EMPLOYMENT TRIBUNALS

Claimant: Mr S Reveley

Respondent: Hull Culture & Leisure Limited

Heard at: **Leeds** **On: 21 June 2022**

Before: **Employment Judge Jaleel**

Representation
Claimant: **Mr S Healey (Counsel)**
Respondent: **Mr S Profitt (Counsel)**

RESERVED JUDGMENT

1. The claimant's claim that the respondent made an unauthorised deduction from the claimant's wages pursuant to section 13(1) of the Employment Rights Act in respect of a deduction on 31 August 2021 is well-founded. The claimant was entitled to be paid one and a half times his basic rate for hours worked. The respondent is ordered to pay the claimant the net sum of £44.73.

REASONS

Introduction

1. This was a complaint of unauthorised deduction from wages brought by the claimant against his employer

2. I had before me an agreed file of documents prepared by the respondent.

3. Having identified the issues, I took some time to privately read into the witness statements exchanged between the parties and relevant documentation. I heard evidence from the claimant's witnesses:

   3.1 Shaun Reveley (claimant)
   3.2 Karen Daniels (UNITE Senior Steward and Health and Safety Representative)

4. I then heard from the respondent's witnesses:

   4.1 Jayne Karlsen (Strategic Advisor HR & Service support for the respondent)
   4.2 Simon Green (Cultural Services Director for the respondent)

Issues

5. The claimant's sole complaint is of unauthorised deduction from wages in breach of s13 Employment Rights Act 1996.

6. The claimant worked on Tuesday 31 August 2021 following the bank holiday in August. It is the claimant's contention that he should have received enhanced pay of one and a half times his basic pay. The respondent said that the claimant was only entitled to basic pay, but agreed the amount claimed in the event that he was entitled to time and a half.

7. The issues to be determined are as follows:

   What were the wages properly payable to the claimant for 31 August 2021? In particular:

   7.1 What was the contractual term about pay for working an additional statutory holiday prior to 2021?

   7.2 Was there an effective variation of the contract expressly or impliedly that entitled him to be paid time and a half?

   7.3 There is no dispute that if the claimant was contractually entitled to be paid time and a half, there was an unauthorised deduction of £44.73.

Facts

8. The claimant is employed by the respondent as a Heritage Officer. He is also a member of Unite (Trade Union).

9. The claimant's role involves supervising staff on museum sites, opening and securing sites, working on events, supervising contractors on site and working on building refurbishment projects.

10. The claimant's employment contract states the following in regard to the terms and conditions of employment and holiday entitlement:

TERMS AND CONDITIONS OF EMPLOYMENT

10. Your terms and conditions of employment are made up of national collective agreements negotiated by the National Joint Council for Local Government Services (these are set out in the "National Agreement on Pay and Conditions of Service" which is known as the "Green Book").

11. These national collective agreements are supplemented or amended by local agreements reached with the trade unions recognised by the Company, and by the Company's decisions, as amended from time to time.

11. Clause 36 sets out the contractual position on statutory/ extra statutory and concessionary days:

STATUTORY/EXTRA STATUTORY AND CONCESSIONARY DAY HOLIDAYS

36. In addition to your annual leave entitlement there are 8 statutory and 2 extra statutory holidays which are normally taken on the Tuesdays immediately following the spring and late summer public holidays, unless these days are changed in agreement with the appropriate trade unions. There is also a local agreement which allows for a concessionary day's leave at Christmas on a day to be fixed each year.

If you are a part-time employee you will have equal entitlement to public holidays, extra statutory holidays and the Company's concessionary day at Christmas on a pro rata basis to the number of hours you are contracted to work per week regardless of whether you would normally work on these days or not (using the same formula for calculating annual leave for part time employees).

12. Paragraph 7.4 of the Green Book states:

Extra Statutory Holidays

Employees shall have an entitlement to two extra statutory days holiday, the timing of which shall be determined by the authority in consultation with the recognised Trade Unions with a view to reaching agreement or added to annual leave by local agreement.

13. Clause 2.6 (a) of the Green Book states that employees are entitled to double time for working Sundays, Public Holidays and Extra Statutory holidays and they are entitled to time off in lieu.

14. Clause 2.6 (d) states that employees required to work on an extra statutory holiday will also be entitled to time off with pay.

15. The provisions in the Green Book, as modified by any relevant local agreement, are incorporated into staff contracts, and so they have binding contractual effect.

16. A collective agreement was agreed between the Respondent and Trade Unions signed 21 March 2014. The agreement replaced paragraphs 2.6d and 2.7 of part 3 of the Green book. It applies to employees of the Council with the exception of those staff employed in schools. The agreement states:

2.1 Public Holiday

Employees in grades up to and including spine point 30 who are required as part of their normal working pattern to work on a public holiday are entitled to receive enhancements in addition to normal pay as follows:

Half of their normal pay for hours on that day and time off in lieu

17. The respondent's annual leave policy stated (prior to consultation):

"This policy applies to all staff employed by the Company. The policy is not intended to form part of the contract of employment of any individual employee"

'…In addition to the 8 statutory and general national holidays, employees are entitled to 2 extra days. The timing of these extra statutory holidays is to be determined by the Company after consultation.

It is agreed that the additional days will be taken at the Late Spring and Late Summer public holidays, on the Tuesdays and that this will apply until either the Company or the trade unions propose a change.

In addition, a concessionary day's holiday to be taken during the Christmas period each year will be fixed by the Company after consultation…'

18. The annual leave policy does not say anything in respect of how the extra statutory holidays will be paid.

19. Since 2014 the claimant has been paid time and a half for working a public holiday. As part of his annual leave the claimant was allowed 2 extra statutory holidays which were taken on the Tuesday after the spring and summer bank holidays in accordance with his contract of employment. The claimant was also allowed a concessionary day which was taken at Christmas. Since May 2014, if the claimant worked a public holiday or one of the extra statutory holidays or the concessionary day, he would be paid time and a half. He would also get time off in lieu.

20. The claimant is entitled under the Green Book and collective agreement to the extra days. Whilst the Green Book states that he would be entitled to double pay on a bank holiday, the collective agreement in 2014 changed this to time and a half

and time off in lieu. The Claimant's employment contract does not set out how the additional days are to be paid. However, in practice the additional days have been treated as bank holidays and he has since 2014 been paid at time and a half.

21. In 2020 issues arose because large numbers of the respondent's staff had annual leave outstanding, either because they had been furloughed during the pandemic, or because they had remained at work but unable to take leave because of business needs. In December 2020, the respondent sought to address that and proposed to change the annual leave policy.

22. The policy in place at that time did not allow for a carry forward of more than 5 days from one leave year to the next so it was felt that this element needed to be reviewed to ease the pressure on the business.

23. The respondent also elected to review the whole policy and determine if any other elements needed to be updated or changed.

24. Ms Daniels, the UNITE workplace representative was involved in the negotiations. The claimant did not have any direct communication from the respondent about the policy until it was due to be implemented.

25. The process involved consulting about changes to the policy; this included establishing a Policy Task and Finish group to negotiate and agree changes to the policy.

26. When there were any proposed amendments to existing policies, procedures, or guidance, they were brought to the Policy Task and Finish meetings for consultation with the Trade Unions. They were for "consultation", the aim was to agree where possible, but they were not strictly for negotiation.

27. Where there was a failure to agree a policy, HR add the word "accepted" to the Policy Task and Finish Schedule of work sheet, rather than use the word "agreed".

28. On 11 December 2020, Ms Daniels received an email from the Respondent's HR Manager, Ms Karlsen, stating that they intended to put an item on the agenda at the next Information, Consultation and Negotiation Group meeting regarding proposed changes to the annual leave policy. A copy of the draft proposals for the revision of the policy was provided with this email and the trade unions were invited to begin consultation with their members on the proposals. They consulted and negotiated the changes with the recognised Trade Unions, UNITE, UNISON and GMB.

29. The change that the respondent was seeking that is relevant to this claim was:

"...These two additional extra statutory days along with the concessionary day (previously taken during the Christmas period) will be added to the employee annual leave entitlement to be taken at any time during the leave year subject to the normal provisions for approving leave."

30. On 28 January 2021, a meeting was held remotely via Microsoft teams. Item 10 of the agenda was the annual leave policy. At this point, Ms Daniels had not yet provided feedback to the Respondent. A deadline until 5 February 2021 was agreed to provide the feedback.

31. A meeting was re-arranged for 9 February 2021 to discuss the policy.

32. Ms Daniels consulted the members following the meetings and also sent comments on the annual leave policy on 5 February 2021. The comments also included feedback by the other Unions. In relation to the statutory and concessionary days, the issue in contention, comments were provided confirming that many members wished to retain their concessionary day due to some departments having limited Christmas closures. A question was also posed as to how the respondent would amalgamate the time as staff had time off in lieu and paid time and a half during this period.

33. On 6 February 2021, Ms Daniels sent a further email to Ms Karlsen requesting that the extra statutory days should be honoured in the policy.

34. On 9 February 2021, a consultation meeting was held, and parties discussed the feedback on the annual leave policy. In relation to the extra statutory days and the concessionary day, the respondent stated that they would not be removing these but adding these 3 days to the annual leave entitlement. A redraft of the policy was provided to the trade unions along with a detailed table of responses to their feedback. This was provided in advance of the meeting that was to be held on that day

35. On 17 February 2021, Ms Karlsen sent an email to the trade unions providing a detailed table of comments by way of response to the discussion held on 9th February 2021 along with a redraft of the policy based on that feedback. The trade unions were asked that any comments and feedback on the redraft were provided by close of business on 24th February 2021 to allow the management team time to consider these before any further discussion took place. It was also pointed out in that email that if an agreement was reached on a final document, one month's notice needed to be provided to employees. This meant that to effect any agreed changes for the start of the new leave year, notice would need to be given by the beginning of March.

36. On 19 February 2021, Ms Daniels asked for an extension until close of business on 25 February 2021, as she was unable to provide comments due to time off and other commitments.

37. Ms Karlsen extended the deadline to 9am on 25 February 2021. As had been advised previously she said that she remained committed to implementing the policy before the next leave year and a month's notice needed to be issued to staff members before the changes were implemented.

38. Ms Daniels provided further comments on the proposal on 24 February 2021. She stated that she was happy with the majority of the amendments to the policy; she raised some issues regarding medical certificates and the wording about the

Christmas shutdown. Ms Karlsen provided her comments to the queries on 24 February 2022 with some changes to the wording of the policy.

39. Ms Daniels did not agree to the final proposal. However, on 1 March 2021, Ms Karlsen confirmed that the consultation period had come to an end and notice letters would be issued to all staff informing them of changes.

40. I accept that Ms Daniels did not realise at this time that adding the additional days to the annual leave entitlement may result in the removal of the enhanced payments for the statutory and concessionary leave days. In her witness statement she states that this was not something that had been specifically discussed between herself and Ms Karlsen. However, during examination-in-chief Ms Daniels stated that she may have in fact raise a query as to how the rate of pay would be calculated in respect of the concessionary day on 5 February 2021 as set out by way of comments on the proposal document:

"…If the concessionary day is removed and added to annual leave, will services be open on that day over Christmas?
How will this be calculated given that some staff currently work 11-hour days on those Tuesdays, would it be leave at time and a half based on those working hours?.."

41. Ms Daniels said that she did not remember highlighting this issue. In cross-examination Ms Daniels accepted that it might not have been her who had made the comment:

"…don't know but likely to be me…"

42. However, it was certainly enquired of as per the queries raised. A response had not been forthcoming in respect of this from Ms Karlsen.

43. In her evidence Ms Daniels agreed that changes were being made to the annual leave policy and not to the contract of employment. She also stated that the annual leave policy document applied to all staff members and did not form part of their contract of employment.

44. The annual leave policy does not contain the additional time and a half rate of pay that was previously being applied to the Tuesday working day after the Spring and Summer bank holidays. The pay enhancement for working on bank holidays was contained in the Green Book as amended by the collective agreement to time and a half. Ms Daniels accepted that the collective agreement dated 2014 had not been changed.

45. The new annual leave policy was accepted and ratified by the Company's Board on 4th March 2021 and a follow up email with a formal letter attached confirming the consultation process and outcome was sent to the trade unions on 10th March 2021.

46. The claimant received a letter dated 4 March 2021 which stated the formal changes to the annual leave policy. He was aware that the respondent had consolidated the

annual leave entitlement so that the statutory days taken after the May and August Bank holidays as well as the concessionary day taken at Christmas were added to the leave entitlement. He did not raise any concerns at this stage as he did not anticipate loss of his pay enhancements.

47. On 10 March 2021, Ms Karlsen sent Ms Daniels a letter confirming that the respondent's Board accepted the final proposals to the policy, and these would now be implemented with effect from 5 April 2021.

48. On 15 March 2021, Ms Daniels exchanged emails with Ms Karlsen. Ms Daniels queried why the annual leave policy stated it was not a contractual document, when annual leave is contractual. Ms Karlsen stated that annual leave entitlement is contractual, but the policy was not. Ms Daniels also queried whether the reduction in wages for staff who got enhancements for public holidays and statutory days was a variation of their contracts.

49. Ms Karlsen's position was that the contracts did not specifically mention payments for bank holidays or extra statutory days but there was a clause that stated that terms and conditions of employment are made up of national and local agreements; the local agreement that determined the payment for designated bank holidays had not been changed. Ms Karlsen, however, also accepted that the additional statutory days were treated and paid as bank holidays.

50. Ms Daniels in her email dated 18th March 2021 stated that she believed that there was a problem as both changes could only be made via agreement with the trade unions. She also stated in this email that at the final consultation she had clarified that Unite's position was that it did not agree to the changes, which was acknowledged by Ms Karlsen, and she was informed that it was deemed 'accepted' and not 'agreed'.

51. Ms Karlsen responded via email on 18th March 2021 to confirm that the respondent was not changing the payments to be made under the local agreement and that this remained unchanged. Ms Karlsen confirmed that the respondent had reached a point where it was felt that consultation had reached an end and through discussion with the trade union over how that was communicated to employees that it was accepted that changes to the policy would be made as per the final version. She pointed out that whilst consultation always has the aim to achieve agreement, however, that was not ultimately necessary to effect a change. In terms of the contract clauses, she stated:

"…it is my view that these merely set out what we give as and class as Statutory/Extra Statutory/Concessionary days. In relation to the current clause this does not even specify them. By consulting to change the policy we have therefore changed these days, hence the amendment I will make for contracts issued from 05 April 2021 onwards to make it clearer".

52. On 26th March 2021 the GMB Organiser sent Ms Karlsen an email stating that the new policy had not been agreed with the trade unions and it adversely affected staff work rotas and bank holidays. A ballot would now take place with their

members, and it was requested that the status quo was maintained until they had the opportunity to meet and discuss this with the respondent.

53. Ms Karlsen responded on 29th March 2021 via email providing evidence of the consultation, confirming the process that had been undertaken and confirming that their request could not be acceded to, and that appropriate notice had been issued to employees to implement the new policy, which would take effect from 5 April 2022.

54. On 1 April 2021, Ms Daniels raised a collective grievance. This was raised because the policy had removed the financial benefits attached to the two statutory days after the May and August bank holidays. Ms Daniels stated that the changes have not been made in agreement with the Trade Unions.

55. On 8 April 2021, Mr Upfold, Director, responded to the collective grievance. He stated that consultations had been carried out with the Trade Unions and the issue with the benefits had not been raised before. This summarised as per the ET3 document as follows:

The consultation on the new policy began in January 2021 and subsequently a number of consultation meetings took place with the recognised trade union representatives.

The company believes that the consultation held was meaningful and constructive with all concerned acting in good faith.

The suggestions that were put forward by the TUs were properly and appropriately considered. Some of these were accepted and some were not.

Reasons were provided and recorded on these decisions and provided to you in the tables that outlined the consultation discussions following each meeting.

At no point was this particular issue flagged with the management representatives.

The advantages to your members of the enhanced carry forward of leave (from five days to ten days maximum) is significant.

The company is not actually legally obliged to give the extra three concessionary days, but the HCL Board has reasonably agreed to continue to do so by agreeing to the changes arrived at. Subsequently, as the consultation had ended, one month's notice to all staff was issued to implement the changes and we received not one complaint from any individual during this period.

The company's collective grievance policy states that "A collective grievance refers to circumstances where the Company is consulting with trade unions with the aim of reaching an agreement, but it is not obliged to agree."

56. Mr Upfold concluded that:

> ***"as the consultation has ended and the contracts have already been varied, there is now no means for a collective grievance to be either raised or heard on this individual aspect by reopening this one element of the overall policy and so the matter is closed…"***

57. The collective grievance was dismissed and there was no right to appeal the outcome.

58. Further emails were exchanged between parties from 19 April 2021 onwards.

59. On 30 April 2021 the GMB also raised a collective grievance.

60. The Trade Union attempted to open dialogue regarding its concerns pertaining to the collective grievance(s) that had been issued. The respondent maintained that it had not made any changes with regards to payments for staff working on bank holidays and it had carried out a proper full and meaning full consultation.

61. In its letter dated 12 May 2021 the respondent provided a detailed response in respect of its position. It again stated that the company was not negotiating a collective agreement and therefore this was not a matter covered under the collective grievance dispute procedure. In conclusion it was stated:

> ***1. The Company's position is this is not an appropriate matter covered under the Company's Collective Dispute Procedure (nor the Collective Grievance Policy for that matter)***
>
> ***2. Due process was followed to implement these changes, as required in our Statement of Main terms.***
>
> ***3. This letter constitutes the Company's final and formal position i.e. that the matter is closed and that any further responses, if any, will now only be for the purposes of responding to any matter requiring a legal reply…"***

62. The claimant worked the Tuesday after the May bank holiday and realised that he was only paid the basic rate of pay. He therefore raised his concerns with Ms Daniels. He then worked the Tuesday after the August bank holiday and again was paid the basic rate of pay.

The Law

Unauthorised deduction from wages

63. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. If the wages paid on any occasion are less than the wages properly payable, there is a deduction under s 13(3). Determining whether wages claimed are 'properly

payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*. In determining whether wages are properly payable, the source of such an entitlement can either be an express or implied term of contract

64. Naturally, the work must be completed for the wages to fall due and become properly payable. In *Hussman Manufacturing Ltd v Weir [1998] IRLR 288 EAT*, Mr Weir brought a claim alleging unlawful deduction when his shifts were altered lawfully (though under protest), which led to a reduction in his earnings because he was moved to day shifts which did not carry the premium he used to earn. The EAT held that the fact that a lawful change or circumstance might have a negative impact on the economic situation of the employee affected does not mean that there has been an unlawful deduction from wages. The wages 'properly payable' to Mr Weir on his new shift pattern were the same as the others on his pattern; he was not entitled to keep his shift premium once he was not working shifts which attracted a premium. In the alternative, where a shift alteration is unlawful (such as through a breach of contract), then an employee who offers services in line with their contract but is not allowed to work and is not paid will suffer an unlawful deduction from wages (*Beveridge v KLM UK Ltd [2000] IRLR 765)*. Tribunals are able to consider that a breach of contract claim which results in reduced pay can be treated as if a claim for unlawful deduction from wages (*Capek v Lincolnshire County Council [2000] IRLR 590*).

Interpretation of contractual terms

65. In *Arnold v Britton [2015] UKSC 36*, Lord Neuberger outlined how a court or tribunal should approach disputes about the meaning of contractual terms. The correct way to do so is to interpret the intention of the parties as to the meaning of the terms by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"* .

66. To assist with this exercise, Lord Neuberger reviewed existing authorities and distilled them into six relevant factors to be considered in order to determine how a contract has been constructed and how it should be interpreted. Those factors are [para 15]:

1. the natural and ordinary meaning of the clause;
2. any other relevant provision of the contract (Lord Neuberger was considering a lease in *Arnold* but the same principles apply);
3. the overall purpose of the clause and the contract;
4. the facts and circumstances known or assumed by the parties at the time that the document was executed; and

5. commercial common sense; but
6. disregarding subjective evidence of any party's intentions.

67. Consequently, the interpretation is an objective exercise by design. Lord Neuberger emphasises the importance of the ordinary language of the provision being considered, which should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].

Variation of contractual terms

68. Terms agreed between an employer and a trade union negotiating on behalf of the workforce may become binding contractual terms between the employer and an employee if they are apt to do so *(Robertson v British Gas Corporation [1983] ICR 351)*. Incorporation of these terms into the employment contract may be implied or express. In *National Coal Board v Galley [1958] 1 WLR 16*, the employment contract contained a clause which read that wages would be:

"regulated by such national agreement and the county wages agreement for the time being in force and that this contract of service shall be subject to those agreements and to any other agreements relating to or in connection with or subsidiary to the wages agreement and to statutory provisions for the time being in force affecting the same".

69. It was held that Mr Galley was consequently bound by provisions agreed between the National Coal Board and the union relating to pay and working patterns.

70. Variation to contractual terms may also happen outside a collective bargaining process with a union. An employer may reserve for itself the right to vary terms in a handbook unilaterally to reflect the changing needs of the employer's business. This may include the introduction of a new pay policy, imposed without the consent of the employees (which is what happened successfully in *Bateman*). Plainly, employees should be aware of a policy if they are to be expected to be bound by it (*W Brooks & Son v Skinner [1984] IRLR 379)*.

71. Variation to contractual terms may also happen by agreement. Such an agreement may be oral and the variation never committed to writing. The question is whether the tribunal is satisfied on the evidence available that an oral agreement served to vary the contract of employment (*Simmonds v Dowty Deals Ltd [1978] IRLR 211)*. Naturally, the best form of evidence of a variation by agreement is through writing. No agreement will be found where consent is obtained under duress, but, even where the alternative to acceptance is to be dismissed, it is unlikely that the agreement will be voided due to duress; working under protest and suing for breach of contract when dismissed is an alternative to consenting in these circumstances (*Hepworth Heating Ltd v Akers and ors [2003] UKEAT)*.

72. Any variation of contract requires the exchange of consideration to be valid. Courts and tribunals have been able to find consideration for variations quite quickly, whether that is in relation to the settling of a pay claim where a pay rise is awarded (*Lee and ors v GC Plessey Telecommunications [1993] IRLR 383)*, or where the employer enjoys greater staff retention where guaranteed bonuses are promised (*Attrill and ors v Dresdner Kleinwort Ltd and anor [2013] EWCA Civ 394)*. Here terms are said to have been imposed, working under protest will not be taken to mean that there is agreement by conduct (*Hepworth Heating Ltd v Akers and ors [2003] UKEAT)*.

73. Each contract variation should be considered as a standalone event, and a unilateral reduction to working hours requires a contractual variation if the employer is not already permitted to act in this way. In *International Packaging Corporation (UK) Ltd v Balfour [2003] IRLR 11*, Lord Johnstone said (para 10):

"The fact that in the past there may have been agreements to vary the contract does not in itself create a power to enable the employer to do that unilaterally. Reduction in working hours is plainly a variation of a contract of employment and, unless expressly catered for within that contract, or allowed by implication again within the terms of the contract, any actual deduction of wages, even if related to the hours worked, is not authorised by the statute and can only be achieved by agreement."

Conclusions

Application of the law to the facts

74. Applying these principles to the facts as found, I reach the following conclusions.

Issue 1 – what was the original contractual position?

75. I find for the following reasons that the claimant was prior to any purported variation contractually entitled to be paid time and a half for working one of the "extra statutory" holidays:

76. The claimant's employment contract confirms that he is entitled to 3 additional statutory holidays which are normally take on the Tuesday after the bank holidays as well as the concessionary day at Christmas. This document does not set out how the additional statutory days are to be paid. Clause 36 of the claimant's contract of employment clearly states that in addition to his annual leave entitlement there are 8 statutory and 2 extra statutory holidays which are taken on the Tuesdays immediately after the spring and summer bank holidays

77. The Green Book forms part of the claimant's terms and conditions of employment. It deals with the payment terms and enhancements that apply to those that work additional hours, on public holidays as well as the extra statutory holidays. Clause 2.6 (a) made it clear that those working on extra statutory holidays would be entitled to double time and 2.6(d) makes it clear that in addition to the aforementioned they would also be an entitlement to time off.

78. The local collective agreement was reached between parties signed March 2014. It was intended to replace clause 2.6 (d) of the green book and is headed public holidays; it stated that employees working on a public holiday would be entitled to time and a half as well as time off in lieu. It also forms part of the claimant's terms and conditions of employment.

79. The annual leave policy mirroring the claimant's contract of employment re public and extra statutory holiday leave does not say anything about how the extra statutory holidays will be paid. This policy is expressly non-contractual and does not form part of the claimant's contract of employment.

80. I found that in practice the additional days have been treated as bank holidays and the claimant has since 2014 been paid at the rate of time and a half for these days. The claimant's contract incorporates the Green Book and local collective agreement dated 2014. The Green Book states that an employee is entitled double time for working on public holidays and extra statutory holidays. This was subsequently changed by local collective agreement which states that a time and a half rate was payable for employees working on public holidays.

81. Since May 2014, if the claimant worked a public holiday or one of the extra statutory holidays or the concessionary day, he would be paid time and a half. He would also get time off in lieu. The timing of the additional statutory days also fell immediately after the respective bank holidays.

82. The intention of the parties to treat the additional statutory days as public days with enhanced payment is apparent. The Green Book has always classified the additional statutory days as akin to public days; clause 2.6(a) and 2.6(d) is clear on this point. Prior to the variation in 2014 the additional days enjoyed an enhancement equal to that of working on public holidays.

83. Further, the agreed variation to pay by way of the local collective agreement in 2014 (to time and a half) was immediately adopted in respect of the additional statutory holidays which again confirms that the intention of parties has always been to afford the additional statutory holidays a special status akin to public holidays. If this was not the case the claimant would not have received enhanced pay when when working on an additional statutory day (which mirrored that of working on a public holiday). The timing of the dates as set out in the terms and conditions also supports this point; from an administrative perspective it allows the respondent to identify the additional statutory day and make payment at the enhanced rate without difficulty. If the additional statutory days were incorporated into the claimant's annual leave entitlement (to be taken at any time) it would naturally be difficult to distinguish from a payment perspective.

84. The extra days have always been treated as public holidays and paid as such. I found that the respondent was contractually bound by provisions agreed relating to pay and working patterns in this regard. The rate of pay and classification of the additional days as bank holidays had been incorporated into the employment contract. As part of his annual leave the claimant was allowed 2 extra statutory holidays which were taken on the Tuesday after the spring and summer bank holidays. The claimant was also allowed a concessionary day which was taken at

Christmas. Since May 2014 the claimant has been paid time and a half for working a public holiday as well as the Tuesday immediately after the spring/summer bank holidays (and the concessionary day). Clause 2.6 (a) of the green book confirmed a pay enhancement of double pay for working on both public days and extra statutory holidays. The additional statutory days have always been treated as working on a public day and were incorporated into the claimant's terms and conditions. I therefore found that the entitlement of the 2 additional days and concessionary days were treated and paid for as if they were bank holidays. The local collective agreement 2014 is clear that an enhancement is payable on bank holidays. Importantly, had the claimant worked on an additional statutory day, i.e., the Tuesday after the spring and summer bank holiday he would be entitled to one and half times the basic pay rate.

85. I am satisfied that the terms of pay at an enhanced rate for three days' additional statutory days are incorporated.

Issue 2 – Was there an effective variation of the contract expressly or impliedly that entitled him to be paid time and a half?

86. On 11 December 2020, Ms Karlsen proposed changes to the annual leave policy. This policy as repeated above was expressly non-contractual. A copy of the draft proposals for the revision of the policy was provided with this email and the trade unions were invited to begin consultation with their members on the proposals. They consulted and negotiated the changes with the recognised Trade Unions, UNITE, UNISON and GMB.

87. The change that the respondent was seeking that is relevant to this claim was:

"...These two additional extra statutory days along with the concessionary day (previously taken during the Christmas period) will be added to the employee annual leave entitlement to be taken at any time during the leave year subject to the normal provisions for approving leave."

88. The consultation lasted more than two months following which the respondent sought the Board's approval (which was duly provided).

89. It is the respondent's position that a variation to the contractual terms has not taken place; the local agreement that determined the rate of pay for designated bank holidays has not been varied i.e. the local collective agreement 2014 stated that an enhancement of time and a half (and time of in lieu) would be paid for working on bank holidays. It is argued that this remains the case. A variation was made to the annual leave policy which is non-contractual, and the Trade Union failed to appreciate the knock-on effect this had with regards to pay. Parties do not dispute that consultation regarding the variation to the annual leave policy was in good faith

90. It is fundamental that if the respondent's position is accepted, following the change to the annual leave policy in March 2021, if the claimant works the Tuesday after the spring or August bank holiday, he would now be worse off financially. He would, however, continue to receive an enhancement for working on a bank holiday.

91. I found that by making changes to clause 5 of the annual leave policy and consequently making payment of basic pay the respondent has sought to vary the claimant's contractual entitlement i.e. the classification of and pay for the additional statutory holidays.

92. The additional statutory days have always been treated as working on a public day and was incorporated into the claimant's terms and conditions (as set out above in issue 1). The claimant is entitled to time and a half for working on a public holiday as well as an extra statutory day.

93. Whilst I accept that the natural meaning of the clauses referred to allow for the parties to change the timing of the additional statutory holidays, I do not find that the meaning of the same would allow the respondent to change the classification and/or rate of pay of such days without express or implied agreement to the contractual entitlement.

94. I therefore reject the respondent's argument that there was no change to the contractual provision. It is contended that the change to the annual leave policy is akin to changing the mechanism as to how annual leave is taken. This argument is centred on the premise that the green book and local collective agreement have not been varied and pay for working on a bank holiday remains unchanged. This is incorrect as the respondent has sought to vary the entitlement to enhanced pay. As I have found, since 2014 the claimant is contractually entitled to 1.5 times his basic rate in respect of working on a bank holiday as well as the 3 additional days; these additional days were specifically treated and classified as additional bank holidays since at least 2014.

95. It is therefore necessary to consider if there has been a valid variation to the contractual entitlement; the classification of and pay rate of the additional statutory holidays has been altered and any change in this regard requires acceptance be that by way of agreement, expressly or implied.

96. It follows that there cannot have been an express variation to the entitlement to in respect of pay for the 3 additional days. Whilst there was reference to pay within the consultation period neither party considered nor agreed to a valid variation in this respect. The parties simply did not turn their mind to the rate of pay of the additional 3 statutory days during consultation and there is no evidence to suggest that either party properly considered this issue.

97. I then turn to whether or not there was an implied variation of contract in the circumstances.

98. The claimant was not aware of changes to his pay in respect of the 3 additional statutory/concessionary days. I found that the claimant raised the issue of receiving basic pay with his line manager via a grievance and escalated the matter following further non-payment of the enhancement having worked on the Tuesday immediately after the bank holiday. As such it is contended that the Tribunal cannot conclude that the claimant has accepted the variation impliedly.

99. I therefore find that the respondent had made an unlawful deduction from the claimant's wages pursuant to section 13(1) of the Employment Rights Act in respect of a deduction on 31 August 2021 as he was entitled to be paid an enhanced rate of a time and a half of his basic rate for working on an additional statutory day.

100. The respondent does not challenge the claimant's schedule of loss.

101. The respondent is therefore ordered to pay the claimant the net sum of £44.73.

Employment Judge Jaleel

Date 07 September 2022