties, but they agreed it took place. At the interview, Mr Dixon told the Claimant that the Respondent's holiday year ran from 1 April to 31 March 2020. He told the Claimant that, because the Respondent was short staffed at the Amazon site, it would not be possible for the Claimant to take holidays accrued between the commencement of his employment and 31 March 2020, but that such annual leave would be carried over into the next leave year or paid in lieu.

12. The Claimant, as a result, did not request any annual leave on the Respondent's system in the period to 31 March 2020. The Claimant's experience of working at the Amazon site in this period was that the Respondent was very short-handed, and he often had to work alone instead of a pair, as was the envisaged norm, because of the unavailability of other staff members. One of his colleagues took a substantial period of annual leave in the run up to the holiday year end.

13. The Claimant was off due to sickness absence on 25 and 27 March 2020. In order to provide cover, the Claimant phoned two security guards in the Respondent's employment who usually worked night shift at the Amazon site. They came in early to cover the Claimant's absence which meant that they worked 18 hour-shifts on that occasion.

14. On or about the 6th May 2020, the Claimant raised the question of his annual leave from the preceding leave year with the Respondent via their online query portal. The

Claimant had previously attempted to raise the matter earlier in May but directed his enquiry to a department which could not assist. An exchange followed on the portal, and he explained what he'd been told by Mr Dixon at interview. Mr Dixon was no longer employed by the Respondent by then. The Respondent refused the request without further discussion with the Claimant or with Mr Dixon.

15. The Claimant accrued 31.14 hours' holiday in the period up to 31 March 2020. When the Claimant's employment terminated on 11 May 2020, the Respondent declined to pay the Claimant in lieu of this annual leave, though he was paid in lieu of untaken leave which had accrued in the period from 1 April to 11 May 2020. The Respondent advised the Claimant in email correspondence dated 30 June 2020 that there was no rollover of holidays and that the Claimant could only be paid accrued holiday for the holiday year in which his employment had ended.

16. The Claimant's employment terminated on 11 May 2020 pursuant to his verbal resignation on that date with immediate effect. He did not serve or work his contractual notice of one week. An Amberstone employed security guard covered the Claimant's shifts in the week commencing 12 May 2020. Like the Claimant, he was employed as a 'relief' security guard and was paid the same hourly rate as the Claimant would have been, had the Claimant worked the shifts in his notice period.

Observations on the Evidence

17. Most of the facts found above were either agreed between the parties or not disputed at the hearing.

18. There were, however, two significant areas of dispute:

19. The Respondent disputed that Gordon Dixon told the Claimant that he would be unable to use annual leave accrued in the period to 31 March 2020 and that Mr Dixon said this would either be paid in lieu or carried over. The Respondent led no evidence, however, to counter the Claimant's account of the matter. The Respondent did not contact Mr Dixon at the time when the Claimant first alleged the conversation or in preparation for the tribunal hearing. Ms Locke gave evidence that it would have been irregular of Mr

Dixon to have said that the Claimant would not have the opportunity of taking holiday in this period.

20. The Claimant gave credible evidence not only of the conversation with Mr Dixon but of the short staffing situation he experienced on commencing employment with the Respondent, caused in part by his colleague taking a substantial period of annual leave around that time. The Respondent agreed and accepted that the Claimant did not make any request for holiday in the period to 31 March 2020. Documentary evidence was produced to the tribunal of the Claimant raising the matter with the Respondent in early May 2020 when he realized his holiday accrual had not been carried over on the Respondent's systems. In his electronic communications on the subject at that time, he consistently maintained he had been told by Mr Dixon that his annual leave would be carried over.

21. The Claimant gave evidence of a conversation on 12 May with one of the Respondent's managers called Kevin Grierson when the Claimant discussed his dissatisfaction about the lack of holiday carry-over. An email was produced by the Respondent in which Mr Grierson recorded the Claimant had stated he was resigning over the issue of the holiday. There was ample evidence that the Claimant felt aggrieved about his treatment regarding holiday accrual in the preceding leave year. The tribunal accepted the Claimant's evidence of his conversation with Mr Dixon, in the absence of contrary evidence.

22. The second key area of dispute was that the Claimant denied having received the formal offer of employment, the Statement, and the Handbook on 5 February 2020 via email or at all. He denied having applied his electronic signature to them via DocuSign.

23. The Respondent produced a DocuSign Certificate of Completion which indicated that the documents were sent at 13;49 on 5th February; that they were viewed at 14:55 on 5th February; and that they were signed via DocuSign at 14:59 on that date. The certificate confirmed the email address to which the documents were sent, and the Claimant confirmed in his evidence that it bore the correct address. The certificate confirmed that the documents were signed via mobile phone.

24. The tribunal finds, on the balance of probabilities, that the Claimant did receive the documents and did apply a DocuSign signature to the Principal Statement of Terms and Conditions, using his mobile phone, just four minutes after viewing them, at 2.59pm on 5 February 2020. The documents ran to over 60 pages and the Tribunal accepts the Claimant may not have read the documents fully before applying his electronic signature, or fully appreciated their significance. He may not recall receiving them and applying his electronic signature in those circumstances, but the tribunal finds, on balance, that he did so.

25. There was also a dispute as to whether the Claimant was interviewed by the Respondent's Gordon Dixon in January (as the Respondent asserts) or on 5 February 2020, as the Claimant asserts. However, nothing turns on this anomaly.

Relevant Law

Amazon Productivity Bonus

26. A deduction from a worker's wages is unlawful unless one of the limited exceptions set out in section 13(1) of ERA is satisfied. Section 13(1)(b) provides for one such exception where the worker has previously signified in writing his consent to the making of the deduction. Section 27(1) of ERA provides that 'wages means any sums payable to the worker in connection with his employment, including any bonus, whether payable under his contract or otherwise'. Section 27(3) provides that where any payment in the nature of a non-contractual bonus is for any reason made to a worker, such payment will fall to be treated as wages and will be treated as payable to him as such on the day on which the payment is made.

Deduction of 2.5 days' pay in consequence of failure to work notice

27. A deduction from a worker's wages is unlawful unless one of the limited exceptions set out in section 13(1) of the Employment Rights Act 1996 is satisfied. Section 13(1)(b) provides for one such exception where the worker has previously signified in writing his consent to the making of the deduction.

Annual leave

28. The WTD was adopted in 1993 as a health and safety measure. The domestic implementation, the WTR came into effect in 1998. Under Reg 14 of WTR, employees are entitled to accrued untaken holiday outstanding at the date of termination. Parties can amend the date on which the leave year begins by a 'relevant agreement' which may take the form of a legally enforceable contract of employment. The electronically signed Statement includes a clause to the effect that the Respondent's holiday year begins on 1 April and ends on 31 March. Regulation 13(9) WTR specifies that leave may only be taken in the leave year in respect of which it is due. However, this is subject to Reg13(10) and (11) which provide that where it is not reasonably practicable for a worker to take some or all of their statutory leave as a result of the effects of the coronavirus (on the worker, the employer, or the wider economy or society), the worker shall be entitled to carry forward such leave into the next leave year, and indeed, the following one.

29. In cases where Regs 13 (10) and (11) are not engaged, the effect of Reg 13(9) of WTR must be considered in light of the decisions of the European Court of Justice in the cases of **Kreuziger v Land Berlin** Case C-619/16, ECJ and **Max-Planck-Gessellschaft zur Forderung der Wissenschaften eV v Shimizu** Case -684/16, ECJ. In both cases, the courts asked the ECJ to give a ruling on the interpretation of Article 7(2) of the Working Time Directive which provides that 'the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated'. The question concerned whether EU law precluded national legislation that provided for the loss of an allowance in lieu of untaken leave where the worker did not apply to take that leave before the employment relationship ended. The ECJ ruled that it is permissible for national legislation to set down conditions for exercising the right to annual leave, including the loss of the right to annual leave at the end of a leave year, provided the worker has had the opportunity to exercise the right to the leave. It would not comply with Article 7 to prescribe an automatic loss of rights without prior verification that the worker had an effective opportunity to take the leave. The onus is on the employer to prove to the court that it

has enabled the worker to exercise his entitlement, particularly through the provision of sufficient information.

30. Following Brexit, the approach to be taken in determining questions on the meaning, validity or effect of retained EU law in UK courts and tribunals depends on whether it has been modified by UK law (European Union (Withdrawal) Act 2018 section 6). Questions on the meaning of retained EU law which has not been modified by the UK are determined in accordance with relevant retained caselaw and principles, using a purposive interpretation where the meaning is unclear (taking into account the original purpose of the original underlying EU law, compatibility with the EU Treaties and the limits of EU competence). The UK has indicated a specific intention to retain the WTR as set out in the explanatory notes to the Withdrawal Act. The WTR and, in particular, Regulation 13(9) should, therefore, subject to any future modification pursuant to the Withdrawal Act, be interpreted purposively in a manner consistent with the ECJ's interpretation of the WTD, if possible.

31. A failure to pay in lieu of annual leave which has accrued and not been 'lost' by operation of Reg 13(9) can be enforced by way of a claim for an unauthorised deduction from wages under section 13 of the Employment Rights Act 1996.

32. There are restrictions on contracting out of the rights regarding annual leave under the Working Time Regulations (WTR 1998 R35). Any agreement is void in so far as it purports to exclude or limit the operation of the respective legislation unless specified stringent conditions are satisfied.

Submissions

33. The Claimant reiterated his conversation with Gordon Dixon. He reiterated that he frequently worked on his own due to the want of cover. He reiterated his evidence that those who covered his shifts in the week commencing 12 May 2020, following his resignation without notice, were paid at the same hourly rate which he was on. He reiterated that he didn't have access to the Statement on 5 February 2020 and pointed out it was 70 pages (along with the Handbook),

34. The Respondent's Ms Locke reiterated her evidence that she believed the interview between the Claimant and Mr Dixon didn't take place on 5 February but earlier. On the issue of annual leave, she submitted that the Respondent's practice in refusing to permit the carry over of leave in all but exceptional circumstances was in line with the WTR. She submitted there was no contractual entitlement to the Amazon bonus which was discretionary.

Discussion and Decision

Amazon Productivity Bonus

35. The Respondent accepts the Claimant was not paid the 'Amazon bonus' in respect of days worked by him in May 2020, but maintains the Claimant had no contractual entitlement to such bonus which was discretionary. Discretionary or otherwise, however, the bonus would fall within the definition of wages under section 27(3) of ERA, as long as the bonus was "payable to the worker" under section 27(1).

36. It was unhelpful that the terms of the bonus and the period for which the bonus would be applied were not communicated to the Claimant or employees generally. It was particularly unhelpful that it was not communicated to the Claimant until after he had left employment that the bonus would be withheld for any month in which the entire month's shifts were not worked. This omission would appear to undermine the apparent aim of the bonus of promoting sustained attendance during the Covid period. Nevertheless, the tribunal has found as a matter of fact that these were the terms Amazon had agreed with the Respondent, and the terms the Respondent applied to its affected employees based at the Amazon site. The tribunal considered whether a contractual entitlement to the bonus may have become implied through the acting of the parties. It concluded there was insufficient evidence that an implied contractual entitlement had crystalized, given the relatively short period over which the bonus had been paid to the Claimant and given the absence of clarity over the terms attached to it which, to be applied, ought to be identifiable with certainty.

37. In these circumstances the tribunal accepts that the bonus was not "payable" to the Claimant for the purposes of section 27(1) of ERA for the shifts worked in May because the Claimant did not attend all shifts in that month in consequence of his resignation.

Deduction from final week's pay due to failure to observe notice

38. The Respondent accepts it deducted 2.5 days' pay from the Claimant on 15 June 2020 but asserts that the deduction was authorized by a clause in his Statement which the Respondent said permitted such deductions. The clause is in the following terms:

> *"We can require you to repay us, by deduction from pay or any other method acceptable to us:-*
>
> *…*
>
> - *An amount equal to our reasonable loss or the extra cost of covering your duties should you fail to work your full contractual notice. This applies when you leave our employment early without our agreement"*

39. It is undisputed that the Claimant did not serve his contractual notice period of one week. The Respondent, however, led no evidence that it had incurred any losses or extra costs in covering the Claimant's duties during the period that should have been his notice period. Indeed, the Respondent did not dispute the Claimant's evidence that the guards who covered his shifts were paid by the Respondent at the same rate he would have paid. There was no evidence that the losses suffered equated to 2.5 days' of the Claimant's pay which is the sum the Respondent deducted. Ms Locke confirmed that such deductions were decided upon by the HR function, which applied them liberally across the Respondent's workforce in cases where notice was not served. When asked what enquiry was made by the Respondent into the losses incurred by the company in each case, she said: "I think it's more of a safeguard we put in for ourselves".

40. The tribunal does not accept that, in the circumstances of the Claimant's case, the clause permitted the deduction of 2.5 days' pay, or indeed any deduction, from the

Claimant's wage. Accordingly, this deduction was unlawful, contrary to section 13 of ERA.

Refusal of annual leave carry-over and payment on lieu on termination

41. The Respondent accepts that the Claimant neither took his accrued holidays in the period from 5 February to 31 March 2020, nor was paid in lieu of these holidays when his employment ended. The Respondent defended the claim on the basis that its holiday year ran from 1 April to 31 March 2020 and they operated a 'use it or lose it' policy with respect to annual leave which was not permitted to be carried over into a subsequent leave year.

42. The Respondent's Handbook contains a statement that "You must take all of your holiday entitlement during the holiday year". The Claimant's formal offer letter includes a clause as follows:

> *"…The annual leave year runs from 1st April to 31st March and, in accordance with the Working Time Regulations leave may not be carried forward from one year to the next or paid in lieu, except on termination."*

43. It has been found that the Claimant was specifically told at interview that he would not be permitted to take any annual leave in the leave year to 31 March 2020. There was equally an absence of any evidence that the Respondent encouraged him to take his accrued leave before the 'lose it' date. In the circumstances, the Claimant was denied an 'effective opportunity' to take the leave in that leave year as envisaged by the **Kreuziger** and **Shimizu** cases.

44. Regulation 13(9) provides:

> Leave to which a worker is entitled under this regulation may be taken in instalments, but –
>
> (a) Subject to the exception in paragraphs 10 and 11, it may only be taken in the leave year in respect of which it is due; and

(b) It may not be replaced by a payment in lieu except where the worker's employment is terminated.

45. Applying a purposive approach to this regulation, the tribunal finds that sub paragraph (a) must be read subject to the insertion after the word due of the words "save where the worker is not provided an effective opportunity by the employer of taking it in that year." Such an approach is necessary to accord with **Kreuziger** and **Shimizu.** The ECJ caselaw aside, however, it cannot have been the intention of the UK Parliament that employers could circumvent the right to a minimum amount of annual leave by prohibiting it being taken in full in a particular leave year while relying on the WTR to refuse carry-over. The remedies under Regulation 30 are framed in terms of scenarios where either requested leave has been refused (R30(1)(a)) or payment has been deficient (R30(1)(b)). The underlying health and safety aims of the legislation would be frustrated if employers could issue pre-emptive prohibitions on the taking of leave for the balance of a leave year then rely upon a 'use it or lose it' construction of R13(9) to thwart carry over and a lack of leave request to deprive the worker of protection under R30(1)(a).

46. Separately, it is concluded that even if Regulation 13(9)(a) cannot be read purposively and subject to the insertion proposed, it is, in any event, disapplied by Regulations 13(10) and (11) in the present case. It was not reasonably practicable for the Claimant to take his leave because of the effects of the Coronavirus on his employer and the wider economy. It was because the Respondent was so shorthanded that Mr Dixon had told the Claimant he would be unable to take his leave. The Respondent's evidence was that it was precisely to address problems with staff attendance that Amazon was willing to top up the Respondent's employees' wages to the tune of £2 per hour in a drive to secure attendance following the Covid outbreak and first lockdown.

47. The refusal to pay the Claimant wages in lieu of untaken holiday accrued between 5 February and 31 March 2020 on termination was, therefore, unlawful.

Conclusion

48. The Claimant's claims in relation to holiday pay and the deduction in consequence of his failure to work his notice succeed. The claim in relation to the Amazon bonus for the month of May is dismissed.

Employment Judge:	**Lesley Murphy**
Date of Judgment:	**31 January 2021**
Date sent to parties:	**05 February 2021**