EMPLOYMENT TRIBUNALS

Claimant: Ms MI Bellon Ferreiro

Respondent: MCD Manchester Limited

Heard at: Manchester (in private; by telephone) **On: 9 August & 4 October 2021**

Before: Employment Judge Shotter (sitting alone)

Representatives
For the claimant: In person
For the respondent: Ms G Nicolls, counsel

Interpreter: Ms F Sempere

JUDGMENT

The Judgment of the Tribunal is:

1. The complaint for unlawful deduction of wages was not presented to the Tribunal 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 being 30 April 2020. There is no continuing act. It was reasonably practicable for a complaint to be presented within the three-month period and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the claimant's complaint for the unlawful deduction of wages relating to a Covid19 payment that allegedly should have been paid on the 30 April 2020, which is dismissed.

2. The complaint for accrued but unpaid holiday pay is not well-founded and is dismissed.

REASONS

Introduction

1. This is a final hearing following an adjournment of the 9 August 2021 hearing.

2. By a claim form received on 20 March 2021 following ACAS Early conciliation between the 24 and 25 February 2021 the claimant, who was employed as a "crew member" from 17 September 2019 to 3 January 2021, claims unlawful deduction of wages under S.13 of the Employment Rights Act 1996 as amended ("the ERA") and accrued unpaid holiday pay.

Holiday pay claim

3. The claimant originally claimed holiday pay outstanding from 2019 totaling £278.18, and £891.43 accrued and unpaid in 2021. These figures have been changed by the claimant who claims £281.05 for her 2019 holiday entitlement and £552.98 for her 2020/2021 holiday entitlement. The claimant's new calculations are difficult to follow taking into account the wage slips in the bundle and the agreed figures. It is noted in the contemporaneous documents the claimant claimed £369.64 holiday pay for 2019, I am concerned that the claimant's figures cannot be relied upon, as the burden of proving the claims rests on her.

4. These figures have since changed as the respondent made a number of payments representing accrued untaken holiday since proceedings were issued in addition to earlier payments made and the 5-day compulsory holiday taken by the claimant together with 17-days taken from 8 to 31 December 2020, which the claimant maintains were not holidays as she was required to work weekends. In so maintaining the claimant appears to be ignoring the fact that she was paid holiday pay for 17-days days in December 2020. To assist her recollection, it has been agreed the respondent would provide a schedule (loosely based on Scott Schedule) showing all the payments made and when over the disputed periods consisting of furlough payments, holiday pay and normal pay. The respondent has now provided this document.

Furlough pay claim

5. At the hearing on 9 August 2021 the claimant gave evidence on cross-examination that she was read out a letter which she never signed and a copy was not sent out to her. The letter is dated 26 October 2020 and it brought the flexible furlough to an end. The claimant did not inform me that she had a copy of the letter, and the hearing was adjourned on the basis that the respondent would try and locate it. The claimant did not volunteer the fact that she had it, and it transpired by the reconvened hearing the respondent could not find the letter, whereupon the claimant produced her copy as she had no choice if she wanted to rely on it as evidence that it was not signed by her and therefore not accepted as bringing furlough to an end. In oral evidence the claimant

confirmed she had not been informed by any person when furlough ended and therefore when she started work after originally being on furlough she was placed on a flexible furlough.

6. The respondent disputes the claimant's claim, maintaining there are time limit issues in respect of claims that occurred prior to 25 November 2020. Having heard the claimant's evidence it appears (a) there is a time limit issue with the 2019 holiday pay claim and there may be one with reference to the furlough claim, (b) the claimant's written contract expressly does not allow holiday entitlement to be taken into the next holiday year and (c) the claimant's evidence was that she could have taken holidays owed to her in February 2020 but did not. It was suggested the claimant took advice on her 2019 holiday claim taking into account oral evidence when the claimant accepted her holiday year finished 31 December 2019 and started again on the 1 January 2020. The claimant maintains there was a continuing act.

7. The respondent denies there is a continuing series of acts. It maintains the holiday year cut off was 31 December and employees could take annual leave accrued in 2019 by the end of January 2020 if they were unable to take holidays in October, November and December due to those months being peak times. With reference to the piecemeal payment of holidays accruing in 2020 the schedule produced for this hearing has clarified the position. The respondent denied the claimant placed on a flexible furlough, maintaining she was taken off furlough on 19 October 2020. The claimant now maintains it was 8 November 2020 and not when her employment finished, despite her earlier assertions to the contrary.

8. The parties have produced a document setting out what facts have been agreed detailed below in the finding of facts. A list of issues have also been agreed:

1. **Time Limits**

1.1. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 25 November 2020 may not have been brought in time.

1.2. Was the claim made to the Tribunal within three months (allowing for an early conciliation) of the date of payment of the wages from which the alleged act complained of/deduction was made?

It is the Respondent's position that the Claimant did not enter into Early Conciliation with ACAS until 24 February 2021, meaning any acts or omissions prior to 25 November 2020 are out of time. The Tribunal does not have jurisdiction to hear any alleged act(s) which occurred prior to 25 November 2020, and it is denied that that any acts prior to 25 November 2020 constitute a continuing series of acts.

1.3. If not, was there a series of deductions and was the claim made to the Tribunal within three months (allowing from any early conciliation extension) of the last one?

1.4. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.5. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

2. Holiday Pay (Working Time Regulations 1998)

2.1. What was the Claimant's leave year?

2.2. How much of the leave year had passed when the Claimant's employment ended?

2.3. How much leave had accrued foe the year by that date?

2.4. How much paid leave had the Claimant taken in the year?

2.5. Were any days carried out from precious holiday years?

2.6. How many days remain unpaid?

2.7. What is the relevant daily rate of pay?

3. Unauthorised deductions

3.1. Were the wages paid to the Claimant on the following dates less than the wages she should have been paid?

3.1.1. 30 April 2020

3.2. Was any deduction required or authorised by statute?

3.3. Was any deduction required or authorised by a written term of the contract?

3.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

3.5. Did the Claimant agree in writing to the deduction before it was made?

3.6. How much is the Claimant owed?

Evidence

9. I heard evidence under oath from the claimant (who did not produce a witness statement), and on behalf of the respondent Lorraine Feeney, who produced a witness statement. With reference to the claimant's evidence the claimant indicated that she relies grounds of complaint as her witness statement further clarified by oral evidence given on the first day of the hearing.

10. Having considered the bundle (in 3 parts) which runs to 158-pages together with the additional documents produced for the reconvened hearing including the amended grounds of resistance on which the claimant has commented, two completed schedules one for holiday the other for furlough, the 26 October 2020 letter, Screenshot of MyStuff2.0 and the list of issues commented on by both parties, I have made the following findings of facts on the balance of probabilities where the evidence is disputed, having taken into account the documents, written and oral evidence and oral submissions resolving the disputes in the evidence.

Findings of facts

11. The claimant was employed as a crew member at MacDonald's, Oxford Street, Manchester, a restaurant business franchised by the respondent.

The employment contract

12. Particulars of employment were provided which confirmed the claimant started her employment on the 17 September 2019, was paid £8.37 per hour gross, **hours of work could not be permanently guaranteed and the number could be increased or reduced to "take business fluctuations into account…if changes need to be made to your work schedule, your manager will tell you about it**" (my emphasis).

13. The employment contract provided **"holidays cannot be carried forward into the next holiday year."** The respondent had a discretionary practice allowing employees to carry over any accrued untaken holidays into the month of January in the next holiday year, if they were unable to take their holidays by October, November or December in the previous holiday year. The claimant had not carried over any holidays according to this discretionary practice from 2020 to January 2021, as she had taken holidays in 2020 including 17-days in December 2020 and her employment was to terminate on the 3 January 2021 following notice of resignation being given by the claimant. There was no provision contractual or otherwise for the claimant to carry over any accrued untaken holidays to the new holiday year commencing 1 January 2021.

14. Nevertheless, Lorraine Feeney confirmed that the claimant's holiday leave entitlement for 2020 was 27-days on a full-time basis as the claimant had originally worked 5-days a week until the 3-day week she worked from 19

October 2020 to 3 January 2021; and was entitled to 4-days accrued but untaken holidays by the 3 January 2021 when she left. The claimant was paid for these holidays. Taking into account the fact the claimant's hours had reduced by October, there was no satisfactory evidence the claimant was entitled to 28-days holiday per annum as the claimant maintained during cross-examination, and I found that she was not.

15. The claimant did not take into account the fact that when she worked 3-days a week from 19 October 2020 the holiday entitlement was pro-rated. The claimant's position was that her flexible furlough entitled her to the equivalent of all holidays accrued as if she were working full time, despite the fact that there was no agreement to this effect, and fatal to the claimant's claim, no agreement to a flexible furlough.

The claimant's absence and accrued holiday pay from 2019 carried over into 202o due to sickness absence

16. The claimant had an accident at work on her hand after tripping and was off sick from 28 November 2019 until 16 April 2020. She was paid SSP during her sickness absence. In an email sent to the claimant on 6 May 2020 by the respondent she was informed that if she was off sick furlough pay would not be paid, and she would receive SSP of £95.85.

17. Holiday pay accumulated from the 17 September 2019 to 31 December 2019 and the claimant's entitlement was 8.2 days holiday calculated at £38.36 based on a 5-day week. The claimant was unable to take the holiday that had accumulated by 31 December 2019 or end of January 2020 due to her sickness absence. The holidays accrued but taken during the claimant's sickness absence was eventually paid by the respondent (see below).

Furlough

18. It is agreed the claimant was furloughed from the 23 March 2020 and would receive 80% of her salary up to a maximum of £2,500 per month if she was not on SSP as a result of her sickness absence.

19. As agreed between the parties the claimant was required to take 5-days holiday between 22 and 28 June 2020 referred to as a period of compulsory leave, and she took 18 days holiday in December 2020. The letter informing the claimant of the position confirmed the week's holiday entitlement would be paid at 100% of average wage.

Holiday pay calculations

20. The average pay calculated from the date of commencement of employment to 19 October 2020 calculated on all pay received and disregarding the 20 percent reduction made as a result of Covid19 furlough and SSP totaled £38.36 net per day. The average pay from 19 October 2020 to 3 January 2021 was £26.35 taking into account the reduction of the claimant's hours and an increase in pay from £8.31 per hour to £8.72 per hour from 31 March 2021.The respondent added the two figures together to arrive at the average weekly wage figure.

21. This joint rate of £32.36 (£38.36 plus £26.35) was the rate applied by the respondent eventually to holiday pay calculations when it was revisited as a result of this litigation.

22. During her sickness absence the claimant received a payment from her 2019 entitlement that accumulated during sick leave totaling £185.70. The claimant maintains she should have received a total of £446.05 and therefore she was underpaid by £280.35.

23. There appeared to be an issue whether the claimant's last fit note expired on the 17 March 2020 or 17 April 2020. In the witness statement produced by Lorraine Feeney at paragraph 14 confirmed the sick note expired on 16 April 2020, the date agreed by the claimant and confirmed by Ms Feeney in oral evidence.

24. The claimant was no longer signed off sick by 16 April 2020, and from this date to her return to work from furlough was entitled to 80 percent of her salary.

25. From 28 November 2019 until 17 April 2020 the claimant was entitled to SSP only which was paid to her and there is no evidence of any unlawful deduction. During this period her holiday entitlement accrued and between the 17 April 2020 to the end of the claimant's holiday year 31 December 2020 the claimant was aware she was required to take her holidays which could not be carried over into 2021. There was nothing to prevent the claimant taking her holidays during this period as confirmed by her during cross-examination. I did not accept the claimant's argument that the holidays accrued during her sickness absence should be carried over into January 2021.

26. The respondent attempted to get the claimant back into work in July 2020. In an email sent on 30 July 2020 following attempts to contact the claimant she was asked to confirm her availability for work. The claimant refused, and she was informed by the respondent that shielding finished on 15 August 2020, she was expected to return to work and would not be entitled to furlough payments when shielding finished. The email confirmed "**Furlough is a benefit for people who are available to work when the workplace cannot provide hours, this means you will not be entitled to furlough payments once shielding finishes**. As I have stated this is currently 15 August but is reviewed weekly" [my emphasis]. There was no suggestion by either party that the claimant would be placed on flexible furlough and I find that she was not. The claimant, contrary to her arguments at this hearing, was aware she would not be entitled to furlough payments when work was provided. The claimant was not shielding.

27. On the 23 July 2020 the respondent paid the claimant for 5-days compulsory holiday from 22 to 28 June 2020 in the sum of £287.69 agreed by the claimant whilst she was on furlough.

28. On the 20 August 2020 the respondent made a payment of £185.70 representing the claimant's holiday entitlement she was unable to take in 2019 due to sick leave. The claimant did not seek to take the accrued holiday after the expiry of her sick note on 16 April 2020 when she was well enough to do so, and accepted the payment.

29. In an email sent on 29 September 2020 the claimant was told "you don't get to pick and chose when you come back to work. Furlough is a scheme that is a government benefit and it therefore a lawful order. You have just told me on the phone that you do not want to come back to work and you have confirmed this by email…you will not be receiving anymore furlough pay as this will be benefit fraud." The claimant's response sent on 29 September 2020 was "I don't go to job until 31 October. I say you in this email before." The claimant was again made aware that she would not be receiving any furlough pay when she had returned to work, contrary to the claimant's evidence at this hearing that she was not.

30. Much has been made by the parties about how the claimant came to work a reduced number of days and whether it was her suggestion or the respondents. Nothing hangs on this. The claimant was on a flexible contract which provided for a variation of her working hours to meet the needs of the business, and it is clear from the contemporaneous documents the claimant agreed to work a three-day week and there was no reference or agreement to the claimant being paid any shortfall of hours under the flexible furlough scheme and I find that she was not.

End of furlough

31. On the 19 October 2020 the claimant's furlough was ended by the respondent.

32. There is an issue as to whether the letter dated 26 October 2020 was sent to the claimant. The claimant maintained she had not been sent it and relies on the fact that her copy was not signed.

33. The 26 October 2020 letter confirmed all employees would no longer be on furlough from 26 October 2020 and "from this date onwards you will attend work as usual and be paid as normal i.e. 100 % of your working hours or salary".

34. In oral evidence the claimant stated she expected to return to work from furlough on 31 October 2020 in accordance with government guidelines, and she was paid furlough monies for July, August, September, October and November 2020. The claimant maintained she was on a flexible furlough until 16 November 2020 as evidenced by the pay slip. The claimant's evidence on the flexible furlough was confused, and when it was pointed out to the claimant that the 8 December 2020 pay slip showed no flexible furlough for November 2020 the claimant's response was not to answer the question, but to refer counsel to the government's scheme which she stated protected her.

35. The claimant returned to work on the 17 October 2020 and moved to at a restaurant in Fallowfield in Manchester working reduced hours by agreement as set out in the claimant's emails sent 29 September 2020. Contrary to the claimant's suggestion I find there was no agreement that the claimant remained on part-furlough working a reduced number of hours, and the claimant would have known this to have been the case at the time which is why she did not want to return to work when asked to do so by the respondent. It suited the

claimant being on furlough receiving 80 percent of her full-time wage rather than working three-days per week on a lower rate of pay.

The end of furlough letter dated 26 October 2020

36. At the earlier hearing the claimant referred to a letter dated 26 October 2020 as follows; “Mr Alex had a letter ready for me, end of flexible furlough, which was never given to me, I was to sign it and accept I wouldn’t get furlough anymore.” The claimant who had a copy of the letter which she had not disclosed to the respondent or Tribunal explained it was mentioned in her personnel file which she had accessed, and it was an important letter. It is notable the claimant did not offer up the letter at the time, and it was left for the respondent to try and find it in accordance with case management orders, the claimant giving the impression that she did not have it. It transpires that the claimant had possession of the only. In oral submissions today, the claimant stated that as she had not been given a copy and had not signed it, she remained on flexible furlough.

37. Under cross-examination Lorraine Feeney confirmed the letter of 26 October 2020 letter was sent to all employees, including the claimant, who could not access her personnel file from the internet. A scree shot was provided in the additional documents of an online employee system completed on the 26 October 2020 (the same date as the letter) which confirmed the claimant was no longer on furlough and she believed the claimant had been sent the 26 October 2020 letter although there was no proof of receipt and the claimant had not signed the letter to confirm its contents. The letter was sent by email to the claimant’s email address that had been successfully used by the respondent in previous emails evidenced by the emails in the bundle.

38. The letter of 26 October 2020 referred to the respondent expressing the following “we very much hope that we will not have to place you back onto furlough…” I find on the balance of probabilities that by 17 October 2020 the claimant was not on furlough and she was not entitled to any furlough pay. The claimant’s evidence regarding how she came to possess the only copy of the letter dated 26 October 2020 was not credible. The contemporaneous documents reveal numerous emails being sent to the claimant’s email address used to send the 26 October 2020 letter, and it is clear the claimant was being pressed to return to work, the exchange of emails referred to above made it clear that she would not be receiving any furlough payments if work was refused and when the claimant returned to work.

39. On the balance of probabilities, I prefer Lorraine Feeney’s evidence that (a) the claimant could not access her personnel file through the internet, and (b) the letter was automatically emailed to the claimant on the same date the online employee system confirmed the claimant was no longer on furlough. I find the claimant was aware she would not be in receipt of any furlough payments from the time she started work on the 17 October 2020 and on balance had received the 26 October 2020 letter after the event. In short, the claimant already knew when she started work on the 17 October 2020 that furlough was ended and there would be no future furlough payments.

40. On the 26 October 2020 the claimant queried the SSP payments made between 17 April and 24 May 2020 which were incorrect, as the claimant's sick note had ended on 17 April 2020. The respondent acknowledged it had made a mistake by incorrectly recording the claimant as sick, and her wage slip dated 12 November 2020 records she was paid Covid 19 pay totaling £1479.56 and the SSP payment of £617.17 incorrectly paid was deducted. No further complaint was raised by the claimant who accepted the payment.

41. The claimant's submission that the Covid 19 pay totaling £1479.56 referenced in the 12 November 2020 pay slip was evidence that she was on flexible furlough had no merit. The claimant was aware she was not entitled to Covid 19 furlough payments from the time she worked on 17 October 2020, and whilst the respondent's error understandably caused some confusion to her, it was not credible that the payment was evidence of a flexible furlough as alleged by the claimant who was not entitled to receive any Covid19 payments for work carried out when she worked a three-day week from 17 October 2020 through to 3 January 2021.

42. In an email sent on 19 December 2020 the claimant terminated her employment with two-weeks' notice terminating on 3 January 2021. The claimant continued to work part-time hours and her holiday leave was pro-rated accordingly. The claimant took 18-days holiday over Christmas. By the effective date of termination, the claimant had taken 23-days holiday and was owed 4 days accrued and untaken holidays.

Payments post-termination

43. On 7 January 2021 the claimant received part-payment of £338.04 for 18-days annual leave for December 2020 on the 7 January 2020. The claimant maintains 18 days holiday was not paid and she is owed £697.50 as the total payment for holidays should have been £1035.00.

44. On the 4 February 2021 the claimant received part payment of 4-days untaken accrued holidays totaling £93.90, which the claimant maintains should have been 5-days and £193.85 is outstanding. The claimant was not paid £100 per day, she was paid £26.33 after 19 October 2020 and her calculation is clearly incorrect.

45. On the 29 June 2021 the claimant received a holiday payment of 4-days totaling £36.12, which the claimant maintains should have been £193.75 and she was owned £99.85.

46. Finally, the claimant was paid 18-days annual leave on the 2 August 2021 totaling £244.37, disputed by the claimant who claims she was owned £453.13 relating to 18-days unpaid holiday.

47. I have considerable sympathy for the claimant and the fact that the respondent, a large organisation, could not calculate the wages for an employee on a minimum wage with the result that had the claimant failed to notice the underpayment it would have more likely than not gone unnoticed and an employee who could not afford to be paid in full, miss out on much needed salary. The respondent, who makes use of a payroll service, can be criticised

for this. The calculations of the claimant's accrued holidays has been convoluted, protracted and unnecessarily complex as can be seen above.

Law

48. The Working Time Regulations 1998 provide that a worker has the right to be paid during the minimum holiday entitlement conferred by Regs 13 and 13A — Reg 16, and receive a payment in lieu of unused annual leave on the termination of his or her employment — Reg 14.

49. All workers are entitled to four weeks' basic annual leave in each leave year. – Regulation 13 of the Working Time Regulations 1998. provides for the total to 5.6 weeks for a five-day-a-week worker, equating to an extra eight days' holiday per year and a total statutory annual leave entitlement of 28 days.

50. Regulation 13A(6)(a) of the Working Time Regulations states that the entitlement to additional annual leave under Reg 13A may not be 'cashed in' for a payment in lieu except where the worker's employment is terminated.

51. Regulation 13A(7) provides that employers and workers may enter into a relevant agreement providing for additional statutory leave to be carried over into the next leave year (but not beyond). The basic four-week entitlement under regulation 13 cannot be carried over.

52. The ECJ's judgment in Greenfield v The Care Bureau Ltd [2016] ICR 161, ECJ, confirms where a worker moves from part-time to full-time work (or vice versa), the employer must distinguish between the periods during which different working patterns applied and calculate the leave due in respect of each period separately. G was employed by CB Ltd from 15 June 2009. She was entitled to 5.6 weeks' annual leave under the Working Time Regulations and her leave year began on 15 June. In July 2012, when her working pattern was one day per week, she took seven days' paid leave. The following month she began working a pattern of 12 days on and two days off, which amounted to an average of 41.4 hours per week. G left her employment on 28 May 2013 and claimed a payment in lieu of untaken leave. CB Ltd resisted the claim on the basis that she had exhausted her entitlement for her final leave year by taking the equivalent of seven weeks' holiday at a time when she worked only one day a week. The European Court held that a worker's entitlement to paid annual leave must be calculated by reference to the days and hours (and fractions) worked and specified in the employment contract.

53. According to sections 211 to 221 of the Employment Rights Act 1996 as amended, a worker who has 'normal working hours' will have his or her week's pay calculated by reference to those normal hours.

54. Under Reg 14(1) and (2) a worker is entitled to a payment in lieu where: his or her employment is terminated during the course of the leave year, and on the termination date, the proportion of statutory annual leave he or she has taken under Regs 13 and 13A is less than the proportion of the leave year that has expired. Where a worker is entitled to a payment in lieu of holiday entitlement, Reg 14(3) provides that the sum due shall be determined either by

the terms of a relevant agreement or by reference to a statutory formula set out in Reg 14(3)(b).

Sickness absence

55. The claimant referred the Tribunal to Stringer and ors v Revenue and Customs Commissioners; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] ICR 932, ECJ, the European Court of Justice (ECJ) ruled that workers absent on long-term sick leave are entitled to benefit from paid annual leave under the Working Time Directive and cannot be excluded from the right to a payment in lieu of unused leave, calculated at their normal rate of remuneration, if their employment is terminated.

56. Ms Nicholls referred the Tribunal to the ruling in Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) [2015] ICR 221, EAT which prevents workers from bringing out-of-time claims going back years. There is a three-month rule in Bear Scotland and the statutory two-year limit on arrears claims for holiday pay under S.13 ERA, when the question of a series of deduction arises.

57. A worker who has been unable to take holidays in one leave year due to sickness can carry leave from one year to the next and if the employment is terminated in that year a payment in lieu made for the holiday accrued but untaken in the previous year as a result of sickness. This was not the case for the claimant Ms Ferreiro, whose employment ended in the year after the accrued holiday entitlement carried over from 2019 to 2020, in January 2021, the start of a new holiday year. She was not entitled to a payment in lieu even if holiday entitlement accrued when she was sick remained untaken and unpaid, which on the evidence I do not accept it was.

58. I took the view that the holiday pay accrued over the 2019 sickness absence could not be carried over to 2021 on the basis that the claimant could have taken it in 2020 after her sickness absence had come to an end, and she had not been prevented from taking holidays by the respondent, and in fact had done so totaling 23-days.

Calculating annual leave

59. Regulation 14(3)(b) provides that, where no provisions of a relevant agreement apply, the sum payable to a worker in lieu of his or her unused holiday entitlement should be calculated under the principles set out in Reg 16 — discussed under 'A "week's pay" under ERA' above — but in relation to a period of leave determined according to the following formula:

(A x B) – C

where:

A is the minimum period of leave to which the worker is entitled under Regs 13 and 13A

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

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

60. Regulation 14(3)(b) states that the amount of pay in lieu of holiday should be calculated in the same way as holiday pay under Reg 16, but instead of being assessed according to how much leave is being taken, the sum is calculated by reference to the amount of leave outstanding on the date of termination as deduced using the formula above.

Time limits

61. Regulation 30(2) provides that a complaint under Reg 30 must normally be presented to a tribunal before the end of the period of three months, beginning with the date on which it is alleged that the exercise of the right should have been permitted or, in the case of holiday pay, the date on which it is alleged that the payment should have been made. If a rest period or leave extends over more than one day, the time limit starts to run on the date when the rest period or leave should have been permitted to begin.

Conclusion; applying the facts to the law

Holiday Pay (Working Time Regulations 1998

Unpaid holiday pay accrual on termination

62. With reference to time limits, the claims were in time.

63. With reference to the first issue the claimant's first holiday leave year ran from 1 January to 31 December.

64. With reference to the second issue, how much of the leave year had passed when the Claimant's employment ended, the holiday year 2020 had passed an and claimant was 3-days into the 2021 holiday year when her employment terminated on 3 January 2021. She worked one of those 3-days and did not accrue holiday.

65. With reference to the issue how much leave had accrued foe the year by that date, by 3 January 2021 the claimant had not accrued holiday pay.

66. With reference to the issue how much paid leave had the Claimant taken in the year, the claimant had taken none. In the previous year she had taken 23 and received a payment for holidays untaken and accrued.

67. With reference to the issue were any days carried out from precious holiday years, contractually there were none. However, the respondent made a payment for holidays accrued and untaken. No days remained unpaid and the relevant rate of pay by January 2021 was £26.35 taking into account the reduced hours worked by the claimant.

68. The claimant argues that the holiday accrued when she was sick should have been paid in January 2021. I did not agree.

69. I find as a matter of fact the claimant was not prevented from taking holiday leave when her sick note ran out on 17 April 2020, and she could have taken her holiday entitlement accrued during her sickness absence from the 17 April in the 2020 holiday year.

70. The claimant was entitled to 2.7 days holiday accrued between 28 November and 31 December 2019 calculated at £38.36 per day which equates to £103.57 net. The claimant was paid £185.70 for the accrued untaken holidays during this period and tis claim has been extinguished.

71. The claimant submits that her holiday entitlement accrued during sickness should be carried over into the next holiday year 1 January to 31 December 2021. I do not agree as it is apparent the claimant was paid all her holiday entitlement accrued during the 28 November to 31 December 2019 sickness absence, and further, she was well enough to take the accrued holiday in the holiday year 1 January to 31 December 2020 after her sick note had expired. There is no provision for the claimant to carry over the holiday entitlement she accrued during sickness into holiday year commencing 1 January 2021.

72. As set out above, the Regulations prohibit carry-over of the 4-weeks basic annual leave into a subsequent leave year (see Reg 13(9)(a)). The ECJ's ruling in above makes it clear that Article 7(1) of the Directive precludes national legislation or practices that provide for the right to paid annual leave to be extinguished where sickness **prevents** the worker from exercising that right before the end of the leave year. It seems clear from the ECJ's decision that, where a worker is **unable** to take annual leave concurrently with sick leave and the sickness persists until the end of the leave year, Member States must make some provision for carry-over. In the claimant's case her sickness did not prevent her from exercising her right to annual leave in 2020, and she was able to take her annual leave after the sick leave in the 2020 holiday leave year without the need to carry over into 2021.

73. Turning to the additional annual leave this is not subject to the principle laid out in Stringer; ECJ's decision in Dominguez v Centre informatique du Centre Ouest Atlantique and anor [2012] ICR D23, ECJ. *A*additional leave under Reg 13A is treated in the same way as basic leave under Reg 13, and carry over can be provided for by agreement between employer and worker. In Sood Enterprises Ltd v Healy [2013] ICR 1361, EAT, the Appeal Tribunal confirmed that, in the absence of a relevant agreement under Reg 13A(7), the Directive does not require carry-over of the additional 1.6 weeks' leave under Reg 13A where a worker is prevented from taking holiday owing to long-term sickness.

74. In the claimant's case the contract provided "holidays cannot be carried forward into the next holiday year." Reg 13A(7) provides additional leave could be carried over into the subsequent leave year but only by relevant agreement. There was no oral agreement between the respondent and claimant for any

carry over into 2021. In the claimant's case there was no agreement to carry over, and an express contractual clause that there will be no carry over of holiday pay, consequently in absence of such an agreement, she was not entitled to carry over her additional leave in to 2021 or to receive a payment in lieu of it when employment was subsequently terminated on 3 January 2021.

75. The relevant period in which the claimant makes a claim for holiday pay accrued and not paid was in the second holiday leave year that ran from 1 January 2020 to 31 December 2021. During this period the claimant was on furlough from 27 March 2020 to 19 October 2020 when she returned to work on part time hours, during which her holiday entitlement continued to accrue. The holiday entitlement which accrued was at the one hundred percent rate of "normal pay" and not the eighty percent rate of furlough pay. The wage slips reflect the respondent has made provision for this.

76. Having commenced work the wage slip for week 32 12 November 2020 reflects the claimant was in receipt of pay at the full rate as did wage slip for week 36. The November, December and January (week 40) wage slips reflect the claimant was not paid Covid 19 payments for that period other than the correction for overpayment to the claimant for Covid19 when SSP was due referenced above, and in relation to November and December only, she was not paid holidays. The 7 January 2021 pay slip reflects the claimant was paid £338.04 accrued holiday.

77. For the period 1 January (when holiday pay was calculated on a 5-day week) to 17 October 2020 when the claimant commenced working 3-days per week, she was entitled to 22.3 days holiday at £38.36 net per day totaling £847.76.

78. From 18 October 2020 to 31 December 2020 the claimant was entitled to 3.5 holidays at £26.35 per day totaling £92.25, based on her 3-day per week working pattern, one which she had agreed to. The claimant took 18-days holiday in December 2020.

79. From 1 January to 3 January 2021 the claimant was not entitled to holidays as she only worked one day.

80. For the holiday year 1 January to 31 December 2020 the claimant had taken 23-days holiday and taking into account all holiday payments made to her by the respondent, she had been paid in total for her holidays £1000.12 net. For the period 1 January to 16 October 2020 on a 5-day week calculation for holiday entitlement the claimant should have received £859.26 (22.4 days ' £38.36 net), and on a 3-day week for the remaining period to 31 December 2020 of £92.22 (3.5 days@ £26.35 net) totaling £940.01 (3.5 days@ £26.35 net).

81. The total payment that should have been made to the claimant was £951.48 net and she received £1000.12 net. In short, the burden is on the claimant to prove her accrued holiday entitlement was not paid in full, and she has failed to discharge that burden. It appears the claimant was overpaid and not underpaid her holiday entitlement.

Unlawful deduction of wages

82. With reference to the agreed issues the claimant has not produced any evidence to discharge the burden that there was an unlawful deduction of her wages.

83. The claimant's claim for unlawful deduction of wages is based on the premise that she was on flexible furlough until 1 March 2021 totaling £1706.03 outstanding wages. This cannot be correct. The claimant's furlough ended on 19 October 2020 and she remained working 3-days a week from that date to the effective date of termination following her resigning on 2-weeks' notice which expired on 3 January 2021. The claimant worked a flexible contract; it was envisaged that her hours would change with the needs of the business. She worked a three-day week from the 19 October 2020 to termination of employment. There is no suggestion in any of the contemporaneous documentation that the claimant was working reduced hours and an agreement had been reached for her to be furloughed to cover the additional days she had previously worked.

84. The 26 October 2020 letter produced confirmed the position; the claimant's furlough was ended by the respondent in no uncertain terms. It confirmed that the claimant had been in furlough since 23 March 2020 and would no longer be on furlough from 26 October 2020 and "from this date onwards you will attend work as usual and be paid as normal i.e. 100 % of your working hours or salary. In fact the claimant started working a few days earlier, on the 19 October 2020 and there was no evidence of any flexible furlough agreement for the period 19 to 25 October 2020 and I find that had there been such an agreement the position would have been confirmed in the documents, and it was not.

85. As submitted by Ms Nicholls, if the Tribunal finds the claimant was not on flexible furlough and unpaid in December 2020 her claim was submitted out of time in relation to the April 2020 Covid19 payments the claimant states were not made. The insurmountable problem for the claimant is that the respondent made a Covid 19 payment of £1479.56 on the 12 November 2020 and deducted SSP totaling £617.17 because it had calculated her entitlement incorrectly for the month of April when she was in receipt of SSP followed by a Covid 19 payment. The claimant's submission that the Covid19 payment made on the 12 November 2020 related to the fact she was on flexible furlough from 17 October 2020 was not credible, and the claimant was well aware from her communications with the respondent that as soon as she started work furlough payments would cease. There is no continuing act between the wages due on 20 April 2020 and some eight months later, on 10 December 2020 as more than three-months had expired between the payments, and there were no issues with the intervening months in relation to any unlawful deductions.

86. The complaint for unlawful deduction of wages must normally be presented to a tribunal 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 i.e. 30 April 2020. There is no continuing act. It was reasonably practicable for a complaint to be

presented within the three-month period and the complaint was not presented within such further period as the tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the claimant's complaint for the unlawful deduction of wages relating to a Covid19 payment that should have been paid on the 30 April 2020, which is dismissed.

87. In the alternative, if the claim was lodged within time, the burden is on the claimant to prove the respondent failed to pay her salary, she has been unable to produce any evidence which points to an unlawful deduction of wages having taken place, and her claim for unlawful deduction of wages is dismissed.

20.10.2021

Employment Judge Shotter

JUDGMENT & REASONS SENT TO THE PARTIES ON

28 October 2021

FOR THE TRIBUNAL OFFICE