



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113488/2019

In Chambers
On 4 May 2020

Employment Judge M Robison

Mr A Shodeinde

Claimant
Written submissions

Group Employment Services Ltd

Respondent
Written submissions
Ms S Grant
HR Manager

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal finds that the claimant is not due any outstanding payment in respect of holiday pay or arrears of pay, and therefore the claim is dismissed.

REASONS

1. A final hearing in this case was set down to take place at 10 am on 14 April 2020 to hear the claimant's claims for holiday pay and outstanding wages.
2. That hearing was set down at a previous final hearing which took place on 28 February 2020, which was postponed because the claimant was not able to attend in person.

3. Following the issue of the Presidential Guidance on the Covid-19 Pandemic, coming into force on 18 March 2020, all in person hearings were converted to telephone conference calls to discuss how the case could proceed in light of that guidance, which in particular indicates that no in-person hearings are to be set down at the present time.
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4. At the telephone hearing on 14 April, consideration was given to whether this claim could be progressed without the requirement for an in person hearing.
5. In terms of options for further procedure in this case, I decided that this is the type of case, dealing with holiday pay, where it was possible for the matter to be determined on the basis of the information supplied in writing by the claimant, and the additional documents, as well as written submissions from the respondent. Both Mr Shodeinde and Ms Grant were content to proceed on that basis.
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6. Ms Grant said she has already written out the respondent's position and she agreed to forward that, in the form of a written statement, by 21 April 2020. I advised that if I had any supplementary questions to ask the claimant, or the respondent, I would e-mail the parties. I recognised that if it transpired that there was a dispute on key facts, then it may be that an in person hearing would ultimately be required.
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7. I had the following information from the claimant:
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 1. ET1 dated 26 November 2019;
 2. two e-mails dated 2 December, enclosing copy pay slip;
 3. three emails dated 4 December, enclosing copy pay slips and emails;
 4. two emails dated 6 December;
 5. two emails dated 10 December, attaching emails regarding holidays (as well as communications with ACAS which I have not considered), in response to a request (EJ Gall) to the claimant to set out what sum he says is due and how it is calculated;
 6. a further 5 mails dated 20 December 2019, attaching copy emails regarding holidays.
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8. The respondent set out their position in some detail in the ET3 which included further information requested of the claimant.
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9. An order to provide that further information was issued to the claimant on 13 January 2020 and the claimant provided further information in three emails

on 23 and 27 January 2020, consisting of his answers to the further information request, a copy of his contract and copy payslips from March to May 2019.

10. The respondent provided further information in the form of a witness statement together with copies of various documents in 9 appendices supporting that witness statement, as requested by 21 April 2020. As it appeared that the respondent had not copied these to the claimant, they were directed to do so by EJ Whitcombe by e-mail dated 28 April 2020.

10 **Claimant's submissions**

11. The claimant's submissions, based on the written information provided to the Tribunal (in the documents set out above) are summarised as follows.
12. The claimant is seeking outstanding holiday pay and payment for a 12 hour shift when he was stood down after he had arrived. Following liaison with ACAS, the claimant lodged his claim in the Employment Tribunal on 26 November 2019. On 4 December 2019, the claimant received net payment of £497.87 representing outstanding wages (for the aborted shift) and holiday pay (see pay slip number 29). The claimant did not accept that this was accurate.
13. He states that he believes that the respondent has calculated his holiday pay from June 2019, and that he is seeking holiday pay for March, April and May 2019 (as well as payment for the 12 hour shift). He stated that he was asking for the calculations to begin from March and to cover April and May, but he understood that they had only paid him for June to September.
14. The claimant stated in response to the written questions that, "I do not know the amount I am owed as I cannot calculate myself but I do have my pay slips for the whole period".
15. He stated variously in emails to the Tribunal that he believes he was due £750, £950, £1150. Finally, in the e-mail of 27 January 2020, he stated, "have calculate all the days I worked for SGL from March £276.22/April £415.40/May £177.48 = £869.10".
16. Of the holiday year 2018/19, he stated that he was "never advised to collect any holidays 2018/2019 that end in April tax year". In response to the request for further information, he said, "I accrued a few days holiday in

March as I started working in March. As for the holiday of 2018/19 I asked for my holiday before the ending of the year (which is 31 of March) via whatsapp message from Richard Bath who is my supervisor which I did not get a response for. I started working in March 2019 and I was entitled to holiday before the year finished. So I never got my holiday in the year 2018-2019, even though I asked for it in advance before the April came to close that year”.

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17. With regard to the cancelled shift on 27 September, he states that he should have been paid because it was the respondent’s fault that he attended a shift when he was not needed. He was given the shift and turned up for work but because the respondent had more staff than they needed he was sent home. He disagrees with the respondent’s decision to pay him for two hours “transportation” (which I understand to mean travel time), when he attended for the shift one hour before the start. The shift was only cancelled once he had arrived there, and not before he left home. In response to the request for information he says, “I believe I should have been paid for a shift that I went for, as I was on site working when I was told to go home without notice. I believe I should be paid for the shift”.

18. With regard to his request for holidays in October 2019, in response to the ET3, he states, “asked for my holidays since September by Peter Bolth (sic) and he send me the form after several times by watsup (sic) message, after 2 weeks he send me the form by watsup. I submit my holidays by watsup before I send email to Michael Bell and Craig Finney, which I have prove (sic) of the conversation by e-mails”. In an e-mail sent to the Tribunal in which he states he is attaching proof that he had asked about his holidays, he forwarded the e-mail dated 8 October 2019.

19. He stated that his last shift was on 27 September 2019. He states that he was not offered any more shifts until after he got into contact with ACAS in November 2019. This caused him a problem because he has a wife and children to support. He seeks the Tribunal’s help in fighting for his rights.

Respondent’s submissions

20. The respondent’s position is set out in the ET3 and subsequent witness statement provided by Ms Grant, and is summarised here. Their position in

relation to any annual leave accrued during March 2019 is that it is lost, relying on the terms of the claimant's contract of employment, and in any event the claim has been lodged out of time.

- 5 21. With regard to sums which the claimant says are due for the period from April to September 2019, Ms Grant points out that although the claimant has been asked for specifics, it is unclear how much he says he has been underpaid. He does not explain how the figures which he puts forward have been calculated, and there is no apparent logical calculation, although if the figures he gives are correct, then that would amount to holiday pay at 31% (not including the March pay), rather than the appropriate 12.07%.
- 10 22. She asserts that the claimant mistakenly believes that the period prior to June 2019 has been ignored for the purposes of calculating his holiday pay. She states that is not correct because they have calculated holiday pay on the basis of the 12 week average wage prior to final shifts worked by the claimant, which is why the period June to September has been used for the calculation.
- 15 23. She states that holiday pay was calculated on the basis of days accrued during the period from April to September, and this clearly included the period from April to June. She sets out the calculations in appendix 3 to her statement, that is that the claimant was due seven days holiday pay at a daily rate of £64.49 for "leisure" and one day for "guarding" based on a daily rate of £73.69. She explains that this use of two different rates to calculate holiday pay is in common usage in the industry.
- 20 24. She also attached all payslips, timesheets and the claimant's P45 to support the figures. The respondent thus denies that the claimant is entitled to any holiday pay.
- 25 25. With regard to the claim relating to the 12 hour shift on 27 September 2019 which was cancelled, the claimant's signed contract explains that cancelled shifts are not subject to payment. The respondent's position is that he attended a shift, as requested, at Queen Margaret University. On arrival due to operational reasons, it became clear that they had rota'd two employees for that shift in error. According to his contract, he has no contractual right to be paid for his full shift. As a gesture of goodwill, the claimant was paid for two hours at a rate of £9 per hour.
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26. With regard to the request for holidays, the respondent's position is that the claimant went on holiday anyway, although his request for leave was turned down.

5 **Findings in fact**

27. The following findings in fact are based on the written information provided and set out the key relevant facts which are not in dispute.

Background

10 28. The respondent specialises in providing security and facilities management to third party clients, which includes services to pubs, bars, football stadiums, business receptions and shopping centres.

29. The respondent's business is split into two sections, "guarding" and "leisure". There are different rates of pay for work done in guarding and in leisure.

15 30. The claimant commenced employment with the respondent on 7 March 2019.

31. He signed a statement of particulars of employment on 7 March 2019, which together with the online employee handbook to which the claimant had access (paragraph 5), formed the claimant's contract of employment (produced). He was employed as a door supervisor (paragraph 2).

20 32. The statement of particulars of employment states as follows: "You acknowledge that this statement of particulars of employment and the terms of the current employee handbook.....form your contract of employment and constitute a relevant agreement..." (paragraph 33).

25 33. Paragraph 17 sets out holiday entitlement, as follows "The holiday year runs from 1st April to 31st March. Your annual holiday entitlement in any holiday year is 5.6 weeks (subject to a maximum of 28 days). This is based on a 37.5 hour working week....you are required to submit annual holiday requests to management as early as possible, normally giving a minimum of one month's notice prior to the requested annual holiday start date".

30 34. The employee handbook states, under the heading "carrying over unused holidays", "You are not permitted to carry over accrued annual holiday from one holiday year to the next. Holidays not taken within the holiday year will be lost".

35. The employee handbook also states, under the heading “hours of work”, “you will be paid in line with your contract of employment for the hours of work you carry out. The company will endeavour to honour shifts offered to you. However, in the event that a shift is cancelled prior to or during your allocated work time due to operational reasons or for any other reason, payment will only be made to you in respect of the hours of work carried out” (appendix 7).

Claimant’s holidays 2018-2019

36. The claimant commenced employment on 7 March 2019. The holiday year for 2018-2019 runs from 1 April to 31 March. The claimant did not take any holidays during the period from 7 March 2019 to 31 March 2019.

Cancelled shift 27 September 2019

37. The respondent was looking for a shift to be covered at Queen Margaret University Union on 27 September 2019. Two managers separately arranged for the shift to be covered. This double booking was not realised until both employees, one being the claimant, had arrived on shift. The claimant’s shift was cancelled because the other employee was a trained officer.

38. The claimant had travelled to the site and arrived one hour early. He was not told that his shift was cancelled until he was about to start work.

39. The claimant immediately e-mailed the area manager (18.20), Craig Finney, because his manager Peter Bolton was on holiday. Craig Finney responded (18.22) “You should have been stood down for this. I’ll add 1 hour to cover your travel but you won’t be paid for the full shift unfortunately. Apologies for the mix up”.

40. The claimant responded (18.30), “Not my fault, is sgl fault. I cant never accepted that. If its you, can you agree. Am getting my 12 hours shift paid. No joke”.

41. Craig Finney responded (18.37), “I’m sorry but I don’t even know who you are and I did not schedule you or see any communication scheduling you for this shift. I’ve apologised for the mix up. I suggest you take this up with Peter when he returns from annual leave”.

Request for leave

42. On 1 October 2019, the claimant completed a holiday form seeking leave from 22 October 2019 to 10 November 2019. This request for leave was refused.

43. The claimant sent an e-mail to the respondent on 8 October 2019, (10.49) as follows (copying in Michael Bell (area supervisor) and Craig Finney) : “I believe I am owed money for a 12 hours shift on 27.09.2019 accrued holiday and annual leave. On this date I had turned up for the shift and was sent back home at Queen Margaret University Way, Musselburgh EH21 6UU. Also my holidays I requested some time ago has not been approved and paid”.

44. In an e-mail response dated 8 October (11.38), Michael Bell said “who did you put your holiday request in to for these dates? Who also gave you these shift dates as I do not deal with QMU”.

45. In an e-mail response dated 14 October (0.17), Craig Finney stated, “I previously explained you won’t be paid for shift at QMU. You have requested 2 weeks holiday which have been declined for the following reasons, “received by myself via e-mail on 4 October 2019. Request was for 22 October 2019 – not within set time frame of 28 days’ notice. You have not accrued this amount of holiday have only worked six shifts in the Sierra East department.....”

46. The claimant did not undertake any work for the respondent after 27 September, although the respondent continued to treat him as an employee until 12 November 2019 and he was issued with payslips showing nil payments.

Holiday pay calculations

47. The respondent calculates annual leave separately for the guarding and leisure parts of the business. The respondent takes the average of the previous 12 weeks’ pay worked in each part, or if an employee has not worked for 12 weeks in one or other or both, then an average of what they have worked.

48. The claimant had no normal working hours. He was paid different hourly rates for different roles undertaken, ranging from £7.83 to £9.50, namely £8.21, £8.45, £9, £9.20 and £9.50.

49. The claimant worked the following hours at these various rates of pay, all as set out in the payslips lodged:

Number	2019	Total hrs	Gross £	Net £
1	20/3	12	114.00	76.61
2	27/3	28.5	231.51	168.97
3	3/4	18.25	160.02	113.43
4	10/4	32	258.91	229.76
5	17/04	35	302.84	255.03
6	24/4	26	226.36	210.93
7	1/05	23.5	203.26	197.79
8	8/5	27.25	247.27	225.13
9	15/5	26.25	228.41	212.33
10	22/5	24	197.04	195.72
11	29/5	8	131.36	146.76
12	5/6	24	197.04	195.52
13	12/6	19.75	162.15	171.35
14	19/6	16	131.36	145.36
15	26/6	14.5	130.50	125.91
16	3/7	20	164.20	164.20
17	17/7	19.25	158.04	158.04
18	24/7	24	197.04	190.16
19	31/7	24	197.04	190.16
20	7/8	27	221.67	210.85
21	14/8	26	213.46	203.95
22	21/8	22.5	184.73	179.81
23	28/8	23.5	192.94	186.71
24	4/9	7.5	61.58	61.58
25	11/9	36	303.48	274.97
26	25/9	8	67.60	66.60
27	2/10	25	211.25	197.50
28	20/11	Refund of SIA		25.00
29	4/12	Holiday pay + 2 hours pay	543.12	497.97

Relevant law

50. Regulation 13 of the Working Time Regulations, headed "entitlement to annual leave", provides as follows

5 [(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(2) . . .

(3) A worker's leave year, for the purposes of this regulation, begins—

10 (a) on such date during the calendar year as may be provided for in a relevant agreement

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under [paragraph (1)] equal to the proportion of that leave year remaining on the date on which his employment begins. . .

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

20 (a) [subject to the exception in paragraphs (10) and (11),] it may only be taken in the leave year in respect of which it is due, and

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

51. Regulation 13A is titled, “entitlement to additional annual leave”, and states as follows:

25 [(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is -

30 (e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

35 (4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period

applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated;....

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due....”

52. Regulation 14 is headed, “compensation related to entitlement to leave”, and states as follows:

(1) [Paragraphs (1) to (4) of this regulation apply where—]

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which

has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.....”

53. Regulation 15 is headed “dates on which leave is taken” and states as follows:

5 (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—

10 (a) to take leave to which the worker is entitled under [regulation 13] [or regulation 13A]; or

(b) not to take such leave [(subject, where it applies, to the requirement in regulation 13(12))],

15 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;

20 (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—

25 (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

30 (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.....”

54. Regulation 15A is headed “leave during the first year of employment” and states:

35 [(1) During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13 [or regulation 13A] is limited to the amount which is deemed to have accrued in his case at that time under paragraph (2) [or (2A)], as

modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.

5 (2) For the purposes of paragraph (1), ...leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) on the first day of each month of that year.

10 [(2A) Except where paragraph (2) applies, for the purposes of paragraph (1), leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and regulation 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.]

15 (3) Where the amount of leave that has accrued in a particular case includes a fraction of a day other than a half-day, the fraction shall be treated as a half-day if it is less than a half-day and as a whole day if it is more than a half-day....

55. Regulation 16 relates to “payment in respect of periods of leave” and states:

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

20 (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].

(3) The provisions referred to in paragraph (2) shall apply—

25 (a)

(c) as if the calculation date were the first day of the period of leave in question; . . .

(d) as if the references to sections 227 and 228 did not apply;

30 [(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—

35 (i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

5 (ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken]

10 [(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3)...

15 (3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.]

20 (4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") [(and paragraph (1) does not confer a right under that contract)].

25 (5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

30 56. Section 224 of the Employment Rights Act 1996 sets how a week's pay is calculated for employments with no normal working hours, as follows:

"(2) the amount of a week's pay is the amount of the employees average weekly remuneration in the period of twelve weeks ending – (a) where the calculation date is the last day of a week, with that week, and (b) otherwise, with the last complete week before the calculation date;

35 (3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken".

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57. The law relating to time limits in respect of deductions to pay is set out in the Employment Rights Act 1996 ("the 1996 Act"). Section 13 of the 1996 Act states that an employer shall not make a deduction from wages of a worker

employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.

58. Section 23(1) states that a worker may present a complaint to an Employment Tribunal that his employer has made a deduction from his wages in contravention of Section 13.
59. Section 23(2) states that an Employment Tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the day of payment of the wages from which the deduction was made.
60. Section 23(3) states that where a complaint is brought in respect of a series of deductions, the complaint must be presented within three months of the last deduction in the series.
61. Section 23(4) states that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the appropriate date, the tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.
62. The law relating to time limits in respect of arrears of holiday pay is contained in the Working Time Regulations 1998. Regulation 30(1)(b) states that a worker may present a complaint to an employment tribunal where his employer has failed to pay him the whole or any part of any amount due to him by way of payment in lieu of accrued but untaken leave upon termination of employment.
63. Regulation 30(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date on which it is alleged that the payment should have been made, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Deliberations and decision

64. In this case the claimant makes claims for accrued holiday pay and for arrears of pay in respect of an unpaid shift. The claim for holiday pay relates to the period from the date of the commencement of his employment on 7 March 2019 to 27 September 2019.

5 65. This case has been dealt with by way of written submissions, as an alternative to an in-person hearing which could not take place due to the Presidential Direction relating to the Covid-19 Pandemic. However, I have approached my deliberations taking the claimant's claim at its highest, that is I assume all that he states to be true. However, the findings in fact are based
10 on the undisputed evidence. Although there are matters which are disputed (principally whether the claimant asked for holiday in March and how and when the claimant's employment terminated), I took the view that I did not require to make findings in fact in regard to these matters because I was able to come to conclusions applying the relevant law without the need to do so. I
15 considered this to be a proportionate approach to take in the circumstances.

66. I deal with each of the claims in turn, but before doing so I will deal with the claimant's request for leave in October 2019.

67. The claimant's position would appear to be that he requested leave in good time, and that it was inappropriately denied, and that he was thereafter not
20 offered any further shifts. The respondent's position would appear to be that his request for leave was denied because it came at such short notice, that he took the leave anyway, and that he was not available to undertake work during that period. The claimant does make reference to being offered a shift in November but that he had already been in touch with ACAS by then about
25 outstanding sums he believed were due.

68. However, I have made no findings in fact in regard to that, because nothing turns on it. For whatever reason, the claimant did not work any shifts after 27 September, and for the subsequent weeks where he received payslips confirming nil payment, these weeks were not taken into account in
30 calculating holiday pay. The respondent's position is that the claimant's employment ended on 12 November 2019. I understand the claimant's position to be that his employment ended on 27 September 2019. Although the position is not clear, it is not necessary for me to make a finding in fact in that regard because no claims arise from it.

Unpaid wages for a 12 hour shift which took place on 27 September

69. The claimant seeks pay for a 12 hour shift that he was due to work on 27 September. The respondent relies on the terms of the employee handbook which state that a worker will be paid for hours of work carried out, and that if a shift is cancelled *prior or during* allocated work time, payment will only be made for the hours worked.
70. In this case as I understood it, the shift was cancelled at the very outset, although the claimant had travelled to work and got there one hour early. The respondent paid the claimant for two hours' work as a gesture of goodwill although they say that they did not need to under the contract.
71. I accept the respondent's submission in this regard. According to the claimant's contract of employment, he is only entitled to be paid for hours worked. According to his own position he did not work on that occasion but had taken the time to get to work early. As the claimant did not work the shift, I find that no payment is due in respect of that shift.

Unpaid holiday pay from 8 March 2019 to 31 March 2019 – time bar

72. The respondent's position is that any claim for holiday pay for this period is in any event time barred and should have been received by the Tribunal no later than 30 June 2019; and it was reasonably practicable for the claimant to have presented a claim in time.
73. I did not accept that argument. When the claimant lodged his claim in the employment tribunal on 26 November 2019 the claimant had received no holiday pay. While the respondent puts forward a perfectly valid explanation for that, sums due in respect of holiday pay throughout the claimant's employment were outstanding at the time that the claimant lodged the claim. Although the claimant appears to suggest that his employment terminated on 27 September 2019, the respondent's position in their ET3 is that the claimant's employment terminated on 12 November 2019. As at that date, the respondent accepts that there were sums due to the claimant which were not paid until 4 December 2019 after he had lodged his claim.
74. While for claims under regulation 30(1)(b) for holiday pay on termination of employment, time runs from the date on which it is alleged the payment

should be made, here the sum due was outstanding at the time of the termination of employment, that is 12 November and the claim was lodged on 26 November. Even if there is any question of the claimant being time barred in respect of regulation 30, the claimant is of course entitled to pursue the claim under section 13, for unlawful deductions from wages, and the three month time limit runs from the date the last deduction was made.

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75. I do not accept that time starts to run from the end of a holiday year, given large numbers of holiday pay decisions (not least *King v Sash Windows* 2018 ICR 693, discussed further below), where arrears were awarded going back several years. In these circumstances I do not accept that the claimant's claim in regard to the holidays in March is time barred.

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Unpaid holiday pay from 8 March 2019 to 31 March 2019 – carry over

76. With regard to the question of carry over, the respondent's position is that the claimant is not entitled to carry over holidays given the provision of his contract.

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77. The statutory provisions of the Working Time Regulations with regard to carry over are clear. In particular, regulation 13(9)(a) provides that the statutory annual entitlement of four weeks set out in that regulation may only be taken in the leave year to which it relates (I will call that "European leave"). Absent an agreement, any additional leave (of 1.6 weeks under regulation 13A) must be taken in the leave year to which it relates in the same way as basic annual leave (that is the "British additional leave").

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78. There have however been a number of decisions of the European Court of Justice which might call into question whether the blanket provisions in regulation 13, which implement the "European leave" right to four weeks of holiday pay, is permitted by European law (which I take to be relevant in this transitional phase at least). Of particular relevance is the decision of the ECJ in *King v Sash Windows*, which at least suggests that where an employee does not take annual leave because the employer refuses to allow him to take holidays carry over should be permitted, and the case of *Kreuziger v Land Berlin* 2012 1 CMLR 1204 may also be relevant, because that case would suggest that an employee should be able to carry forward where an employer does not give the worker an effective opportunity to take leave.

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79. It may or may not be the case that the claimant was prevented from taking annual leave in this case. He suggests that he asked for it but was refused. He says he has proof of that in Whatsapp messages but he has not lodged them. However, I have not explored that matter further. I am prepared to give the claimant the benefit of the doubt because it does not impact on the outcome of this case.

80. This is because, even giving the claimant the benefit of the doubt, what is clear is that these European cases only apply to the four weeks of “European” leave. As discussed later in this judgment, that is significant in this case when it comes to determining whether the claimant is owed anything from the respondent in regard to carried over leave.

Unpaid holiday pay for the period from 1 April 2019 to 27 September 2019

81. The respondent explained that they calculated annual leave on the basis of the average for the last 12 weeks of pay. The claimant appears to believe that the respondent has ignored the period prior to June 2019, whereas the respondent explains that they calculated what was due based on average earnings for the 12 weeks over July, August and September. The respondent states that the period prior to June was not relevant for calculating the rate of a week’s pay as it was outside the claimant’s last 12 weeks of employment, but that they had taken that period into account when they calculated how much annual leave the claimant had accrued.

82. The respondent acknowledged that there was a delay in payment but this was because the claimant was still an employee, so he could not be paid accrued and untaken annual leave as a payment in lieu while he was still employed by the respondent.

Calculation of holiday pay

83. The respondent has calculated holiday pay in accordance with their own system. That system does not however apparently follow the provisions of the Working Time Regulations. In particular, there is no support for calculating holidays in relation to two differing hourly rates, and nor would daily rates be used when calculating holidays, given that the regulations are

framed in terms of weeks. That said, whatever formula the respondent has used, the outcome is similar although not exact. I use here the approach which is set out in the regulations themselves.

84. Regulation 16(1) of the Working Time Regulations states that a worker is entitled to be paid at a rate of a week's pay in respect of annual leave he is entitled to under regulations 13 and 13A, that is respectively the four weeks "European leave" and the 1.6 weeks "British additional leave". That means that workers are entitled to 5.6 weeks leave annually.
85. A week's pay for those with no normal working hours is calculated in accordance with the provisions of section 224 of the Employment Rights Act 1996, that by reference to an average of hours and remuneration over a 12 week period, which is the 12 calendar weeks ending with the last complete week before the calculation date. In this case the calculation date is 2 October 2019, because even if the claimant remained an employee after that date, weeks when he received nil pay would not count anyway.
86. In the last 12 weeks when the claimant did paid work for the respondent, the claimant earned £2,191.03. That includes 2 hours pay for the cancelled shift on 27 September 2019 (which the claimant was not paid until 4 December 2019). Consequently the average pay over the relevant 12 week period was £182.58, which is a week's pay in this case. The total is set out in the following table:

Number	Date	Hours	Gross	Net	weeks
16	3/7	20	164.20	164.20	12
17	17/7	19.25	158.04	158.04	11
18	24/7	24	197.04	190.16	10
19	31/7	24	197.04	190.16	9
20	7/8	27	221.67	210.85	8
21	14/8	26	213.46	203.95	7
22	21/8	22.5	184.73	179.81	6
23	28/8	23.5	192.94	186.71	5
24	4/9	7.5	61.58	61.58	4
25	11/9	36	303.48	274.97	3
26	25/9	8	67.60	66.60	2

27	2/10	25	211.25	197.50	1
		Plus 2 x 9	18		
TOTAL			£2,191.03		

87. During the leave year for 2019/20, the claimant worked 25 weeks from April to September. He is therefore entitled to 2.69 weeks of holiday pay ($25/52 \times 5.6$), paid at a week's pay of £182.58, ie $2.69 \times £182.58$, that is £491.14.
- 5 88. Even if the claimant were entitled to carry forward the leave which was due to him for the period from 7 March to 31 March, any carry forward could only apply to the four weeks basic leave under European law as discussed above. Consequently, in respect of that period the claimant is entitled to 0.15 weeks pay ($2/52 = 0.038 \times 4$), that is $0.15 \times £182.58 = £28$.
- 10 89. Thus the claimant would be entitled to be paid holiday pay of £491.14 plus £28, that is £519.23.
90. In the claimant's last pay slip (numbered 29), the claimant was paid £543.12 gross including two hours for the cancelled shift, so that £18 requires to be subtracted from that, meaning that the claimant was paid £525.12 gross in
15 respect of holiday pay.
91. The claimant was therefore due to be paid £519.23 in respect of holiday pay, and the respondent having paid the claimant a gross sum of £525.12 in holiday pay, the claimant's entitlement to holiday pay has been fulfilled.
92. The claimant is therefore not entitled to any award in respect of holiday pay
20 or arrears of pay and therefore this claim is dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 08 June 2020
25 Entered in register: 11 June 2020
and copied to parties