EMPLOYMENT TRIBUNALS

Claimant: Mr M Bashir

Respondent: 168 Security Limited (t/a Sword Security)

Heard: by video **On:** 5 October 2021

Before: Employment Judge S Jenkins

Representation
Claimant: In person
Respondent: Mrs J Barnett (Consultant)

RESERVED JUDGMENT

The Claimant's claim for payment in respect of accrued but untaken holiday fails and is dismissed.

REASONS

Background

1. The hearing took place by video to consider the Claimant's claim in respect of accrued but untaken holiday, the Claimant having been employed by the Respondent as a security guard on a casual basis between the months of August 2019 and June 2020.

2. The Claimant's connection to the hearing, via his mobile phone, was poor. Initially he was unable to access the hearing at all, and, when he did so, after about ten minutes he was unable to hear anything and subsequently disconnected.

3. During the period when the Claimant was present and able to participate, I explained to the parties what the case was about and the issues I would need to address. I also clarified the documents and statement I had received from the Respondent's side and received confirmation from the Claimant that he did not have any documents and did not have any witness statement. I confirmed that I would take evidence from the Respondent's witness, Mr Hendy, and that the Claimant would have the ability to ask questions of Mr Hendy as would I. The Claimant at that point indicated that

he did not wish to ask any questions of Mr Hendy and that he was happy to abide by the outcome of the Tribunal hearing.

4. Soon after that, the Claimant's picture on the video screen froze and he left a message in the chat room saying, "*can't hear anything now. I am happy what ever will outcome as I don't have any written contract or pay slips . Thank you*". The Claimant then disconnected.

5. Bearing in mind the Claimant's comment that he did not have any documents or evidence to provide to the Tribunal and did not wish to ask any questions of the Respondent's witness, and his comment in the chat room, I considered it appropriate to exercise my power under Rule 47 of the Employment Tribunals Rules of Procedure to proceed with the case in his absence.

Issues

6. As I have noted, the Claimant's claim was in respect of payment for accrued but untaken holidays, pursuant to his entitlement under his contract with the Respondent and/or under the Working Time Regulations 1998 ("Regulations"). The issues for me to address were therefore as follows:

    a. What was the holiday year?
    b. How much holiday accrued during that year?
    c. How much holiday was taken during that year?
    d. What balance, if any, remained outstanding when the employment ended?

7. In addition however, this was a case where the Respondent asserted that it had satisfied its obligations to the Claimant, both under his contract and under the Regulations by operating a process of rolled up holiday pay, i.e. payment to the Claimant of a sum for each period of worked reflective of his holiday entitlement, which was not referable to whether or not he took any holiday during that period.

Findings

8. Mr Jason Hendy, the Respondent's Operations Manager, gave evidence via a brief written statement and through answers to questions from me. In that, it was confirmed that the Respondent is a security company which provides security services relating to crowd control management at events across numerous client sites in the UK and Ireland. The Claimant was engaged as a casual worker between August 2019 and June 2020 to work as a security guard. Although the Claimant worked for approximately 125 hours across the whole of that, he did not work every month, working only in August, November and December 2019, and in January, February and June 2020.

9. I was provided with a contract of employment, albeit not that specifically provided to the Claimant, but which Mr Hendy confirmed was the Respondent's standard contract and which would have been given to the Claimant, along with any employee, during the induction process. I saw no

reason to doubt that evidence.

10. The contract contained a clause relating to holidays which provided as follows.

> "*9.4 You will receive your holiday pay with your normal wages throughout the year, this is referred to as rolled up holiday pay. In effect this means that you will receive your annual entitlement of 5.6 weeks (full time equivalent) in advance of any holiday and not at the time of taking your leave. Each week you will be paid an enhanced rate of 12.07% in addition to your basic hourly rate for every hour worked to ensure you receive your due entitlement to payment. This means you can take your leave when convenient at any point in the year as you will already have received the payment generated to that point.*"

11. The contract also confirmed that the Respondent's holiday year ran from 1 January to 31 December each year, and that, "*On termination of employment, you will be entitled to be paid for holiday accrued but not taken the date of termination of employment*".

12. The application of rolled up holiday pay envisaged by clause 9.4 was applied by the Respondent in relation to the Claimant's pay. Bearing in mind that the holiday year ran from 1 January 2020, I focused on the payslips provided to the Claimant from January 2020 onwards.

13. In the January payslip, the Claimant was recorded as having worked 25.75 hours and as having been paid in respect of 3.11 hours in relation to holiday pay. In February 2020 the Claimant is recorded as having worked 6 hours and was paid in respect of 0.72 hours of holiday pay. Finally, in the July payslip, the Claimant was recorded as having worked 15 hours and he was paid in respect of 1.81 hours. It appeared, therefore, that the Claimant had been paid holiday pay on a rolled up basis, as envisaged by the terms of clause 9.4 of the contract.

14. However, Mr Hendy was unable to provide any evidence as to any holiday actually taken by the Claimant in 2020. He did not know if the Claimant had requested any leave, and I took from that the Claimant had not requested leave and indeed had not taken leave. That was perhaps not surprising, bearing in mind that the very limited amount of work undertaken by the Claimant in 2020. He confirmed however, and I accepted his evidence, that records of hours worked and holidays taken were kept and monitored by the Respondent, and that staff would be alerted if their periods of work suggested that their entitlements under the Regulations might be breached.

Law

15. The law in relation to rolled up holiday pay was very clearly and succinctly set out by the Employment Appeal Tribunal ("EAT"), in the case of Lyddon v Englefield Brickwork Ltd (UKEAT/0301/07/CEA. I can do no better than recite paragraphs 4 to 16 of that judgment.

"4. Before considering the facts in a little more detail, we set out the material law. The ***Working Time Regulations*** *are designed to give effect to Council Directive 93/104/EC. Article 7 of the Directive provides as follows:*

> ***"(1) Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.***
>
> ***(2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."***

5. Regulation 13 provides as follows:

> ***"(1) … a worker is entitled to four weeks' annual leave in each leave year."***
>
> ***"(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but – (a) 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."***

Regulation 16 provides:

> ***"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13" – ie four weeks' annual leave in each leave year – " at the rate of a week's pay in respect of each week of leave."….***
>
> ***"(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ('contractual remuneration').***
>
> ***(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."***

6. Regulation 35 renders void any provision in an agreement which is designed to exclude or limit, or has the effect of excluding or limiting, the operation of any provision of the Regulations.

7. In ***Robinson-Steele v R D Retail Services Limited*** *[2006] ICR 932 the European Court of Justice was asked to answer three questions concerning the operation of the Directive. The first was*

whether part of the remuneration payable to a worker for work done could be attributed to annual leave without any payment being made additional to that for the work done. Hardly surprisingly, the Court held that it could not; in order to comply with the Directive there had to be a sum paid which was over and above the remuneration payable for the work done. Otherwise there would be a derogation from the entitlement under the Directive. Moreover, if there is no separate payment identified referable to holidays, there can be no subsequent allocation of part of the remuneration to holidays, even by agreement.

8. *The second question was whether the provisions of rolled up holiday pay was in accordance with the Directive or whether the payment should be made in respect of a specific period during which the worker actually takes leave. The European Court noted that there was no provision in the Directive specifically identifying how the payment should be made, but nonetheless held that the proper construction of Article 7 did not permit a rolled up payment:*

> ***"[Article 7] precludes the payment for annual leave within the meaning of that provision from being made in the form of part payment staggered over the corresponding annual period of work and paid together with the remuneration for work done rather than in the form of a payment in respect of a specified period during which the worker actually takes leave."*** *(para 63)*

9. *The final question concerned the status of the payments made to a worker under the rolled up holiday pay arrangements. Notwithstanding that payments made in that way were incompatible with the Directive, could they be set off against the entitlement to payment for a specific holiday period conferred by the Directive itself?*

10. *The Court held that in appropriate circumstances they could. They identified those circumstances as follows (paras 62-65):*

> ***"The question is therefore whether payments in respect of minimum annual leave, within the meaning of that provision, already made within the framework of such a regime contrary to the Directive, may be set off against the entitlement to payment for a specific period during which the worker actually takes leave.***
>
> ***In that situation, article 7 of the Directive does not preclude, as a rule, sums additional to remuneration payable for work done which have been paid, transparently and comprehensibly, as holiday pay, from being set off against the payment for specific leave.***
>
> ***However, the member states are required to take the measures appropriate to ensure that practices incompatible with article 7 of the Directive are not continued.***

In any event, in the light of the mandatory nature of the entitlement to annual leave and in order to ensure the practical effect of article 7 of the Directive, such set-off is excluded where there is no transparency or comprehensibility. The burden of proof in that respect is on the employer."

11. *Two of the cases considered by the Court of Justice in* ***Robinson-Steele*** *had been referred to them by the Court of Appeal on an appeal from the Employment Appeal Tribunal. The EAT (Burton P) had considered five unrelated appeals concerning annual leave entitlement under the title of the lead case,* ***Marshall's Clay Products Ltd v Caulfield*** *[2004] ICR 436. In fact the EAT held - wrongly in view of the subsequent decision of the ECJ - that rolled up holiday pay was not incompatible with the Directive. The court went on to consider the circumstances in which holiday pay made in that way could be set off pursuant to regulation 16(5) against any entitlement to remuneration under the Regulations as Robinson-Steele makes clear, such set off is permitted even although rolling up the pay contravenes the Directive.*

12. *The EAT first identified five different categories of case which might typically arise with respect to rolled up holiday pay:*

"14 "….Mr Hogarth has put forward an extremely helpful analysis of the five categories of contract which need to be considered, in the context of the issue of the lawfulness of provisions relating to holiday pay pursuant to the 1998 Regulations, which we have been very happy to adopt. (i) Category 1: contracts between the worker and the employer which are silent in relation to holiday pay. (ii) Category 2: contracts which purport to exclude any liability for or entitlement to holiday pay. (iii) Category 3: contracts where the rates are said to include holiday pay, but there is no indication or specification of an amount. (iv) Category 4: contracts providing for a basic wage or rate topped up by a specific sum or percentage in respect of holiday pay. (v) Category 5: contracts where holiday pay is allocated to and paid during (or immediately prior to or immediately after) specific periods of holiday."

13. *The EAT later analysed the extent to which these categories were consistent with obligations under the Regulations as follows (para 37):*

"(i) Mr Hogarth's categories 1, 2 and 3 fall foul of the 1998 Regulations, howsoever construed. In our judgment, in such situations either there is no "contractual remuneration paid to a worker in respect of a period of leave" to be set off against the statutory entitlement under regulation 16(1), and there is a simple breach of regulation 16(1) and/or an entitlement to be paid pursuant thereto: or there is a purported exclusion of such entitlement, which is void pursuant to regulation 35(1)(a): or there may be a breach of regulation 13(9)(b) and/or any such provision so purporting would then itself be void in

accordance with regulation 35(1)(a). Our conclusion is however that, in principle, a category 4 contract, providing for payment of holiday pay, in respect of an express holiday entitlement, but accruing throughout the year, is indeed an entitlement to "contractual remuneration … in respect of a period of leave" albeit that it is not, and in Marshalls Clay cannot, at the stage of its payment be specifically appropriated to any particular period, and is not paid at the time of such leave, but wholly or in part in advance of it…."

Plainly the fifth category is compatible with the obligations under European law.

14. *The EAT then gave guidance as to how to ensure that payments made could be set off as falling within the scope of regulation 16(5):*

"37 …(ii) We would however take this opportunity to give guidance for the future to employers, and indeed trade unions and employees, with regard to rolled-up holiday provisions, in order … to minimise the risk of any such contractual remuneration not qualifying under regulation 16(5)……

(a) the rolled up holiday pay must be clearly incorporated into the individual contract of employment, and thus expressly agreed; (b) the allocation of the percentage or amount to holiday pay must be clearly identified in the contract, and preferably also in the payslip; (c) it must amount to a true addition to the contractual rate of pay; (d) records of holidays taken must be kept; and (e) reasonably practicable steps must be taken to require the workers to take their holidays before the expiry of the relevant holiday year."

15. *In a later case,* ***Smith v J Morrisroes & Sons Ltd*** *[2005] ICR 596, which concerned three unrelated appeals, the EAT (Burton P) again had to consider the circumstances in which claims for annual leave entitlement were made. It is not necessary to set out the facts of each of those cases. However, the court thought it appropriate to reconsider the guidelines that had been laid down in the earlier* ***Marshalls Clay*** *case and to reformulate them as follows (para 5):*

"There must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked. The best way of evidencing this is for:

(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 (or particulars sufficient to enable it to be calculated) to be identified in the contract and preferably also in the payslip;

> ***(c) records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year."***
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> *It will be noted that the changes, although minor, make it plain that the conditions identified in (a) to (c) are the best evidence of a proper and compliant agreement. The essential question is whether there is a true agreement providing a genuine and identifiable payment for holidays. These are guidelines: they do not purport to lay down the only way in which the existence of such an agreement can be established.*
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> *16. It is fundamental, as the language of regulation 16(5) itself makes clear, that if any set off is to be permitted, the payment made by the employer referable to holidays must be contractual. In* ***Gridquest Ltd v Blackburn*** *[2002] ICR 1206 the Court of Appeal held that it was not open to an employer unilaterally to specify a sum referable to holidays and to seek to set that off against the entitlement under the Regulations. The payment had to be contractually agreed between employer and employee. Pill LJ said this:*
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> > ***"7. …An employer cannot unilaterally decide that the week's pay is a payment not only for the hours worked during the week but includes an element of holiday pay. The claim that holiday pay was "in fact" paid amounts to an assertion that the employer can decide unilaterally what is included in the weekly payment.***
> >
> > ***8. In my judgment, regulation 16(5) does not confer that right upon an employer. Indeed, it expressly refers to "contractual" remuneration paid in respect of a period of leave. If the worker has not agreed that the sum paid includes a sum in respect of a period of leave, it is no part of the contract that the sum includes an element of holiday pay. The remuneration under the contract is for the week's work."***
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> *Although pre-dating the* ***Robinson-Steele*** *case, this authority is entirely in accordance with it.*"

Conclusions

16. As I have noted in my findings, when dealing with the essential issues of the Claimant's claim, it was clear to me that the relevant holiday year ran from January 2020 to June 2020, and that in that period the Claimant worked for a total of 46.75 hours. That led to an entitlement to 5.64 hours of holiday for which the Claimant paid, on a rolled up basis, in the three specific months in 2020 in which he worked.

17. It was also clear to me that the Claimant did not physically take holiday during that period, it seemed to me fairly obviously due to the fact that he

worked for the Respondent for such a limited amount. However, the actual position with regard to accrued but untaken holiday was that, by the time his employment ended, the Claimant had accrued holiday of 5.64 hours and had not taken any of it. There was therefore 5.64 hours outstanding. The question then for me to consider was whether the payments made to the Claimant in respect of rolled up holiday pay could be set against his entitlement conferred by his contract and the Regulations, i.e. the point addressed in paragraphs 9 and 10 of the Lyddon judgment by reference to the Robinson-Steele judgment, namely that the transparent and comprehensible payment of sums additional to remuneration as holiday pay is not precluded by the Working Time Directive.

18. Looked at from the perspective of the Marshalls Clay case, the point for me to consider was whether the circumstances in this case fell within Category 4, as quoted from that judgment in paragraph 12 of the Lyddon judgment. As noted in the extract from the Marshalls Clay case quoted in paragraph 13 of the Lyddon judgment, "*in principle, a category 4 contract, providing for payment of holiday pay, in respect of an express holiday entitlement, but accruing throughout the year, is indeed an entitlement to "contractual remuneration… In respect of a period of leave" albeit that it is not, and in Marshalls Clay cannot, at the stage of its payment be specifically appropriated to any particular period, and is not paid at the time of such leave, but wholly or in part in advance of it…*".

19. The Smith case, quoted at paragraph 15 of the Lyddon judgment reformulated the Marshalls Clay guidelines, and noted that there must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked. In that case, the EAT noted that the best way of evidencing that would be for the provision of rolled up holiday to be clearly incorporated into the contract, for the percentage or amount allocated to holiday pay to be identified in the contract, and preferably also in the payslip, and for records to be kept of holidays taken or of absences from work when holidays can be taken, and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year. The EAT in the Lyddon case, however, went on to say that those matters were guidelines and did not purport to lay down the only way in which the existence of a true agreement providing a genuine and identifiable payment for holidays could be established.

20. In this case, I was satisfied that there was a consensual agreement identifying a specific percentage properly attributable to periods of holiday. The mechanism operated by the Respondent in respect of rolled up holiday pay was clearly set out in the contract of employment, and I was satisfied that it had been brought to the Claimant's attention during the induction process. The percentage allocated to holiday pay was identified in the contract and was also set out on each payslip received by the Claimant.

21. The only area of concern remaining for me related to the third guidance point provided by the EAT in the Smith case, which was that records should be kept of holidays taken and that steps should be taken to ensure that workers take their holidays before the end of the relevant holiday year.

22. In that regard, records were taken, albeit in this case that there was no holiday to record as the Claimant had not taken any holiday during the holiday year. That said, he had only accrued holiday amounting to probably less than one shift during that period, so the opportunity to take holiday up to that stage of the holiday year had, in reality, not arisen. I also noted that the Claimant's employment ended approximately half way through the holiday year, and therefore the obligation on the Respondent to take reasonably practicable steps to ensure that the Claimant took holidays before the end of the holiday year had not come into effect.

23. I also noted the direction of the EAT in the Lyddon case that the guidance in the Smith case was indeed only guidance, and that the key question was whether there was a consensual agreement identifying a rate properly attributable to periods of holiday. I was satisfied that that fundamental question could be answered in the affirmative. I therefore concluded that the Claimant's claim for holiday pay failed and had to be dismissed.

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Employment Judge S Jenkins

6 October 2021

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....7 October 2021.....

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FOR EMPLOYMENT TRIBUNALS