EMPLOYMENT TRIBUNALS

Claimant: **Mr T. May**
Respondent : **Leisure Technique Limited**

Heard at: **Leeds by CVP** **On:** **15 July 2021, with a reconsideration hearing on 30 September 2021**

Before: **Employment Judge T R Smith**

Representation
Claimant: In person

Respondent : Mr Flanaghan(Solicitor)

JUDGMENT

The Claimant's complaint of unlawful deduction from wages is well-founded. .
On reconsideration the Respondent is ordered to pay the Claimant £505.34 p, with credit to be given to the Respondent for the sum of £404.58 already paid.

Written reasons pursuant to rule 62 (3)

Background

1.On 15 July 2021 the Tribunal found in favour of the Claimant in respect of his complaint of unlawful deduction from wages. The Tribunal awarded the Claimant £404.58p, which was considerably less than the sum the Claimant was seeking.

2.Having given oral judgement the Claimant subsequently wrote to the Tribunal seeking full written reasons, within 14 days of receipt of the judgement.

3.When the Tribunal came to write up the written reasons it considered that both parties had misunderstood the law in respect of when there was a break in a series of deductions.

4.In the circumstances the Tribunal caused a letter to be sent to the parties on 28 July 2021 indicating that under rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 it considered it appropriate to reconsider its judgement of its own volition.

5.The letter set out why the Tribunal believed it was appropriate to reconsider its judgement in the following terms: –

"When looking at a series of deductions time runs from the date of the last payment and a complaint may then be made about the entire series of unlawful deductions. It was made clear in Arona -v- Rockwell Automation Ltd … that in relation to an unlawful deductions claim, time starts not from the date of termination of the contract but from the date of the payment of wages containing the shortfall.

Arguably it would therefore appear that there may have been a series of deductions with a gap of less than three months. If that is right the Claimant may have arguments that the sum should be greater than contained in the judgement".

6.The Tribunal considered, having regard to the overriding objective, it was appropriate to defer giving full written reasons until the reconsideration had been concluded. It is for this reason that these written reasons have been delayed.

7.Prior to the reconsideration hearing the Respondent produced a comprehensive holiday chart. The Respondent accepted that the Claimant was owed a further £100.76 p, having reviewed the point of law raised in the Tribunal's letter.

8.The Claimant was invited to agree the additional sum but he declined, and therefore a full reconsideration hearing was held.

The Evidence

9.The Tribunal had before it at the original hearing a bundle of documents consisting of 113 pages. At the reconsideration hearing this was supplemented by a more comprehensive holiday chart (R1) which had been served on the Claimant.

10.A reference to a number in brackets is a reference to a document in the bundle.

11.The Claimant gave evidence and made submissions at the original hearing. He also made submissions at the reconsideration hearing.,

12.For the Respondent the Tribunal had before it a statement from Mr Paul Barnett, its in-house accountant. The Tribunal heard oral evidence from him at the original hearing. He briefly explained one issue as to the calculation of holiday pay at the reconsideration hearing. Submissions were made at both hearings on behalf of the Respondent by Mr Flanagan.

The Issues

13.The Tribunal sought to extract concessions and narrow the issues to be determined with the parties. The concessions and issues are set out below.

14.Firstly it was conceded by the Respondent that in the calculation of Working Time Directive holiday pay, the Claimant's overtime should have been taken into account and that his holiday pay should not have been calculated only base contractual salary.

15.Secondly it was conceded by the Respondent that holiday pay had to be averaged over a previous 52-week period.

16.Thirdly it was conceded by the Respondent that as the Claimant was no longer a PAYE employee, any award made by the Tribunal in respect of holiday pay had to be gross.

17.Fourthly the Claimant conceded that in terms of calculating holiday pay the requirement to include overtime could only apply to 20 days holiday per annum, that is the Working Time Directive holiday entitlement and not the additional holiday entitlement under regulation 13A of the Working Time Regulations 1998.

18.The issues in dispute between the parties were as follows: –

19.Firstly whilst the Claimant accepted that the Deduction from Wages (Limitation) Regulations 2014 applied to any claim presented after 01 July 2015, and limited a claim for, inter alia, holiday pay for a period of two years, he contended he should be

permitted to pursue a claim for holiday pay from 1 July 2013 to the termination of his employment as the Respondents were in breach of their obligations in respect of holiday pay prior to the implementation of the 2014 regulations.

20.Secondly was there a gap of more than three months in the two-year reference period if that was established as applicable in this case?

21.The parties had very helpfully cooperated to agree figures, dependent on the Tribunal's findings

The Facts

22.The facts were essentially not disputed.

23.The Claimant commenced employment with the Respondent on or about 05 February 1990 and was sadly made redundant on 31 August 2020.

24.The Claimant presented his complaint to the Tribunal on 29 October 2020.

25.The Claimant was clearly a very hard-working member of staff and the Tribunal is satisfied, having regard to the wage documentation and P60's placed before it, that over time was a regular and intrinsic feature of his normal day-to-day duties. The Claimant was not challenged on this evidence.

26.Certainly from 2013 at the latest the Claimant was entitled to 33 days contractual holidays, which included bank holidays.

27.On the balance of the evidence the Tribunal found that the Respondents holiday year ran from 01 May to 30 April of each year.

28.Having regard to the holiday charts placed before it (49 and R1) the Tribunal determined that in the holiday year 2020 the Claimant took one day's contractual holiday namely 29 May 2020. The Claimant was paid monthly with payment being made on the last Wednesday of every month (see pay slips, examples at 41 to 43). It follows that holiday pay for 29 May 2020 would be paid on 30 June 2020.

29.The Claimant fairly indicated he could not dispute the Respondents holiday records, either 49 or R1.

30.Between the start of the 2020 holiday year and the termination of the Claimant's employment the Respondent asserted the Claimant had accrued 11 days holiday and that evidence was not challenged. The Claimant had two bank holidays in this period

namely 08 and 25 May 2020. He did not work either bank holiday. He was paid for the bank holidays at his contractual flat rate.

31.The Claimant had not taken all his holiday in the previous holiday year and the Respondent conceded that he was entitled to carry forward 1.5 days. This was not challenged.

32.It was further expressly conceded by the Respondent at the reconsideration hearing that it had made an error in its original calculation. It now accepted that in relation to an unlawful deduction from wages claim, time started run from the date of the payment of wages containing the shortfall and not the date of termination. This had the effect of increasing the amount due of £404.58p by £100.76 p.

33.Having made the above adjustment the holiday chart , R1, showed there was then a gap of over seven months until the Claimant's next holiday.

34.By the time of the reconsideration hearing the Respondent had dispatched a cheque for £404.58p. The Claimant had not presented the cheque. The Claimant was advised that presenting the cheque would not impact upon any right of appeal.

35.It is proper to record, for reasons that will become clear, that in the holiday year 2018/ 2019 the Claimant took a total of 44 days holiday and in the holiday year 2019 / 2020 he took a total of 38 days holiday

Discussion

36.The Tribunal is satisfied that over time was a regular and intrinsic feature of the Claimants normal day-to-day duties as evidenced by the documentation placed before it and his unchallenged evidence.

37.It follows therefore that the Claimant's was underpaid as the Respondent accepted it had based the Claimant's holiday pay on base salary alone.

38.However the Claimant is only entitled to part of his holiday pay to be based on overtime. As the parties agreed that is limited to 20 days per annum because it is only the Regulation 13 Working Time Regulations 1998 holiday entitlement which incorporates the Working Time Directive. There is no equivalent of regulation 13A in the Directive. Put differently the Claimant is entitled to his holiday pay to be calculated to include overtime on only 20 of his holiday days per annum.

39.Holiday pay now has to be based on the Claimants earnings averaged over 52 weeks.

40.Thus on the law the Tribunal concluded that the Claimant was entitled to his holiday pay for 20 days per annum to be based upon his pay including overtime calculated by averaging his earnings over the period of 52 weeks.

41.The one dispute between the parties was how should the holiday pay that attracted the overtime be differentiated from that which does not

42.The Tribunal concluded that in assessing how holiday is allocated between regulation 13 and regulation 13A, given the structure of the regulations themselves and the reference to "additional annual leave" that the logical way to approach matters was on the basis that the regulation 13 holiday came first in the holiday year.

43.Turning to the principal issues the Tribunal's findings are as follows.

44.The Tribunal came to the conclusion that the Claimant cannot recover holiday pay for the period 1 July 2013 to 1 July 2015. It has reached this conclusion because of the specific wording in regulation 2 of The Deduction from Wages (Limitation) Regulations 2014 Regulation 2 which in turn adds a new subsection, 4A to section 23 of the Employment Rights Act 1996 reads as follows: –

"In section 23 of the Employment Rights Act 1996(c) (protection of wages: complaints to employment Tribunals) after subsection (4) insert— "(4A) An employment Tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

45.It follows that the Tribunal cannot in the light of this clear authority consider a claim for holiday pay for the period 01 July 2013 to 01 July 2015. It cannot do so because it is denied jurisdiction by Parliament. The Tribunal was not attracted to the argument that because the regulation was not in force between 01 July 2013 to 01 July 2015 the Claimant could recover for this period. The argument is rejected because the Claimant's claim was lodged after the Regulations came into force. The mere fact the Respondent may have been in breach of its obligations in respect of the calculation of holiday pay prior to that date does not assist the Claimant.

46.The Tribunal therefore concluded that the 2014 regulations were applicable to the Claimants claim. His maximum entitlement was two years worked backwards from the presentation of his claim form.

47.The Tribunal then had to consider whether in the two years prior to the presentation of the complaint there were a series of deductions. A deduction under section 13 of the Employment Rights Act 1996 can include both a non-payment and a short payment. It follows therefore that even though holiday pay was paid by the Respondent, if the amount tendered was below the Claimants entitlement, then that will amount in law to a potential reduction. As the Respondent accepted it had calculated holiday pay at the flat rate that therefore had to be a deduction within the meaning of section 13 Employment Rights Act in respect of the regulation 13 Working Time Regulations holiday entitlement.

48.The issue of a series of deductions and the time for presenting a complaint to an Employment Tribunal is set out in section 23(3) of the Employment Rights Act 1996. Put in layman's language the complaint must be presented before the end of the period of three months beginning with where there is said to be a deduction, that is the date of payment of the wages from which the deduction was made.

49.Where there is a series of deductions time runs from the last deduction.

50.On the face of matters, therefore the Claimant potentially has an argument for the period of two years from the last deduction.

51.The difficulty however in respect of holiday pay arises from the controversial judgement of Mr Justice Langstaff, as he then was, in **Bear Scotland Ltd -v- Fulton 2015 IRLR 15** at paragraph 81 when he said:-

Since the statute provides that a Tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (sections 23(2) and (3) ERA 1996 taken together) (unless it was not reasonably practicable for the complaint to be presented within that three month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any

series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.

52.This Tribunal considers that the law is more accurately stated in the decision of the Court of Appeal of Northern Ireland in **Chief Constable of the Police Service of Northern Ireland -v- Agnew 2019 IRLR 782.** However this Tribunal is bound by the judgement of the English EAT and as a matter of precedent must follow the decision in Bear Scotland Ltd, even though it causes a windfall to many employers because most employees take a summer holiday and then have no further holiday until Christmas, which immediately generates a gap of more than three months.

53.As was accepted at the reconsideration hearing applying the series of deductions principle the Claimant is entitled three further days holiday pay (in reality a top up over base pay) because the parties had laboured under the mis-apprehension that three-month run from the date of termination of the Claimant's employment.

54.The Claimant contended that he had not always fully exhausted the regulation 13 entitlement and therefore that should roll over each and every year thus in effect enhancing the period of 20 days in terms of the calculation. The Tribunal did not accept that argument for the simple fact that as it has already found the Claimant took 44 days in the holiday year 2018/2019 and 38 days in the holiday year 2019/2020. Even if there had been some Working Time Directive carry forward, which the Claimant could not identify, it would have been fully exhausted by the additional holiday taken.

55.Applying the Bear Scotland principle and having regard for the first 20 days in each year should be deemed to be regulation 13 holiday, there is a break in continuity given the gap in the holidays taken (see R1) of in excess of seven months.

56.It follows therefore that save for adjusting the amount of the Claimant's holiday pay by three days no further reconsideration is necessary.

Employment Judge T.R.Smith
Date 01 October 2021

JUDGMENT SENT TO THE PARTIES ON
7Th October 2021