EMPLOYMENT TRIBUNALS

First Claimant: Ms E Lamey
Second Claimant: Ms F Hughes
Third Claimant: Ms P Norcombe
Fourth Claimant: Ms J Daniel

Respondent: Renandco Limited

HELD AT: Manchester **ON**: 3rd & 4th May 2022

BEFORE: Employment Judge Anderson
(sitting alone) via CVP

REPRESENTATION:

First Claimant: Mr Mithani of Counsel
Second Claimant: In Person
Third Claimant: In Person
Fourth Claimant: In Person

Respondent: Ms Boyle of Counsel

JUDGMENT having been sent to the parties on 10th May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is the Judgment of the Tribunal in relation to claims brought by Ms E Lamey, Ms Faye Hughes, Ms Polly Norcombe and Ms Jodi Daniel.

2. The Respondent by its ET 3, denied the Claimants claims.

3. None of the parties had prepared a list of issues for the outset of this case. Therefore, the first part of the hearing was dedicated to exploring the issues between the parties.

4. Following this discussion, it was identified that the claims made were as follows:

    a. A failure to pay the National Minimum Wage either as a wages claim or a breach of contract claim (First and Third Claimants)
    b. Whether the Respondent unlawfully deducted sums from the Claimant's wages in relation to a failure to pay Holiday pay. (All Claimants)
    c. Whether the Respondent unlawfully deducted sums from the Claimant's wages in the form of furlough pay due to not recording hours correctly. (All Claimants)

5. In relation to c) above, the Respondent took issue with this point, saying it was not apparent on the face of the ET 1. I indicated that I would hear evidence on the point and allow submissions on whether I was permitted to determine the point at the end of the case. This became somewhat of a moot point as during the case, it became apparent that the Claimants were in fact claiming that incorrect reference periods had been used in order to calculate furlough pay. I ultimately decided that such claims were not contained within the ET 1.

6. At the outset, it was made clear by all Claimants that no other potential claims (e.g. the reference to Pensions) contained within the ET 1 were being pursued by any Claimant.

7. The Respondent was also aware through exchanges during the hearing that a potential consequence of a finding that there was not a statement of main terms and conditions in place for the purposes of s.1 Employment Rights Act 1996 could result in an award under s.38 Employment Act 2002 in the event a Claimant succeeded in a claim listed in Schedule 5 of that Act.

Procedural Matters

8. All of the Claimants provided witness statements which were taken as read. Ms Zoe Johnson also provided a witness statement on behalf of the First Claimant. Ms Alison Callaghan provided a witness statement on behalf of the Respondent which was taken as read. All witnesses gave live evidence and were cross-examined.

9. There was an agreed bundle of 837 pages.

10. The hearing took place via CVP and regular screen breaks were provided.

11. Each party made closing submissions.

Facts

12. The following findings of fact were made on the balance of probabilities. I have sought to confine myself to making findings of fact that were relevant to the specific claims before me.

13. In relation to credibility, I found each Claimant to be generally consistent in their evidence. I accepted their evidence. In relation to Ms Callaghan for the Respondent, it was necessary for her to be prompted on a number of occasions to answer the questions asked and I formed the view that she was a partisan witness on whose evidence I would place limited weight. Her witness statement makes repeated bold assertions as to events and the law which were evidently incorrect by the time her oral evidence concluded. She was not a direct witness to many events and in respect of points where she did have direct knowledge (e.g. calculations of pay) she was unable to recall the relevant detail.

14. Each of the Claimants were initially employed by Vulture Leisure Limited to work as bar staff at premises known as 'El-Diablo'. I find that each of the Claimants commenced employment on the dates contained within their witness statements. The Respondent did not seek to contradict these dates. Indeed, in relation to the pre-transfer period, the Respondent did not call any evidence or produce any contemporaneous records. The explanation for this was the somewhat chaotic nature of the TUPE transfer that took place and the cost/benefit analysis of proceeding with the transfer in the absence of due diligence.

15. At no time whilst employed by Vulture Leisure were any of the Claimants permitted to take paid annual leave. Each Claimant gave consistent evidence to this effect. On occasion, this was queried by each of the Claimant's with reasons such as the small size of the Respondents business being advanced as to reasons why paid annual leave was not provided.

16. On or around 11th January 2020, each of the Claimants employment transferred from Vulture Leisure to the Respondent. It is accepted that this was a relevant transfer for the purposes of TUPE. The relevant liabilities transferred to the Respondent.

17. The Respondent is owned by Mr Rennie who is also a Director of the business. Mr Rennie was present throughout the hearing but did not submit a witness statement or give evidence.

18. I find that none of the Claimants were given a statement of terms and conditions. The evidence was largely one way on this point. All of the Claimants gave consistent evidence on the fact that they were not provided with the unsigned documents in the bundle and that they saw these documents for the first time in these proceedings. The Respondent called no direct evidence on the point in terms of a live witness handing them over or evidence of them being handed over. The Respondent did not have any signed copies. There was no wider evidence called in relation to the documents existing on the Respondents internal systems in some form.

19. It follows from the above, that I expressly reject Ms Callaghan's framing of the contractual position at paragraph 2 of her witness statement which presents a misleading picture as to the correct situation. Whether contracts were provided or not was not a matter within Ms Callaghan's direct knowledge.

20. In March 2020, the country went into lockdown. As a hospitality business, the Respondent was not able to trade in that period.

21. The Respondents case is that Mr Rennie informed staff that furlough payments received would count as Holiday. None of the Claimants accepted that this conversation had taken place. Mr Rennie did not give evidence. There was no note of this conversation or secondary evidence provided such as a diary entry. I find that no such communication was made and I prefer the direct evidence of each of the Claimants on this point.

22. As was the position with Vulture Leisure Limited, at no point during the course of any of the Claimants employment with the Respondent did the Claimants take any annual leave.

23. The Respondents case is that staff were permitted to take leave. I find as a fact that this was not the case. It is artificial to suggest that the Respondent had in place a system of annual leave but notwithstanding this, no employee took advantage of it. No records or other evidence of an annual leave system being in place were provided by the Respondent.

24. In November 2020, each of the Claimants were made redundant. A number of email exchanges took place following the redundancies. Some of those exchanges relate to matters not before the Tribunal.

25. Following the termination of the Claimant's employment, a payment said to be amounting to 20% of the leave entitlement for that year was paid to each Claimant. The Respondent asserted that the other 80% was to be covered by the furlough payments already received by employees.

26. Early Conciliation was commenced on the 13th November 2020, concluding on 30th November 2020. The ET 1 is dated 17th December 2020.

The Law

27. The burden of proof is on each individual Claimant to prove their claim.

28. The right not to have sums unlawfully deducted from wages is contained within s.13 Employment Rights Act 1996. Subsection (3) provides:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

29. Section 27 ERA 1996 defines 'wages' for the purposes of the Act. S.27(1)(1)(a) includes Holiday pay within the definition of wages.

30. In relation to time limits and the concept of a series of deductions, section 23 of the Employment Rights Act 1996 provides:

> "(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
>
> (3) Where a complaint is brought under this section in respect of—
> (a) a series of deductions or payments, or
> (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

31. In respect of the concept of a series of deductions, the starting point was **Bear Scotland v Fulton [2015] ICR 221.** However, in respect of the point whether a gap of three months or more breaks the series of deductions, the contrary had been held by the Northern Ireland Court of Appeal in **Chief Constable of the Police v Agnew [2019] IRLR 792** (permission to appeal to the Supreme

Court having been granted, but the case did not end up being heard) and doubted on an obiter basis by the Court of Appeal in **Smith v Pimlico Plumbers [2022] EWCA Civ 70.**

32. In respect of the law governing Holiday pay, there has been a number of recent developments through case law. The most recent and indeed most pertinent case for the purposes of this hearing is **Smith v Pimlico Plumbers [2022] EWCA Civ 70**. In Smith, the Court of Appeal held that a worker can only lose the right to take leave at the end of the leave year when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract at which point the worker is entitled to a payment in respect of the untaken leave.

33. At para 102 of the Judgment, Simler LJ summarised her conclusion:

"The language of article 7(1), article 31 of the Charter, and King, establishes that the single composite right which is protected is the right to "paid annual leave", for the reasons given above. If a worker takes unpaid leave when the employer disputes the right and refuses to pay for the leave, the worker is not exercising the right. Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave."

34. In respect of a breach of contract, such a claim is made under the Employment Tribunals (Extension of Jurisdiction) Order 1994. Regulation 3 provides:

"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force

have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment."

35. Under Regulation 7 of the Order, such claims must be brought within the period of three months beginning with the effective date of termination (subject to the application of any ACAS EC extension).

Conclusions

Holiday Pay

36. This is not a case concerning contractual Holiday pay over and above the statutory minimum.

37. Each of the Claimants were employees of the Respondent. Each of the Claimants were entitled to the statutory minimum Holiday entitlement of 5.6 weeks as contained within the Working Time Regulations 1998.

38. This is not a case in which the Respondent has suggested that any of the defences (authorised by contract or statute) to a s.13 claim would apply. Essentially, the Respondent's defence is twofold:

    a. Firstly, it is predicated upon my making findings that during the course of the employment with the Respondent, the Claimant's were not prevented from taking their annual leave. I do not make such findings. For the reasons set out, the Claimants were prevented from taking their leave.
    b. Following the termination of each of the Claimant's employment, the Respondent paid 20% of the Claimant's accrued Holiday entitlement for that year. The Respondent claimed that it was entitled to retain 80% of the entitlement. I find that the Respondent was not entitled to retain 80% of the Claimant's entitlement. At no time was any furlough pay allocated to holiday. Furlough pay was normal remuneration. The attempt to describe it as including holiday pay is entirely an after the event label.

39. I apply the case of Smith (above). This is a case in which the Claimant's were prevented from taking annual leave throughout the entirety of their employment. I base this on the following:
    a. The absence of a written contract.
    b. The absence of Holiday pay records.

c. Whilst with Vulture, the Claimants being told that Holiday pay was rolled up, without any basis of calculation or transparency or being told that the business was too small to pay Holiday
d. Whilst with the Respondent, no documentation or other information being given to the Claimants regarding Holiday pay. The Respondent not having, not seeking nor enquiring as to the Holidays taken.
e. The absence of any witness to gainsay the direct evidence of four Claimants plus Ms Johnson.

40. Elaborating on point (d) above, I refer myself back to para 102 of **Smith.** There was nothing of the sort envisaged in that paragraph evidenced in the present case.

41. There is one contrary factor and that is there is one entry for Holiday just prior to the TUPE transfer, being referenced in one pay slip supplied after the event and some 8 months late. I am not satisfied that this payslip is accurate. It doesn't follow that it is a fraud, but it isn't consistent with the Fourth Claimant's oral evidence nor do I have anything from a witness who is responsible for that pay input.

42. The documentary evidence in this case is lacking. This could be said to be attributable to the transfer, but it is apparent from the content and tone of Ms Callaghan's evidence that obtaining or recording relevant information in relation to each employee was not actively pursued by the Respondent.

43. In relation to the Holiday pay claim, I find that this is a case in which it is permissible for me to rely upon Smith. There has been a wholesale failure to pay Holiday pay from the start to the end of all of the Claimant's employment and that the requirement to pay this sum crystalised upon the dismissal of the Claimants.

44. If I am wrong on this being a 'Smith' case, or to deal with the distinction between Working Time Directive and Working Time Regulations leave, then I find in the alternative that there was an ongoing series of deductions in respect of each Claimant.

45. The deductions are capable of being an ongoing series for the purposes of s.23 Employment Rights Act 1996 on the basis that they all relate to Holiday pay and arise out of the same factual nexus. This is correct irrespective of whether **Bear Scotland** or **Agnew** is applied.

46. None of the employees had the opportunity to take their leave. They were prevented from taking their leave. **Leeds NHS Primary Care Trust v Larner [2012] ICR 1389** left open the question of whether the prevention of taking leave and thus the ability to carry it over could apply to Working Time

Regulation leave in addition to Working Time Directive leave. This point appears to be concluded at paragraph 103 of **Smith** which refers to "all the leave" being part of Mr Smith's case and then identifies that the prevention of him taking that leave means that the leave carried over each year throughout his engagement with the Respondent.

47. No contrary case has been advanced by the Respondent on this point. Whatever analysis that is provided, there is an ongoing failure to pay Holiday pay that is owed to the Claimants up to the point of dismissal.

48. Each of the Claimant's must give credit for the 20% figure paid post termination in November 2020.

National Minimum Wage

49. I accept the evidence of Ms Lamey at paragraphs 21 to 27 of her witness statement. The calculations in relation to the First Claimant were agreed. Credit must be given for the £50.25 that was paid by the Respondent. The defence raised by the Respondent was that any such claim was out of time. I deal with the time point below.

50. The third Claimant's claim is based upon the fact that she turned 25 on the 1st March 2020 but continued to be paid £7.70. The 25 year old rate was £8.21 for March 2020 and then £8.72 from April 2020. It was accepted in oral evidence that the correct rate was paid from April rather than July as suggested in the witness statement. The Third Claimant was therefore underpaid 54.25 hours with a shortfall of £0.51p per hour. The total shortfall was £27.67. Again, the Respondent did not dispute this calculation.

51. In relation to the National Minimum Wage claim, I find that any such claim expressed solely as a wages claim is out of time. However, as a breach of contract claim, it is in time. The failure to pay NMW is a debt that is extant on the termination of employment and therefore can be claimed under the extension of jurisdiction order.

Wages - Furlough

52. As noted above, the nature of this claim changed during the course of the hearing.

53. The ET 1 contains the following "Prior to COVID we received cash in hand every week, I believe this is because our proper hours were never logged properly."

54. At the outset of the case, I was asked to interpret this as a claim for unlawful deduction from wages because COVID payments had been incorrectly calculated due to the calculations being based upon incorrect weekly hours.

55. This claim was not advanced or established by any Claimant during the course of the hearing.

56. Rather, the claim turned into the Claimant's seeking to establish that the Respondent used the wrong reference period in calculating the payments that were made to them on furlough. i.e. the Respondent had not used the correct methodology to calculate the correct reference period.

57. In relation to the First and Third Claimants, a reference period longer than a month would on the face of it have resulted in higher furlough payments.

58. However, in respect of the Second and Fourth Claimants, I find that neither discharged their burden of proof to show that had the correct calculation period been used that the hours used would have been different and therefore any unlawful deduction from wages claim or breach of contract claim cannot succeed on this point.

59. However, it is clear that no such claim is made on the face of the ET 1. Even on a generous interpretation of the ET 1, there is no claim that incorrect reference periods were used which resulted in incorrect furlough payments.

S.38 Award Employment Act 2002

60. Having found that the Claimants have succeeded in claims listed in Schedule 5 of the Employment Act 2002 and having further found that they were not provided with a statement of terms and conditions, I am required to consider an award under s.38 Employment Act 2002. The Respondent was on notice of this point. The Respondent accepted that an award under s.38 would flow from a successful claim in this case but urged that I award two weeks rather than four weeks of pay.

61. I would note that even if the Claimants had been supplied with the copies of the terms and conditions that were in the bundle (which they were not), these documents were defective as to the Claimants correct start date. This was a small employer with around 50 employees. I consider that an award of two weeks pay is appropriate in relation to each Claimant.

Calculations

62. Therefore taking each Claimant in turn, I have performed a number of calculations. I have used where possible figures given in each of the

Claimant's witness statements. In respect of the claims in which the Claimants were successful, the Respondent has not sought to dispute the figures contained within the Claimants witness statement. Figures in respect of the unsuccessful wages claim were disputed by the Respondent.

63. Where the holiday pay figures are broken down, the second figure is for the most recent year prior to the dismissal and the first figure is for the year prior to that.

64. First Claimant

    a. Holiday Pay: I accept the calculations set out at para 13 of the Claimant's witness statement. I consider that this may well undervalue the Claimant's claim, however it is not for me to run the Claimant's case for her. I therefore award the sum of **£2101.77.**
    b. NMW: The calculations are agreed between the parties. The Claimant was owed £452.79 less £50.25 received, which totals **£402.54.**
    c. S.38 Award Two Weeks gross pay 7.70 (pay) x 28 (hours) x 2 = **£431.20**

65. Second Claimant
    a. Holiday Pay: 8.20 x 20 = 164 x 5.6 = £918.14
    b. Holiday pay: 31 x 5.6. X 8.20 less 20% = 1047.33 totalling **£1965.77**
    c. S.38 Award: Two weeks gross pay £8.20 (pay) x 31 (hours) x 2 = **£508.40**

66. Third Claimant
    a. Holiday Pay: 7.70 x 23.5 x 5.6 divided by two (half year to Dec) = £506.66
    b. Holiday Pay to payrise (2 months):= £168.88
    c. Holiday pay after payrise 8.72 x 23.5 x 5.6 divided by 12 multiplied by nine = 860.66 minus £149.04 received = £711.62 Totalling **£1387.15**
    d. NMW: 54.25 x 0.51 = £27.67
    e. S.38 Award: Two weeks gross pay £8.72(pay) x 23.5 (hours) x 2 = £409.84

67. Fourth Claimant
    a. Holiday Pay: 7.25 x 18.25 = 134 x 5.6 = £752.10 x 2 = £1502.20
    b. Holiday Pay: 8.20 x 18.25 = £149.65 x 5.6 = 8.38 less 20% received equals £740.36 Totalling **£2242.56**
    c. S.38 Award: 8.20 (pay) x 18.25 (hours) = £149.65 x 2 = **£299.30.**

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Employment Judge Anderson

Date 6th June 2022

REASONS SENT TO THE PARTIES ON

8 June 2022

FOR THE TRIBUNAL OFFICE