



EMPLOYMENT TRIBUNALS

Claimant: D Stewart
Respondent: The Palm Indian Restaurant Ltd
Heard at: Bristol Employment Tribunal by CVP
On: 21 and 22 March 2022
Before: Employment Judge Murphy

Representation

Claimant: Mr D Jones of Counsel
Respondent: Mr B Uduje of Counsel

RESERVED JUDGMENT

- (1) The claimant's leave year for the purposes of the Working Time Regulations 1998 ("WTR") ran from 22 March to 21 March annually; and
- (2) the claimant was not entitled, on the termination of his employment on 31 March 2021, to payment in lieu of untaken annual leave which accrued during the leave year from 22 March 2020 to 21 March 2021.

Case Management Order

The following case management orders are made under Rule 29 of the Employment Tribunal Rules of Procedure 2013. It is intended to ensure a fair hearing in accordance with the "overriding objective" set out in rule 2. That includes avoiding delay and expense so far as compatible with a proper consideration of the issues. The complexity and importance of the issues were taken into account when deciding the appropriate and proportionate order.

Amendment of respondent's name

1. The claimant shall by **21 April 2022** send to the respondent's representative an updated Schedule of Loss which shall include a calculation of the holiday pay claim brought under section 23 of the Employment Rights Act 1996 in light of the determinations recorded in the judgment. The claimant shall provide a full breakdown of the calculation.

REASONS

Background

1. The claimant brought claims of unfair dismissal, breach of contract (in respect of notice), for a statutory redundancy payment, for a failure to provide a written statement of employment particulars and for accrued untaken annual leave. A hearing took place remotely by video conferencing on 21 and 22 March 2022. Evidence was heard from the claimant and the respondent's director and an oral judgment was given on liability in all claims brought with the exception of the claim relating to annual leave.
2. During the preliminaries, there was an adjournment during which further instructions were taken on the holiday pay claim. Mr Jones confirmed thereafter that the claimant brings the claim under section 23 of ERA (as opposed to under Reg 30 of the Working Time Regulations 1998 ("WTR")). He confirmed the claimant's position to be that his leave year ran from 22 March to 21 March annually. The respondent said that the leave year had been varied by a relevant agreement to run from 6 April to 5 April annually. Mr Jones also confirmed the claimant pursues payment in lieu of accrued unpaid leave from the previous leave year (which, on the claimant's case, ran from 22 March 2020 to 21 March 2021) in addition to the leave year in which the employment ended. Mr Uduje said the respondent did not permit any carry forward of more than 5 days' leave.
3. The representatives advised me during the preliminaries that they were still considering the figures and seeking to identify if agreement might be reached between them on the quantification of untaken leave and outstanding pay for that leave. It was agreed that the hearing would proceed to consider liability only in respect of this head of claim. Evidence about the value of the claim would be held over for a hearing on remedy, if applicable, (as was to be the case for all other claims brought).
4. During submissions, Mr Jones clarified that the claimant seeks more by way of accrued untaken annual leave than the 16.2 hours intimated in his Grounds of Claim. Mr Uduje objected to this expansion of the claimant's holiday pay claim. Having heard argument from the parties, I permitted the claimant to amend the quantification of the holiday pay claim which would

be determined, if applicable, at a separate hearing on remedy. I reserved judgment on the claim for holiday pay and confirmed that the reserved written judgment would be confined to determining: (1) the claimant's annual leave year for the purposes of Regulation 13(3) of the WTR; and (2) whether, in the circumstances of the case, the claimant is able to carry forward leave from the preceding leave year for the purposes of calculating the accrued untaken leave for which he was entitled to payment in lieu on termination.

5. I confirmed that, to the extent that the respondent disputes the amount of leave the claimant says was taken and / or the amount of holiday pay received for the material period of employment, the respondent shall have an opportunity to lead evidence on these matters at the hearing on remedy. This has been fixed for 27 June 2022.

Facts

6. Having heard the evidence of the claimant and Mr Feah, director of the respondent, I make the following findings of fact on the balance of probabilities.
7. The respondent is a limited company which operates a restaurant called the The Palm Indian restaurant. The claimant was employed by the respondent from 22 March 2009 to 31 March 2021. He was employed as a barman. No written contract of employment was provided to the claimant. He was not told that he was guaranteed any particular number of hours. In practice, his hours increased from two days a week when he began work to three days a week and latterly from around 2017 to 5 days per week, equating to around 35 hours. There was some fluctuation in his hours from week to week and month to month.
8. No written document was issued when the claimant began work with the respondent which governed or purported to govern the taking of annual leave. In the early days of his employment, he was told by the respondent that he was not entitled to paid annual leave. He sought advice from ACAS and discussed this further with the respondent. The respondent accepted the claimant was entitled to paid annual leave. The respondent paid the claimant holiday pay based on a percentage of the number of hours he had worked. This 'holiday pay' was paid in a rolled-up payment, initially every six months then quarterly. Latterly, the respondent paid this monthly. The payments did not necessarily coincide with the taking of annual leave.
9. The respondent did not inform the claimant that its annual leave year ran from 6 April to 5 April. It did not inform the claimant that the taking of leave was linked to any specified leave year. The arrangement was that the claimant notified the respondent of the dates on which he wished to take leave and would take his leave as and when, with the respondent's agreement.

10. On 24 March 2020, the Covid 19 pandemic had struck and a national lockdown had been ordered. The respondent's restaurant closed. The Government introduced the Coronavirus Job Retention Scheme (referred to in the judgment as the furlough scheme) to provide for Government funded payments to be made to employers in respect of costs of employment they incurred for furloughed employees. The claimant was placed on furlough leave on 24 March 2020.
11. The Treasury's Direction to HMRC issued on Wednesday 15 April said the employer can reclaim the employee's salary "...if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment." The respondent prepared a document which the claimant signed. In it, he agreed to being placed on furlough leave. With regard to annual leave, the document said:

Should you wish to take annual leave during furlough, you must notify us.

12. The restaurant reopened for a period during the summer of 2020, when permitted to do so. The claimant worked one shift in August 2020 but otherwise remained on furlough leave until his employment ended on 31 March 2022.
13. The claimant notified the respondent that he wished to take two weeks' holiday in September 2020 and the respondent agreed to this request. The claimant took two weeks' leave at that time.

Relevant Law

14. The Working Time Directive 2003/88/EC (WTD) was adopted in 1993 as a health and safety measure. Under the domestic implementation, the Working Time Regulations 1998 (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 WTD (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').
15. Decisions of the European Court of Justice apply to the Basic Entitlement but not always to the Additional Entitlement.

16. 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 23 of the Employment Rights Act 1996 (“ERA”). The WTR was amended by the Working Time Coronavirus (Amendment) Regulations 2020 to include provisions enacted in response to the pandemic.
17. Those parts of the WTR (as amended) which are most relevant to the issues are reproduced below:

Reg 2: Interpretation

...
“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;
...

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.

(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).*

...

(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.*

Discussion and decision

18. The first issue to be determined is the leave year of the claimant. Although the position taken by the respondent during the preliminaries was that this had been varied by a relevant agreement, the evidence did not support such a finding and Mr Uduje, quite rightly, did not invite one in his closing submission. Mr Meah accepted in cross examination that it had not been made clear to the claimant that the annual leave year was linked to the respondent's financial year. Regulation 2 of the WTR defines a 'relevant agreement' and requires that such an agreement be in writing and be legally enforceable (at least if it is not part of a workforce or collective agreement). There was, on the facts found, no agreement to vary the leave year either verbally or in writing. Therefore, the claimant's leave year ran from the date he commenced employment and annually thereafter from the anniversary of that date (Reg 13(3)(b) and 13A(4)). That is to say, it ran from 22 March to 21 March each year.
19. The second issue is whether, in the circumstances of the case, the claimant is able to carry forward leave from the preceding leave year (that is from leave year ending 21 March '21) for the purposes of calculating the accrued untaken leave to be compensated on termination.
20. Mr Jones noted in his submission that the respondent paid the claimant a monthly sum by way of rolled up holiday pay whereby a percentage of

hours worked was paid each month. He said that because the claim is brought as a claim for unauthorized deductions from wages under ERA, there was a continuing series of deductions and it is possible, on that basis, to claim for annual leave going back to March 2020. He alleged it was possible to do so because of the rolled-up way in which holiday was paid each month. Alternatively, he said that the claimant could carry leave forward from the preceding leave year based on the emergency legislative provisions introduced in response to Covid.

21. I deal with Mr Jones' arguments in reverse order. Reg 13(9) requires that annual leave accrued under the WTR is taken in the leave year in which it is due, subject to sub paragraphs (10) and (11) of that regulation. I consider first whether Reg 13(9) is disapplied by R13(10) or (11). I take these provisions which were introduced by statutory instrument in 2020 in response to the pandemic to be the emergency legislative provisions to which Mr Jones refers.
22. The claimant's position is that he did not take all accrued annual leave to which he was entitled under the WTR during the leave year ending March '21. Under Reg 14(2) of the WTR, a worker is entitled to payment in lieu of holiday which has accrued and remains untaken during their final leave year. In the claimant's case only ten days of his final leave year had elapsed when the termination of his employment took effect. Only a small amount of leave accrued during this period. The relative value of the claim, therefore, lies in the leave allegedly accrued but untaken in the previous leave year. If Reg 13(9) is disapplied by Reg 13(10), allowing leave to be carried forward, then payment in lieu of that untaken carried forward leave is also required on termination (Reg 14(5)).
23. The question posed by Reg 13(10) is whether it was not reasonably practicable for the claimant to take some or all of the leave to which he was entitled in the leave year ending 21 March 2021 as a result of the effects of the Coronavirus including on the claimant, the respondent, the economy or the wider society. The onus lies on the claimant to show on the balance of probabilities that that it was not. If it was not reasonably practicable for him to take his leave, the claimant can carry forward such leave from his Basic Entitlement as remains untaken. There is no equivalent provision permitting carry forward of his Additional Entitlement under R13A.
24. Government guidance suggests a number of factors which employers should consider in deciding whether it was not reasonably practicable for a worker to take leave in the leave year it accrued. The Guidance suggests, for example, situations where a business has faced a significant increase in demand or a substantial disruption to its workforce. Other factors suggested include the health of the worker and the length of time remaining in their leave year. They include the extent to which the worker taking leave would impact the wider society's response to the pandemic and the availability of cover for the leave from the remaining workforce. According to the Government's Guidance, workers who are furloughed are unlikely to have needed to carry forward statutory annual leave, as it

would have been easier for them to take it during the furlough period, in most cases.

25. I am mindful that the Guidance, though it gives an insight into the sorts of situation the legislature may have envisaged, does not bind this Tribunal. I have focused on the wording of Reg 13(10). The test of reasonable practicability appears elsewhere in employment legislation. In line with the interpretation given to the phrase in other contexts, I consider it is not confined to physical impracticability. However, even allowing a liberal interpretation of the phrase in favour of the claimant, there was no evidence before me to support a finding that the effects of Covid 19 rendered it not reasonably practicable for him to take some or all of his Basic Entitlement in the year ending March 2021. On the contrary, his clear evidence was that he did take a period of two weeks' leave in September 2020.
26. The respondent had not refused his request for that holiday. This was not a situation where the business was under increased demand because of Covid. Quite the reverse; the restaurant was not operational for swathes of the leave year. No evidence was led that the claimant was ill or shielding because of the effects of the coronavirus during the leave year in question. There was no evidence that the respondent refused or discouraged the taking of annual leave because of the effects of Covid on its business or because it could not cover his absence. He was absent anyway on furlough leave and the respondent, for much of the leave year, had no requirement for a barman. The claimant has not shown that he falls within the category of workers described in Reg 13(10) of the WTR. Accordingly, Reg 13(9) is not disapplied in this case by R13 (10).
27. Neither party cited the cases of **Kreuziger v Land Berlin** Case C-619/16, ECJ and **Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu** Case -684/16, ECJ. Nevertheless, in a case such as this one where I have found that R13(10) and (11) are not engaged, I must consider the correct interpretation of Regulation 13(9) in light of these decisions of the European Court of Justice.
28. In both cases, the courts asked the ECJ to give a ruling on the interpretation of Article 7(2) of the Working Time Directive which provides that 'the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated'. The question concerned whether EU law precluded national legislation that provided for the loss of an allowance in lieu of untaken leave where the worker did not apply to take that leave before the employment relationship ended. The ECJ ruled that it is permissible for national legislation to set down conditions for exercising the right to annual leave, including the loss of the right to annual leave at the end of a leave year, provided the worker has had the opportunity to exercise the right to the leave. It would not comply with Article 7 to prescribe an automatic loss of rights without prior verification that the worker had an effective opportunity to take the leave. The onus is on the employer to prove to the

court that it has enabled the worker to exercise his entitlement, particularly through the provision of sufficient information.

29. 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. I proceed on the basis that the WTR falls to be interpreted purposively in a manner consistent with the ECJ's interpretation of the WTD, if possible.
30. This was the approach taken by the Court of Appeal in its recent judgment in **Smith v Pimlico Plumbers** [2022] EWCA Civ 70. The Court considered, among other things, the ECJ judgments to which I have referred. It was invited by parties and agreed to provide 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 WTD as interpreted in domestic and ECJ decisions. The reformulation applies to the Basic Entitlement only. Relevant to the issues in this case, the Court added the following suggested sub-paragraph to Regulation 13 and consequential amendments to R14(5), as follows:

Reg 13(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.

Reg 14(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.

31. I give the WTR the purposive interpretation proposed in the Court of Appeal's formulation. However, even applying the test as framed in the putative Reg 13(16), I do not find that the claimant, in the circumstances of this case, is entitled to carry forward untaken leave from his penultimate leave year into his final leave year. The respondent did not fail to recognise the claimant's right to paid annual leave in that year. On the contrary, it expressly acknowledged the claimant's right to take annual leave in a document the claimant signed early in his furlough leave (and, therefore, early in the leave year). It said: "*Should you wish to take annual leave during furlough, you must notify us.*" The claimant asked to and did take annual leave in September 2020. He

was given the facility to do so. He knew he had the facility to take further annual leave in that leave year but omitted to request such leave.

32. I turn to the other argument advanced by Mr Jones. He submits, alternatively, that the claimant can recover payment in lieu of holiday that was accrued but untaken in the year to 21 March '21 by relying on a series of unauthorized deductions from his wages. Holiday pay is included in the definition of 'wages' in section 27 of ERA. Broadly, section 23 of that Act allows a complaint to be presented that an employer has made a deduction or a series of deductions from a worker's wages. Where a complaint is brought in respect of a series of deductions, the three-month time limit begins to run from the date of the last deduction in the series (s.23(2) and (3) of ERA). The respondent's practice in the latter years before the leave year starting on 22 March 2020 was to pay the claimant a rolled up monthly sum to cover his holiday pay regardless of when holiday was taken. Mr Jones' argument, as I understand it, is that the respondent ceased to pay the claimant this monthly sum in most of not all months during the leave years '20/'21 and '21/'22. The monthly failure to do so gave rise to a series of deductions from the claimant's wages which continued until the employment ended.
33. The claimant's claim for holiday pay as pleaded in the Grounds of Claim is premised on his rights under the WTR, regulations 13 and 14. The amendment which I permitted to the claim was confined to the quantification of that claim which Mr Jones believed had been understated as 16.2 hours in the Grounds of Claim due to an error in the calculation. There is no claim before the Tribunal that the claimant had a contractual right to a monthly sum in respect of rolled-up holiday pay. He may or may not have done so, but that is not the claim that has been brought. In any event, there is certainly insufficient evidence before me to determine the precise terms of any such agreement. The claim instead is that the claimant was not, on the termination of his employment, paid in lieu of the leave which he had accrued under R13, as required by R14 (paragraph 25 and 26 of the Grounds of Claim). Though it was clarified by Mr Jones during the preliminaries that the failure to do so is claimed as an unauthorized deduction, the basis on which the right to the deducted 'wages' was asserted to have arisen was unchanged. That was clear from the preliminary discussions with respect to holiday pay. These focused on what the relevant leave year was for the purposes of the WTR and whether leave alleged to have accrued under the WTR in the leave year before the claimant's final leave year was claimed.
34. The respondent's previous practice of rolling up holiday pay into monthly payments does not assist the claimant in establishing an entitlement under the WTR to carry forward leave into his final leave year. Whether or not the respondent's 'rolled-up' approach in previous years was compliant with its obligations under the WTR is not a matter for this Tribunal. What is clear is that the WTR confers no right on a worker to be paid in lieu of his accrued leave entitlement except on the termination

of his employment (R13(9)(b) and R13A(6)). The WTR did not give the claimant a right to a monthly payment in respect of holiday pay during months when no holiday was taken. Any failure by the respondent to pay a monthly rolled-up payment attributed to holiday did not breach an obligation conferred upon it by the WTR.

35. There was, therefore, no series of unauthorized monthly deductions based on an entitlement conferred by those Regulations which extended back to March 2020. I do not accept that, simply because the claim is brought as a claim for unauthorized deductions from wages under ERA, it is possible to claim for annual leave accruing from March 2020 in circumstances where the WTR does not permit untaken leave in that leave year to be carried forward. The claim that has been brought is that deductions were made which breached the claimant's rights to wages conferred by the WTR, not some other alleged entitlement of which notice has not been given in the pleadings.
36. The claimant was not entitled, on the termination of his employment on 31 March 2021, to payment in lieu of untaken annual leave which accrued during the leave year from 22 March 2020 to 21 March 2021 by operation of Reg 14(5) of the WTR (as reformulated in the appendix to the Court of Appeal's judgment in **Smith v Pimlico Plumbers**). The claimant cannot rely on a series of unauthorized deductions in order to claim payment in lieu of untaken holiday which accrued in that leave year.

Employment Judge Murphy (Scotland), Acting as an
Employment Judge (England and Wales)
Date: 24 March 2022

Judgment sent to parties: 8 April 2022

FOR THE TRIBUNAL OFFICE

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