EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102358/2020 (V)

Final Hearing (Remedy) Held in Glasgow by CVP on 23 August 2022

Employment Judge: Russell Bradley

Mr J Anderson	**Claimant** **Represented by:** **Mr R Lawson – Solicitor**
Gareloch Support Services (Plant) Limited	**Respondent** **Represented by:** **Mr N Moore – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgement of the Tribunal is that the respondent is ordered to pay the claimant the sum of **THREE HUNDRED AND EIGHTY THREE POUNDS AND FOUR PENCE (£383.04) STERLING** under deduction of any amounts for which it lawfully requires to account to HMRC in respect of any tax or national insurance due on that sum.

REASONS

Introduction

1. This case concerns a claim for holiday pay brought by a seafarer (a deckhand) employed by the respondent on the vessel/workboat the *Lesley M*. The claim was for an entitlement to holiday pay spanning the period of his employment, almost nine years. It was first made after his contract of employment ended on 18 December 2019.

2. On 8 and 9 November 2021 a final hearing took place to consider the extant bases on which the claim was made. By judgement and reasons dated 8 March 2022, I decided that in one respect the claim succeeded. In those

reasons, I directed that a case management preliminary hearing should be fixed. It duly took place on 19 May 2022.

3. On 23 May, EJ Doherty sent her Note from that hearing to the parties. It recorded that:

i. The aspect of the claim in respect of which remedy required to be determined was confined to the claimant's entitlement to additional payment for "*the month of December 2019*"

ii. Both parties agreed that; the issues for this hearing would be identified by the exchange of a schedule of loss and a counter schedule; and that no further documents beyond those lodged for the November 2021 hearing were required

iii. The claimant was to produce his schedule by 9 June; the counter by 30 June

iv. The schedule was to specify; how much was claimed; how it was calculated; and the specification was "*to include the pay period which had been taken into account to calculate the additional payments said to be due, and why that period had been taken into account*"

v. The counter was to indicate the respondent's basis on which it did not accept the claimant's calculations.

4. On 5 July the claimant's schedule was produced. On 27 July the counter was lodged (called Response).

5. For this hearing a separate claimant's bundle (of 60 pages) was produced. It reproduced; the judgment and reasons from March 2022; EJ Doherty's Note from 19 May; the agreed facts from the hearing in November 2021; the schedule of loss (**page 48**); and theResponse (**pages 49-53**). It included an exchange of emails between the solicitors in August 2022; and a Table showing earnings from payslips (**page 60**).

6. On 23 August Mr Lawson lodged a written submission.

The issue for this hearing

7. The schedule and its response did not clearly identify the issues for this hearing. In his written submission, Mr Lawson proposed the following questions. Mr Moore did not suggest that they were not relevant to the issue for me. The questions are:-

   i. What was the claimant's paid annual leave entitlement as at December 2019 and when was this annual leave entitlement exercised by the claimant, if at all?

   ii. What was 'normal remuneration' for the claimant in respect of that annual leave entitlement?

   iii. If the claimant received less than his normal remuneration for this annual leave, what award, if any, should be made to the claimant?

Evidence

8. There was no oral evidence. The claimant's bundle included previously agreed facts (**pages 42 to 47**). It also included a table (**page 60**) which was said to summarise the claimant's earnings information, that information (wage slips) having been included in the bundle for the November 2021 hearing (**pages 154-159** in that bundle). I say more about this information later. The findings below are limited so as to be relevant to the issues. Some are repeated from the judgment and reasons of 8 March.

Findings in fact

9. In the period between 31 January and 31 December 2019 the claimant was paid a total gross basic pay of £25,743.31. Over the same period he was paid (gross); £2,299.50 for Saturdays; £2,320.50 for Sundays; £546.00 for "*Over 12 hours*"; £451.50 for "*owed from last pay*"; £756.00 "*owed Saturday*"; and £756.00 "*owed Sunday*" (all shown on **page 60**). The first payment for an "*owed Saturday*" (£126.00, paid on 31 January 2019) was "*owed*" from the previous month and thus the previous calendar year (December 2018). The

first payment for an "*owed Sunday*" (also £126.00, and also paid on 31 January 2019) was, again, due from December 2018.

10. The "*additional payments*" received by the claimant in the period between 31 January and 31 December 2019 therefore totalled £6,877.50 and not £7129.50 as shown on **page 60**.

11. On 20 November 2019, whilst on Time Off, the Claimant tendered his resignation. The Claimant was on Time Off continuously for 35 days and on continuous pay from his last day of work on board ship (13 November 2019) up until the effective date of termination of employment (see Reasons, March 2022, paragraphs 51 and 53, **pages 16 and 17**). The only reason why the claimant did not re-join his ship on 11 December was because the respondent decided it was not worth him joining for just a week, with the associated travel cost, administrative inconvenience, etc. It was simpler to leave him at home on full pay until his notice expired. The respondent therefore waived its contractual entitlement to require the claimant to provide his labour for that week in return for his salary.

12. On 17 March 2020 ACAS received notification of early conciliation. That date is three months (less one day) from the claimant's effective date of termination. The certificate was issued on 1 April 2020.

Comment on the evidence

13. The information within **page 60** was agreed but subject to what is set out at paragraphs 9 and 10 above. Mr Moore explained the position with which Mr Lawson agreed.

Submissions

14. Mr Lawson spoke to and supplemented his written submission. Mr Moore spoke to his Response and also supplemented it orally. I mean no disservice to either party by recording a brief summary of their respective arguments here. I say more about each below.

15. For the claimant it was said that; his entitlement to paid annual leave was in total 38 days, which accrued evenly throughout the leave year; for the period between 13 November and 18 December 2019 the claimant's total paid annual leave entitlement which accrued to him was 3.64 days; he should have been paid (in lieu) of those days in his December 2019 pay; which is the answer to question 1; under reference to the total additional payments shown on **page 60** (£7129.50) the average pay per week in the period shown on it (and thus the appropriate amount per week for this calculation) is £167.01; assuming a 5 day working week his claim per day is thus £33.40. For those 3.64 days the sum claimed is (3.64 X £33.40) = **£121.58**. In addition, and under reference to the claimant's basic pay of £2220.83 per month calculated thus (£2220.83 X 12 (months) / 365 (days)) a daily loss of £73.01 is sought. For the same 3.64 days (3.64 X £73.01) the loss claimed is **£265.76**. The schedule of loss thus specifies the award claimed is the total of those two sums, **£387.34**. I note that these are gross sums.

16. The respondent's written position was that; in the first place, no sum is due because (i) the contract does not specifically address the scenario (ii) the claimant's construction results in an "*absurd and unconscionable*" outcome the answer to which is the introduction of an implied term (***Southern Foundries (1926) Ltd v Shirlaw***, noted below); alternatively the principle of the claimant's methodology is fundamentally wrong; alternatively yet still even if that methodology is correct his formula is wrong; and finally even if by any method a sum would otherwise be due, the claimant has been overpaid in 2019 by a sum greater than any sum due to him, and is thus not due any further sum. In his oral submission, Mr Moore suggested an argument on time bar. I have set out my views on it at paragraph 24 below.

Law

17. In its Response the respondent referred to the decision of the Court of Appeal in ***Southern Foundries (1926) Ltd v Shirlaw*** [1939] 2 K.B. 206.

18. In its written submission, the claimant referred to ***Deeley v British Rail Engineering*** [1980] IRLR 147 (also in the Court of Appeal); the decision of

the ECJ in ***British Airways v Williams*** [2011] IRLR 948; ***Dudley Metropolitan Borough Council v Willetts*** [2017] IRLR 870, [2018] ICR 31 in the EAT; ***Yarrow v Edwards Chartered Accountants*** EAT 0116/07; and ***Leisure Leagues UK Ltd v Maconnachie*** 2002 IRLR 600 (EAT). To the extent necessary I say something about them below.

Discussion and decision

19. In my view, it is important to recall that on the facts, the key issue is whether (in circumstances where the claimant gave notice while on Time Off and was then not required to return to work in his notice period) he accrued an entitlement to paid leave in respect of which he was neither (i) able to take it nor (ii) be paid in lieu of it.

20. It is convenient to begin by considering the respondent's primary argument, that contractually the claimant had taken all paid leave due to him and was therefore due nothing further. The respondent says "*the contract did not specifically address this scenario*" and thus a term should be implied, under reference to ***Shirlaw***. Two points occur. First, and as Mr Lawson pointed out, clause 26.6 of the contract's standard terms provides, "*On termination of employment, any Annual Leave which has accrued due but not been taken under the preceding provisions of this clause will be compensated in accordance with Flag State*." In principle, therefore, it appears that the contract expressly provides for this particular situation. That being so, there is no need to imply another term. Second, on the respondent's case had the claimant "*rejoined on 11 December, then under clause 26.5.2 of his SEA he would immediately prior to joining have taken in advance all the annual leave which would accrue due to him up to the EDT*". It was therefore within the respondent's control as to whether the claimant would have taken all accruing annual leave. In my view their decision to "*leave him at home on full pay until his notice expired*" does not produce an absurd and unconscionable result. In short, it is a result which the respondent could have avoided if it had chosen to do so. Accordingly, in my view the answer to question 1 is "*yes*."

21. It is agreed that the claimant's entitlement to paid annual leave in each year is 38 days. In both his schedule of loss and his written submission, the claimant sets out his rationale for concluding that his entitlement for the period in question is 3.64 days. The respondent appears to agree that if I did not accept its primary argument, 3.64 days is the relevant period for the claim (paragraph 2 of the Response, **page 50**). But Mr Moore argued that there is a fundamental error in the claimant's approach thereafter. The error, he says, is in using the period of the Leave Year to arrive at an average for the additional payments. He says the error occurs for two reasons. First, it does not fairly and effectively recognise "*further payments*". Second it is inordinately complex. I deal with each reason in turn. On the question of fairness and effectiveness, the respondent says (i) further payments which arise early in the Leave Year will repeatedly feature in the calculation and hence an employee such as the claimant would be over-compensated and (ii) further payments which arise later in the Leave Year may not feature and be compensated for at all and provides an illustration. In my view it is important to focus on the particular facts in this case. Of relevance are the following; during a period of Time Off the claimant gave notice to end the contract; and the respondent chose not to have him "*work his notice*". The possibility that in other hypothetical circumstances the result may not be fair or effective is not in itself a reason to decline to use the claimant's approach. Indeed the illustration provided was of an employee whose employment was continuing. It is thus not a relevant comparison. Separately, I do not accept that on the facts in this case the calculation is complex. The claimant has provided a relatively simple method taking account of earnings in a discrete period. Further, I accept (as argued by the claimant under reference to the case of ***Williams***) that the assessment to determine "*normal remuneration*" must "*be carried out on the basis of an average over a reference period which is judged to be representative*". In my view the period used here is representative.

22. Separately the respondent says that it is wrong to assume that the claimant worked a 5 day week. Mr Moore says "*a seafarer's paid annual leave entitlement is calculated on a seven day week*". That assertion was not supported by a reference to the contract. In any event, the question here is

about the claimant's entitlement to be paid in lieu of accrued but untaken holiday at the end of the contract. The claimant's answer (under reference to ***Yarrow*** and ***Maconnachie***) is to say that daily pay must be computed by reference to the working year rather than the calendar year and his rationale for the use of five days is that it is the number of working days in a normal working week for a full-time employee. In ***Maconnachie*** the claimant was employed on the basis of an annual salary. Following the termination of his employment, he applied to an employment tribunal claiming arrears of holiday pay. The tribunal found that he was owed eight days' holiday and was therefore entitled to eight days' pay in lieu. It calculated the appropriate daily rate of pay by dividing the annual salary by the number of working days in the year, in his case 233. The employers appealed, arguing that the daily rate of pay should be calculated on the basis of the number of calendar days in the year, not working days. The EAT had a preliminary hearing to determine whether the appeal raised an arguable point of law. It held that; the employment tribunal had correctly calculated the daily rate by dividing his annual salary by the number of working days in the year rather than calendar days; and for the purposes of calculating payment for accrued holiday entitlement, the concept of day-to-day accrual must be by reference to the number of working days in the year and not the number of calendar days in the year. There does not appear to be a dispute between the parties in this case that the correct method of calculating the daily rate is by dividing annual salary by the number of working days. The issue is, however, what is the correct number of working days? I prefer the claimant's position. I note that the contract expressly provides (**page 118** of the earlier bundle) that the claimant's "*annual days of work*" are said to be "*182.5 days per year*." Were that number of days to be used as the denominator, the daily rate would increase. I note that the total of additional payments beyond basic pay in that period is not £7129.50 but is instead £6877.50 when the January 2019 additional payments (which total £252.00) are left out of account.

23. Further, the respondent says, even if by any method a sum would otherwise be due to the claimant, he has been overpaid in 2019 by a sum greater than that sum and is thus not due any further sum. The premise on which this

argument rests is that "*the issue for the Employment Tribunal is whether the Claimant was underpaid in December 2019*" (see paragraph 3 of the Response, **page 53**). I do not agree that this is an accurate reflection of the issue for me. The respondent's contention rests on there being a requirement to carry out a reckoning exercise taking account of payments made to the claimant throughout that calendar year. I do not agree. The focus of the issue is on what was accrued and untaken at the end of the contract. The claimant addressed the issue in paragraph 47 of his submission by reference to Regulation 26 of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018. Regulation 26(5) provides, "*Where on complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a seafarer in accordance with regulation 15(1)(a) or (b), it must order the employer to pay the seafarer the amount which it finds to be due to the seafarer*." Regulation 26(1)(b) provides, "*An employed seafarer may present a complaint to an employment tribunal that the seafarer's employer has failed to pay the seafarer the whole or any part of any amount due to the seafarer under regulation 15(1)(a) or (b)*." Regulation 15(1) provides for an entitlement to paid annual leave which totals 38 days per year. Regulation 15(2)(b) provides that leave "*may not be replaced by payment in lieu, except where the seafarer's employment is terminated*." In my view the regulations provide a separate negative reply to the respondent's argument.

24. Finally, the respondent made an oral argument on time bar. As I understood it, it proceeded this way; the claimant's case based on the separate "*additional payments*" is that on each occasion he received such a payment there should be a supplementary payment alongside it to represent leave; but there was no additional payment in December (as per **page 60**, and as shown on the corresponding wage slip, **page 154** of the November 2021 bundle); there was thus no "*trigger*" (my word) in December for the supplementary payment; and therefore given that early conciliation began on 17 March 2020, the claim for this separate element is out of time. For the claimant, Mr Lawson referred to ***Williams*** and posed the question, "*does a zero payment in December reflect "normal payment" compared to every other month?*" and suggests that the answer is "*no*". In my view it is important to recall that; the claim in this case

is for a sum to represent accrued and untaken holiday derived from the period 13 November to 18 December 2019; during that period the claimant gave notice to end the contract; and the respondent decided that it did not require him to work in the notice period. In ***Williams*** at paragraph 22 it was said that; "*workers must receive their normal remuneration*" and quoting from earlier decisions, *"… it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case law cited above, according to which [the Working Time Directive] treats entitlement to annual leave and to a payment on that account as being two aspects of a single right*." I have accepted that the period between 31 January and 31 December 2019 is a representative reference period. It is representative so as to compensate the claimant for a loss which he sustained at the end of December 2019 when he was entitled to be paid in full for the loss of leave days. The claim is not out of time.

25. In answer to question 2, in my view the normal remuneration for the claimant in respect of his annual leave entitlement in December 2019 was £383.04 made up of £117.28 representing additional payments and £265.76 representing basic pay. I note that in its Response, the respondent does not dispute (all other things being equal) that £265.76 is a relevant claim for this element.

26. On question 3, the claimant received less than his normal remuneration for the period of annual leave in question. The award is set out below, and in the judgment.

Summary

27. In my view the gross sum due is £383.04, being the addition of £117.28 (not £121.58) + £265.76. The judgement reflects that the net version of this should be paid by the respondent.

Employment Judge: Russell Bradley
Date of Judgment: 21 October 2022
Entered in register: 24 October 2022
and copied to parties