EMPLOYMENT TRIBUNALS

Claimant: Mr. S. Smith

Respondent: Royal Mail Group Ltd.

HELD BY: CVP **ON:** 30th September 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr Smith represented himself
Respondent: Ms A. Carse, Counsel

JUDGMENT having been sent to the parties on 4th October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Issues were agreed at the outset in this case where the Claimant (C) claims that the respondent (R) made unauthorised deductions from his pay:

   1.1. What was the nature of each of C's absences (sickness absence or Special Leave for bereavement) on the following dates, and therefore what was the applicable payment policy for each?

      1.1.1. 15 – 18th October 2020
      1.1.2. 23 – 27th November 2020
      1.1.3. 7th December 2020 – 5th January 2021

   1.2. What rate of pay was the applicable rate to apply when calculating C's entitlement in each period of absence? R says the "rate" is defined in C's contract and that he was paid at that rate according to the applicable policy in each period of absence; that the issue is one of contractual construction and interpretation. C says that the calculation of pay ought to have reflected his

actual earnings inclusive of average overtime pay during the 12-week period immediately preceding each period of absence; that the issue is one of statutory interpretation, and effectively the application of established interpretations such as in respect of the Working Time Directive's effect on holiday pay as applied in the CJEU and Tribunals in England & Wales.

1.3. Was C paid for each period of absence as above at the appropriate rate or did R make unauthorised deductions from C's pay?

1.4. If R made unauthorised deductions from C's pay, what award should the Tribunal make to C?

2. The facts:

2.1. C's statement of terms and conditions of employment ("initial statement of terms") are at pages 47 – 59 of the hearing bundle (to which all page references refer). His contractual terms were varied a few times and most recently with effect from 30th March 2020 (p.64 - 65). At the time material to this claim the claimant was employed as a "Postman", OPG Grade, located at Cardiff North East and his weekly pay was stated at £441.58 and, save as varied, the initial statement of terms remained effective.

2.2. R set, and operatives accepted, a "Rate of Pay" as explained in the initial statement of terms at clause 5 (p.48).

2.3. R also operated several Policies and Guides including for our purposes today:

2.3.1. Sick Pay & Sick Pay Conditions Policy (pp66 – 71, 93 - 98)
2.3.2. Reward Policy (72 – 77)
2.3.3. Reward Guide (78 – 92)
2.3.4. Other Time Off Policy
2.3.5. Other time off (Special Leave) Guide (173 – 182)

2.4. Over-time is available either as cover for sickness or other absence (Absence overtime), at busy times (Pressure Overtime) or on a regular basis when it is accepted by way of a separate, time limited, assignment (Scheduled Agreement).

2.5. Clause 9.2 of the initial statement (p.49) provides that as R provides a public service with a special obligation on employees to provide that service then for that reason it is a condition of employment that employees are "liable to work overtime" and to work varied hours as the need of the business demand. In fact, and in practice, as understood by management and operatives, overtime, under any of the three situations mentioned, is not compulsory when offered. R offers it because the "special obligation" and "needs of the service" demand it, but operatives can apply for or ignore such offers without penalty or disciplinary action. If an Operative repeatedly refused overtime hours having entered into a Scheduled Attendance agreement the likely consequence is that R would withdraw from that agreement with the

Operative as the purpose is to have a schedule and if one declines the offered hours, then the schedule cannot be set. If an operative did generally not accept overtime hours, he/she may have more deliveries to make on their next round to ensure R met its obligations, and so an Operative may choose to make a regular shift easier by working overtime.

2.6. Overtime payments are only made when the additional hours have been authorised and have "actually been worked" (Policy & Reward Guide). It is not a given.

2.7. The respondent's Sick Pay & Sick Pay Conditions Policy forms part of its employees contracts (pp. 94 – 98). Sick pay under this policy is the difference between SSP and an employee's "full normal rate". An Employee/Operative during the first twelve months of employment is entitled to SSP only and that is specifically stated (with no reference to any rate of pay or additional sums). Company sick pay arises after twelve months' employment. C was entitled at the material time to full rate sick pay for the first six months of absence followed by six months half rate sick pay. Having read the above cited documents and heard evidence from Mr G. Rees (Reward Development Manager), Mr J. Nawrocki (Delivery Office Manager) and the claimant I find that R's intention was that the word "rate" in the Sick Pay Policy referred back to an Operative's statement of terms where Rate is defined and set (subject to any subsequent agreed variation which sets a revised "rate"), that the contractual scheme did not include other payments in the calculation of sick pay, such as overtime, bonuses, and rewards received by an Operative; it was a reference to a defined basic rate and not to average earnings; it is a basic safety net. C contested this in his evidence and submissions.

2.8. C's hours of work were variable in that he was party to a Scheduled Agreement, and he regularly worked on his rest days on rounds that coincided with his general delivery route or was close to it. In evidence C stated that if he did not do such overtime, he would have a considerable amount of extra work to do within his normal hours of work. He chose to do scheduled overtime; he was not obliged to undertake it; it was not guaranteed save in so far as any schedule was agreed and worked. His basic working hours as per his varied statement of terms was 38 hours per week; anything worked over that, when authorised by management, was paid as overtime.

2.9. C was absent from work on the following dates and for the reasons I state:

2.9.1. 15 – 18 October 2020 due to ill-health
2.9.2. 23 – 27 November 2020 Special leave because of bereavement (see below)
2.9.3. 7 December – 5 January due to ill health.

2.10. The claimant's ill-health absences were genuine and not challenged by R; R recorded them accordingly. C was paid for each such absence at full sick pay rate by reference to his basic rate of pay as provided for by the applicable policy. Calculation of C's sick pay was exclusive of credit for

average or otherwise calculated overtime payments received by C before any such absence.

2.11. Sadly, Mr Smith's father died in November 2020. C liaised via text or WhatsApp messaging and email with his manager Mr Nawrocki notifying Mr Nawrocki about taking time off that he required to make arrangements with the funeral director, to be with his mother and siblings as they needed support, and as he did not feel he would be "in any fit state" to work due to the loss. C was not ill but bereaved and naturally preoccupied with his family's affairs. That is the natural reading of the messages at pp.186 – 187 and the emails between C and Mr Nawrocki at pages 196 – 198. That is how Mr Nawrocki understood them and he used his discretion to authorise payment under the Special Leave Policy.

2.12. This Guide (commencing at p.174) is not contractual and is to be read in conjunction with the Other Time Policy. The section covering Bereavement is at p.176. It gives guidance that "reasonable time off" should be allowed although the amount of time will vary depending on each person's circumstances, with "up to one week with pay" being allowed for the death of immediate family. This is stated as being at a manager's discretion (p.174). Mr Nawrocki exercised his discretion to allow C to be absent on what he took to be Special Leave 23 – 27 November 2020. C did not self-certify ill-health absence or provide a medical certificate. R paid discretionary Special leave pay by reference to his basic rate as defined by his varied statement of terms, and, by that reckoning, in full for his absence.

2.13. The claimant has made other claims to the Tribunal against R and entered ACAS Early Conciliation with R concerning his pay. Those claims have been settled on a without prejudice basis, without admission of liability. In the light of those matters it appears that C assumed R would also settle this claim and he appears to rely on the earlier negotiated, without prejudice, settlements as precedent. R has not and does not concede liability to make the payments that C contends for, namely that during the three absences above his sick pay and special leave pay should have been calculated by reference to his earnings averaged out over the 12-week period immediately preceding such absence (that is inclusive of overtime pay).

2.14. During C's sickness absence he was paid sick pay at the rate specified by R in the latest variation of C's contract, less SSP. He was paid in full by that reference and payment did not involve calculating average overtime payments and adding them to weekly pay, over and above the stated "rate".

2.15. During C's Special leave for bereavement, at R's discretion, he was both allowed to be absent from work and paid discretionary pay based on his rate as specified by R in the latest variation of C's contract. He was paid in full by that reference and payment did not involve calculating average overtime payments and adding them to weekly pay, over and above the stated "rate".

The Law

3. S.13 Employment Rights Act 1996 (ERA) provides workers with the right not to suffer unauthorised deductions from their wages and s.220 – s.229 cover a Week's Pay. C contends that his pay is covered by s. 224 ERA "Employment with no normal working hours"; in these circumstances a week's pay is the average weekly remuneration over a 12-week period as described.

4. S. 234 ERA provides that where a worker is entitled to overtime pay when employed for more than a fixed number of hours in a week, or other reference period, the fixed hours are the normal hours of work.

5. A contract should be construed giving words their usual meaning as generally understood; a Tribunal should not imply terms or meanings unless that is necessary to give effect to a contractual term, which otherwise should be taken to mean what it says. The contract of employment may in fact more accurately reflect what is done in practice rather than what is indicated by written labels or verbiage that is routinely and by agreement or expectation ignored. A contract should be interpreted in context taking its circumstances into account, viewing the contract as a whole.

6. Authorities referred to by the parties in their respective submissions:

    6.1. Bear Scotland v Fulton [2015] IRLR 15 and Flowers & Others v East of England Ambulance Service NHS Trust [2019] IRLR 798 R23: these are authorities concerning principally, entitlement to holiday pay and its calculation where inclusion of overtime pay earned and paid pre-holiday was in issue. Entitlement in respect of holiday pay is covered by the Working Time Regulations whose minimal terms are incorporated into contracts but can be bettered. The interpretation of WTR entitlements is derived from EU law and jurisprudence. The principles adopted in the cited authorities are specific to holiday pay and have no bearing on contractual sick pay or discretionary special leave pay.

    6.2. Beattie v Age Concern UKEAT/0580/06: this case concerned sick pay where the contract provided B with a minimum of 15 hours work each week, but she actually worked 30 hours per week on a regular basis. It was said s.221 ERA was irrelevant because it did not relate to B's contractual entitlement; the contract must be applied and therefore its terms were to be ascertained. In that case B was paid sick pay based on a 30-hour week because that was the actuality of the contractual relationship, and the 15 hours stated was only a minimum and did not set the rate of pay or number of hours worked.

    6.3. Luck v Hanson Quarry Products Europe Ltd (Case No 1401285D, ET, 8th July 2020): in this case a contractual rate was set and applied; that was upheld rather than the claimed calculation based on what L generally worked or L's pay averaged out over a pre-sick leave period.

6.4. Wood v Capita Insurance Services Ltd [2017] AC 1173, SC: this case concerns contractual interpretation requiring a court/tribunal to check each suggested interpretation of a clause against the provisions of that contract; the Tribunal must ascertain the meaning of the language used and consider the contract as a whole including its nature, context, formality and drafting to understand what is meant.

6.5. Amdocs Systems Group Ltd v Langton UKEAT/0093/20/AT (24.08.21 UNREPORTED): The issue included interpretation of the provision for payment during sickness absence of "full salary" (less SSP). C says this is authority for the need for R to communicate clearly what is meant by its policy, which he says it did not do. R says this is irrelevant as the case concerns incorporation into the contract of a long-term absence policy and associated income protection. To me the difference in language between "full salary" and "rate", where "rate" is defined in the contract as in our case, is significant, whilst I take the point that clarity is important.

6.6. New Century Cleaning Co Ltd v Church [2000] IRLR, CA: C says that this is authority for the proposition that wages properly paid are sums to which an employee has some legal "but not necessarily contractual", entitlement. I agree with that statement of principle; I must determine however whether C's entitlement includes average overtime payments in the light of a contractual provision that specifies a rate for sick pay, less SSP, when C generally worked overtime hours. Legal entitlement is indeed the point. R says that the authority is irrelevant as it concerned a piecework rate based on a fee and what happens when the fee is reduced.

7. Application of law to facts:

7.1. It is significant that we are dealing here with a claim in relation to sick pay and not to EU derived holiday pay. Entitlement to these types of payment is not derived from the same legal source; it is not guided by the same jurisprudence and authorities.

7.1.1. Workers are entitled to holiday pay by reference to their earnings; if the contract is silent then there is a regulatory method of calculating entitlement and the number of days' leave, accrual in given circumstances, the leave year, provisions for untaken leave. There are many binding authorities on the calculation of pay. There is authority to the effect that workers should not be deterred from taking leave, a health & safety matter, by a feared reduction in earnings.

7.1.2. In relation to sick pay the public policy is to provide a safety net through SSP but not to encourage absence, sickness absence being a matter of incapacity from work and not choice. That said it is left to employers to supplement statutory entitlement through company pay schemes. They are matters of contract. The holiday pay regulations and authorities cannot, at least as matters currently stand, be read across as applicable to the situation of sick leave.

7.2. I appreciate, in part, the logic of C's argument and have some sympathy with the proposition that he ought to receive while sick what he would have received if working; that a worker should not be deterred from being absent when in fact ill and incapacitated, because of loss of income. I understand how he has reached his argument, but I disagree with his conclusion in law.

7.3. This is not one of those claims where the Tribunal applies a reasonableness test. This claim is one of statutory or contractual entitlement and interpretation of that entitlement. Sympathy is irrelevant.

7.4. C has no statutory or regulatory entitlement to sick pay beyond SSP. He has a right to SSP.

7.5. C has no statutory or regulatory entitlement to special leave pay.

7.6. C has a contractual right to company sick pay. The sick pay scheme applicable to C was, at the material time, payment during six months absence of a specified rate of pay (less the SSP received); this would drop to 50% after six months for up to six months. Despite the attraction of C's argument, C was paid what he was entitled to receive. For all the reasons above, applying the stated law including authorities to the facts found it is clear that the scheme in place involved payment of what R said was the "rate", that rate was notified to C and C agreed the variation in contractual hours and rate. He thus accepted that contractual schemes of payment referring to "rate" referenced that agreement. The sick pay scheme did not reference, nor was it intended to reference, average overtime payments or bonuses or any other such additional payments or rewards that a worker might receive if actually working.

7.7. I have looked at the contract as a whole. I have ascertained what its language means, rather than what C hoped it could mean. I have checked both suggested interpretations against the provisions of the contract. This is a matter of contractual construction. I have considered the natural meaning of the words used and what a reasonable person would have understood by the contractual terms and reference to "rate". My construction is as R's and not as C's. This is what was intended initially when the scheme and terms were decided upon by R. This construction is consistent with the documents before me seen a whole. I have accepted the evidence of R's witnesses who were clear, plausible and credible. R paid C during the sickness periods claimed according to C's contractual entitlement. There was no deduction from wages.

7.8. I have dealt with the Special Leave in the same way and reached the same conclusion. C has said that if he had not been granted bereavement leave, he would have been absent sick, and he was sick. The fact is that he did not so notify his manager although he did say that he was struggling and would have been unable to work effectively; I absolutely understand that. Grief can feel like a terrible illness, at times a literal heartache. It is however clear from the messages and emails that C was effectively asking for bereavement leave; Mr Nawrocki dealt with that situation with kind compassion and

appropriately. It is clear that he granted Special Leave for bereavement. Both leave and pay are discretionary. R granted both. Exercising his discretion Mr Nawrocki paid C fully by reference to his contractual "rate" and not by reference to average earnings, overtime payments or bonuses or any other such additional payments or rewards that a worker might receive if actually working. There is no statutory, regulatory, EU or otherwise derived right to paid Special leave in C's circumstances, or to pay at a laid down rate; there are statutory rights to time off in certain circumstances and they include for dependents and for certain family reasons. R'[s scheme was discretionary, and it exercised discretion in C's favour applying what Mr Nawrocki understood to tb the appropriate rate of pay in the given circumstances by reference to contractual "rate". There was no deduction from wages.

7.9. I understand C's optimism and enthusiasm for his claims given a history of earlier settlements when he advanced similar or the same arguments; that is as may be. The fact is that for whatever reason of its own R decided to settle those earlier claims. I cannot now adjudicate them. I have not assumed and taken in to account any number of reasons for R offering and C accepting settlement of the earlier claims. I have however seen that R has not at any point conceded liability to pay the sums C now claims; settlements were made previously "without prejudice"; R chose not to amend or in any way vary the Sick and Special Leave policies and guidance, or seek agreement to vary C's contract, in the light of those settlements. By the same token I need not guess why on this occasion R has chosen to litigate, but it has, and robustly. Those "without prejudice" settlements did not establish a variation to contractual entitlements. None of that has a bearing on my interpretation of the contract and application of the law to the facts found.

Employment Judge T V Ryan

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Date: 27.10.21

REASONS SENT TO THE PARTIES ON

.....1 November 2021.....

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FOR THE TRIBUNAL OFFICE

[TVR]