



EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr. D. A. Midwood
Mr. M. Elvidge
Mr. S. Garside**

v

Moventas Gears U.K. Limited

Heard by CVP

On: 5 February 2021

Before:

Employment Judge Wedderspoon

Representation:

Claimant:

In Person

Respondents:

Mr. Hill, Managing Director

JUDGMENT

1. The claimants complaints of unlawful deductions succeeds.
2. There will be a further hearing to deal with clarification of the claimant's allegations that working out payments should have been included and the calculation of the holiday pay outstanding.
3. This case will be relisted for a further hearing by CVP for 3 hours. A date will be provided by the Tribunal.

REASONS

4. The claimants remaining as parties to this claim are Mr. D. A. Midwood; Mr. Elvidge and Mr. Garside. All presented a complaint of unauthorised deductions from wages (holiday pay) on 7 May 2020. The early conciliation notification date is 28 February 2020 and the certificate is dated 11 April 2020.

Issues

5. At a preliminary hearing on 27 July 2020, Employment Judge Rostant identified the following issues and made the following observations :-
 - 5.1 Were all the claimant's complaints presented within the time limits set out in sections 23 (2) to (4) of the Employment Rights Act 1996;

- 5.2 The claimants all bring claims for failure to pay the correct rate of holiday pay. In each case those claims extend back to the start of the employment of the relevant claimant;
- 5.3 The claimants complain that each time they have taken holiday they have been underpaid;
- 5.4 At this stage it is not clear what periods of holiday entailed. It is not clear whether for each claimant there has been a deduction after 29 November 2019 (the earliest possible date). Nor is it clear whether there have been previous deductions culminating in a deduction within the time period permitted by the Act;
- 5.5 Dealing with this issue will involve a consideration of the effects of the judgment of the EAT in the Bear (Scotland) case;
- 5.6 Furthermore the Tribunal will have to consider the effects of the Deduction from Wages (Limitation) Regulations 2014.
- 5.7 Did the respondent make unauthorised deductions from the claimants' wages in accordance with ERA section 13 by failing to pay the appropriate amount for a week's pay each time the claimants took holiday;
- 5.8 The claimants contend that voluntary overtime hours ought to have been taken into account when calculating pay;
- 5.9 The respondent's case is that the overtime is not sufficiently regular or frequent to fall within the description of normal pay;
- 5.10 The claimants also complain that a "working out" allowance was payable to the field workers namely Mr. Midwood, Mr. Elvidge and Mr. Anderson. They contend that allowance too ought to be included in the calculation of pay;
- 5.11 The respondent concedes that for Mr. Elvidge that allowance was paid with sufficient regularity that it too ought to have been (but was not) included in pay calculations;
- 5.12 That concession is not made for Mr. Midwood and Mr. Anderson where the respondent says the allowance was not paid with sufficient regularity;
- 5.13 The parties agree that the assessment in relation to the regularity and frequency of payments should be done over the three month period preceding the last period of holiday to which the alleged underpayment relates;
- 5.14 Since the claims were brought some of the claimants may have taken further periods of leave and may wish to claim in respect of underpayments associated with them;
- 5.15 Others may have left the business and may wish to claim for payments made for accrued holidays on termination;
- 5.16 The claimant may apply to amend their existing claims or bring fresh claims in relation to those holidays or holiday payments.

Hearing

6. At the start of the hearing the respondent contended that payments had been made to all three claimants and therefore no payments were outstanding. Mr. Midwood stated very recently the respondent he had paid Mr. Elvidge £1,167; Mr. Garside £249 and Mr. Midwood £547. Mr. Midwood took instructions and he stated Mr. Elvidge had been paid £675; Mr. Garside was paid £199.20 and he, Mr. Midwood had been paid £437.60 today. Mr. Midwood stated that he was entitled to £612.87; Mr. Elvidge entitled to £2,595.90 and Mr. Garside was entitled to £589.84. It was not apparent to the Tribunal or the claimants how the payments made by the respondent recently to the claimants had been calculated and for what days holiday the claimants had been paid. Mr. Midwood for the claimant stated that the holiday pay should have included overtime and that the claimant assert statutory and bank holidays should be paid at the overtime rate and the claimants sought payments for holiday pay for holiday and bank holidays to include the holiday pay for a period of 2 years. Mr. Hill for the respondent stated that the claimants were not entitled to holiday pay for bank holidays and there was a 3 month gap in respect of the claims so that they were out of time.
7. The Tribunal was provided with a number of documents included a detailed excel sheet from the claimants indicating from 2018 the amount of overtime payments by the claimants. The respondent relied upon a base data sheet whereby the respondent set out holidays taken and the aggregate of holidays in the calendar year. There was no agreement between the parties about these dates. Further the respondent relied upon a further document which set out the amount of pay for the claimant's above the basic wage (overtime or premium pay) and the amount the claimant's received during that period which the respondent contended was additional pay.
8. Mr. Midwood stated looking at the excel sheet it was clear that all three claimants regularly undertook overtime for the respondent. Mr. Midwood submitted in respect of his claim between November 2018 and March 2020 there was no gap of three months when he took holidays. Including bank holidays there was no three month gap. From memory his holiday entitlement was 261 hours per annum. He submitted in respect of Mr. Elvidge for the period from August 2018 to February 2020 there was no gap of three months. His holiday entitlement was 281 hours per annum including bank holidays. Mr. Garside from August 2018 to January 2020 there was no gap of three months and his holiday entitlement per annum including bank holidays was 281 hours.
9. The respondent submitted on the basis of the claimant's document Mr. Midwood had taken holidays and there was a three month gap between April 2019 and August 2019 for statutory holidays. In the circumstances Mr. Midwood could not make a claim before May 2019. In respect of Mr. Elvidge there was a gap between April to August 2019 of more than 3 months. Mr. Elvidge can only claim from August 2019. In respect of Mr. Garside his claim can only run from August 2019. There is a gap of three months before this.

The Law

10. Pursuant to section 13 of the Employment Rights Act 1996 an employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorized to be made by virtue of a statutory provision or the 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. A complaint shall not be considered unless it is presented before the end of the period of three months beginning with in the case of a complaint relating to a deduction by the employer the date of payment of the wages from which the deduction was made or (b) in the case of a complaint relating to a payment received by the employer the date when the payment was received. Where a complaint is brought in respect of a series of deductions or payments, the reference to the time limit means the last deduction or payment in a series.
11. Pursuant to section 234 of the Employment Rights Act 1996 where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period there are for the purposes of this Act normal working hours in his case. Normal working hours in such a case are the fixed number of hours or where the contract of employment fixes the number or minimum number of hours of employment in minimum in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances) and (b) that number or minimum number of hours exceeds the number of hours without overtime, the normal working hours are that number or minimum number of hours (and not the number of hours without overtime). Voluntary overtime can be included as part of normal remuneration; **Dudley MBC and Willetts (UKEAT/0235/17)**.
12. Pursuant to section 13 of the Working Time Regulations 1998 a worker is entitled to four weeks annual leave in each leave year. Pursuant to section 13A of the Working Time Regulations a worker is entitled in each leave year to a period of additional leave in any leave year beginning on or after 1 April 2009, 1.6 weeks.
13. In terms of time limits, in **Bear Scotland v Fulton (2015) ICR 221**, the EAT said a gap of more than three months between deductions means there is no series. Relevant to time is the date of payment and not the date of the holidays. Following Bear Scotland it was held that in a leave year an employee would take regulation 13 leave first then regulation 13A leave, meaning that a series of underpayments for the former may be interrupted by a gap of more than 3 months whilst the latter is correctly paid.

Conclusions

14. From the information available, the Tribunal sets out principles to be applied to the claims and re-lists the case for a remedy hearing, if required.
15. The Tribunal finds that all three claimants regularly carried out overtime for the respondent. For a 16 month period, Mr. Midwood carried out overtime over 11 months; Mr. Elvidge carried out overtime for 10 months over a 19 month period and Mr. Garside carried out overtime for 10 months out of an 18 month period. The Tribunal was satisfied that overtime was intrinsically linked to the tasks

required by the contract (**Dudley**) and on this basis overtime should be included in the calculation of pay.

16. From the excel spread sheet provided by the claimants, there is a gap of more than three months between deductions in respect of Mr. Elvidge and Mr. Garside. In respect of Mr. Elvidge there is gap of more than three months from May to August 2019; there is no series and his claim is limited to claiming from August 2019. Similarly, there is a gap of more than three months from February 2019 to August 2019 for Mr. Garside. His claim is limited to a claim dating from August 2019. There is no gap in the payments to Mr. Midwood and he validly claims for a series of deductions from November 2018 to March 2020.
17. There is insufficient evidence to deal with the complaint that working out allowance was payable to the field workers and whether this should have been included in the calculation of pay. Directions have been given to deal with this at a further hearing.
18. The claimants must provide to the respondent and the Tribunal within 14 days (by 30 March 2021) a calculation of the holiday pay claimed based on the principles set out below along with the calculation of the same and a statement setting out the basis of why it is asserted the working out allowance.
19. The respondent must provide the claimant and the Tribunal by 13 April 2021 any dispute about the claimant's calculations of holiday pay and a statement objecting to the why working out allowance should not be included.

Employment Judge Wedderspoon
Date 22 March 2021