



EMPLOYMENT TRIBUNALS

Claimant: Ms D Lukasik & Others

Respondents: (1) Norwegian Air Resources UK Ltd
(2) OSM Aviation UK Limited
(3) The Secretary of State for Business, Energy & Industrial Strategy

Heard at: East London Hearing Centre

On: 28 June 2022

Before: Employment Judge Thackray

Representation

Claimant: Ms Wheeler of Counsel

Respondents: Did not attend and were not represented

RESERVED JUDGMENT

1. The First Respondent was the employer of the Claimants. All claims against the Second Respondent were withdrawn.
2. The Third Respondent is the relevant Secretary of State with responsibility for the payment of redundancy payments and other guaranteed payments out of the National Insurance Fund following the insolvency of the First Respondent.
3. The claim on behalf of Mr C Archibold was withdrawn. Claims on behalf of 55 employees remained.
4. By reason of explicit written variation of contract, the Claimants were entitled on termination to the payment of the accrued but unused holiday pay from the leave year ending on the 31st December 2020 to be made in 2021 by the First Respondent.
5. To the extent that the Claimants did not receive such payments the Claimants experienced unauthorised deductions from their pay.

6. **The First Respondent having become insolvent, by operation of statute, payments in respect of outstanding holiday entitlement become the responsibility of the Third Respondent.**
7. **The payments made to the Claimants by the Third Respondent were less than they should have been paid, in that they did not include payment in full for accrued but unused holiday pay for annual leave in the 1 January to 31st December 2020 leave year.**
8. **The Claimants are entitled to be paid by the Third Respondent an amount equal to the full amount of their unused 2020 holiday entitlement (i.e. the full amount less any holiday actually taken in the first quarter of 2020) subject to the statutory weekly wages limit and six week cap for holiday payments referred to in these reasons.**
9. **If agreement cannot be reached as to the amounts due to the Claimants, the parties may apply to the Tribunal for a remedy hearing.**

REASONS

Introduction

1. These are the reasons for the reserved judgment of the Tribunal following the hearing of this matter on 28 June 2022.
2. This is a claim for unlawful deductions from wages brought by Ms Dorota Lukasik and 55 other short haul cabin crew based at Gatwick Airport ('the Claimants') against their employers, Norwegian Air Resources UK Ltd ('the First Respondent') and the Secretary of State for Business, Energy and Industrial Strategy, being responsible for the payment of redundancy payments and other guaranteed payments on the insolvency of the First Respondent ('the Third Respondent'). The claims against the Second Respondent were withdrawn, the First Respondent having taken over ownership of the Second Respondent.
3. The claims arise in relation to the entitlement to holiday leave and entitlement to holiday pay in the leave year January to December 2020 and the month January 2021 in which the First Respondent became insolvent. In March 2020, as a result of the Covid pandemic the airline ceased flying and staff were put on furlough. Negotiations took place during 2020 with regard to proposed redundancies and how holiday entitlement should be dealt with. Proposed redundancy was postponed and arrangements were made for holiday pay to be brought up to date. The First Respondent, however, then became insolvent on 14 January 2021 and the Claimants were made redundant on 29 January 2021. The Third Respondent then became responsible for redundancy and other guaranteed payments.

Procedure and evidence

4. The hearing was conducted remotely. I heard evidence from the one of the Claimants, Ms J Foldessy-Kovats and from Ms C Simpson, union representative, who had been involved in relevant negotiations. The Claimants were represented by Counsel. The witnesses adopted their statements as evidence in chief. I was also provided with an agreed, paginated bundle of documents running to 173 pages ('the Bundle').

5. The Respondents did not attend. The Third Respondent indicated in writing that, having provided information appended to the ET3, it did not intend to make further representations nor to attend the hearing. The First Respondent was not involved in the proceedings after the Third Respondent had taken responsibility for making payments arising from the First Respondent's insolvency.

6. A copy of this decision and reasons shall be sent to each of the parties in the above claims, per Rule 36(2) of the Procedure Rules and shall be binding upon them (subject to the provisions of Rule 36(3) of the Procedure Rules).

Claims and issues

7. The Claimants sought the following declarations and orders:

7.1. A declaration that the Claimants have been subjected to unauthorised deductions from their wages by the First Respondent.

7.2. A declaration that the Claimants were entitled on termination to the payment of the accrued but unused holiday pay from the leave year ending on the 31st December 2020 by the First Respondent.

7.3. An order for payment to the Claimant of the accrued but unused holiday pay from the leave year ending on the 31st December 2020 by the First Respondent.

7.4. A declaration that the payments made to the Claimants by the Third Respondent were less than they should have been paid, in that they did not include payment in full for accrued but unused holiday pay for annual leave which accrued in the leave year ending 31st December 2020.

7.5. A declaration of the amounts of payment for accrued but unused holiday pay from the leave year ending 31st December 2020 owed to each Claimant which it finds that the Third Respondent ought to make.

8. The Claimants argued that there were two alternative routes to success on their claims; contractual and under the Working Time Regulations as modified by the Coronavirus related amendments. In relation to contractual claims, it is argued that the existing contracts were explicitly amended in writing and with the consent of the claimants to allow the outstanding holiday from the year 2020 to be taken after the year end and for payments for untaken leave to be made after

the end of the relevant year. In the alternative the Claimants argue estoppel, that binding oral contractual promises evidenced in writing, allowed the carry over of the 2020 holiday and holiday pay entitlement.

9. The Third Respondent submitted an ET3 on 28 March 2022 and applied for an extension of time to do so on the basis that there had initially been service at an incorrect address causing delay and on the substantive ground that payments had already been made that satisfied the claims and that the claims should be withdrawn if the Claimants were satisfied with the payments. As noted above the Third Respondent indicated that it did not intend to submit further evidence or submissions nor to attend the hearing.

10. It was not clear when the Third Respondent had been properly served and the Claimants did not oppose the submission of the response by the Third Respondent. In the interests of justice, I allowed the Third Respondent's response.

Fact-finding

11. The claimants were short haul cabin crew working out of Gatwick Airport. The lead Claimant was a senior cabin crew member and compliance and performance supervisor and had been employed since 14 January 2013.

12. The Claimants were originally employed by the Second Respondent OSM Aviation UK Limited, owned in 50% shares by the First Respondent (the operating company for Norwegian Airlines in UK) and OSM Aviation Limited. In August 2020, by way of share transfer, the Second Respondent became a wholly owned subsidiary of the First Respondent.

13. In March 2020 flights were suspended and the Claimants were placed on furlough due to the Covid pandemic. I heard evidence that the Claimants were paid whilst on furlough, in accordance with the relevant regulations, the greater of either their average monthly pay or the pay received in the equivalent month from the previous year. Payments could, therefore, vary from month to month. The Claimants were usually paid a basic amount of pay and a variable amount of duty pay which could depend on whether they flew and how much.

14. Holiday entitlement was provided for in the contract of employment, on a leave year that ran from January to December. It was usually not possible for holiday to be carried over to the next year and staff were required to bid for holiday every quarter and to take their leave throughout the year. Ms Foldessy-Kovats in her statement and in oral evidence explained that generally holiday would be taken a week at a time, staff would bid for the holiday they wished to take and then dates would be confirmed; this process would be done on a quarterly basis. Staff would be told whether their bid for holiday had been successful by email and they could check the computerised holiday management system. Single days could be taken 'as and when' convenient. Ms Foldessy-Kovats was entitled to 31 days and the lead Claimant was also entitled to 31 days a year.

15. In March 2020 staff were informed that from the end of March, the first quarter of the year, no further holiday could be taken. Emails included in the bundle showed that HR confirmed to staff that any booked holiday would be returned to the year's allocation and matters would be reviewed with a view to reallocating the holiday once flights started again. In particular, an email to the lead Claimant dated 4 November 2020 confirmed that she remained entitled to a balance of 14 days' holiday, having taken holiday in the first quarter of the year.

16. Redundancy negotiations took place over a number of months in 2020; on 11 November 2020 staff received a letter confirming that the proposed redundancy date was deferred until January 2021. On 24 December 2020 an email from the First Respondent to HR and the Union, confirmed that an announcement was to be made in relation to the holiday entitlement for 2020 that included the following:

'Crew have continued to accrue vacation throughout the year. Whilst vacation was only assigned during the first quarter of 2020, there remains a large amount of vacation to still be allocated...It has been concluded...that a reasonable solution is to allocate as many vacation days as the roster permits in January 2021. This will be in line with the amount of outstanding vacation you have from 2020. To clarify, any assigned holiday will be paid in the same month it is allocated at basic salary in line with your contractual percentage, however the 'duty pay' part will be paid in February 2021'.

17. Staff were advised that in order to achieve this, there was insufficient time to comply with the notice requirements in the Working Time Regulations. All staff were sent an electronic form on 4 January requesting that they consent to waive the notice requirements to allow the rostering and pay for holiday to be processed in January 2021. An example of a completed consent form was provided in the bundle.

18. Ms Foldessy-Kovats gave evidence that the airline wanted to resolve the issue of holiday entitlement by making payments so that if flights started again it would avoid the serious difficulties for scheduling and absence that would occur if staff were entitled to take, rather than be paid for, outstanding holiday. Ms Simpson gave evidence, in her capacity as union representative, that negotiations with the First Respondent had been relatively smooth; there had been no apparent resistance to carrying over holiday entitlement into a new year for the first time.

19. I found as a matter of fact that the usual, and contractual, practices relating to taking holiday and being paid for holiday had been varied by agreement between the Claimants and the First Respondent. The practice of applying for and taking holiday on a quarterly basis had been suspended and by explicit agreement between the Claimants and the First Respondent the bar on rolling untaken holiday entitlement over to the following year was lifted for 2020 holiday. By explicit agreement the contract was varied to provide that untaken 2020 holiday entitlement would be 'honoured' and rolled over into the following year, 2021. Further, the First Respondent provided a timeframe in which pay for untaken 2020 holiday would be paid, i.e. the basic element in January 2021 and any additional element in February 2021.

20. On 14 January 2021 staff were informed that the First Respondent was entering into voluntary insolvency and would cease to trade. The Claimants were dismissed by reason of redundancy on 29 January 2021.

21. Ms Foldessy-Kovats gave evidence that she, and other Claimants received no furlough or other pay in January 2021 (the usual pay date was towards the end of the month). The proposed payments in respect of holiday entitlement were not made in January 2021 and no further payments were made after that time by the First Respondent.

22. I found as a matter of fact that the agreed process for settling holiday pay entitlement for 2020 had not, in fact, been carried out. Neither the payments proposed for January in relation to basic pay or for February in relation to any additional entitlement had been made.

23. The Claimants applied to the Third Respondent, responsible for the Insolvency Service, for the monies owed. A number of letters from the Insolvency Service relating to the specific circumstances of Claimants were included in the bundle. Calculations for holiday pay, and in some cases redundancy and wages, were set out. The Claimants argue that there is a shortfall in what has been assessed as due and what they are entitled to. It was confirmed that the claims are limited to shortfall in holiday and not other pay.

24. The Tribunal considered in detail the examples of the lead Claimant and Ms Foldessy-Kovats.

25. Ms Foldessy-Kovats

25.1. Ms Foldessy-Kovats submitted evidence that she was contractually entitled to 31 days holiday for leave year 2020 and that having taken 4 days she remained contractually entitled to 27 days. She also claimed 2.5 days for the first month of the leave year 2021, a total of 29.5 days, which at £107.79 daily gross pay amounted to £3,179.81.

25.2. The Redundancy Payments office stated that it had paid her for 10.46 days owed. This appeared to represent 2.46 days for January 2021 and 8 days for 2020, calculated as follows:

25.2.1 Gross entitlement £804.16.

25.2.2 Less £52.58 National Insurance and £160.83 tax.

25.2.3 Amount of holiday pay due £590.75.

25.3. Ms Foldessy-Kovats gave evidence that she had sought an explanation for the amount calculated, but that none had been forthcoming, other than there was a cap at 8 days, for which no reason was given. Ms Foldessy-Kovats contends that she is owed £2,375.65 (£3,179.81 – 804.16).

26. Ms Lukasik - The Lead Claimant:

- 26.1. Ms Lukasik submitted evidence that she was contractually entitled to 31 days holiday, less 14 days for holiday taken in the first quarter of 2020, leaving 17 days for her 2020 entitlement. Together with 2.5 days for January 2021 she calculated that she was owed pay for a total of 19.5 days, which at the appropriate daily gross rate of pay of £113.29 was £2,209.16.
- 26.2. The Redundancy Payments office stated that it had paid her for 10.49 days owed, calculated as follows:
- 26.2.1. Gross entitlement £1,113.99.
- 26.2.2. Less £85.20 National Insurance and £222.80 tax.
- 26.2.3. Amount of holiday pay due £805.99.
- 26.3. Ms Lukasik contends that she is owed £1,095.17 (£2,209.16 – £1,113.99).

27. It would appear from other calculation letters that 2021 claims were paid at around 2.46 days, though there were some variations and the 2020 claims were limited to 8 days, regardless of entitlement or the number of days taken from the 2020 entitlement, though no explanation of the reason for the limited payments was included in any of the letters seen.

28. I found as a matter of fact that the two Claimants referred to did not receive payments from the Third Respondent equivalent to the days of holiday to which they had been contractually entitled in 2020.

Law

29. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.

30. Regulation 14 of the Working Time Regulations 1998 requires an employer to pay an employee in respect of holidays accrued but untaken in the leave year upon termination.

31. The Working Time (Coronavirus) (Amendment) Regulations 2020 amends regulation 13 of the WTR 1998 in relation to annual leave by adding the provisions:

13 (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).

And 13 (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.

32. A worker is entitled to be paid a week's pay for each week of leave. There is no statutory cap on a week's pay for this purpose. Since the payment for leave in this case was due after 6 April 2020, where pay is variable an average of pay over the previous 52 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in *British Gas Trading Ltd v Lock and anor 2017 ICR 1*, all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the four weeks' leave derived from European law (but not for the additional 1.6 weeks leave which is purely domestic in origin).

33. S 182 ERA provides for an employee's rights on insolvency of employer:
If, on an application made to him in writing by an employee, the Secretary of State is satisfied that –

- (a) the employee's employer has become insolvent,*
- (b) the employee's employment has been terminated, and*
- (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies, the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt*

34. S 184(c) provides that these provisions apply to *any holiday pay –*

- (i) in respect of a period or periods of holiday not exceeding six weeks in all, and*
- (ii) to which the employee became entitled during the twelve months ending with the appropriate date,*

35. S 184 (3) provides that in subsection (1)(c) "holiday pay", in relation to an employee, means –

- (a) pay in respect of a holiday actually taken by the employee, or*
- (b) any accrued holiday pay which, under the employee's contract of employment, would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday.*

36. S 188 provides that a person who has applied for a payment under section 182 may present a complaint to an employment tribunal –

- (a) that the Secretary of State has failed to make any such payment, or*
- (b) that any such payment made by him is less than the amount which should have been paid.*

37. Where an employment tribunal finds that the Secretary of State ought to make a payment under section 182, the tribunal shall –

- (a) *make a declaration to that effect, and*
- (b) *declare the amount of any such payment which it finds the Secretary of State ought to make*

Conclusions

38. I found as a matter of fact that the usual, and contractual, practices relating to taking holiday and being paid for holiday had been varied by agreement between the Claimants and the First Respondent. The practice of applying for and taking holiday on a quarterly basis had been suspended and by explicit agreement between the Claimants and the First Respondent the bar on rolling untaken holiday entitlement over to the following year was lifted for 2020 holiday. By explicit agreement the contract was varied to provide that untaken 2020 holiday entitlement would be honoured and rolled over into the following year, 2021. Further, the First Respondent provided a timeframe in which pay for untaken 2020 holiday would be paid, i.e. the basic element in January 2021 and any additional element in February 2021. There was email evidence that indicated that the amount of holiday to be carried over would be the full amount of the 2020 entitlement less any holiday taken in the first quarter of the year, at which point the taking of holiday was suspended.

39. At the point of it being confirmed when the 2020 holiday payments would be made the employees were asked to sign documents waiving the full notice period required under the Working Time Directives. In order to receive the payments for untaken holiday in January and February 2021, employees duly signed the waivers. I found that this was clear evidence of the agreement having been made to vary the usual contractual arrangements and for the balance of holiday not taken in 2020 to be settled by payment in the first two months of 2021.

40. Having made these findings above it was not necessary for me to find for the Claimants relying on the alternative arguments of estoppel.

41. The First Respondent having become insolvent and the Claimants' employment having been terminated, they were entitled under s 182 ERA as set out above to be paid outstanding holiday pay, such payments to be made on behalf of the Secretary of State from the National Insurance Fund.

42. In relation to the amount due S 184(3) provides that in subsection (1)(c) "holiday pay", in relation to an employee, means...

- (b) *any accrued holiday pay which, under the employee's contract of employment, would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday.*

43. There is a statutory limit on the weekly amount payable in respect of any payment under s 182 and s 184 provides that period exceeding 6 weeks of holiday pay will not be paid. Aside from these limitations, the Employees were entitled to 'the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt'. The Claimants acknowledge that some payment has been made but make their claims under s 188 ERA that the Secretary of State payments are 'less than the amount which should have been paid'.

44. I found as a matter of fact that the payments made by the Third Respondent were less than the contractual entitlement to holiday pay and that the Third Respondent had provided no rationale or justification for having calculated the payments to the Claimants at a reduced level and at a rate that appeared to have been applied across all the Claimants without reference to their entitlement or the amount of holiday taken.

45. I therefore make a declaration that the Claimants are entitled under the relevant provisions to the full entitlement of their 2020 holiday (less any holiday already taken in the first quarter) and subject to the six week cap and the weekly limit as set out in the legislation as referred to above.

46. The Claimants requested that a decision from the Tribunal be made in principle so that discussions and negotiations could take place between the parties as to the specifics of payments. I considered this to be appropriate and practical given the number of Claimants and the differing circumstances of each. If agreement cannot be reached as to the outstanding sums for each of the Claimants an application for a remedy hearing may be made and detailed evidence and submissions can be made to allow the Tribunal to consider and decide those matters.

**Employment Judge Thackray
Date: 02 September 2022**