



EMPLOYMENT TRIBUNALS

Claimant: Mr S Connor

Respondent: Chief Constable South
Yorkshire Police

Heard at: By CVP

On: 3 February 2020

Before: Employment Judge Davies

Appearances

For the Claimant: In person

For the Respondent: Ms von Wachter (counsel)

JUDGMENT having been given to the parties on 3 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Technology

1. This hearing was conducted by CVP. The parties did not object. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

2. These were claims of unauthorised deduction from wages/breach of the Working Time Regulations 1998 brought by the claimant, Mr S Connor, against his former employer, the Chief Constable of South Yorkshire Police. The claimant represented himself and the respondent was represented by Ms V von Wachter (counsel). I was provided with an agreed file of documents. I heard evidence from the claimant and, for the respondent, from Mrs J Read.
3. Although the respondent made a request for written reasons on 16 February 2021, that request has only today been referred to me. I am sorry that means the parties have had to wait some time for the reasons.

Claims and issues

4. The claims were identified at a preliminary hearing as follows:
 - 4.1 A claim for £1255.22 underpaid holiday pay for the year 2018/2019;
 - 4.2 A claim for £295.21 underpaid holiday pay for the year 2019/2020; and

- 4.3 A claim for £9 underpaid mileage expenses.
5. The Claimant confirmed at the hearing that the mileage expenses have now been paid and that claim is therefore dismissed on withdrawal.
6. The claim for the 2018/2019 holiday year arises as follows. The claimant accrued holiday in that year and was allowed to carry it forward to the holiday year 2019/2020. During that holiday year, while off sick, he requested to be paid in lieu of the accrued holiday for the previous year. Even though his employment had not ended, the respondent agreed to pay him in lieu of the accrued holiday. It did so at a rate of 1/365th of his salary per day's holiday. The claimant says this is an underpayment. The issues are:
 - 6.1 Was payment for this annual leave governed by the Working Time Regulations 1998?
 - 6.2 If not, was it governed by the Police Staff Council Handbook? What rate should have been paid if so?
 - 6.3 If not, was there a separate agreement for payment for the accrued leave and what was the agreement (express or implied) about the rate at which it would be paid?
7. The claim for the 2019/2020 holiday year is a claim in relation to holiday accrued but not taken on termination of employment. The issues are:
 - 7.1 Was payment for this leave governed by a relevant agreement for the purposes of Regulation 14 Working Time Regulations 1998? The respondent says it was governed by the 2013 and/or 2017 PSC Handbook. The claimant says it was not governed by either of those.
 - 7.2 If it was governed by a relevant agreement, was payment made in accordance with the agreement?
 - 7.3 If it was not governed by a relevant agreement, was payment made in accordance with the Working Time Regulations?

Findings of fact

8. The claimant started working for the respondent in 2004. He was a member of the Police Staff, and was employed as Office Manager when his employment ended. He was suspended from duty on 8 February 2019 pending an investigation into allegations of gross misconduct. He was signed off sick from 19 February 2019 and remained suspended and off sick until his dismissal for gross misconduct with effect from 29 May 2020. He had six months on full pay and six months on half pay and then had his pay reduced to nil. He asked to take annual leave at that stage, as a means of securing some income. The respondent refused because it would not allow him to take holiday while signed off sick. That is when his wife made a request on his behalf that he be paid for the leave he had accrued but not taken.
9. His leave year ran from 1 April to 31 March. As of March 2020 he had accrued 288 hours of untaken leave. The first element of his claim concerns the rate at which he was paid in lieu of that leave.

10. The Claimant accrued a further 40 hours and 42 minutes of untaken leave between 1 April 2020 and 29 May 2020. He was paid in lieu of that leave after his dismissal. The second element of his claim concerns the rate at which he was paid in lieu of that leave.
11. The claimant's normal contractual hours were 37 per week and he worked a regular working week. He was paid his annual salary in monthly instalments. His contract of employment said that the terms and conditions of service applicable to his post were contained in the "Police Support Staff Council Handbook", which was available for him to inspect. His contract said that the Handbook came into force on 1 September 1996, but that the conditions of service that applied before that date (determined by the national negotiating councils and supplemented by the local conditions of service) would continue to do so pending the outcome of future consultation with recognised trade union representatives. His contract told him how much holiday he was entitled to take but said nothing about the rate at which he would be remunerated for annual leave.
12. I was shown the respondent's 2013 Handbook ("the 2013 Local Handbook"). The introduction stated that the terms and conditions of employment for police staff employees were negotiated nationally. The 2013 Local Handbook incorporated the nationally negotiated terms and conditions of employment, along with locally determined terms and conditions negotiated with local trade union representatives.
13. Section 3, paragraph 3.18 of the 2013 Local Handbook dealt with annual leave on termination of employment. It said that employees might be entitled to payment for untaken annual leave on termination of their employment and continued:

Payment will be based on 1/365th of annual salary for each day's leave. Any payment will be subject to the usual statutory deductions.
14. Section 6 of the 2013 Local Handbook dealt with annual leave entitlement. It said that employees were encouraged to take their annual leave in periods spread across the annual leave year. However, in certain circumstances it might be possible for outstanding leave to be reimbursed to the employee as payment. In such situations, the calculation for payment would be based on the calculation set out in section 3. Likewise, where employees had outstanding leave on termination of their employment they could request payment for balances accrued during the current leave year. Payment would again be calculated in accordance with section 3.
15. In 2017 new nationally negotiated terms and conditions were published. I was not provided with an updated version of the 2013 Local Handbook, but with a copy of the nationally negotiated terms ("the 2017 Terms"). In the introduction, the 2017 Terms explicitly state that local machinery should be established with recognised trade union representatives of staff to discuss the application of the provisions of the 2017 Terms, consider other conditions of service issues and, where possible, resolve any differences through local collective machinery.

16. Section 2 of the 2017 Terms deals with pay. It sets out pay rates, details of overtime pay and other payments and entitlements. Paragraph 18 is headed "Holiday pay." It provides:
- 18.1 Police Staff Council Handbook allowances and entitlements are already paid to police staff for all periods of annual leave in accordance with contractual entitlements and existing collective agreements, e.g. shift pay, unsocial hours allowance, contractual and overtime and weekend working allowance.
 - 18.2 For the purpose of the four weeks (20 days) annual leave payment, under Regulation 13 of the UK Working Time Regulations police forces should reckon the following as "normal remuneration" for payment:
 - all forms of noncontractual overtime, for both full-time and part-time workers (including plain time overtime where applicable) including that payable as part of rest day working compensation;
 - standby;
 - acting up allowances.
 - 18.3 The payment is pensionable except in accordance with LGPS regulations – payments made in recognition of leave that has not been taken (e.g. upon leaving employment) are not pensionable.
 - 18.4 The calculation for payment is 20/365 of total of payments identified in the list above paid during a 12 month reference period, which is the rolling 12 month prior to the commencement of the allowance.
- ...
17. Section 3 of the 2017 Terms deals with leave. The first heading is "Annual leave", and employees' entitlements to annual leave are set out. The document indicates that any arrangements for carrying leave forward from one leave year to the next are to be determined by local agreement with recognised trade unions. It also makes clear that if an employee falls sick during a period of annual leave, he or she should be regarded as being on sick leave from the date of the medical certificate and further annual leave should be suspended from that date.
18. The 2017 Terms do not contain any other provisions dealing with the rate at which annual leave, or payment in lieu of accrued leave, should be paid.
19. Mr Algie, a Senior Adviser (Negotiations and Workforce) at the Local Government Association emailed the claimant on 16 November 2020 to confirm that the 2017 Police Staff Council Handbook replace the 2013 Police Staff Council Handbook.
20. Mrs Read is the Payroll and Systems Manager of the Respondent. She is also Secretary of the National Police Payroll Managers and is involved in discussions at a national level about matters relating to pay, terms and conditions. She has a good understanding of how the machinery works at the local and national level. She was confident that there were not discussions at a national level after 2017 about how pay in lieu of accrued leave should be remunerated.
21. Her evidence was that the 2013 Local Handbook incorporated the nationally negotiated terms and conditions of employment, along with locally determined terms and conditions. In 2017 when the new nationally negotiated terms and conditions were published, for any sections which were silent they continued to

follow the previously negotiated terms in order to treat all staff equitably. The 2017 (national) Terms do not say anything about how pay in lieu of accrued leave should be remunerated. Therefore, they continue to apply paragraph 3.18 of the 2013 Local Handbook.

22. Mrs Read's oral evidence, which I accept, was that when the 2017 Terms were published the respondent's HR had a series of meetings to review the terms and conditions. She attended as did local trade union representatives. Any specific changes were reviewed, decisions made about how to implement them, and the understanding was that everything else stayed as it was.
23. Mrs Read gave evidence, which I accept, that payments for accrued leave are made around two or three times per month and are always made in accordance with paragraph 3.18. Usually those arise when someone's employment terminates, but sometimes line managers agree with individual employees that they can "buy out" untaken leave. This might happen, for example, where someone has been prevented by operational reasons from taking the leave, and given that they are only permitted to carry five days forward from one leave year to the next. Sometimes people ask about the basis on which payment is calculated and they are provided with the information.
24. The claimant was not aware of how anybody else had been paid in lieu of accrued leave, whether during their employment or following its termination. He emphasised that whenever he took annual leave he was paid at his normal weekly rate, but that is of course different from being paid in lieu of leave that has not been taken.
25. When the claimant's wife requested that he be paid in lieu of his accrued leave, there was no agreement about the rate at which he would be remunerated. He evidently assumed he would be paid at the same rate as if he were taking annual leave. By the time he found out that a different calculation method was being used, the payroll had already been run and it was too late for him to change his mind. The payment was made in accordance with paragraph 3.18 of the 2013 Local Handbook, i.e. he was paid at the rate of 1/365th of his salary per day's leave. He says he should have been paid at the rate of 1/260th of his salary per day's leave. That is the difference between calendar days and working days.
26. When the claimant originally queried how his payment had been calculated, he was told that it had been based on paragraph 18.4 of the 2017 Terms. He queried that and a Business Manager took advice from a Senior Payroll Officer. The claimant was then told that payment was in accordance with paragraph 3.18 of the 2013 Local Handbook.

Legal principles

27. The entitlement to paid annual leave is governed in part by the Working Time Regulations 1998. Those regulations make clear that annual leave under regulation 13 and 13A may **not** be replaced by a payment in lieu except on termination of employment.

28. Where payment is made in lieu of accrued annual leave on termination of employment, regulation 14(3) says that the payment due is either the amount provided for in a “relevant agreement” or, where no provisions of a relevant agreement apply, as calculated in accordance with the remainder of regulation 14.
29. A “relevant agreement” is defined in regulation 2 as a “workforce agreement which applies to [the worker], any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer.”
30. The terms of a contract are governed by ordinary contractual principles. When deciding what a contract means, a tribunal must ask what a reasonable person with all the relevant background knowledge that would have been available to the parties at the time would have understood the contract to mean. Contracts may incorporate provisions in other documents such as handbooks and collective agreements. A tribunal must ascertain, as between the individual employee and the employer, whether it was objectively intended that the relevant terms in such a document would give rise to contractual rights enforceable by the employer or the employee.

Application of the law to the facts

31. In each of the complaints, looking at the list of issues, the fundamental question for me is whether it was a term of the claimant’s contract that payment in lieu of accrued leave, on termination of employment and or during employment, would be made in accordance with paragraph 3.18 of the 2013 Local Handbook.
32. The position is different during employment and on termination, because if there is no relevant agreement, payment in lieu on termination will by default be governed by the Working Time Regulations. Those regulations do not apply to payment in lieu made during employment, and the lack of a fallback position may affect how the contract is to be construed.
33. However, I find that the provisions of paragraph 3.18 of the 2013 Local Handbook were still incorporated in the claimant’s contract of employment. That applied to any payment in lieu of accrued leave, whether on termination or during employment (see section 6 of the 2013 Local Handbook). The correct method of calculation was by reference to 1/365th of the Claimant’s salary per day’s leave. In reaching that view, I took into account the following:
 - 33.1 The Claimant’s written contract incorporated an earlier version of the national handbook, which has obviously now been superseded. It also expressly contemplates the continuation of previously agreed terms pending agreement with unions.
 - 33.2 The 2013 Local Handbook and the 2017 Terms are different. The former is the locally agreed document, incorporating national and local terms. The latter contains the nationally agreed terms only.
 - 33.3 The 2017 Terms document makes clear that local machinery should be established with Trade Union representatives to discuss the application of its provisions.

- 33.4 The 2017 Terms do not deal with remuneration for annual leave generally or for payment in lieu of accrued leave at all. It seems to me clear that they deal with a specific issue, namely the well-known decisions of the CJEU that a worker's annual leave under the Working Time Directive must be remunerated at a rate that includes regular overtime or other payments, and not just at the rate of basic salary. That background information would have been well known when the 2017 Terms were agreed. It would be very surprising if the fact that the 2017 Terms dealt with this issue, meant all the previous, detailed provisions dealing with pay for annual leave and pay in lieu of accrued leave fell away or were intended to be determined by reference to the Working Time Regulations 1998 (where applicable). There is a detailed, national, negotiating process that leads to detailed and comprehensive national terms, and clear words would be expected if those were to be set aside if the new terms were silent on a particular issue. Further, this interpretation seems to me to be consistent with the express wording of paragraph 18.1. It refers to the fact that certain allowances and entitlements are already paid for annual leave "in accordance with existing contractual entitlements and existing collective agreements". On an objective reading of the 2017 Terms, it was understood and intended that those agreements would continue, as amended by the new provisions.
- 33.5 When Mr Algie confirmed that the 2017 Terms replaced the 2013 Police Staff Council Handbook, he was talking about two national handbooks, not about the Respondent's local handbook. Further, he could just have meant that where both handbooks dealt with the same issue, the later one replaced the earlier one. He did not give evidence and was not asked about this.
- 33.6 Mrs Read's evidence shows that what happened in practice reflected what the 2017 Terms envisaged: local machinery including Trade Union representatives reviewed the 2017 Handbook and decided what to do about the new provisions. The mutual understanding was that for everything else it remained the same. That was what happened in practice from 2017 onwards.
- 33.7 The alternative, if paragraph 3.18 does not apply, is that no express contractual provision is made at all for how pay in lieu of accrued leave should be remunerated, in circumstances where this happens not only on termination of employment (which would be governed by the Working Time Regulations 1998) but also during the course of employment.
- 33.8 The fact the Claimant was always paid his normal week's pay when he took a week's holiday is not relevant. This claim concerns pay in lieu of untaken leave, not payment for leave that is taken. The Working Time Regulations say that payment in lieu of untaken leave (on termination of employment) can be governed by a relevant agreement. This means it can be less than a normal week's pay. Pay for leave that is actually taken cannot.
- 33.9 The fact that the Claimant was told two different things about how the payment was calculated after the event does not affect the proper construction of contract.
34. Therefore, the Claimant's contract of employment provided for payment in lieu of accrued but untaken leave to be paid at the rate of 1/365th of his salary for a

day's leave. The two payments made to him were made on the correct basis. The first was governed only by the contract, which provides for 1/365th of salary per day's leave. The second was governed in the first instance by the Working Time Regulations. However, there was a relevant agreement, so, in accordance with Regulation 14, the payment was correctly made by reference to that agreement.

35. I note finally that the Claimant was concerned that he had not been given the chance to change his mind about asking for a payment in lieu. In view of my findings, it would have made no difference if he had changed his mind. When his employment was terminated a few weeks later, the additional hours' leave would have been included in his payment in lieu, and would have been calculated on the same basis.

**Employment Judge Davies
23 March 2021**