EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4111382/2021 (V)

Held via Cloud Video Platform (CVP) on 14 February 2022

10 **Employment Judge Murphy (sitting alone)**

Mr R Graham — **Claimant**
15 **In Person**

Off-World Industries Ltd — **Respondent represented by Mr B Thornber,**
20 **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claim for breach of contract in respect of notice pay
25 does not succeed and is dismissed.

2. The respondent has made an unauthorized deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the claimant the sum of ONE THOUSAND FOUR HUNDRED AND EIGHTY EIGHT POUNDS STERLING
30 AND FIFTY-FOUR PENCE (**£1,488.54**) in respect of pay in lieu of accrued untaken holiday.

3. The sum awarded in item 2 is expressed gross of tax and national insurance. It is for the respondent to make any deductions lawfully required to account to HMRC for any tax and employees' national
35 insurance due on the sum, if applicable.

REASONS

Preliminary Discussions

1. The claimant brought claims of unfair dismissal, a statutory redundancy payment breach of contract in respect of notice pay and unauthorized deductions from wages in relation to accrued untaken holiday he alleged he was owed on the termination of his employment. The complaint of unfair dismissal and the claim for a statutory redundancy payment were both dismissed following withdrawal at a previous preliminary hearing on case management. The claimant confirmed his only outstanding complaints relate to notice and holiday pay.

2. At the outset, a number of matters were discussed and clarified. The parties agreed that the claimant's employment with the respondent began on 14 August 2020. They agreed that the claimant worked initially for 5.5 weeks from 14 August until on or about 23 September 2020 and that during this period, his average gross weekly pay was £404.

3. They agreed that, thereafter, the claimant was off on a period of sick leave during which he was paid Statutory Sick Pay until late October 2020. From late October 2020, they agreed the claimant, who was still signed unfit for work, was placed on furlough leave and was paid furlough pay at the gross weekly rate of £315.85.

4. There was a dispute as to when the employment ended, and who ended it. The claimant maintains the respondent dismissed him. The respondent maintains the claimant resigned.

5. With respect to his claim for breach of contract in respect of notice pay, the claimant accepts that, if he is found to have resigned, he is not entitled to notice pay. The parties agree that the claimant's notice entitlement, if he is found to have been dismissed, was one week.

6. The claimant confirmed he claims for holiday accrued throughout the whole period of his employment. He alleges he took no holiday. He accepts the respondent paid him £46.66 as a top up to his furlough pay in or around January 2021 which the respondent attributes to 3 days' holiday. The claimant denies he was given any notice of holidays to be taken in the relevant pay cycle or at all. The respondent denies that the claimant has any entitlement to payment in lieu of any outstanding accrued annual leave on termination.

Issues

7. The Issues to be determined are:-

   a. Did the respondent dismiss the claimant?
   b. If the respondent dismissed the claimant, it is agreed that the claimant's notice entitlement was one week. How should his week's notice pay be calculated?
   c. If the respondent did not dismiss the claimant, has the claimant's employment ended, and, if so, when?
   d. What was the claimant's annual leave year?
   e. How much of the leave year had passed when the claimant's employment ended?
   f. How much leave had accrued for the year by that date?
   g. How much paid leave had the claimant taken in the year?
   h. Were any days carried over from previous holiday years?
   i. How many days remain unpaid?
   j. What is the relevant rate of pay?

Findings in Fact

8. The claimant gave evidence on his own behalf and the respondent led evidence from Iain Meiklejohn. Reference was made by the witnesses to an electronic joint bundle. I make the following findings in fact on the balance of probabilities:

   8.1 The respondent is a limited company which operates three café bars, two butchers and one restaurant.

8.2 The claimant was employed by the respondent as a Kitchen Supervisor at its café bar, 1703, in Dunfermline. The respondent operates a portal called Planday for staff communication and HR information and documentation On or about 10 August 2020, the respondent uploaded a contract of employment for the claimant to the portal (the Contract of Employment). It was signed electronically by Iain Meiklejohn, manager of 1703 and the claimant's line manager. The claimant was sent a digital message which invited him to view and sign the document electronically. The claimant saw the contract but did not sign it electronically. Nor did he sign a hard copy. The contract which was uploaded to the portal. The Contract of Employment was the only document containing written contractual terms of employment which was issued to the claimant. No other version was provided.

8.3 It included an 'Hours of Work' clause as follows:

> *"9. Hours of Work*
>
> *Your working hours are variable and will be organized according to a rota which the Company will notify to you in advance. The Company does not guarantee to provide you with a minimum or maximum number of hours of work.*
>
> *You will be required to work at weekends (Saturday and Sunday) in the evening and early hours of the morning."*

8.4 Although these were the terms of the only written 'Hours of Work' clause which the claimant was given, it was his understanding, both when giving evidence, and during his employment, that when allocated hours, the respondent would offer him and expect him to work between forty and fifty hours per week**.**

8.5 The Contract of Employment included a clause on holiday entitlement, which, so far as relevant, is in the following terms:

> *"13. Holiday Entitlement*

The holiday year runs from 1st January to 31st December.

Your annual holiday entitlement in any holiday year is 5.6 weeks (subject to a maximum of 28 days). The Company does not recognise public holidays, which are viewed as normal working days.

For business reasons, annual holidays must be taken in blocks of one week with the exception of three days which may be taken as single days.

The Company will require you to take annual holiday on those days during the year when the Company is closed for business. You will be notified of the days when the business will be closed.

….

You are not normally permitted to take more than two weeks' annual holiday at any one time.

As your working hours are variable, you will be entitled to holiday pay based on an average amount of remuneration paid to you over the 12 weeks prior to the commencement of your holiday leave.

…

The Company has the right to inform you with notice, as to when you will be required to take annual holiday. The notice given will be at least twice the period of annual holiday that you will be required to take during the specified time.

The Company may require you to take all, or part of any outstanding holiday entitlement, and reserves the right not to provide you with advance notice of this requirement.

…

In the event of termination of your employment, you will be entitled to holiday pay calculated on a pro-rata basis in respect of all annual holiday accrued in the current holiday year, but not taken at the date of termination of employment.

…"

8.6 The claimant's first shift was on 14 August 2020. He worked for the respondent for 5.5 weeks until on or about 23 September 2020. During that period, he earned, on average, £404 (gross) per week.

8.7 At that time, the claimant began a period of sick leave as a result of a relapse of a back problem for which he had previously had surgery. He produced a sick line to the respondent. He was paid SSP at the rate of £95.85 per week until on or about 31 October 2020.

8.8 At that time, there was a discussion between the claimant and Mr Meiklejohn. The Covid 19 pandemic was ongoing and was affecting the respondent's trade. The café bar, 1703, was for the time being still trading but the respondent had placed some of the claimant's colleagues on furlough. It was agreed that the claimant would be placed on furlough leave and be paid furlough pay instead of SSP. At the time, the claimant remained unfit for work and the absence was still covered by a fit note which he had provided to the respondent. He was placed on furlough leave and paid furlough at the rate of £315.85 per week (gross).

8.9 On or about 1 January 2021, the claimant received an additional £46.66 'top-up' payment in addition to his usual furlough rate. He had not received contact in December or January from the respondent to say that he was to take annual leave on any particular dates in those months.

8.10 The claimant remained unfit for work until 1 June 2021 and did not return to work for the respondent. He was reviewed by his GP intermittently and was provided with further certificates which certified he remained unfit for work. These included a certificate issued on 9 February covering the period from 9 February to 5 April 2021 and a certificate issued on 8 April 2021 which covered the period from 6 April to 1 June 2021.

8.11 Mr Meiklejohn uploaded a number of general staff communications to Planday. The claimant received and read these. On 9 December 2020, Mr Meiklejohn issued such a staff a message. He said, "*we have been forced into taking some hard decisions for what may be the remainder of the year*". He went on to inform staff that the venue, which had been open previously during tier 3 restrictions, would be closing completely until the restriction level changed to tier 2. On 5 January 2021, Mr Meiklejohn issued a further staff message. It noted the venue remained closed "*with no real light at the end of the tunnel*".

8.12 On or about 10th February, the claimant uploaded a photo of his latest GP certificate to Planday. The certificate was issued on 9 February 2021 by the claimant's GP and signed him off until 5 April 2021.

8.13 On 23 February 2021, Mr Meiklejohn issued a further staff message. It included the sentence: "*This week we will be starting to plan what the next 8 weeks look like as we prepare to possibly open*." It ended: "*Before we start to formally recruit can I ask you all to send a message to megan on this your availability and hours status from April onwards. Can everybody please send this over by Friday this week…*" The claimant received this message and replied via Planday. He stated that he would be off for at least another month.

8.14 Mt Meiklejohn sent a further staff message on 19 March 2021 which the claimant saw and read on 25 March 2021. The

message informed staff that the respondent had taken a decision to reopen in the week beginning 17 May 2021. The claimant waited a couple of weeks to respond until he was assessed by his GP again on 8 April 2020. He obtained a further GP certificate on that date, signing him off until 1 June 2021. The claimant uploaded a photo of this certificate on Planday on or about 9 April 2022, along with a message to Mr Meiklejohn, informing him that he hoped this would be his last sick line.

8.15 During his period of extended absence, neither Mr Meiklejohn nor any other manager of the respondent attempted to contact the claimant on an individual basis to discuss his health situation.

8.16 On 24 April 2021, Iain Meiklejohn sent another staff message via Planday. He invited staff to a meeting at the café bar on 28 April 2021 at noon to discuss re-opening on 19 May 2021. The claimant read the message that day. He forgot, however, about the meeting and failed to attend. He remembered after the meeting had already taken place on 28 April 2021 while he was visiting friends up north. When he realized his mistake, he sent a text message to Mr Meiklejohn's personal mobile number. His message said, "*How you doing, mate? Guess who just remembered what day it is?*" The claimant received no reply from Mr Meiklejohn. He remained certified unfit for work at this time.

8.17 The claimant received his furlough pay in the usual way on or about 28 May 2021. His GP fit note expired on 1 June 2021. He received no contact from the respondent, asking him to return to work after the certificate expired. He received no communication to the effect that his furlough leave was coming to an end. His next pay was due on or about 18 June 2021. He received no pay on this date.

8.18 The claimant made various attempts to contact Mr Meiklejohn's personal mobile phone but was unsuccessful. He contacted Kieran Connor, another manager of the respondent, on 21 June

2021. He told Mr Connor he had tried contacting Mr Meiklejohn without success. He repeatedly asked what the situation was and whether he had been taken off the payroll. In one of his messages, he said "*Hi Kieran I wrote to you regarding my wages. I would just like to know what the situation is so I can plan ahead. I'm still not fit enough to be at work doing 50 hours weeks [sic] and correspondence as to why I never received my wage on Friday would be greatly appreciated*". Mr Connor directed the claimant back to Mr Meiklejohn.

8.19 The claimant sent Mr Meiklejohn another message on Planday on 23 June 2021, asking for clarification of the position. He received no response. He sent Mr Meiklejohn an email on 13 July 2021.

8.20 He received no response until 19 July 2021, Mr Meiklejohn replied on that date by email on 19 July 2021. In that email, Mr Meiklejohn narrated the messages he had sent on Planday on 9 December 2020, 6 January, 23 February and 24 April 2021. He stated that the claimant had not responded and had not shown up at the meeting arranged for 28 April 2021. His email continued:

> "*From 9th December you were given 4 separate opportunities to communicate with myself via the correct channels and were kept fully up to date with the goings on at 1703.*
>
> …
>
> *At this point with three weeks left until reopening we and [sic] had to recruit in each department to ensure we were ready to do so. You did not respond via the business' communication platform of planday when prompted to and you were aware of the business plans based on correspondence stated as above. As per the company handbook, all professional correspondence should be made via planday, business email or the business landline.*

Personal phones and social media accounts should not be used.

As regards to furlough payments, this was set up by the uk government as a support mechanism for employers to support their teams whilst their businesses were forced to close or it was unviable to operate. As the business opened Wednesday 19 May final furlough payments were made Friday 21 May for the period 19/04/21 – 16/05/21. Furlough was never a right for anyone as this was a cost to the business.

No official correspondence was received from you until you did not receive any payment on June 18th. As stated above Furlough payments stopped the pay period before.

Due to the lack of communications from you, hours have been re-allocated to other members of the team to accommodate the business needs and we do not have any additional hours available at this time.

Regards"

8.21 The claimant contacted the respondent at some stage thereafter in July 2021 and told them he proposed to pursue the matter further via ACAS. Around that time, the respondent blocked his access to Planday. The respondent did not offer the claimant any hours after Mr Meiklejohn's email of 19 July 2021. The claimant did not contact the respondent to ask if hours were available. The claimant obtained new employment on 31 July 2021.

8.22 Throughout the period from 14 August 2020 until July 2021, the claimant did not at any time request to take annual leave. Other than the Contract of Employment, he received no communications from the respondent regarding the taking of annual leave.

Observations on the evidence

9 Many aspects of the evidence were uncontroversial.

10 There was a dispute regarding who initiated the suggestion that the claimant move from SSP to furlough leave. It is not necessary to resolve the dispute to determine the issues in this case, so I make no finding on that matter.

11 More materially, there was a dispute concerning the extent of the claimant's communications with the respondent during the period of his furlough leave. The claimant's evidence was that he had made various attempts to contact Mr Meiklejohn via Planday and also on his personal mobile phone. He alleged the respondent had been selective in the communications on Planday which they produced to the Tribunal.

12 Mr Meiklejohn denied receipt of any contact from the claimant during his furlough leave, including the provision of updated GP certificates, until on or around 20 June 2021 when he accepted the claimant contacted the respondent about his lack of furlough payment for the pay period ending on or about that date. Mr Thornber pointed to the claimant's omission to lodge copies of screenshots of all electronic communications which he claimed had taken place. The claimant, a litigant in person, did not appear to appreciate the importance of lodging all documentary evidence. In any case, the claimant's access to Planday had ceased before the proceedings commenced, when the dispute between the parties was referred to Acas.

13 I accepted the claimant's evidence that he had sent the communications between December 2020 and May 2021 as set out in the findings of fact. Documentary support for his account was not available, but he was specific in his account of the dates and nature of his communications. He provided the dates on which he was assessed by his GP and the content of his messages to Mr Meiklejohn. It was not inherently improbable that the claimant, having received GP certificates certifying his unfitness for work, would seek to communicate these to his employer. I did not find Mr Meiklejohn's evidence on the issue compelling. He denied the claimant's

contact in response to being led by Mr Thornber but his denials were tempered with phrases such as “I don’t recall” and “I have no recollection of getting [the messages]…”. I also noted the wording of Mr Meiklejohn’s email to the claimant dated 19 July 2021. The emphasis in italics is mine.

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> From 9th December you were given 4 separate opportunities to communicate with myself via the *correct channels* …
>
> …
>
> You did not respond via the business’ communication platform of planday when prompted to …. As per the company handbook, all professional correspondence should be made via planday, business email or the business landline. *Personal phones and social media accounts should not be used.*
>
> …
>
> No *official* correspondence was received from you until you did not receive any payment on June 18th. [emphasis added]

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14 There was no reason for Mr Meiklejohn to include this instruction regarding communication channels in his email unless the claimant had been contacting him or the company through ‘unofficial’ channels (i.e. methods other than Planday). Mr Meiklejohn took the position in evidence that, at the point he sent the email, he believed the claimant’s employment had already ended by the claimant’s resignation. There would be no purpose to his comments about workplace communication channels in that circumstance if not to make clear that previous work communications from the claimant through ‘unofficial channels’ were not being recognized by him. I readily accept that such contact had taken place, as the claimant described in evidence.

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Relevant Law

Breach of Contract (Notice)

15 Under section 86(4) of the Employment Rights Act 1996 ("ERA"), a statutory minimum notice period linked to the employee's period of continuous employment is incorporated into the contract of employment. The remedy in the event of failure to give due notice is a claim for breach of contract.

16 Under section 86(1)(a) of ERA, the notice required to be given by an employer to terminate the contract of employment of a person who has continuously been employed for one month or more, but less than two years is not less than one week's notice.

Unauthorized Deductions from Wages (Holiday Pay)

17 The Working Time Directive 2003/88/EC (WTD) was adopted in 1993 as a health and safety measure. The domestic implementation, the Working Time Regulations 1998 (WTR) came into effect in 1998. Under the WTR, workers are entitled to 5.6 weeks' annual leave. The right is made up of:

(i) A basic entitlement a minimum of four weeks' annual leave each year, implementing the right to annual leave under the WRD (referred to in this judgment as the 'Basic Entitlement'; and

(ii) An additional entitlement to 1.6 weeks' annual leave each year, which is a right under UK domestic legislation only ('Additional Entitlement').

18 The difference in the provenance of the entitlements means that the two types of leave sometimes require to be treated differently as decisions of the European Court of Justice will apply to the Basic Entitlement but not always to the Additional Entitlement.

19 Under the WTR, employees are entitled to accrued untaken holiday outstanding at the date of termination. A failure to pay in lieu of annual

leave which has accrued on termination can be enforced by way of a claim for an unauthorized deduction from wages under section 13 of ERA.

20 There are restrictions on contracting out of the rights regarding annual leave under the WTR. Any agreement is void in so far as it purports to exclude or limit the operation of the respective legislation unless specified stringent conditions are satisfied (Reg 35).

21 A body of caselaw from the European Court of Justice has developed on the interpretation of the WTD and UK domestic caselaw gives a great deal of authoritative guidance on the purposive construction to be given to the WTR to achieve consistency with the Directive. Following Brexit, the approach to be taken in determining questions on the meaning, validity or effect of retained EU law in UK courts and tribunals depends on whether it has been modified by UK law (European Union (Withdrawal) Act 2018 section 6). Questions on the meaning of retained EU law which has not been modified by the UK are determined in accordance with relevant retained caselaw and principles, using a purposive interpretation where the meaning is unclear (taking into account the original purpose of the original underlying EU law, compatibility with the EU Treaties and the limits of EU competence). The UK has indicated a specific intention to retain the WTR as set out in the explanatory notes to the Withdrawal Act. The WTR must, therefore, subject to any future modification by Parliament, be interpreted purposively in a manner consistent with the ECJ's interpretation of the WTD, if possible.

22 Those parts of the WTR which are of most relevance to the issues are reproduced:

> ***Reg 2: Interpretation***
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> *…*
>
> *"relevant agreement", in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer;*
>
> *…*

"worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

Reg 13: Entitlement to annual leave

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

. . .

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

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

(b) where there are no provisions of a relevant agreement which apply—

…

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

…

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

…

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

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

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

(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

…

Reg 13A: Entitlement to additional annual leave

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

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

…

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

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

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

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

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

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

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

…

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

…

Reg 14: Compensation related to entitlement to leave

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

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

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year

under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

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

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

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

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

(A x B) – C

where—

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

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

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

…

(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.

Reg 15: Dates on which leave is taken

(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker—

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

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

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

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(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

Reg 16: Payment in respect of periods of leave

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

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

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

(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

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

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

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

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

(ii) in any other case, 52; and

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

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

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

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

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

…

(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day

10 *other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.*

…

(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

15 *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.*

20 23 The provisions of ERA referred to in Reg 16 of WTR, so far as relevant, are reproduced:

Chapter II A week's Pay

…

***Employments with no normal working hours**.*

25 *(1)This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

(2)The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

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

(b)otherwise, with the last complete week before the calculation date.

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

35 *the number of weeks of which account is taken.*

(4)This section is subject to sections 227 and 228.

Caselaw

24 The following cases are cited in this judgment.

- **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
- **British Gas Trading Ltd v Lock and anor** [2017] ICR 1, CA
- **Conley King v The Sash Windows Workshop Ltd** C-214/16 ECJ
- **Department of Work and Pensions v Sutcliff** UKEAT/0319/07
- **Gisda Cyf v Barratt** [2010] IRLR 1073, SC
- **HMRC v Stringer** [2009] IRLR 677, HL;
- **Kigass Aero Components v Brown** [2002] IRLR 312
- **NHS Leeds v Larner** [2012] ICR 1389
- **Pereda v Madrid Mobilidad** SA (C-277/08), ECJ
- **Sandle v Adecco UK Ltd** [2016] IRLR 941
- **Smith v Pimlico Plumbers Ltd** (Rev 1) [2022] EWCA Civ 70 (1 Feb 2022);
- **Sood Enterprises v Healy** [2013] ICR 1361
- **Stringer and ors v Revenue and Customs Commissioners** ICR 392, ECJ
- **Wess v Science Museum Group** UKEAT/0120/14/DM

Submissions

25 The claimant elected not to make any submission. Mr Thornber gave an oral submission for the respondent and also spoke to a written submission which dealt with the issue of holiday pay (only). In the interests of brevity and to avoid of repetition, I do not summarize his submission here, but set out his arguments in turn, within the framework of the list of issues which provides the structure for the following discussion and decision.

Discussion and Decision

Did the respondent dismiss the claimant?

26 The claimant maintains the respondent dismissed him on 19 July 2021 when Iain Meiklejohn sent him an email which ended with the words:

> "*Due to the lack of communication from you, hours have been re-allocated to other members of the team to accommodate the business needs and we do not have any additional hours available at this time*".

27 The respondent maintains the claimant resigned by his conduct in failing to turn up for work from 28th May 2021 onwards. In his submission, Mr Thornber invited me to prefer Mr Meiklejohn's account of the communications between him and the claimant during the period of the claimant's absence and to accept there had been an absence of communication by the claimant until around 20 June 2021. He pointed out that the claimant's messages in June 2021 were not about returning to work but about not having received furlough pay. He invited me to find that, through his conduct, the claimant resigned on 28 May 2021. As I understand it, Mr Thornber's suggestion is that the asserted lack of adequate communication from the claimant during this period should be construed as his resignation. Alternatively, Mr Thornber said it was crystal clear that the claimant's employment ended on 21 June 2021 when he sent messages to the respondent but did not seek to return to work in his communications.

28 Where, as here, the dismissal is disputed, it is for the employee to satisfy the Tribunal that there was a dismissal on the balance of probabilities. A dismissal will not be effective until the employee actually knows he is being dismissed (**Gisda Cyf v Barratt** *).* In **Sandle v Adecco UK Ltd** *,* the EAT considered a scenario involving a zero-hours contract. Adecco (the agency) employed Ms Sandle on such a contract. It provided temporary workers it employed (of which Ms Sandle was one) to clients for temporary assignments. The client to which Ms S was assigned had concerns about her performance and ended the assignment. Before the assignment ended, a manager at the agency tried to call her and left a voicemail but made no further attempts to contact her. The assignment ended and neither party made any attempt to get in touch. Ms S

brought a claim for unfair dismissal against Adecco UK Ltd. The Employment Tribunal held the claimant had remained employed, albeit in limbo, at the time she presented her claim.

29 The EAT dismissed her appeal. It ruled:

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> In our judgment, the ET in the present case was not wrong: dismissal does have to be communicated. Communication might be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware.

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30 The EAT observed that the circumstances of Ms Sandle's employment were not irrelevant to the determination the Tribunal had to make. Agency workers may well experience gaps between assignments that will not fit the standard direct employment model; context is everything. The claimant's own response – the failure to treat the agency's conduct as a constructive dismissal – was a relevant consideration in this regard, as was the absence of any finding on the part of the Tribunal to the effect that the Agency itself considered its contract with the claimant had come to an end.

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31 The respondent's messages in December 2020 and January 2021 from Mr Meiklejohn did not invite or require a response. The claimant was certified unfit for work over that period and the café bar was closed with no clarity at the time as to when it might reopen. I have found that the claimant did communicate with the respondent on Planday on or about 10 and 23 February and 9 April, providing copies of GP certificates and updating Mr Meiklejohn as to his lack of fitness for work. I have also found the claimant sent a text message to Mr Meiklejohn's personal mobile on 28 April 2021 to acknowledge he had forgotten about the staff meeting Mr Meiklejohn had arranged for earlier that day.

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32 The café bar in which he worked was closed for business between December 2020 and 19 May 2021. There were no actings or communications by either party during this time which could be construed as terminating the claimant's employment. On the contrary, throughout this period, the respondent paid the

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claimant furlough monies. They continued to include him in staff communications on Planday which they knew he accessed and read. Given my findings about the claimant's communications to the respondent in 2021, his conduct likewise was consistent with a continuing employment relationship.

33 The claimant's lack of contact with the respondent when the restaurant opened on 19 May 2021, viewed in the context of the facts found, is unremarkable. He remained signed off and had communicated as much to the respondent. In any event, under his contractual terms, any requirement to work was to be notified to him by the respondent in advance by the provision of a rota. He was not guaranteed any hours. The failure to attend work between 19 May 2021 and 1 June 2021 in circumstances where he was (a) certified unfit for work; and (b) had received no notification from the respondent of hours being allocated to him by way of a rota was consistent with continuing employment and did not communicate his resignation to the respondent.

34 On Monday 1 June 2021, the claimant's sick line expired. Mr Thornber alternatively submits that by his failure to attend for work from that date (or the preceding Friday), the claimant effectively resigned. I don't agree. There was no evidence before me that the respondent had informed the claimant that they were ending his furlough leave or that he was expected to attend work. He was not sent a rota allocating him hours in that week or in subsequent weeks. Between 1 June and 20 June 2021, the claimant reasonably believed he remained on furlough leave.

35 When he realized he had not been paid his furlough monies in the usual way on or about 20 June, he made numerous attempts to contact the respondent to clarify the position Mr Thornber contends it is crystal clear that the employment had ended on 21 June 2021. Having reviewed the claimant's communications to Mr Connor and Mr Meiklejohn on or about that date, I am not satisfied they convey any intention to resign, expressly or impliedly. The claimant simply asks to clarify the situation regarding his wages and whether he has been taken off the payroll. He repeats his enquiry with increasing urgency when no response is received. His lack of attendance at work remains consistent with his contractual terms.

36 The claimant received no substantive response from the respondent until some weeks later when Mr Meiklejohn sent an email on 19 July 2021. The claimant argues that this communication amounted to notice of his immediate dismissal. The material paragraphs are as follows.

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> *At this point with three weeks left until reopening we and [sic] had to recruit in each department to ensure we were ready to do so. You did not respond via the business' communication platform of planday when prompted to and you were aware of the business plans based on correspondence stated as above. As per the company handbook, all professional correspondence should be made via planday, business email or the business landline. Personal phones and social media accounts should not be used.*

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> *As regards to furlough payments, this was set up by the uk government as a support mechanism for employers to support their teams whilst their businesses were forced to close or it was unviable to operate. As the business opened Wednesday 19 May final furlough payments were made Friday 21 May for the period 19/04/21 – 16/05/21. Furlough was never a right for anyone as this was a cost to the business.*

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> *No official correspondence was received from you until you did not receive any payment on June 18th. As stated above Furlough payments stopped the pay period before.*

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> *Due to the lack of communications from you, hours have been re-allocated to other members of the team to accommodate the business needs and we do not have any additional hours available at this time.*

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37 I am not satisfied that, on the facts of this case, this communication either expressly or impliedly communicated the claimant's dismissal. As the EAT noted in **Sandle**, the background circumstances are not irrelevant. The claimant here (as in **Sandle**) was employed on a 'zero hours' contract. He was not guaranteed any hours. Mr Meiklejohn gave no indication he was terminating the contract but instead indicated "we do not have any additional hours available *at this time*" [emphasis added]. The words "at this time" were unnecessary if not to leave open the possibility that hours may become available in the future. Neither does anything in his email communicate an understanding on his part that the claimant had previously terminated the employment by resigning. On the contrary, if this had been Mr Meiklejohn's belief, it would have been irrelevant to inform the claimant of the unavailability of hours going forward. It would arguably also have been redundant to remind him of the preferred channels for work-related communications. I don't accept that Mr Meiklejohn understood, when he wrote the email, that the claimant had previously resigned his employment.

38 The claimant has not proved that the respondent dismissed him on 19 July 2021 or at all. The claim for breach of contract in respect of the respondent's alleged failure to serve the contractually required one week's notice does not, therefore, succeed.

Has the claimant's employment ended? If so, when did it end?

39 To decide the claimant's claim for holiday pay allegedly outstanding on termination, it is necessary to determine whether the claimant's employment has terminated at all. I have found there was no dismissal on 19 July 2021 or at all. Nor did the claimant resign before that date.

40 What was the situation after 19 July 2021? I heard little evidence regarding the ensuing period. In that time, the café bar was open and the claimant was not being paid by the respondent. He had been informed the respondent did not have additional hours available for him and that his furlough leave was at an end. He had been told that he would not be paid any furlough monies for the period after 19th of May 202, though the respondent had not communicated the ending of his furlough leave to him

before that date. There was no evidence that the claimant asserted the respondent was in breach of contract in this respect, or that he was treating himself as constructively dismissed.

41 The written Contract of Employment is silent on whether the claimant was obliged to accept any particular number of hours, should the respondent offer them. The claimant believed his agreement with the respondent to be that, if allocated them, he was obliged to work 40 plus hours per week. Although he had been signed by his doctor as fit for work, he did not consider himself capable of undertaking 50-hour weeks and he told the respondent as much in his message to Mr Connor on or about 20 June 2021. The respondent did not dispute or correct the claimant's understanding about the number of hours he would be obliged to work, if he was put on the rota. None were offered in July '21 (or since).

42 The claimant took up new employment with another employer on 31 July 2021. In many circumstances, where an employee is engaged on a zero-hours contract by Employer A, his recruitment by Employer B will be quite consistent with his continuing employment by A. However, on the facts of this case, I find, on balance, that the claimant's act in taking up new employment on 31 July 2021 effectively communicated his termination of his employment with the respondent. The background circumstances include the escalating dispute which was, by then, the subject of correspondence via Acas; the withdrawal of the claimant's access to Planday; and the fact that the café bar 1703 was trading but no hours were being offered. Of particular significance, however, was the claimant's belief, known to the respondent, that if he was placed on their rota he would require to work over 40 hours per week. In the context of that understanding and the respondent's knowledge of it, the claimant's act in beginning new employment was incompatible with his continuing employment on the terms he believed himself to be engaged. His commencement of employment elsewhere effectively communicated his resignation to the respondent on the facts of this case. The claimant's employment, therefore, ended on 31 July 2021.

What was the claimant's annual leave year?

43 The WTR prescribes that an employee's leave year begins on the date of commencement of his employment or as such date as may be provided for in a 'relevant agreement' (Reg 13(3)). This question was not addressed in submissions, but I understand the respondent's position to be that the written contract of employment was a 'relevant agreement' for the purposes of the WTR and that the leave year provided for in Clause 13 should prevail. It states that "the holiday year runs from 1 January to 31st December".

44 A 'relevant agreement' includes any agreement in writing which is legally enforceable as between the worker and his employer'. A relevant agreement may, therefore, include the written terms of an employment contract. A contract of employment need not necessarily be signed for it to be legally enforceable between the parties. Acceptance of the terms offered can be verbal or may be implied through conduct. If an employee works in accordance with the terms of the contract for a period without protest, it can be inferred that they have accepted the terms of the contract (e.g. **Wess v Science Museum Group**). In the claimant's case, he did not sign the written Contract of Employment. Nevertheless, he worked under it for the period of roughly 5.5 weeks from 14 August 2020 and continued to be employed under its terms during his subsequent period of leave and beyond. He did not raise any protest about any aspect of the written terms in the document. His conduct in this regard amounted to acceptance of the terms.

45 In principle, then, the Contract of Employment could amount to a 'relevant agreement', subject to the principle that any individual term relied upon must itself be sufficiently certain to be legally enforceable. It must also be sufficiently clear that it is varying or excluding a provision of the WTR in circumstances where the WTR prescribes a relevant agreement may do so.

46 In relation to the specification of a holiday year which differs from that proposed by the WTR, the Contract of Employment satisfies these principles. The claimant's leave year therefore ran from 1 January to 31 December.

How much of the leave year had passed when the claimant's employment ended?

47 The claimant's employment ended on 31 July 2021. Seven months of the leave year had, therefore, passed when his employment terminated.

5 *How much leave had accrued for the year by that date?*

48 Mr Thornber submitted that holiday only accrues during periods when the worker is actually at work. In other words, he said, the claimant was not a 'worker' for the purposes of the WTR for periods when he was not working
10 and when he was not given hours to work on a rota. No authority was cited in support of this proposition.

49 I reject this argument. It is long established that "*There is no requirement in order to be a "worker" some work needs to have been done. There is no express provision in the* [Working Time] *Regulations that annual leave is,*
15 *and is only, leave to be absent from what would otherwise have been "working time*"" (**Kigass Aero Components v Brown**). The European Court of Justice confirmed in **Stringer** that the "*right to paid annual leave conferred by Directive 2003/88 itself on all workers …cannot be made subject by a member state to a condition concerning the obligation actually*
20 *to have worked during the leave year laid down by that State*". The ECJ specifically held the entitlement is not affected by sickness absence. Whether the claimant's leave was characterized by the respondent as sick leave or furlough leave is irrelevant; the claimant was unfit for work due to illness for the period from late September 2020 to 1 June 2021. He
25 continued to accrue leave throughout.

50 He also continued to accrue leave in the period from 1 June 2021 to 31 July 2021 when he was allocated no hours by the respondent as he continued to meeting the definition of a 'worker' set out in Regulation 2 of the WTR during this period. He had entered into a contract of employment with the
30 respondent. The regulation 2 definition does not require a worker to be performing work under the contract of employment to continue to fall within its scope.

51 During the leave year in which the employment terminated (which ran from 1 January 2021 to 31 December 2021), the claimant accrued **3.3 weeks'** annual leave in accordance with the WTR (i.e. 5.6 weeks x 7/12 = 3.3).

How much paid leave had the claimant taken in the year?

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52 The claimant's position was that he took no annual leave in the relevant leave year (or at all) and that although he was paid £46.66 in January 2021 ostensibly as a top up for 3 days' annual leave, he had received no notice of such leave.

10 53 Mr Thornber submitted that the claimant had been given notice to take, and had taken, all accrued holiday to which he was entitled during the period when the respondent's café bar was closed for business. He relied in this regard on a single paragraph within Clause 13 of the Contract of Employment which states:

15 *The Company will require you to take annual holiday on those days during the year when the Company is closed for business. You will be notified of the days when the business will be closed.*

54 I refer to this as the 'Closure Paragraph' for ease of reference as Clause 13 comprises several paragraphs which are not numbered. Other potentially 20 relevant paragraphs in the same clause are the following:

You are not normally permitted to take more than two weeks' annual holiday at any one time.

…

The Company has the right to inform you with notice, as to when 25 *you will be required to take annual holiday. The notice given will be at least twice the period of annual holiday that you will be required to take during the specified time.*

The Company may require you to take all, or part of any outstanding holiday entitlement, and reserves the right not to provide you with advance notice of this requirement.

55 Regulation 15 of the WTR makes provision for the notice to be given by an employer of the taking of annual leave. The default position under Reg 15(3) is that an employer requires to give notice to the worker specifying the days on which leave is to be taken, and must do so "twice as many days in advance of the earliest day so specified as the number of days … to which the notice relates". Reg 15(5) provides that this obligation may be varied or excluded by a relevant agreement.

56 The meaning of a relevant agreement purporting to exclude the default notice provisions must be sufficiently certain to be legally enforceable. It must also be clear that the provision is intended to vary the WTR and how it does so. I am not satisfied that the Closure Paragraph meets these requirements when viewed in the context of the whole of the clause and when not supplemented by notice of the particular dates of the closure and the nominated leave dates within that period.

57 The right to annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure (**Sash Windows**, ECJ). It follows that he must have adequate notice of the specific dates on which he is taking leave and that is what Reg 15 of the WTR is designed to achieve. A relevant agreement which varies or excludes Reg 15(3) must likewise adequately identify the specific dates on which the leave is to be taken or provide an effective mechanism for how this will be done by the employer. The words, "*The Company will require you to take annual holiday on those days during the year when the Company is closed for business"* may be regarded as no more than a statement of intent or expectation. Certainly, where a period of closure exceeds the amount of annual leave available, some further notification is needed to adequately identify the dates on which leave is to be taken. The claimant's place of work was closed (in the relevant leave year) from 1 January to 19 May 2021, a period of more than 4.5 months.

The claimant was given no notice of which days during the closure he was required to take annual leave.

58 The respondent did not comply with the terms of the Closure Paragraph on which it now seeks to rely. That paragraph states: "*You will be notified of the days when the business will be closed*". The words "*will be*" indicate notification is to be given in advance of the closure. No notification was provided by the respondent in advance of the closure of the days when the business would be closed. In Mr Meiklejohn's communication on 9 December 2020, he said "we have been forced into taking some hard decisions for what *may be* the remainder of the year" (emphasis added). He later said, "we have had to take the decision to close the venue completely until such time as Tier 2 comes to fruition." The days of the closure were not specified sufficiently to comply with the Closure Paragraph itself or to fulfil the underlying purpose of Regulation 15 to allow workers to plan and take their leave days for the purpose of rest, relaxation and leisure.

59 Apart from the payment of £46.66 in January 2021, no additional payment was made by to the claimant during the closure period to signal that even the respondent believed his entire accrued leave entitlement to have been taken pursuant to the Closure Paragraph in Clause 13.

60 In any case, the claimant was unfit for work due to sickness throughout the whole closure period. In **Pereda**, the European Court of Justice held that a worker who was ill during a period of time booked off as paid annual leave was entitled to take the annual leave at another time once he had recovered, even if it meant the annual leave had to be carried over to the next leave year.

61 In a recently revised version of its recent judgment in **Smith v Pimlico Plumbers**, the Court of Appeal has provided a helpful appendix with a revised formulation of Regulations 13, 14 and 30 of the WTR to take into account the Court's judgment along with earlier caselaw as to how these regulations must be read to be compatible with Article 7 of the Working Time Directive and related ECJ decisions. The reformulation applies to the Basic Entitlement of four weeks. The Court has no power to draft

regulations, as it acknowledged, but it proposed the formulation which it considers best reflects the relevant judgments. Those judgments bind this Tribunal. The Court added the following sub paragraphs to Regulation 13 of WTR:

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> *(14) Where in any leave year a worker was unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because he was on sick leave, the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (15).*
>
> *(15) Leave to which paragraph (14) applies may be carried forward and taken in the period of 18 months immediately following the leave year in respect of which it was due.*
>
> *(16) Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.*

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62 In the present case, given the claimant's sickness absence, he was entitled to delay taking his annual leave until he had recovered from his illness. In the leave year 2021, no annual leave was taken during the period he was unfit to work. None was properly notified to him, and he did not agree to take any while ill.

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63 After he was signed fit for work on 1 June 2021, the respondent gave no notice he was required to take annual leave.

64 The claimant had, therefore, taken no paid leave in the leave year in which his employment terminated.

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Were any days carried over from previous holiday years?

65 Under the WTR as implemented, Reg 14 provides that where a worker's employment is terminated in the course of a leave year, the employer shall make payment in lieu of the accrued untaken leave, calculated pro rata, on termination. As implemented, it does not provide for carry forward. However, in light of judgments including **Larner** and **Sood**, it is clear that a worker who has not taken their paid basic annual leave entitlement under the WTR in a relevant leave year because of absence on long term sick

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leave does not lose the entitlement to that leave and can carry it forward into the following leave year without making a prior request to do so.

66 In the **Smith** appendix, the following sub paragraph was proposed to be added to Regulation 14 of the WTR to reflect the approach in the authorities which bind this Tribunal:

> *(5) Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(10) and (11), (14) and (15), or (16), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of such leave.*

67 I have found that no annual leave was taken by the claimant in leave year 2021. By the same reasoning, I also find that none was taken in leave year 2020.

68 The right to carry forward relates only to the proportion of the accrued untaken Basic Entitlement outstanding at the end of the leave year. The claimant had been employed for 4.5 months of the leave year when 2020 ended. He had accrued 1.5 weeks' basic leave entitlement (i.e. 4.5/12 x 4 weeks = **1.5 weeks**).

How many weeks remain unpaid?

69 The total number of weeks' leave which were accrued but untaken on the termination of the employment (including permitted carry forward from the preceding year) is, therefore **4.8 weeks'** leave (i.e. 3.3 weeks accrued in 2021 plus 1.5 weeks' leave (Basic Entitlement only) carried forward from 2020).

What is the relevant rate of pay?

70 Reg 16(2) of the WRT provides that a week's pay for the purposes of payment in respect of leave shall be calculated as set out in sections 221 to 224 of the Employment Rights Act 1996, modified by the WTR Reg 16(3) *et*

seq. If there are no normal working hours, a week's pay is calculated as the average weekly remuneration (including commission and bonuses) over the previous 52 complete weeks or, if the employee has been employed for a lesser period, over the period of complete weeks for which they have been employed (ERA section 224; WTR, R16(3) (e); and SI 2018/1378 R10).

71 'Remuneration' is not defined in Part XIV of ERA (which houses the provisions on 'a week's pay'). Mr Thornber submitted that both SSP and furlough pay fall to be regarded as 'remuneration' for the purposes of s.224(2). He maintained, therefore, that the weeks during which the claimant received either of these types of payment do not fall to be disregarded when carrying out the averaging exercise.

72 In support of his argument that SSP should be regarded as 'remuneration', Mr Thornber says that, since 6 April 2014, it has not been possible to recover SSP, and so this is no longer a factor, and it is likely to amount to remuneration. Mr Thornber said it is also likely that contractual sick pay would also be regarded as "remuneration" for these purposes and cited the EAT decision in **Sutcliff** regarding contractual sick pay. **Sutcliff** is concerned with the right of an employee certified sick during her ordinary maternity leave to claim contractual sick pay. It is not concerned with annual leave and does not consider the caselaw on the interpretation of the WTR to accord with the WTD and the ECJ cases interpreting the Directive.

73 It is right that (except in limited circumstances where SSP is paid to employees due to Covid 19), it has not been possible for employers to recover SSP from the Government since 2014. Furlough payments, in contrast, have been recoverable (to varying extents at different times throughout the pandemic) from the Government under the Coronavirus Job Retention Scheme. Mr Thornber did not expand on the reasons for his contention that furlough payments amounted to remuneration; he simply proposed calculations which included weeks paid at the furlough rate. His argument relating to SSP based on recoverability of Government funding appears to be a double-edged sword for the respondent. If the employer's ability to recover Government funds for a payment were the defining

criterion in establishing 'remuneration', then furlough payments would be excluded.

74 I don't accept recoverability to be the defining criterion for what amounts to 'remuneration'. I am not persuaded that either SSP or furlough payments paid to the claimant ought to be regarded as 'remuneration' when applying section 224 of ERA for the purposes of calculating holiday pay under the WTR. In **Stringer**, the ECJ ruled that under the WTD, workers absent on long term sick leave are entitled to benefit from paid annual leave at their 'normal' rate of remuneration. Domestically, the Court of Appeal's decision in **Lock** confirms that, in light of the ECJ's caselaw, all elements of a worker's remuneration must be taken into account when calculating holiday pay under the Directive. To the extent that the WTR (and by extension section 224 of ERA) provides otherwise, it must be construed to achieve that result. This can be achieved very simply by excluding statutory sick pay and furlough payments made at a reduced rate from the scope of 'remuneration' for the purposes of section 224 of ERA when that provision is being used to compute holiday pay.

75 It is not binding on this Tribunal, but it is noted that this approach accords with the current Government guidance (produced below). The Guidance has, no doubt, been drafted with regard to the relevant authorities on the interpretation of the WTR.

> *For casual workers with no normal hours, including workers on a zero-hours contract, the holiday pay they receive will be their average pay over the previous 52 weeks worked (taking the last whole week in which they worked and earned pay, ending on a Saturday, as the most recent week. ..*
>
> *The reference period must include the last 52 weeks for which they actually earned, and so excludes any weeks where no work was performed. … if this gives fewer than 52 weeks to take into account, then the reference period is shortened to that lower number of weeks.*
>
> …

Over a 52-week pay reference period, it is possible that a worker will have weeks where they received statutory payments in place of wages. Statutory payments are payments for state mandated leave, such as maternity leave, where the wage costs are partially covered by the government. See list of types of paid statutory leave [The list of types of paid statutory leave includes SSP]. …

In our view, statutory payments should not be included in the calculation for holiday pay. A week where a worker receives statutory payments instead of their regular pay should be excluded from the 52-week reference period. The employer should then count back a further week to bring the total up to 52 weeks' worth of pay data.

76 If, counting back from 31 July 2021, all weeks are excluded in respect of which the claimant received (i) no payment; or (ii) only a furlough payment or (iii) only SSP, then all weeks of his employment are excluded bar the 5.5 weeks commencing 14 August 2020. During that period, the claimant was paid, on average, £404 per week. This is the relevant rate of pay to be used in calculating the payment in lieu of his annual leave entitlement pursuant to Reg 16 WTR and s224 ERA.

Conclusion

77 The respondent has made an unauthorized deduction from the claimant's wages on the termination of his employment by failing to pay him in lieu of accrued untaken holiday pay owing to him pursuant to the WTR. Outstanding on termination were 1.5 weeks' annual leave carried forward from leave year 2020 and 3.3 weeks accrued in 2021. The relevant weekly rate of pay is £404. The calculation is, therefore:

3.8 x £404 = £1,535.20

LESS £46.66 (excess payment in Jan 2021)

= £1,488.54.

The respondent is ordered to pay the claimant this sum less deductions legally required for income tax and employees' National Insurance contributions, if applicable.

5 Employment Judge: Lesley Murphy
Date of Judgment: 01 March 2022
Entered in register: 07 March 2022
and copied to parties