



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case no 4105274/2020 (V) & others**

**Held remotely on 6 January 2021**

**Employment Judge: W A Meiklejohn**

<b>Miss L Mulholland</b>	<b>First Claimant</b>
<b>Mrs G Scally</b>	<b>Second Claimant</b>
<b>Miss N Whitelaw</b>	<b>Third Claimant</b>
<b>Maxwell Bruce Ltd</b>	<b>Respondent</b>

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that (i) the respondent has made unlawful deductions of wages from the claimants and (ii) the claimants are entitled to receive additional holiday pay from the respondent, and the respondent is ordered to pay –

- (a) To the first claimant the sum of **ONE THOUSAND FIVE HUNDRED AND THIRTY NINE POUNDS AND NINETY FIVE PENCE (£1539.95)** in respect of unlawful deduction of wages and **SEVEN HUNDRED AND FORTY FOUR POUNDS AND SIXTY NINE PENCE (£744.69)** in respect of holiday pay.
- (b) To the second claimant the sum of **ONE THOUSAND TWO HUNDRED AND THIRTY THREE POUNDS AND FIFTY NINE PENCE (£1233.59)** in respect of unlawful deduction of wages and **ONE HUNDRED AND FIFTY SEVEN POUNDS AND EIGHTY SEVEN PENCE (£157.87)** in respect of holiday pay.
- (c) To the third claimant the sum of **EIGHT HUNDRED AND FIFTEEN POUNDS AND TWENTY SEVEN PENCE (£815.27)** in respect of unlawful deduction of

wages and **TWO HUNDRED AND FIFTY FIVE POUNDS AND SEVENTY SIX PENCE (£255.76)** in respect of holiday pay.

Each of the foregoing sums is expressed gross and should be paid to the claimants by the respondent under deduction of the appropriate amounts for income tax and employees' National Insurance contributions.

### **REASONS**

1. This case was listed for a final hearing in respect of both liability and remedy, conducted remotely by means of the Cloud Video Platform. The first claimant and the second claimant participated in person. The third claimant had intended to participate but was unable to do so for an unforeseen reason. The respondent had not submitted an ET3 response form and did not participate.

### **Nature of claims**

2. The ET1 claim form was submitted by the first claimant, naming the second claimant and the third claimant as additional claimants. The ET1 identified holiday pay and arrears of pay as the types of claim being made.

### **Evidence**

3. I heard evidence from the first claimant and the second claimant. I had a bundle of documents extending to 14 pages to which I refer by page number.
4. Following the hearing I asked that the first claimant should provide a copy of the provisions of her contract of employment relating to holidays and any documentation relating to being furloughed. The first claimant duly complied on 7 January 2021.

### **Findings in fact**

5. The claimants were all employed by the respondent until their employment terminated by reason of redundancy on 31 July 2020. The respondent was a recruitment agency. The first claimant was a contracts manager. The second

claimant was PA to the respondent's chief executive officer (Mr R Donaldson). The third claimant was a resourcer, and was line managed by the first claimant.

6. Each of the claimants was provided with a written contract of employment when their employment started. This provided for a holiday entitlement of 25 days plus public holidays. The first claimant advised that the public holidays comprised 2 days at the start of January, 1 day in April, 2 days in May, 1 day in July, 1 day in September and 2 days at Christmas. This was a total of 8 days whereas the contract provided for 9 days of public ("*statutory*") holiday, as detailed below. The holiday year was the calendar year.
7. The relevant clause in the first claimant's contract of employment was as follows

—

**"7 HOLIDAY ENTITLEMENT**

*7.1 The Company's holiday year runs from 1<sup>st</sup> January to 31<sup>st</sup> December. In each holiday year your basic holiday entitlement is 25 days.*

*You are also entitled to 9 statutory holidays which will be set in line with the needs of our clients' business needs and at the discretion of your Manager.*

*7.2 Holidays are to be taken at such times agreed with the Company. Unless otherwise agreed by the Company, the Employee is not allowed to take more than two weeks (10 days) holiday at any one time.*

*7.3 Holidays may not in any event be carried over to the next financial year if actual holidays taken in the current calendar year would be less than your entitlement under the Working Time Regulations 1998.*

*7.4 You may not carry any holiday entitlement forward to a subsequent holiday year and, save as provided by sub-clause 7.6, are not entitled to payment for unused holiday.*

*7.5 Holiday entitlement in any holiday year in which you commence or terminate other than at the beginning or end of that year shall be proportionate to the period of employment in that year in whole months.*

7.6 *Upon termination of the Employment you will be entitled to a pro rata payment in lieu of any unused holiday entitlement unless the Employment is terminated by the Company for misconduct. The Company reserves the right to deduct payment made for holidays taken in excess of holiday entitlement under this clause for the final payment of salary to be made to you.*

7.7 *Holiday entitlement may only be taken once it is accrued.”*

8. The first claimant said, and I accepted, that the other claimants were issued with a contract of employment in similar terms to her own. They had the same holiday entitlement.
9. The claimants were furloughed under the Coronavirus Job Retention Scheme with effect from 1 April 2020. The first claimant provided an exchange of emails between Mr Donaldson and herself dated 23 April 2020. Mr Donaldson’s email to staff asked them to confirm that they were “*happy to be furloughed*” and the first claimant’s reply confirmed that she was. The first claimant said that the other claimants must have agreed as well otherwise they would not have received furlough pay.
10. In April and May 2020, the claimants each received furlough pay, being 80% of their normal pay, as evidenced by their payslips (8-13). The gross amounts were as follows –
  - First claimant - £2266.67
  - Second claimant – £1600.00
  - Third claimant - £1200.00
11. On 9 June 2020 Mr Donaldson sent an email (1) to the respondent’s staff, including the claimants, which stated as follows –

*“Maxwell Bruce are looking to pay all accrued holiday pay up until 30 June on 27<sup>th</sup> June pay, minus any leave already taken. This will enable us to fairly provide the outstanding holiday accruals.*

*You will see your furlough pay and the accrued holidays will be detailed separately on your payslip. Holiday pay will obviously be paid at the full 100% of your salary.”*

12. Each of the claimants received a payment from the respondent on or around 24 June 2020 which, according to their payslips, represented an element of furlough pay and an element of holiday pay. These were as follows (expressed in gross terms) –
  - The first claimant received £726.72 of furlough pay and £1946.56 of holiday pay
  - The second claimant received £366.41 of furlough pay and £1557.25 of holiday pay
  - The third claimant received £384.73 of furlough pay and £1030.53 of holiday pay
13. Mr Donaldson’s email of 9 June 2020 did not require the claimants to take leave on any particular day or days. Similarly, the respondent had not required the claimants to take leave on the public holidays which occurred in April and May 2020, and did not require them to take leave on the public holiday which occurred in July 2020.
14. The claimants were confused. The first claimant emailed Mr Donaldson on 24 June 2020 (2) querying why she had not received her full 80% furloughed payment and asking if something was wrong. Mr Donaldson replied (2) *“No idea. Let me look into it.”*
15. The second claimant also emailed Mr Donaldson on 24 June 2020 (3) indicating that she had been expecting to receive her full furlough payment for June 2020 plus her accrued but untaken holiday entitlement. She requested a breakdown of the payment she had received.
16. Later on 24 June 2020 Mr Donaldson responded (5) to the first claimant and the second claimant (and to another employee who had also queried the payment received) in terms which included –

*“I emailed you on the 9<sup>th</sup> June to explain what [we] I was going to do with holidays and asked for questions.”*

*“The furlough scheme is in place to ensure you actually receive money rather than nothing and the way we have dealt with holidays in this month pay is correct based upon legislation and money available and the notice I gave on the 9<sup>th</sup> June.”*

*“Once I send the email with the explanation of how your June payment was calculated, if you still have concerns I would recommend you seek advice from either ACAS or the citizens advice bureau.”*

17. On 25 June 2020 Mr Donaldson sent a further email to the first claimant and the second claimant (and to the other employee) in which he indicated that it would be Monday (28 June 2020) before he had *“the information”* and stated that he would email on that date. Mr Donaldson did not do so.
18. On or around 7 July 2020 the claimants received a letter from the respondent stating that they were on notice as from 1 July 2020 by reason of redundancy. Their employment ended on 31 July 2020. They were paid full salary for their period of notice entitlement. Statutory redundancy payments were paid to the claimants during August 2020.
19. All of the claimants had taken annual leave on 1 and 2 January 2020. In the case of the first claimant only, this was taken as carried over holiday entitlement from the previous holiday year. None of the claimants had taken any further holidays since 1 January 2020 before (or indeed since) being placed on furlough. In the case of the third claimant, who was not present to give evidence in person, this was confirmed by the first claimant as line manager of the third claimant.

### **Applicable law**

20. Section 13(1) of the Employment Rights Act 1996 (“ERA”) provides as follows –  
  
*“An employer shall not make a deduction from wages of a worker employed by him unless –*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

21. Section 13(3) ERA provides as follows –

*"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."*

22. The Working Time Regulations 1998 ("WTR") include the following provisions –

- Regulation 13 **Entitlement to annual leave**
- Regulation 13A **Entitlement to additional annual leave**
- Regulation 14 **Compensation related to entitlement to leave**
- Regulation 15 **Dates on which leave is taken**
- Regulation 16 **Payment in respect of payment of leave**
- Regulation 17 **Entitlement under other provisions**

I have omitted Regulation 15A which relates to leave during the first year of employment as this is not relevant.

23. The combined effect of Regulations 13 and 13A is that a worker who works 5 days per week has an annual leave entitlement of 28 days. The effect of Regulation 14 is that a worker whose employment is terminated part way through a leave year is entitled to payment in lieu of annual leave, based on the proportion of the leave year which has expired before his/her termination date less annual leave actually taken, and calculated by reference to annual leave entitlement under Regulations 13 and 13A.

24. Regulation 15 so far as relevant provides as follows –

- “(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*
- (2) A worker’s employer may require the worker –*
- (a) to take leave to which the worker is entitled under regulation 13 or regulation 13A; or*
- (b) not to take such leave,*
- on particular days, by giving notice to the worker in accordance with paragraph (3).*
- (3) A notice under paragraph (1) or (2) –*
- (a) may relate to all or part of the leave to which a worker is entitled in a leave year;*
- (b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
- (c) shall be given to the employer or, as the case may be, the worker before the relevant date.*
- (4) The relevant date, for the purposes of paragraph (3), is the date –*
- (a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and*
- (b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.*
- (5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.”*



25. Regulation 16 deals with calculation of a week's pay for the purposes the WTR (ie a week's pay for each week of leave). I consider the effect of Regulation 17 below.

### **Discussion and disposal**

26. I was satisfied that the email sent by Mr Donaldson to the respondent's employees, including the claimants, on 9 June 2020 did not have the effect which Mr Donaldson appeared to contend. That effect was to require the claimants to use annual leave for the rest of the month of June 2020. That this was the effect contended for was borne out by the manner in which the claimants were paid for the month of June 2020. For part of the month they received furlough pay and for the remainder they received holiday pay.
27. The respondent's objective appears to have been to require employees to use holiday entitlement before their employment was terminated by reason of redundancy, no doubt to reduce the overall cost of the redundancy exercise. This could have been done by serving a notice under Regulation 15(2)(a) WTR requiring employees to take leave on particular days. However, such a notice would have to comply with Regulations 15(3) and 15(4) WTR. It would have to (a) specify the days on which leave was to be taken and (b) be given sufficiently far in advance of the earliest day so specified.
28. Mr Donaldson's email of 9 June 2020 did not meet the requirements of Regulation 15 WTR. It did not specify the days on which leave was to be taken. It did not give the required notice of those days. The result is that none of the days between 9 June 2020 and 31 July 2020, when their employment terminated, was a day of annual leave for any of the claimants.
29. In terms of Regulation 14 WTR, a payment in lieu of annual leave can only be made where the worker's employment is terminated during the course of the leave year. Nothing in Regulation 14 appears to require that the payment in lieu of annual leave can only be made once the employment has been terminated. Accordingly, I consider that the payments of holiday pay made to each of the claimants on or around 24 June 2020 count towards the payment in lieu of annual leave to which they were entitled on termination of employment.

30. However, what the respondent was not entitled to do was to reduce the claimants' normal furlough pay in June 2020. The full amount of that furlough pay represented the "*wages properly payable*" to the claimants in terms of section 13(3) ERA. It could not be substituted by holiday pay as the respondent had purported to do. In any event the holiday pay was not part of "*wages properly payable*" to the claimants because the respondent had not complied with Regulation 15 WTR. Also, the claimants had not provided agreement or consent in writing to the deduction of part of their furlough pay in June 2020.
31. I was therefore satisfied that each of the claimants had suffered an unlawful deduction of wages in June 2020. The amount of that unlawful deduction was the net pay they should have received representing the difference between the full monthly furlough pay due and the amount of furlough pay they actually received. Expressed in gross terms that was as follows –
- In the case of the first claimant £2266.67 due less £726.72 paid – a difference of £1539.95.
  - In the case of the second claimant £1600.00 due less £366.41 paid – a difference of £1233.59.
  - In the case of the third claimant £1200.00 due less £384.73 paid – a difference of £815.27.
32. Each of the claimants was entitled to pay in lieu of annual leave on termination of employment. Their leave year started on 1 January 2020. Their employment terminated on 31 July 2020. Sub-clause 7.5 of the claimants' contracts of employment provided for an accrual rate based on "*whole months*" which, in terms of Regulation 14(3)(b), meant that each claimant had accrued 7/12ths of their annual leave entitlement.
33. Regulation 17 WTR provides as follows –
- "Where during any period a worker is entitled to.... annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but*

*may, in taking....leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.”*

34. I noted that Regulation 17 refers to “*taking leave*” and not specifically to payment in lieu of leave which was accrued but untaken at the time of termination of employment. It seemed to me that the correct approach was (a) to calculate what the claimants were entitled to under their contracts of employment and (b) to check that this was not less than their entitlement under the WTR.
35. In the case of the second and third claimants, they had accrued seven months of their 25 days of annual holiday entitlement, excluding public or statutory holidays on the basis that they fall where they fall. At an accrual rate of 2.083 days per month (25 divided by 12), that equates to 14.58 days. They had not been required to take as holidays those public holidays which fell while they were on furlough (see paragraphs 6 and 13 above). These totalled 4 days. That gave them an accrued holiday entitlement of 18.58 days as at 31 July 2020.
36. The same calculation applied in the case of the first claimant. However, in her case and notwithstanding sub-clauses 7.3 and 7.4 of her contract of employment, I accepted her evidence that she had been permitted to take 1/2 January 2020 as holidays carried over from 2019 rather than as part of her 2020 holiday entitlement. This meant that her accrued holiday entitlement as at 31 July 2020 was 20.58 days.
37. Turning to the WTR, each of the claimants had an annual holiday entitlement of 5.6 weeks in aggregate under Regulations 13 and 13A. That equated to 28 days with an accrual rate of 2.33 days per month (28 divided by 12). Based on their employment for 7/12ths of the holiday year, that gave each claimant an accrued entitlement of 16.31 days. Accordingly, their accrued holiday entitlement under their contracts of employment exceeded their entitlement under the WTR.
38. I then calculated each claimant’s accrued holiday pay entitlement as at 31 July 2020 in money terms, as follows –
  - (a) I took the gross monthly furlough pay and divided this by 4, then multiplied by 5, to get the gross monthly pay before furlough.

- (b) I multiplied the result by 12 to get the gross annual pay before furlough.
- (c) I divided this result by 260 (52 x 5) to get the daily rate of pay before furlough.
- (d) I multiplied this result by the number of days of accrued holiday entitlement.
- (e) I subtracted from this figure the actual gross holiday pay received by each claimant in June 2020.
- (f) The resulting net amount was the balance of holiday pay due to each claimant as at 31 July 2020.
39. In the case of the first claimant, the gross monthly furlough pay was £2266.67. Steps (a) to (d) above produced a gross holiday pay entitlement of £2691.25. Deducting the amount actually paid of £1946.56 left a balance due of £744.69.
40. In the case of the second claimant, the gross monthly furlough pay was £1600.00. Steps (a) to (d) above produced a gross holiday pay entitlement of £1715.12. Deducting the amount actually paid of £1557.25 left a balance due of £157.87.
41. In the case of the third claimant, the gross monthly furlough pay was £1200.00. Steps (a) to (d) above produced a gross holiday pay entitlement of £1286.29. Deducting the amount actually paid of £1030.53 left a balance due of £255.76.
42. Accordingly, the gross amounts due to each claimant in respect of accrued holiday pay as at 31 July 2020 were as follows –
- First claimant - £744.69
  - Second claimant - £157.87
  - Third claimant - £255.76
43. The amounts due to each claimant in respect of unlawful deduction of wages (per paragraph 31 above) and holiday pay (per paragraph 42 above) are expressed in gross terms. When making these payments, the respondent will require to

deduct the appropriate amounts for income tax and employee's National Insurance contributions. Payment to the claimants of the resulting net amounts will satisfy my Judgment in their favour.

Employment Judge W A Meiklejohn

---

**Employment Judge**

8 January 2021

**Date of Judgment**

**Date sent to parties**

**23 January 2021**