Case Number: 2300079/19

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr A Harman		**Cleshar Contract Services Limited**

Held at London South **On 16 and 17 November 2020**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **Ms C Casserley**

For the Respondent: **Mr K Chaudhuri**

CORRECTED RESERVED JUDGMENT

The decision of the tribunal is that:

1. The respondent made unlawful deductions from the wages of the claimant in relation to the deduction of a sum equivalent to the apprenticeship levy and he is awarded a sum of £353.40.

2. The claims that the respondent made further unlawful deductions from the wages of the claimant (including in relation to holiday pay, to the extent that such a claim was brought) do not succeed.

3. The respondent refused permission for the claimant to exercise his right to paid annual leave in accordance with regulations 13 and 16 of the Working Time Regulations 1998.

4. The claimant is awarded a sum of £6717 (net of tax) pursuant to regulation 30(4) of the Working Time Regulations 1998.

5. The total sum awarded to the claimant is £7070.40

6. The respondent breached section 1 of the Employment Rights Act 1996 in that it has not provided the required written statement of particulars in relation to the rate of pay

7. It is determined that the particulars that ought to be included are a statement that the claimant shall be paid a gross rate of pay for every shift calculated on the basis of the shift calculation rate applicable at the time less any amount of employers national insurance and employers pension contributions that are payable. This statement shall be deemed to have been given by the respondent to the claimant in accordance with section 11(2) of the Employment Rights Act 1996.

REASONS

1. The Claimant claims:
    a. Annual leave/pay pursuant to regulation 13 or 16 Working Time Regulations 1998
    b. Unlawful deductions from wages contrary to section 13 Employment Rights Act 1996; and
    c. Breach of section 1 of the Employment Rights Act 1996.

2. I heard evidence from the Claimant himself and from Mr Simon Miesegaes (Company Secretary and HR Director) and Mr Simon Harrison (former Head of Human Resources) on behalf of the Respondent.

3. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.

4. The respondent provides rail maintenance services to London Underground and Network Rail. The claimant has worked as a skilled plate layer since October 2007. He was engaged by the respondent in or around 2010 on a self-employed basis and was paid under the CIS construction scheme. He works

on the Bakerloo underground line at night replacing worn, damaged or broken rails and related maintenance work.

5. Before starting work with the respondent, the claimant completed a form entitled 'tendering for the supply of self-employed contracted services to Cleshar Contract Services Limited'. This form contained a statement in which the claimant acknowledged that he was a sub-contractor providing services on a self-employed basis. It stated that the services could be provided by a suitably qualified replacement. The claimant also signed a contract for services. He was registered as self-employed.

6. It is not in dispute that since the start of his engagement the claimant has worked for the respondent five nights a week. His shift is eight hours per night although he is able to go home once the night's work is completed. This has been the consistent pattern of work since the claimant started working for the respondent in 2010. Under this arrangement he was paid a total of £800 gross each fortnight (ten shifts at £80 per shift or £10 per hour) with a deduction of 20% for tax under the CIS scheme.

7. The claimant described his working arrangements and his account is not disputed. At the start of the shift he attends the respondent's premises at Lambeth North and meets the rest of his gang. His team leader collects the work allocation for that night. The claimant and his colleagues are then transported to the location of the work in the respondent's vehicles. The respondent provides him with a uniform and with PPE including hard hat and boots. The claimant wears his own gloves due to a skin condition. Tools are provided by the client.

8. Mr Miesegaes says at paragraph 3 of his statement that the claimant's work as a skilled plate layer 'is a basic form of track maintenance service. He would have carried ballasts and rail as part of a larger team. I understand that he would have worked at a number of different sites and he did work at a number of locations'.

9. There was no evidence in front of me to suggest that the claimant had ever sent a substitute to carry out the work for him and neither Mr Miesegaes nor Mr Harrison said in their witness statements that this was a possibility, although Mr Miesegaes suggested during cross-examination that this has sometimes happened in other cases.

10. It was the claimant's evidence, which was not challenged, that he has never taken time off either for holiday or for sickness during his entire period of working for the respondent.

11. The claimant worked under the arrangements set out above until March 2015.

12. In around February 2015 the board of the respondent discussed new tax rules that were due to be introduced by HMRC. These provided that if there was any degree of 'supervision direction or control' over the manner of the work, the party making payment to the operative would be liable to make PAYE deductions from their pay.

13. The board identified this change as a risk to the company. Although they believed operatives to be self-employed, they identified that if there was any form of supervision, direction or control within the contractual chain, HMRC may take the view that PAYE should apply.

14. The respondent decided to offer operatives two choices: either to be engaged as PAYE employees or to offer their services via a limited company.

15. The respondent organised a series of presentations to operatives including the claimant. He believed that he attended such a presentation in March but accepted when questioned that he had attended on 4 February 2015 and had been transported to the presentation venue at the end of his night shift. Everyone was handed a pack containing documents about the proposed changes and a contract of employment. The respondent also provided a power point presentation.

16. A copy of the power point slides was contained in the bundle. Page 91 contains a slide with the heading 'the benefits'. The last bullet point on that

slide reads: ‘we have done our best to ensure that the impact on your home pay is as minimal as possible’.

17. The slide at page 92 is headed ‘typical example’. At the top of the slide there is a reference to the Shift Rate Calculation of ‘80’. That was the current shift rate. There was a reference to 5 shifts a week, and to an operative claiming a portion of their pay, (£50 was given as an example), by way of expenses thus reducing the tax. Two calculations then followed. Both referred to an annual income of £20,800. The first calculation purported to show the net result under the CIS scheme and the second showed the result under a PAYE arrangement. The former showed a net amount of £16640 pa or £320.80 per week. The latter showed a net amount of £17094.35 pa or £328.74 per week ie the PAYE position was slightly better.

18. This made sense to the claimant. The figure of £20,800 pa represented his existing income – 5 shifts at £80 per shift over 52 weeks. His take home pay was £320 which matched the slide. He was also told that he would receive paid annual leave. He signed form P46 before he left indicating that he would accept the offer to become an employee.

19. The respondent says that staff who attended the presentation were not told that they would be on the same income or better off if they became PAYE employees. They refer to a document at page 42 of the bundle entitled ‘how your pay is calculated’. This stated that operatives were not being offered the ‘shift calculation rate’ of £80. This was the starting point. From that the respondent would deduct both employer’s national insurance and pension contributions. The remaining amount would be available for pay to the worker. Expenses would be processed first. The remainder would represent both pay and holiday pay. Wages would not be lower than the national minimum wage. Gross pay would be the total of expenses plus wages and holiday pay.

20. The respondent also states at page 42 that ‘the higher deductions mean that many of our operatives would be worse off under PAYE; However one advantage is that any expenses can be paid tax free’.

21. Nowhere on page 42 is the actual rate of pay on offer stated.

22. A number of people had queries about the new arrangements and the respondent later issued a response to 'Frequently Asked Questions' (page 95).

23. In answer to the question 'is this a zero hours contract?' the respondent replied 'no it is a 336 hours contract per 12 months'.

24. In answer to the question 'will my rate change' the reply is: 'your line manager will meet with you shortly to discuss this'. The claimant's evidence was that his manager had never met with him to discuss what his wage rate would be. Mr Harrison was questioned about this. He was asked whether the respondent had arranged meetings with operatives such as the claimant to discuss what would happen to their rate of pay. He replied that if anyone had a query about their rate of pay they could raise it with their line manager. He did not suggest that any programme of meetings with individuals had actually been arranged.

25. The claimant's evidence is that he does not recall being told that his rate of pay might go down at the presentation. He remembers the slide on page 92 and this gave him reassurance that he would be better off or at least as well off as an employee. He could not remember ever reading the document at page 42. He accepted that it could have been included in the pack of documents he was given.

26. I turn now to the proposed contract of employment which the claimant received in the pack of documents that he took away from the meeting (page 33). Clause 5.1 of the contract states: 'Your rate of pay at all times will be no less than the National Minimum Wage per hour worked. Additional pay may be paid depending on the work you are required to perform. Where overtime rates are applicable you will be notified of this prior to the commencement of the work'.

27. Clause 7.1 stated that the claimant wold be entitled to the statutory 28 days holiday and clause 7.4 said: 'you will receive holiday pay at the rate of 12.07% of the rate of pay as set out in clause 5 per hour worked… you will not receive any additional payment when you are on holiday'.

28. Mr Miesegaes gave evidence about how the pay arrangements worked in practice. He explained that each fortnight staff would be sent a 'Payment Reconciliation' and a payslip. The payment reconciliation stated the Shift Calculation Rate to be £800 per fortnight. Employers NI and pension contributions were deducted, as were expenses, leaving a gross pay figure. Examples can be seen on page 249 and 250. The gross pay figure is £740.82.

29. This gross pay figure is shown on the payslip but it is broken down as follows: the first figure is for 'wages' and this represents hours worked at the NMW rate. There is then an amount of 'additional wages' and finally an amount for holiday pay. The total of these three figures matches the gross pay figure shown on the pay reconciliation statement. From this figure is deducted tax and employee's national insurance resulting in the net amount.

30. I put it to Mr Miesegaes that the offer made to operatives in March 2015 in fact represented a pay cut and he agreed. The gross amount offered was not £80 per shift or £800 per fortnight as previously. The respondent's position was that it could not afford to absorb any of the costs associated with employing the operatives directly under PAYE. Mr Miesegaes stated that if the respondent had to bear these costs the contract would have collapsed. He had tried to persuade London Underground to increase their contractual payments to cover the additional costs of employment but they had refused. The decision was made that these costs including employer's NI and pension contributions would have to be included within the gross shift pay rate. The same arrangement would apply to holiday pay. Mr Miesegaes stated that the respondent could not afford to pay holiday pay on top of normal pay so holiday pay too would have to be absorbed within the gross shift rate of £80.

31. The scheme that the respondent came up with was to guarantee staff only the national minimum wage rate of pay. However once the available sum had been identified by deducting employers NI and pension contributions from the shift rate of £80, the remaining amount would be allocated between NMW pay, 'additional' pay (which was described in the contract as discretionary), and holiday pay.

32. This meant of course that in terms of taking holiday the claimant was in no better position than he had been when he was treated as a self-employed contractor. If he took time off as a contractor he would not be paid any money for those weeks. When he became an employee, the respondent's position was that he was being paid for his holiday in advance on a rolled-up basis. However Mr Miesegaes accepted that the claimant would in fact be financially worse off if he took holiday as an employee as opposed to a contractor as the net amount he was receiving every fortnight would be somewhat lower than he had enjoyed previously. Once again, if he took weeks off, he would not be paid anything during those weeks.

33. These matters did not concern the claimant at the time. He had attended the presentation after working a night shift. He had seen the 'typical example' situation. He understood that his shift rate would stay at £80 and that he would get paid holiday. He decided that he would accept the offer of becoming a PAYE employee and signed form P46. He took the contract away with him. He signed it a month later, on 5 March 2015 and returned it to the respondent.

34. It is not in dispute that the claimant then continued working in exactly the same way as before. He remained with his gang and attended work eight hours per shift, five nights a week, arriving at the start of his shift to find out where he would be working that night. Working arrangements remained exactly the same.

35. The respondent had set up an online portal to allow employees to access their payslips. The claimant stated that he was not computer literate and was not able to do this. He did not see his payslips nor the pay reconciliation statements which were emailed to him. He received a text each fortnight telling him what he was being paid and he checked his bank account.

36. The claimant expected to see net pay of around £640 arriving in his bank account every fortnight. Following the date when he signed his contract of employment, his pay varied to some extent. For example on 27 March 2015 net pay was £617. On 10 April it was £646 as the shift rate was higher,

possibly due to a bank holiday. On the 3 May it was £574.66 and so on. I have noted that there are a total of 21 wage slips for 2015 in the bundle. The average take home pay per fortnight was £619. The claimant was paid less than £640 on 15 separate occasions. I have done the same calculations for 2017 and 2018. In those years the average rate of pay per fortnight is £625.

37. There is no evidence that the claimant queried his pay for some time. However at some point he realised that he would not be paid extra if he took holiday. In fact his evidence which was not disputed is that he took no holiday at all from March 2015 onwards. He says that he could not afford to take leave.

38. The respondent says that other employees did take leave on a regular basis. However they do not monitor the amount of leave taken and they do not take any steps to encourage staff to take their annual leave. They did not dispute the claimant's evidence that he had taken no leave for five years. When they realised that the claimant was planning to work a night shift after attending the two-day tribunal hearing they indicated to him that he did not need to come into work for two nights and he would not suffer a deduction from his pay.

39. The claimant decided that there had in fact been no change in his status. He continued filing self-assessment tax returns as he had been doing as a self-employed contractor, and claiming expenses. This led to him receiving tax rebates in 2016 and 2017.

40. On 21 December 2016 the claimant contacted the respondent asking for copies of his pay records detailing his days, weeks and shifts to be provided for his housing association. He explained that his email did not work and he asked for information to be sent by post.

41. On 23 February 2017 HMRC contacted the respondent with a query about the claimant's status. They confirmed that he was an employee. HMRC then contacted the claimant in late 2017 or early 2018 demanding that he repay the tax rebates. It was at that point that the claimant sought legal advice first from Hackney CAB and then from Hackney Community Law Centre.

42. The pay reconciliation statements show that from 2 April 2017 the respondent started to deduct a sum for 'apprenticeship levy' of £3.69 per fortnight from the gross shift pay rate.

43. On 15 November 2017 the claimant contacted the respondent asking to be opted out of the NEST pension scheme.

44. On 4 October 2018 Hackney Law Centre wrote to the respondent arguing that rolled up holiday pay was a breach of the Working Time regulations and seeking payment of holiday pay.

45. On 7 January 2019 the claimant commenced proceedings in the employment tribunal for holiday pay and for unlawful deductions from wages.

DECISION

Status of the Employee

46. At the start of the hearing, it was agreed with the parties that it may be necessary to consider the claimant's status prior to March 2015 and I have therefore done so (although I do not believe my decision on this issue to be determinative of any of the claims). The claimant's position was that although he was registered as self-employed and had signed a contract for services, he was in fact an employee or a worker from the start of his engagement by the respondent in 2010. The respondent disputes this.

47. I note that before his engagement began the claimant completed a tender form in which he acknowledged that he was self-employed and that he could send a substitute to do the work. He also signed a contract for services. This stated that he was not obliged to accept any contract that the respondent offered; he could leave site and did not have to work fixed hours; he was not required to hold public liability insurance but would be charged for this; he could send a substitute; and could end the contract without giving notice.

48. I have considered the terms of this agreement and compared them with the way in which the contract was in fact being operated in order to decide whether

the written terms reflect the reality of the relationship: **Autoclenz v Belcher** [2011] ICR 1157 SC.

49. Although the contract states that the claimant did not have to work fixed hours, he consistently worked five night shifts a week, turning up at work at the same time every night to find out what maintenance tasks had been allocated to his gang. He worked for a fixed shift rate from 2010 to 2015 and there is no evidence that he had any ability to negotiate the price for the work. He worked as part of a team under the supervision of a gang leader. He was supplied with uniform and with tools and PPE. Although the contract states that he would be charged for the cost of personal liability insurance, there is no evidence that this was in fact deducted from the sums paid to him.

50. Mr Miesegaes asserts at paragraphs 4 and 5 of his witness statement that the claimant was self-employed and worked under the terms of the contract for services. He states that the respondent had no obligation to provide him with work and he had no obligation to take it. He said during cross-examination that operatives had the right to send a substitute and that this sometimes happened (although he also stated that the respondent sometimes contacted an agency to supply additional workers). I have noted that this was not mentioned in his witness statement and the respondent has not supplied evidence of occasions when a substitute was provided by any operative. It is not alleged that the claimant ever did so.

51. It is instructive that when the tax rules changed the respondent identified that there was a risk that HMRC might take the view that there was sufficient supervision, direction and control within the contractual chain for PAYE rules to apply. It is also instructive that having identified that risk the respondent took the decision to offer all operatives the opportunity to become PAYE employees unless they chose to set up a limited company through which to contract.

52. I have also noted the claimant's evidence that after he had signed the contract of employment absolutely nothing changed in terms of his working arrangements.

53. Finally I note from Mr Miesegaes' statement that the claimant was not doing highly skilled work: he says that he was carrying out a 'basic form of track maintenance' and that he 'carried ballasts and rail as part of a larger team'. This demonstrates that the claimant was not exercising a high degree of skill and autonomy over the work that was being done; he and his colleagues were given a piece of work to do and they got on with it. I do not find that the situation was analogous to engaging a painter to come in and paint a room, as Mr Miesegaes argued.

54. Having identified the relevant facts, I seek to apply the relevant legal principles in order to determine the claimant's status in accordance with **O'Kelly and others v Trusthouse Forte plc** [1983] ICR 728 CA. I make the following findings.

55. The respondent exercised a significant degree of control over the work carried out by the claimant. He was not simply given a work sheet and sent away: he reported in nightly and work was allocated to his team leader. He was then transported to that night's work location by the respondent, in the respondent's uniform, and with the respondent's PPE. He and his colleagues worked as a team to get the work done and then went home. It is the respondent's own evidence that this was basic maintenance work and there is no evidence that it required a high level of autonomous skill or decision-making.

56. The right of substitution contained in the written terms was never exercised.

57. I find also that the claimant was integrated into the respondent's organisation to a significant extent. He was part of an identified team with a leader who was the liaison point with other managers regarding the allocation of work. He worked with the same team every night.

58. There was mutuality of obligation to the extent that the claimant turned up for work five nights a week for a period of five years and received the same, fixed rate of pay for doing that work. It does not seem to be in dispute that he could have taken time off, which would have been unpaid. Mr Miesegaes referred to a number of operatives who sometimes took extended periods of time off, for

example to visit family overseas. However a right to take time off is not inconsistent with a contract of employment which might allow for holiday, sabbaticals and unpaid leave. Given the claimant's working pattern I find that there was mutuality of obligation in his case.

59. It seems clear that the claimant did not have any say in how his pay was fixed and nor did he take any risk in relation to the work, even to the extent that he was not required to have insurance. There is no evidence that he was operating a business in his own account, that he advertised his services or supplied them to any other person. He simply turned up for work five nights a week as many employed people do.

60. Having carried out a comparison between the terms of the contract for services and the way in which the contract was actually operating I find that the written terms do not reflect the reality of the relationship and that it is appropriate to look behind it. Although the claimant 'tendered' for the work initially as if he was an independent contractor, in reality he was not operating a business and the balance of bargaining power favoured the respondent who paid him on a fixed basis per shift.

61. My conclusion is that all the features of the working arrangements which I have identified are consistent with there being a contract of employment between the claimant and the respondent from 2010 onwards.

62. In reaching that decision I have taken into account the fact that the question of mutuality of obligation in this case is difficult to assess. That is because the issue of whether the claimant could decline to accept work from the respondent never arose. He worked five nights a week without taking any time off. I accept that there is some evidence from Mr Miesegaes that staff had flexibility in that they could cease working for the respondent for a number of weeks or months if they chose to do so. There was no evidence produced as to the extent this was allowed, any process that applied and what happened to operatives who took significant periods of time off. If I am wrong in my conclusion that the claimant was an employee I find that in any event he

qualified as a worker under regulation 2 of the Working Time Regulations 1998 which defines the term as *'an individual who has entered into or works under …b) any other contract whether express or implied…whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.*

63. Although there is a right of substitution contained in the contract for services, in the case of the claimant this was never exercised in practice and nor was he in business on his own account. I find that he was required to carry out the work personally and that he meets the definition of a worker for the purposes of the Working Time Regulations from 2010 onwards and was therefore entitled to paid annual leave from that point.

Claim for Unlawful Deduction from Wages

64. That brings us to the events of March 2015 and the point at which the claimant signed a contract of employment and was treated as a PAYE employee.

65. The claimant's case is that following this change his rate of pay stayed at £80 per shift and that the respondent made unlawful deductions from this amount when it deducted employer's national insurance and pension contributions from it (and later the apprenticeship levy) before paying the claimant.

66. I am not surprised that the claimant left the presentation on 4 February 2015 under the impression that his rate of pay would not change. The slide at page 92 of the bundle entitled 'typical example' is highly misleading. It suggests that the rate of pay would remain at £80 per shift. Although it deals with the effect of expenses and taxation on that figure, it makes no mention of any deduction for employer's NI or pension contributions before the pay of employees is calculated. It suggests that net pay will be the same or higher than previously.

67. I accept that there is other evidence that the respondent sought to warn operatives that there could be a negative impact upon their pay. This is implied on page 91. It is set out a little more clearly on page 42 which is the document entitled 'how your pay is calculated'. That document sets out a method of calculation. However even this document does not state what the pay rate is likely to be. A person who had studied the document carefully and looked up rates of national insurance and pension could probably have gleaned a rough idea of what the actual rate of pay would be. In any event, it seems clear that the claimant did not take the information in at the time (he had after all just worked a night shift) and nor did he read it carefully afterwards.

68. I have also noted that although the Frequently Asked Questions at page 95 deals with the direct question – 'will my rate change?' – the respondent fails to provide a direct answer, instead stating that line managers would meet with staff to discuss this with them. It seems clear from Mr Harrison's evidence that no such meetings ever took place. I find that notwithstanding the document at page 42 many staff would not know what their actual rate of pay would be until they received their first pay slip and reconciliation statement.

69. I turn to the contract of employment. This makes it clear that the rate of pay on offer under the new arrangement is not £80 per shift or £10 per hour. The only guarantee offered to staff is that they will receive 'no less than the National Minimum Wage' plus an amount of additional pay which is not specified.

70. I find that even if the claimant left the presentation on 4 February 2015 under the justifiable impression that his pay rate would stay the same, he would have realised if he read the contract and accompanying documentation through carefully that this was not guaranteed. He had the contract in his possession for a month before he signed it. This gave him the opportunity to raise queries about it or to seek advice, but he did not do so. He signed and returned it at the beginning of March and must be taken to have agreed to its terms.

71. Ms Casserley argues that as the actual rate of pay in the contract is not specified and as it refers to a payment of 'no less than' the NMW, this implies

that the actual rate of pay remained at £10 per hour. I am not able to accept that. Although the information communicated at the presentation was less than transparent, page 42 of the bundle and the terms of the contract make it clear, as Mr Miesegaes accepted, that what the respondent was offering operatives amounted to a pay *cut.* The previous shift rate of £80 was not guaranteed and this was described as the 'starting point' of the pay calculation. The rate of pay would only be determined after deduction of employer's NI and pension contributions. The sum on offer to prospective employees was therefore lower than the previous shift rate of £80 which was paid net only of the CIS deduction.

72. If the claimant genuinely believed that his pay would stay the same, it is surprising that he did not query this shortly after he signed the contract of employment. He accepted that he knew he could contact the wages department if he felt his wages were not correct and that he had done so in the past. He was not getting his payslips or pay reconciliation statements at the time as he could not access email or the online portal. Nevertheless he was able to check his net pay each month from his bank account and from the texts he received. Payslips in the bundle show that certainly from July 2015 onwards his net pay was consistently lower than the £640 per fortnight that he was used to receiving. When questioned about this he replied that the pay looked 'about right' to him and he had no reason to query it. He did not challenge his pay arrangements until Hackney Law Centre wrote to the respondent in 2018.

73. It would not have been surprising if it had taken the claimant a few months to realise that his pay had reduced, given his lack of access to his payslips and the fact that pay varied somewhat from month to month. However the only conclusion that I can draw is that even if the situation was initially unclear he failed to raise any protest for over three years despite the fact that he would have seen that his pay had gone down. He must be considered to have accepted the respondent's new pay arrangements.

74. In relation to the claim for unlawful deductions of employer's national insurance and pension contributions, I find as follows. The power point presentation on 4

February 2015 was misleading about what the rate of pay would be if operatives signed a contract of employment. However the claimant does not plead misrepresentation. Page 42 of the bundle sets out a method of calculation and states that the 'shift calculation rate' of £80 does not equate to the rate of pay for the shift. The contract of employment made it clear that he was not being offered a rate of £80 and asserts that only the NMW amount was guaranteed. Part of his fortnightly pay would be made up of a discretionary amount that was not guaranteed. However the gross rate of pay that was being offered to him was *after* deduction of NI and pension from the 'shift calculation rate'.

75. I can understand why the claim for unlawful deductions has been brought. If one considers the pay reconciliation statements, it might be easy to conclude that the rate of pay is in fact £80 per shift or £800 per fortnight. If that were the case the deductions would not be lawful. But that is not the case. Page 42 of the bundle and the contract of employment make that clear. Gross pay for the claimant is calculated after these deductions have been made. This aspect of the unlawful deductions claim fails.

76. I turn to the later decision to deduct the apprenticeship levy. The document at page 42 states clearly that employer's national insurance contributions and pension contributions will be deducted from the 'shift calculation rate' to determine the amount available to pay the employee (which is then broken down into NMW pay, additional pay and holiday pay). There is no mention of deduction of any other sums.

77. The contract of employment does not mention this. The only guaranteed sum is the amount that corresponds to the minimum wage entitlement. Any additional pay is stated to be discretionary.

78. The claimant did not read this information at the time. However a person who had read that document carefully, or who had raised a query about it, would have understood the way in which pay was to be calculated. It is also made clear on the pay reconciliation statements. I have noted that gross pay was

calculated on the basis of the principles set out on page 42 from March 2015 to April 2017.

79. From that date however the respondent started to deduct a sum of £3.80 every fortnight. Mr Miesegaes and Mr Harrison do not deal with this in their witness statements. No effort was made to justify the deduction of this amount. Mr Harrison stated it had been implemented before he joined the company. Ms Casserley did not challenge the respondent about it but I raised it with Mr Chaudhuri prior to closing submissions. I put to him that the deduction of employer's NI and pension had been flagged with operatives before they signed a contract of employment but the deduction of the apprenticeship levy had not. This would result in a further reduction in the gross pay of employees and I queried whether the deduction was lawful.

80. Mr Chaudhuri's reply was that the amount of any additional pay was discretionary and in deciding to deduct the apprenticeship levy the respondent was not acting arbitrarily, capriciously or maliciously in accordance for example with cases like *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1267.

81. Although charges for employers NI and pension arise as a result of the employment of a specific individual and are referrable to that person, the apprenticeship levy does not. It is a charge levied against an employer based on a calculation of .5% of their total payroll. It is not a charge that an employer has to pay in relation to an individual, unlike employer's NI and auto-enrolment pension contributions. I have struggled to understand how the respondent can justify passing this cost on to individual employees.

82. Although the contract of employment states that any additional pay is discretionary, in fact the respondent had applied a specific formula for calculating pay from March 2015 to April 2017. This formula is set out in the document at page 42 which was given to operatives to allow them to make a decision about whether they would become PAYE employees. It was part of the pack of information, including the contract, that they were asked to take away and consider before signing and it provides important information about

the offer of employment that was made and how pay would be calculated. That document mentions just two deductions from the 'shift calculation rate' – NI and pension contributions. There is no mention of a levy (which did not apply at the time) nor of a broader right to make other deductions. If the respondent was entitled to deduct the levy it suggests that they could introduce a whole range of deductions at any time, thus reducing the gross pay rate further.

83. I find that the terms of the contract of employment must be read in conjunction with the information at page 42 which effectively amounts to an offer of employment. I place weight also upon the pay reconciliation statements that followed which are in accordance with this method of calculation. I find that notwithstanding the express terms of the written contract of employment these are qualified by the conditions set out on page 42 which explained that the gross rate of pay would be calculated by deducting national insurance and pension contributions from the shift rate, but not other sums. Alternatively it was an implied term of the contract that pay would be calculated in this way. That is the expectation that operatives would have had before they signed up as employees. I find that the imposition of the apprenticeship levy in April 2017 amounted to an unlawful deduction from wages and I award the claimant the sum of £353.40 gross.

Section 1 of the Employment Rights Act 1996

84. Section 1(4) of the Employment Rights Act 1996 requires an employer to provide employees with particulars of *'(a) the scale or rate of remuneration or the method of calculating remuneration'.* It follows from what I have said above that I find that the respondent has not complied with this provision as the contract does not accurately set out the method of calculating remuneration.

85. A revised statement would have to set out the method of calculation based on the shift calculation rate and showing the deduction of employer's NI and pension contributions (but not the apprenticeship levy) in order to identify the actual gross rate of pay.

86. I therefore make a determination under section 12 ERA 1996 that the written statement of particulars shall be deemed to include a statement that the claimant's gross rate of pay shall be the sum that remains after deducting the applicable rate of employers national insurance and employers pension contributions from the 'shift rate calculation' amount (initially £80 but as increased from time to time).

87. In the alternative the respondent could provide a statement showing the *actual* rate of pay. I am not quite sure why this has not been done, unless the intention has been to provide the respondent with maximum flexibility to make other deductions from the shift rate. The respondent will know the 'shift rate calculation' amount that will apply from year to year (it appears that his has gone up over time). The rate of employers NI is fixed for each tax year and the rate of required pension contributions is also a known amount. There seems to be no reason why the respondent could not provide each employee with an annual letter setting out the rate of pay that is applicable after allowing for these amounts.

Holiday Pay

88. The claimant brings claims under regulation 13 of the Working Time Regulations which sets out the entitlement to the statutory minimum amount of four weeks annual leave (supplemented by an additional 1.6 weeks leave in regulation 13A).

89. Regulation 13(9)(b) states that annual leave 'may not be replaced by a payment in lieu expect where the worker's employment is terminated'.

90. Regulation 16 provides for payment in respect of annual leave at the rate of a week's pay in respect of each week of leave'.

91. The relevant enforcement provision is at Regulation 30 and the claimant relies upon regulation 30(1)(a)(i) and 30(1)(b):

(1) A worker may present a complaint to an employment tribunal that his employer—

(a)has refused to permit him to exercise any right he has under—

(i)regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4) or 13(1);

(b)has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

92. Regulation 30 (3)and (4) deals with the remedies available if a breach is found:

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a)shall make a declaration to that effect, and

(b)may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a)the employer's default in refusing to permit the worker to exercise his right, and

(b)any loss sustained by the worker which is attributable to the matters complained of.

93. The case of *Smith v A J Morrisons and Sons Ltd* [2005) IRLR 72 states that 'the principle guideline in determining whether a provision for rolled up holiday pay meets the requirement of the Working Time Regulations is that there must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked'.

94. The EAT indicated that this could be evidenced by:

a. The provision for rolled up holiday pay to be clearly incorporated into the contract of employment
b. The percentage or amount allocated to holiday pay to be identified in the contract;

c. Records to be kept of holidays taken and for reasonably practicable steps to be taken to ensure that workers take their holiday before the end of the leave year.

95. The headnote goes on to state: 'where there is a variation of an existing contract where holiday pay was not paid, into a new contract where holiday pay is to be paid, but by way of incorporation of a rolled up holiday pay provision *it will be particularly necessary to show that there is not just an adjustment of the figures but a true addition to the contractual rate of pay for time worked so as to amount to a genuine payment for holidays. The variation must be a genuine means of providing payment for holidays'* (my emphasis).

96. In the case of *Robinson-Steele v R D Retail Services Limited* [2006] IRLR 386 the European Court of Justice addressed the matter of rolled up holiday pay. The court held that Article 7(1) of the Working Time Directive *precludes* part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for the work done. The court added 'An agreement under which the amount payable to the worker, as both remuneration for work done and part payment for minimum annual leave, would be identical to the amount payable, prior to the entry into force of that agreement as remuneration solely for work done effectively negates by means of a reduction in the amount of that remuneration the worker's entitlement to paid annual leave and would run counter to the requirement in Article 18(3) that '*implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers'.*

97. The European Court of Justice decision in the case of *The Sash Window Workshop Ltd v King* [2018] IRLR 142 provided further clarification of the law. Mr King worked under a commission only contract and when he took leave it was unpaid. The question asked was whether a worker had to

take his leave before establishing whether he had the right to be paid in respect of that leave. The court answered: '..in a situation in which the employer grants only unpaid leave to the worker such an interpretation would have resulted in the worker not being able to rely, before the courts, on the right to take paid leave per se. To do so he would have been forced to take leave without pay in the first place and then to bring an action to claim payment for it'.

98. In *Kreuziger v Berlin* (C-619/16) the ECJ noted that an employee was usually the weaker party in the employment relationship. Whilst employees should not be forced to take paid annual leave, 'employers must however ensure that workers are given the opportunity to exercise such a right' and should encourage him to take his leave within the leave year.

99. The claimant also cites *Grange v Abelio London Ltd* [2017] IRLR 108 where the EAT held, regarding rest breaks, that an employer 'refused' the entitlement where it put in place working arrangements that failed to allow the taking of breaks. If however the employer had taken active steps to ensure working arrangements that enabled the worker to take the requisite breaks it would have met the obligation upon it.

100. Turning to the facts of this case, I find that the respondent's argument that the rolled-up holiday arrangement provided for in the contract of employment complies with the Working Time Regulations and the Directive cannot succeed. *Robinson-Steele* states that such an arrangement is precluded. In any event, and applying the principle identified both in *Robinson-Steele* and *Smith v Morrisons*, the respondent's case falls at the first hurdle*:* there is no way in which the rolled up holiday amount provided for in the contract can be described as 'a true addition to the contractual rate of pay for time worked'. Prior to him being given a contract of employment in March 2015 the claimant was an employee or at least a worker entitled to a shift rate of £80. The evidence of the respondent concerning the method of calculation of pay from March

2015 onwards clearly demonstrates that from that date his calculated rate of pay was lower than that amount and that *holiday pay was included within the gross rate decided upon.* The respondent did not dispute that after signing a contract of employment the claimant was actually worse off should he have decided to take a period of annual leave: that is because his actual gross and net rates of pay were lower than previously.

101. *Smith* identified some cases in which rolled up holiday pay was the only practical way of providing paid annual leave including irregular and short-term workers. The principle in *Robinson-Steele* must cast doubt on whether that is lawful under the Working Time Directive but in any case that is not the situation here. The claimant was in established employment on a regular and consistent shift basis and with guaranteed hours per year.

102. I am reaching the conclusion that the respondent's system of rolled up holiday pay breached the Working Time Regulations and the Directive on the basis that the claimant was in fact a worker for the purposes of the Regulations prior to March 2015, with an entitlement to paid annual leave, (albeit that he had not been given that right by the respondent); and that from March 2015 the respondent purported to give him that entitlement by deeming that part of the rate of pay was attributable to annual leave on a rolled-up basis.

103. However I would have reached the same conclusion even if I had concluded that the claimant was genuinely self-employed prior to March 2015. I would do so in reliance on the decision of the ECJ in *Robinson-Steele* which describes it as a breach of the directive where 'the amount payable to the employee, by way of remuneration for work done and part payment for annual leave was identical to the amount payable prior to the entry into force of that agreement'. In this case the shift rate payable to the claimant prior to the commencement of his contract of employment was identical to the 'shift calculation rate' on which his pay was based from

that point onwards. (Although as stated above the amount that the employee was entitled to was actually lower). In a case where a person was actually worse off if they tried to take annual leave as an employee as opposed to a self-employed contractor cannot be said to be enjoying a genuine addition to his rate of pay.

104. Turning to the other tests set out in *Smith v Morrisons* (to the extent they still may apply which is in doubt) I accept that the percentage amount of rolled up holiday pay is properly identified in the contract of employment. There is no allegation that the respondent was not keeping records of holiday taken by other members of staff. But it is clear that the respondent was taking no steps whatsoever to ensure that workers took their holiday in any year. In fact until the hearing commenced it appears that the respondent was entirely unaware that the claimant had taken no annual leave over a period of five years. As the Working Time Directive is a health and safety measure this is a matter of some concern, especially in light of the fact that the claimant was doing manual work on the railways and was a night worker.

105. I have carefully considered the submission of Mr Chaudhuri to the effect that the respondent had provided an arrangement whereby employees could take leave; that they were in effect being paid in advance for that leave; and that the claimant had never tried to take leave and therefore was not entitled to any remedy under section 13 or section 16 as he had not been refused his rights.

106. The situation the claimant found himself in is analogous the position of Mr King in *The Sash Window Workshop Limited v King.* The claimant has not sought to take paid annual leave (or indeed any leave). The *King* case found that it was not necessary for a person to take leave before claiming payment for it, (which the claimant has done under regulation 16).

107. The case of *Grange v Abelio* is not directly analogous as it relates to rest breaks not pay. However it focusses on the question of the extent to which an employer has put in place arrangements to exercise a right under the Working Time Regulations.

108. Mr Chaudhuri argues that the principles set out in these cases do not apply as in those cases, the employer had not put in place any working arrangements to allow for holiday to be taken (in Mr King's case) or rest breaks (in Mr Grange's case). However the key question here is whether the respondent had put in place a system to allow for *paid* annual leave. The claimant could have taken leave at any point but that leave would have been unpaid at the time he took it. His evidence was that he could not afford to have a period off that was not covered by pay. The claimant was not being paid any money in addition to his normal salary that he could have put aside to allow him to take leave. If he wanted to take leave he would in effect have had to fund this out of a lower sum of money than he received when treated as a self-employed contractor. Effectively he was not provided with any opportunity to take paid leave.

109. I therefore make a declaration that the claimant's complaint under regulation 30(1)(a)(i) is well founded. The claimant was refused an entitlement to take *paid* annual leave under regulations 13 and 16. Going forward, he is entitled to paid annual leave of 5.6 weeks per annum from 7 January 2019 (the date he lodged this claim) onwards.

110. *Robinson-Steele* provides that it is possible for sums paid as rolled up holiday pay to be set off against an entitlement to pay for annual leave where they have been 'paid together with remuneration for work done'. Set off is subject to the condition that 'the employer can prove that the sums have been paid transparently and comprehensibly'. That statement needs to be read in conjunction also with the court's confirmation that treating the rate of pay that the worker was receiving previously as being *inclusive* of holiday pay is not permissible.

111. A decision that the rolled-up amounts should be considered as satisfying any entitlement to payment for annual leave would leave the claimant in no better position – he would still be having to fund his annual leave out of his normal pay, not from an additional amount paid to him to allow him to take leave. The arrangements for annual leave put in place by the respondent are not 'transparent and comprehensible' and do not represent any genuine addition to the normal rate of pay. I therefore find that set off is not appropriate in accordance with the principles set out in *Smith v Morrisons* and *Robinson-Steele.*

112. In terms of compensation, under regulation 30(4) I must award such amount as is just and equitable, taking into account all the circumstances including the employer's default and any loss sustained by the worker.

113. As the claimant has not been able to take any annual leave, his losses amount to the amount of holiday pay he should have received had he been able to take his full statutory leave entitlement. I award him a sum equivalent to 5.6 week's pay for the period from March 2015 to 7 January 2019.

114. Both the claimant's schedule of loss and the counter-schedule appear to be based on an assumption that the correct gross rate of pay is £80 per shift or £850 per fortnight gross. I have not accepted that this is correct. In addition the respondent has applied a notional tax rate of 20% as if the claimant was still a contractor. I am not able to accept the figures in either schedule.

115. As the sum to be awarded is a 'just and equitable' amount and to allow for any variations in pay, rather than take the 12 week's preceding the date of application I have considered the claimant's payslips supplied for the whole of 2018 (ie the twelve months prior to the date when the claim was presented). By adding up the amounts paid and dividing by the number of payslips available I calculate that the claimant received a net payment of £625 per fortnight or £312.50 per week. 5.6 week's pay at this rate is £1750 per annum. The period between 5 March 2015 and 7 January 2019 is equal to three years and 43.7 weeks (or 306 days). I award the sum of £1467 for March 2015 to January 2016 and three year's further loss of a sum equivalent to holiday pay of £5250. I award the claimant the total sum of £6717 (net of tax)

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Employment Judge Siddall
Date: **3 December 2020**

Judgment sent to the parties and entered in the Register on: : : .
for the Tribunal Office