EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102453/2022

Hearing held at Glasgow by Cloud Video Platform on 30 November and 1 December 2022

Employment Judge A Kemp

Mrs Laura-Jean Harkin	**Claimant** **In person**
Master Peace Recruitment Ltd	**First respondent** **Represented by** **Ms A Blake,** **Operations Director**
Infinity Payroll Solutions Ltd	**Second respondent** **Represented by** **Ms S Kingshot,** **Director**
Little Missenden Ltd	**Third respondent** **No appearance or representation**
Greencolor Ltd	**Fourth respondent** **No appearance or representation**
Zymanthorpe Ltd	**Fifth respondent** **No appearance or representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal declares that there were unauthorised deductions from the wages of the claimant made by the first respondent and orders the first respondent to pay her the sum of EIGHT THOUSAND EIGHT HUNDRED AND THIRTY ONE POUNDS FORTY EIGHT PENCE (£8,831.48) subject to any necessary statutory deduction. On making such deduction the amount shall be remitted by the first respondent to Her Majesty's Customs and Excise, and the first respondent shall provide written notice of that payment and its amount to the claimant when doing so.

2. The claim as to unauthorised deductions from wages in relation to pension contributions is dismissed as not being within the jurisdiction of the Tribunal.

3. The claims as directed to the second, third, fourth and fifth respondents are dismissed.

4. A decision on whether or not to impose a penalty on the first respondent is continued for 28 days to allow it to make representations.

REASONS

Introduction

1. This was a Final Hearing into claims of unlawful deduction from wages by the claimant against five respondents. If follows a Hearing which was to have been a Final one on 20 September 2022, which was postponed, and the present hearing arranged in its place. The first and second respondents defend the claims, but there has been no appearance at any stage by the third, fourth or fifth respondents, who also did not appear at this Hearing. In the Note of the hearing on 20 September 2022 the Tribunal noted that documents had been produced by parties, and gave directions as to the creation of a single Bundle, which were not followed.

2. There was an initial discussion about the documentation before the Tribunal, which was in two separate Bundles one from the claimant and the other from the first and second respondents containing the documents both of those respondents wished to refer to. Despite that not being the direction from the Note, I considered that it was appropriate to proceed with the documents in those two Bundles.

3. As none of the parties had legal representation I outlined at the start of the hearing what the issues I considered were, and gave them an opportunity to comment on them, which they did not wish to do. The issues are set out below. I also outlined that there may be complex issues of law in relation to status, which entity was in law the employer, holiday pay, and issues of remedy which included the 2014 Regulations referred to below, and the authority of ***Bear Scotland***, also referred to below.

4. Before evidence was heard I explained to those present how the hearing would proceed, the giving of evidence, the need to put in cross examination firstly any fact that was disputed spoken to by the witness, and secondly any fact the witness was aware of which had not been commented on in her evidence in chief but which was to be spoken to by that party in its own evidence, the need to refer to documents in oral evidence as they would not be considered unless that was done, and that all evidence required to be placed before the Tribunal at this stage as further evidence was permitted only in exceptional circumstances. I explained that I could ask questions under Rule 41, but that I could not act as if a representative of any of the parties in a way that amounted to entering the arena. None of those present had had prior experience of Tribunal proceedings, but were content to proceed. I explained about the opportunity to make submissions.

5. The hearing was conducted remotely, and I was satisfied that it had been conducted appropriately. Breaks were taken regularly or when requested by one of those appearing.

Issues

6. I identified the following as the issues:

(i) Whether the claimant was a worker under the Employment Rights Act1996 ("the Act")

(ii) If so, with which employer?

(iii) For what period or periods of time?

(iv) Was there an unlawful deduction from wages under section 13 of the Act in relation to (i) holiday pay, including during maternity leave (ii) wages, in relation to what was said to be a pay rise and (iii) pension contributions?

(v) If so, to what remedy is the claimant entitled under the Act having regard inter alia to the Deductions from Wages (Limitation) Regulations 2014?

Evidence

7. The position with regard to the documents is as above. The claimant in her documents had produced brief extracts from terms and conditions documents, which included the parties, and a term as to holidays, only. The respondents had not produced the terms of those documents, nor details from the portal as to acceptance of the terms, nor any other documents related to the issue of the identity of the employer such as P60s, P45s, letters of termination of employment, letters of commencement of employment, or similar. This is addressed further below.

8. The claimant, and the representatives for each of the first and second respondents being Ms Blake and Ms Kingshot respectively, gave oral evidence. They were cross examined, and each of them were asked questions by me seeking to elicit the facts under Rule 41.

Facts

9. The Tribunal found the following facts, material to the issues before it, established:

10. The claimant is Mrs Laura-Jean Harkin. Her maiden name is Stewart.

11. The first respondent is Master Peace Recruitment Limited, and it trades as Peace Recruitment Group.

12. The second respondent is Infinity Payroll Solutions Ltd.

13. The third respondent is Greencolor Ltd.

14. The fourth respondent is Little Missenden Ltd.

15. The fifth respondent is Zymanthorpe Ltd.

16. The claimant returned to the UK after a period of working in Canada and contacted the first respondent in February 2019 seeking work. She spoke to Martyn Aitken of the first respondent, and provided her personal details to him. He later contacted her about a position at Glasgow City Council ("the Council"). She had an interview at the Council on 13 March 2019 and Mr Aitken contacted her shortly afterwards to state that she had been successful.

17. Mr Aitken told the claimant that she would be employed as an Architectural Technician on a contract likely to last six months. She would be working 37.5 hours per week, and would have 37.5 days holidays per annum. He said that the hourly rate was £18.

18. The claimant commenced the role at the Council on 14 April 2019. From then onwards she sent timesheets to the first respondent. After she had done so a payslip was provided to her by an electronic portal referred to below which referred to an hourly rate of £16.34. It had a box for employer with the entry "Habakarts Ltd" and for employee as the claimant (with her then maiden name). It had statutory deductions for tax and National Insurance.

19. The claimant had not heard of Habakarts Ltd. No documents with that entity had been provided to her. No person from that entity contacted her. She considered that it was the organisation making payroll payments to her on behalf of the first respondent, and that the first respondent remained her employer.

20. The claimant raised the issue of her hourly rate with Mr Aitken by email on 3 May 2019. She asked for documentation, and raised whether the hours were 37.5 as he had said or 35 as she had been told by a colleague with whom she worked.

21. Mr Aitken replied on 6 May 2019, gave apologies and attached an assignment schedule document. He stated that the Council work a 35 hour week and "maybe we got our wires crossed". The document attached was on headed paper of the first respondent, which trades as Peace Recruitment Group, setting out terms with a heading "Provision of consultancy services". It stated that the Consultancy Staff Name was Laura Christie, that there were 7 hours per day, notice for either the Client or Consultancy to terminate the assignment was one week, and that the "Agreed Rate" was £18 per hour. It did not have provisions as to holidays or pay for holidays specified.

22. In around December 2019 the claimant noticed that she could not access payslips on the portal, which is an electronic means of access to documentation operated within the agency industry. The portal had been provided for the claimant with an individual password to access it. She asked the first respondent to enquire into that. She did not receive a reply.

23. In March 2020 the claimant was informed when seeking to access the portal to retrieve payslips that the entity that employed her had changed, and that to access her forthcoming payslips she must click "accept" in relation to a contract from an entity named Gardenmight Ltd. She could only access such payslips if she accepted the terms, and she did so in order to access the payslips. She had not received any document or other indication that any previous employment relationship was to cease, or had ceased, or receive a P45 confirming termination of employment for tax purposes. She remained working at the Council.

24. The second respondent commenced to make arrangements for the payroll of the claimant on or around 8 March 2020.

25. The pay rate for the claimant increased from £18 per hour to £18.54 per hour with effect from on or around 4 April 2020.

26. In April 2020 a similar requirement to click accept terms for another entity was given on the portal, which she did in order to access payslips on the same basis. She asked the first respondent about her "employer" changing three times, by email of 17 April 2020 to Mr Aitken, but was not

assisted. She sought to contact the company whose details were on the portal by telephone and email on 1 May 2020, with no response.

27. The claimant raised the issue of who the employer was with the first respondent in June 2020, who forwarded an email to the second respondent, which later told the claimant that the issue she raised was not for them, but for the first respondent, to resolve. The claimant sought to contact the first respondent in July 2020 on numerous occasions to address that, without reply.

28. On 25 June 2020 the claimant emailed Mr Aitken raising issues as to payments to her after reviewing payslips. She said that she had not been informed of the hourly rate being inclusive of holiday pay, but that it had been stated in the contract at £18.

29. In 16 June 2020 the claimant emailed the second respondent raising the issue of her hourly rate. They responded on 30 June 2020 referring the claimant to the first respondent. The claimant emailed the second respondent further on 16 July 2020. They did not reply.

30. Mr Chris Peace, the Managing Director of the first respondent, called the claimant on 17 July 2020. He sought to explain matters to the claimant, but she did not understand or accept his comments. He emailed her on that day to refer to their conversation and lack of agreement, and attached a document, which was not before the Tribunal.

31. On 24 July 2020 the claimant emailed Mr Peace further asking about the companies said to be used as employers, and for details of the same, as well as where in the document he had sent it stated that holiday pay is included in the hourly rate. He did not reply. She sent a reminder on 31 July 2020. Again he did not reply.

32. On 16 November 2020 the claimant emailed Ms Blake asking for an update about her missing pay, as she described it. She added “Also, starting this week and going forward can you please revise my weekly pay to include “holiday” so that I am back to my original hourly rate. I no longer wish for it to be accrued.”

33. On 16 December 2020 Ms Blake emailed the claimant about the calculation of holiday pay and agreed that the sum of £530.54 had not been paid and that that "we are requesting this payment from Infinity today and this will be paid separately from your normal week's pay".

34. The claimant became pregnant in or around August 2020. She intimated to the first respondent that she was pregnant by email on 5 January 2021.

35. On 8 January 2021 the first respondent made payment of £882 for holiday pay to the claimant, confirmed in a later email by them which was undated.

36. On 19 January 2021 the claimant sent the first respondent by email details of the Council's maternity package which she stated had been agreed by them to apply to her also, and sought to have them discuss that with the Council. It provided for Statutory Maternity Pay at 90% of a week's average pay for six weeks, and Occupational Maternity Pay of 50% of that week's average, together with SMP or maternity allowance, for thirty three weeks.

37. She commenced her maternity leave on 26 April 2021. The payments that the claimant received thereafter generally accorded with the Council maternity package although the calculation of the amount of Occupational Maternity Pay was based on an hourly rate said to be inclusive of holiday pay.

38. On 6 May 2021 the claimant received an email from Ms Blake with regard to maternity pay, after the claimant had earlier received a letter from Greencolor Ltd on that issue (that letter was before the Tribunal). It gave the claimant three options. Ms Blake stated that this was the first occasion of her dealing with a contractor on maternity leave with the position left open for the person. She had not had experience of such Occupational Maternity Pay from the end user, the Council in this case, before similarly. The claimant was at that stage in labour.

39. The claimant sent an email to Ms Blake on 6 July 2021 asking about the position, providing details of the Council policy as to maternity, and referring to the right to receive holiday pay accrued during maternity leave as if still at work. She asked if that was being accrued.

40. Ms Blake replied on 8 July 2021. She stated that additional payments were to be made, and that holiday pay is included in the rate, but that she had asked for confirmation of that. She did not send a further email on that matter to the claimant.

41. In December 2021 the Council announced that there was to be a 2% pay rise for all those working at its offices, including agency workers, back dated to 1 January 2021. On or around 15 December 2021 Liam McCafferty of the Council emailed the first respondent to inform it of this, and stated that he "did not know if this affects maternity pay for Laura Christie".

42. In around mid January 2022 the claimant contacted Ms Alison Blake of the first respondent, and sought to resolve issues. She emailed Ms Blake on 18 January 2022 asking for details of whoever she could discuss issues regarding holiday pay and pension contributions. She did not receive a reply, and sent a reminder on 27 January 2022. There was no reply.

43. The claimant returned to work after maternity leave on 4 February 2022. When she did so she again worked at the Council but in a promoted role, and no longer through a relationship with the first respondent.

44. On or around 1 February 2022 the claimant contacted the first respondent as to her holiday pay, who on that date replied to direct her to the second respondent. On 8 February 2022 the claimant emailed the second respondent about her accrued annual leave, as she understood it. The second respondent replied on 11 February 2022 directing her to the first respondent, referring to pension paid during maternity leave, and stating that the first respondent was a "Staffing Agency", the second respondent an "Intermediary", and Greencolor Ltd, Little Missenden Ltd and Zymanthorpe Ltd were "Employer", with that term in inverted commas.

45. On 16 February 2022 the Council emailed the first respondent to confirm details of the said pay rise for the claimant and others, and stated that it wished to ensure that it was paid. A further email was sent by the Council to the first respondent similarly on 1 July 2022.

46. The claimant has not been paid that pay rise. It was to increase the pay rate to £18.91 per hour, with effect from 1 January 2021.

47. Throughout the period of 14 April 2019 to when she commenced maternity leave the claimant worked 35 hours per week, being 7 hours per day Monday to Friday.

48. The claimant contacted Her Majesty's Revenue and Customs for the purposes of these proceedings, on a date not given in evidence, which informed her that its records indicated that her employers had been as follows:

(I) Habakirk Ltd from 9 April 2019 to 30 December 2019

(II) Dynonice Ltd from 30 December 2019 to 15 March 2020

(III) Gardenmight Ltd from 4 March 2020 to 9 April 2020

(IV) Greencolor Ltd from 9 April 2020 to 10 September 2021

(V) Little Missenden Ltd from 15 September 2021 to 29 December 2021

(VI) Zymanthorpe Ltd from 29 December 2021 to 4 February 2022

49. The agreements the claimant accepted with each of Greencolor Ltd, Little Missenden Ltd and Zymanthorpe Ltd were not fully before the Tribunal, and included only the parties and a clause as to holidays. That clause was identical in each case, and as follows:

> "**9. Holidays**
>
> 9.1 You are entitled to 5.6 weeks holidays per year which will be pro rated for part time staff and which includes public/bank holidays.
>
> 9.2 You will earn holiday pay at the rate of 12.07% of your basic pay (which is represented as the National Minimum Wage/National Living Wage in force at the time entitlement to holiday pay accrued). Unless otherwise agreed, the accrued amount will be retained in a holiday fund and will be paid to you when you take annual leave.

> You will be paid for each day of holiday authorised by the Company at an hourly rate calculated on the basis of your average income over the 52 weeks preceding the holiday."

50. The only P45 that the claimant had sight of was purportedly from Greencolor Ltd. The claimant had no contact from the purported employers as to prospective termination of employment, prospective commencement of employment, nor was there any consultation by any party in relation to any obligation under the Transfers of Undertaking (Protection of Employment) Regulations 2006. The only information as to such employers was on the portal, but the claimant did not receive any reply from any of those organisations when she sought to do so by telephone or email.

51. Payment of employer pension contributions were made in respect of the claimant to the NEST scheme under auto-enrolment provisions, but for a period of twelve weeks after the purported employer changed, no such contributions were paid to NEST.

52. Initially the first respondent contracted with Zeva Ltd to provide it with services. In 2020 that company ceased to do so, and the second respondent did so in its place. A contract was entered into between the first and second respondents.

53. The second respondent contracted with other companies as suppliers to it of payroll services. The second respondent made calculations of what sums were due to an individual, and what statutory deductions were required for income tax, National Insurance, and employee pension contributions, together with those for employer pension contributions. It did so on the basis of information given to it by the first respondent. It then passed the detail to its suppliers. Those companies made payment of sums to the claimant.

54. The claimant commenced Early Conciliation in respect of each of the respondents on 10 March 2022.

55. A Certificate for Early Conciliation in respect of each of the respondents was issued on 21 April 2022.

56. The claimant presented a Claim Form on 2 May 2022

Claimant's submission

57. The following is a brief summary of the submission made by the claimant. She had established an agreement for a rate of £18 per hour. There was no document that clearly explained it. The only company she had communication with or a contract with was the first respondent. If there was to be rolled up holiday pay it had to be transparent and agreed to, but that was not the case for her. She was entitled to the same terms as Council employees after 12 weeks in the role, and should have had 37.5 days holidays, as well as their maternity benefits for holidays. Holiday pay on maternity should be the same as if working. There had been unpaid pension contributions, though she was in the same role throughout at the Council, and had not had knowledge of what was happening. She had had no say. The Council had provided a pay rise not passed on to her. She had tried to resolve the issues with the first respondent, and the whole experience had caused her undue stress.

Respondents' submissions

58. The following is again a brief summary of the submissions. The **first respondent** said that it had done everything possible to resolve matters. The claimant had been paid correctly and on time. Ms Blake had found compliance information and demonstrated through evidence that the first respondent could not be the employer. The rate of £18 per hour took into account 37.5 days holidays, as the AWR calculator showed. If it was not that the rate would not be accepted by the Council, as it would be higher than their own employees. The claimant had decided to have rolled up holiday pay at times in email, and at others separately. The first respondent had acted correctly under employment law. It had used 12.07% for holiday pay as an industry standard. Intermediary companies had been used, and the claimant accepted terms. The maternity rights were not the same as a Council employee. The second respondent had calculated them. On the back dating of pay they had been waiting for clarification from the Council. The first respondent had not acted against the law. Ms Blake had tried to source documentation and contact

suppliers, and had not always received answers that the claimant wanted. Ms Blake too had been caused stress by the matter.

59. The **second respondent** argued that it was an intermediary and not the employer. It had processed everything provided by the first respondent. There was evidence that the claimant had received details by email, and she did know how she was paid. She had accepted multiple contracts. Ms Matthews of the second respondent had written to her. A standard industry model was used. It was accepted that £171 in pension contributions was outstanding. The issues raised had also caused Ms Kingshot stress, and there should have been engagement by the claimant.

Law

(i) Identity of employer

60. Where the identity of the employer is in dispute matters depend on the evidence heard, see ***Clifford v Union of Democratic Mineworkers [1991] IRLR 518***. That includes looking at the reality of the situation, see ***Secretary of State for Education and Employment v Bearman and others [1998] IRLR 431*.** The issue of which entity is the employer was addressed in ***Hewlett Packard Ltd v O'Murphy [2002] IRLR 4***.

61. In ***Autoclenz Ltd v Belcher and others [2011] ICR 1157*** the Supreme Court considered the issue of whether a person was a worker or self-employed, and held that "the question in every case is, ……what was the true agreement between the parties?" and made reference to the importance of looking at the reality of the obligations of the situation. All of the evidence is to be considered, and the relative bargaining positions of the parties taken into account. Arrangements which were a sham were not effective in law.

62. In ***O'Brien v Ministry of Justice [2013] OCR 499*** the Supreme Court held that the distinction between a worker and a self-employed person was to be determined from "the true picture of the reality".

63. Those cases dealt with different issues to that in the present case, but I consider are on a related matter, and relevant to set the context in which to address those in the present case.

64. In ***Clark v Heaney, Westwood and Reigel and others 2020 UKEAT/0018-20*** the EAT considered the authorities and said the following

> "documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed."

65. The Supreme Court held in ***UberBv v Aslam*** **[2021] ICR 657**, that:

> "In determining whether an individual is a 'worker', there can, as Baroness Hale DPSC said in the ***Bates van Winkelhof case [2014] ICR 730***, para 39, 'be no substitute for applying the words of the statute to the facts of the individual case.' At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the

individual as a ‘worker’ who is employed under a ‘worker's contract’.”

(ii) Unauthorised deduction from wages

66. Unauthorised deduction from wages is provided for in section 13 of the Act. It applies to deductions by employers from wages of a worker, with exceptions in that section and section 14. A complaint may be made to an Employment Tribunal under section 23 within a period of three months, save where there is a series of deductions under section 23(3) in which case the claim must be commenced within three months of the last deduction in that series. Claims are commenced having regard to the provisions as to Early Conciliation.

67. Wages are defined in section 27, and includes any sums payable to the worker in connection with his employment, including holiday pay and other emolument referable to his employment whether payable under his contract or otherwise.

68. Section 230(3) of the Act provides: “(3) In this Act “worker” (except in the phrases ‘shop worker’ and ‘betting worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;”

69. The wages may be payable from a source other than the contract with the worker itself, see ***Kent Management Services Ltd v Butterfield [1992] IRLR 394*****,** but must be “properly payable” in the sense of a legal obligation to do so, see ***New Century Cleaning Co Ltd v Church [2000] IRLR 27*****.**

(iii) Series of deductions

70. In ***Group 4 Nightspeed Ltd v Gilbert [1997] IRLR 398*** **the** EAT held that a 'series of deductions' exists if similar claims are made under the same contract relating to similar payments. The fact that there were various different reasons why the employer declined to pay did not alter the fact that there was a 'series of deductions' within the ordinary meaning of the word 'series' (that principle was followed in ***Reid v Camphill Engravers [1990] IRLR 268*****,** ***[1990] ICR 435,*** and ***Taylorplan Services Ltd v Jackson [1996] IRLR 184*****).** The requirement was for a factual nexus between the deductions. In ***Ekwelem v Excel Passenger Service Ltd UKEAT/0438/12*** the EAT held that the position in which only some of the deductions in a purported series were unlawful, and some lawful, did not break the series.

71. In ***Bear Scotland Ltd v Fulton; Hertel (UK) Ltd v Woods; Amec Group Ltd v Law [2015] IRLR 15*** a different division of the EAT held that for there to be a series of deductions, each such deduction required to be no more than three months in time before the next, otherwise the series was broken.

(iv) Holiday pay

72. The right to holiday pay may arise under contract and also arise under the Working Time Regulations 1998 ("WTR"). The definition of a worker under the WTR is addressed in Regulation 2 and is to the same effect as section 230(3) above. The right to annual leave is set out in Regulation 13 and 13A, and amounts to a minimum of 28 days per annum for a five day per week worker, the equivalent of 5.6 weeks per annum. Payment for that is provided for in Regulation 16 during employment, and Regulation 14 at termination. There is a right to present a claim under Regulation 30.

73. The WTR implement the terms of the Working Time Directive 2003/88/EC, and requires to be construed purposively. That includes authorities of the CJEU. A woman on maternity leave accrues leave during that maternity period, but does not take it during the period. That is firstly analogous to the position of someone unable to take annual leave as a result of absence through illness - ***HM Revenue and Customs v Stringer*** **(*Case C-520/06*),** ***Schultz-Hoff v Deutsche Rentenversicherung Bund*****: *C-350/06*: *[2009]***

IRLR 214. Although that case concerns holiday rights during extended sick leave, the CJEU dealt with the position of a woman on maternity leave in ***Gomez v Continental Industrias del Caucho SA*****: *C-342/01*, *[2004] IRLR 407*).** The position, in relation to maternity leave, was also addressed in ***Tribunalal Botaşani v Dicu*****: C-12/17, *[2018] IRLR 1175***.

74. The requirement for purposive construction of statutory provisions that implement EU Directives is a requirement that continues as retained law under the European Union (Withdrawal) Act 2018.

75. The issue of what has become known as rolled up holiday pay has been considered in a number of authorities. It was considered by the Court of Justice of the European Union in the case of ***Robinson-Steele v R D Retail Services Ltd [2006] IRLR 386***. It held that rolled up holiday pay was precluded by the Directive. The Directive does not specifically prohibit the setting off of sums actually paid under transparent and comprehensible arrangements for rolled-up pay, but the earlier case of ***MPB Structures Ltd v Munro [2003] IRLR 350,*** at the Court of Session, indicated that payment received at the point of earning it not at the time of taking leave acted as a disincentive to taking that leave, which may in turn be contrary to the Regulations and Directive.

Other provisions

76. There is a requirement that an employer "shall give" a statement of initial particulars of employment to a worker as set out in section 1 of the Act, supplemented by section 2 and, and to an itemised pay statement under section 8 of the Act.

77. The Act includes the terms of section 230, which commences as follows:

> "Section 203 of the Act commences:
> "**203 Restrictions on contracting out**
> (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—
> (a) to exclude or limit the operation of any provision of this Act."

78. In the event of a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures an uplift in the award of

compensation for jurisdictions listed is provided for in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. That requires amongst other matters that the failure is unreasonable. The said Code states that "If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."

79. Those on maternity leave have rights which include those set out in the Maternity and Parental Leave etc Regulations 1999 ("MAPLE"). The Social Security and Benefits Act 1992 makes provision for statutory maternity pay, particularly in sections 164 and 165. Rights also emanate from the Pregnant Workers Directive 92/85/EEC. The prohibition on carrying forward untaken leave contained in Regulation 13(9) is incompatible with the requirements of the Working Time Directive, and requires to be construed purposively, see ***NHS Leeds v Larner [2012] IRLR 825*****,** which concerned sick leave but where the principle applies to maternity leave

80. The Transfer of Undertakings (Protection of Employment) Regulations 2006 make provision for a relevant transfer in Regulation 4, which is either the transfer or an undertaking or part, or the transfer of a service provision or part. The Regulations provide for transfer of rights and liabilities, and a requirement for information and consultation in advance of a transfer. Provision in respect of pension is made in the Transfer of Employment (Pension Protection) Regulations 2005.

81. The Pensions Act 2008 introduced what is generally known as auto-enrolment for pensions, and is supplemented by Regulations. Under the terms that apply, save for those opting out, pension contributions are made by employer and employee to a pension scheme for the employee operated independently of the employee.

82. The Agency Worker Regulations 2010 have provisions as to Agency Workers, and implement the Agency Workers Directive 2008/104/EEC. They include rights in relation to basic working and employment conditions

as to pay and annual leave, amongst other rights, under Regulations 5 and 6. There is a qualifying period of twelve weeks under Regulation 7.

Observations on the evidence

83. **The claimant** gave what I considered to be obviously credible and reliable evidence. I accept that what she said had been said to her by Mr Aitken at the commencement of matters was accurate. It is supported by a document the first respondent provided. I accepted her evidence that she did not see or agree to any document with the first respondent, and that what bears to be an electronic signature for her on it is not the one that she uses, and was not appended with her knowledge or approval. I accept her evidence on how matters progressed, and that she thought that her employer was the first respondent, with the other entities being purely payroll companies, in the sense that those companies made payment of salary to her, made statutory deductions, but did so as agents for the first respondent which remained her employer. I accepted her evidence that in order to access payslips she required to accept terms and conditions on an electronic portal, but did not have any contact with any purported employer. I also accepted her evidence that the Council gave her the benefit of its maternity policy, and the retrospective pay rise of 2% from 1 January 2021.

84. **Ms Blake** was I considered seeking to give honest evidence, but the difficulty is that she was not present for the conversations with Mr Aitken, and could only give general evidence of what the file showed, what the normal practice had been and what she thought that the position would have been. I was concerned at the reliability of her evidence for the issues in dispute. Where that general evidence conflicted with that of the claimant I preferred the claimant's evidence. Ms Blake accepted that the document provided by the first respondent itself firstly did not refer to any intermediary company, and secondly simply stated an hourly rate of £18. It did not refer to a net rate of £16.54 which was said to be the position, and that the higher rate was inclusive of holiday pay. Her evidence as to how holiday pay had been calculated did not suggest that it was reliable in its understanding of how that should be done, and I address these issues further below. She said in evidence that she could not understand

why the claimant thought that the first respondent was her employer, but given her apparent lack of understanding that did not carry I considered any weight. Her evidence was also inconsistent in how she described the claimant, and payments to her were made, such as in an email saying that "we made holiday payments to her", not that they were made by the employer said to be another company.

85. **Ms Kingshot** gave evidence that I had concerns over. It was contradictory in a number of respects. For example she said initially that her company had no knowledge of why there were changes of employing entity, or any involvement in that. Later she said that there had been changes because companies had ceased to trade. That appeared to me to be inconsistent with the earlier evidence. She also accepted in cross examination that the second respondent contracted with those suppliers, but had denied that the second respondent had any say in which company was employer. That was contrary to common sense given the circmstances, and not I considered credible or reliable evidence. She gave in her evidence dates when she said new contracts had been accepted by the claimant on the portal, but they were not the same dates as those in the HRMC records which the claimant spoke to, and Ms Kingshot could not explain why that was. The material from which the dates Ms Kingshot gave was based was not before the Tribunal. She had not put the dates to the claimant in her cross examination of the claimant. The difference was most striking for Little Missenden Ltd, where the HRMC records started on 15 September 2020 and the date she gave was 17 January 2021. That indicated I consider that the date Ms Kingshot provided was not likely to be accurate. She had also not produced any of the details from the portal, no documents from her suppliers including the acceptances of contract or the full terms of those contracts, nor the payslips or similar evidence. If she did not have access to them easily they could have been obtained by document order under Rule 31, but that was not sought.

86. She could not give any names of those who she had spoken to at any of the suppliers. When asked on such matters she could either not recall, or said something to the effect that as the second respondent was not the employer it had nothing to do with them. That again in my opinion did not accord with common sense where it was the second respondent which

contracted with those suppliers, and had the choice of with which entity to do so.

87. An excel sheet had been created by the respondent which purported to show an overpayment of maternity pay, but it had the wrong SMP figure, being that for the previous year, and Ms Kingshot could not explain when asked in cross examination by the claimant where the figure for OMP (Occupational Maternity Pay) on it came from. It was not related to what the Council had provided for in respect of the claimant.

88. Taking account of all before me, I regret that I did not consider her evidence to be reliable, and not credible in the aspects set out above, and where it conflicted with that of the claimant I preferred the evidence of the claimant.

Discussion

89. Before commenting on the detail of the issues, I consider it appropriate to make some general remarks. Neither of the two respondents could conceive that there was any merit in the claimant's position, and both thought that they were following industry standards. That was particularly the case with the second respondent. I was not of the impression that either of the two respondents appearing had a sound and comprehensive knowledge of the law in relation to the issues before the Tirbunal. It is complex, and has a number of aspects, set out above and analysed below. None of the parties referred in their submissions to statutory provisions or case law, which is understandable as none of them were legally qualified, I have set out the statutory provisions and authorities above..The evidence before me was very far from complete. I required to make the best of what the parties had produced both in their written and oral evidence, and submission.

(i) Was the claimant a worker?

90. It appeared to me that neither of the respondents who appeared at the Hearing seriously disputed that the claimant was a worker. The documentation before me indicated that she was an employee. She was

treated as such for tax purposes. For the avoidance of doubt, however, I concluded that she was a worker as defined in the Act.

(ii) If so for whom?

91. This is the principal area of dispute. The first respondent denied that it was ever the employer for the purposes of Part II of the Act. It argued that the employers were the succession of companies used for paying payroll, although it had produced none of the documents that might establish that. The second respondent took the same position. It described itself as an intermediary. Both of those respondents suggested that the claimant knew that neither of them was their employer because she had accepted terms with other entities on the portal, but the acceptances were not in the documents before me, nor were the full terms of the documents themselves, only the brief extracts produced by the claimant herself.

92. I have come to the conclusion that the first respondent was in law the claimant's employer. I did so from a review of all the evidence before me, taking into account also what was not before me, and applying the statutory terms as explained in case law.

93. Firstly, the claimant said that she had taken from the discussion with Mr Aitken that the first respondent was her employer and that no other arrangement was suggested. I accepted her evidence on that.

94. Secondly, that evidence is supported by the document the first respondent sent to her by email, using its trading name and bearing the name of Mr Aitken, which does not refer to any intermediary. It refers to her using the word "Staff". It has an hourly rate. These terms from the first respondent are strongly indicative of the first respondent being employer for these purposes. I accepted the claimant's evidence that she had never seen documents the first respondent sought to rely on, being a purported "Registration Agreement" with her but with an electronic signature, and a Key Information Document on which there was no direct evidence that she had been sent it. The purported agreement I concluded had not been seen or agreed to by the claimant. That it was part of the first respondent's normal practice to send was considered, but I accepted the claimant's clear evidence that she had not ever seen it. As the EAT stated, caution

is required where such documents are sought to be relied upon. In any event that document had a provision which applied if there was an intermediary, and here I did not consider that the documentation showed that to be the case. Ms Blake accepted that the document sent by Mr Aitken did not identify an intermediary. So far as the Key Information Document was concerned I accepted the claimant's evidence that she had never seen that, and in any event it had as a rate, said to be a minimum, the sum of £8.91 per hour, which was not near that agreed with the claimant, or even one close to the figure "net" of holiday pay that the first respondent argued for.

95. Thirdly, there was only one payslip produced before me, by the claimant, which referred in the box for employer to another entity Habakirk Ltd, not the first respondent. I did not consider that to be determinative. For the reasons I shall address further below, that was I consider not a reflection of reality.

96. Fourthly, the claimant was said initially to have been employed by or through a company named as Zeva Ltd, but no documentation to support that was provided, and no evidence led from that company. There was no document from the supplying company Habakirk Ltd before me either. No witness from that or any other of those companies said to be the employer was led. It was also of note that the claimant referred to such entities in an email as 'employer', with the inverted commas indicating, I consider, that they were not truly the employer, and that in one email the second respondent did exactly the same. That was I considered an acknowledgement by the second respondent that the purported employer was not that in reality. The full terms of the agreements the claimant accepted in order to recover her payslips were not before me. I did not therefore know what they said, and what if any effect they had. The one clause that was before me was not accurate in so far as the claimant's holiday pay entitlement was concerned.

97. Fifthly it was instructive that the claimant addressed concerns or points over issues such as pay, holidays and maternity leave to the first respondent, which did not reply by saying that they should be addressed to another entity which was her employer, but at least to an extent

responded itself, or passed her to the company with which it had contracted, the second respondent. The claimant addressing issues to the first respondent included the claimant confirming to the first respondent the important issue of when maternity leave was to start, on which again I accepted her evidence. It did not reply to ask her to send that to another entity. There is no evidence that the first respondent did other than deal with that issue itself. I also accepted the claimant's evidence that she informed the first respondent when she was due to take holidays, and again there was no evidence of the first respondent stating that she should tell another entity as her employer of that. These are all the kind of issues raised with an employer, and support the claimant's evidence that the first respondent was the employer, and other entities only made payment of her pay and attended to related issues such as statutory deductions, on the first respondent's behalf.

98. Sixthly the contract that led to the claimant's services was held by the first respondent with its client Glasgow City Council. The Council paid the first respondent for the services undertaken by the claimant, and others. The source of the funds that led to payments to the claimant was the Council making payment to the first respondent. The first respondent in turn contracted with either a company believed to be named Zeva Ltd, and latterly the second respondent as its successor, which in turn outsourced aspects to other companies as I shall come to. As however the contract with the end user was with the first respondent it was in a dominant position so far as the claimant was concerned, and it was able to determine how the relationship with the claimant would be managed and following from that, the claimant was in a subordinate position.

99. Seventhly the claimant was not in receipt of documents that would be expected if she was truly employed by other companies, and none were before the Tribunal. They included documents such as an initial contact by email or otherwise to seek personal information and bank details. Those details were only given to Mr Aitken. Those details must then have been passed on by the first respondent to others to pay the claimant's wages. The documents not provided included documents sent to the claimant welcoming her to the company, and policies and procedures. The fact that the claimant had to sign electronically to terms and conditions (as

stated only a small part was provided, and that by the claimant herself) either as to those terms or what exactly it was that the claimant electronically accepted, in order to access payslips, was I consider evidence of a sham transaction or series of such transactions. The claimant had a right to an itemised pay statement under section 8 of the Act. It was I consider a breach of that provision to require her to agree to such terms with a purported new employer to be able to access them. She did not give her consent in law in such circumstances, in my opinion. The terms themselves, whatever they fully stated, did not reflect reality. The one provision I did see, on holiday pay, was not what the Council provided. There was no dispute that that was 37.5 days per annum, not the statutory minimum of 28. The claimant tried to contact the companies but could not get any response. There was no evidence from any of them. There was no witness, nor explanation as to why that was not produced. What if anything those companies did was not explained in evidence.

100. These comments are also supported by the fact that only one of the prospective employers issued a P45, Greencolor Ltd, which the claimant had seen on the portal but was not before me. There was no suggestion of any contact with the claimant to terminate one relationship before another is said to have started, no documentation produced to that effect, nor of any information or consultation in relation to what appears almost certainly a transfer of undertaking under the requirements of the Transfer of Undertakings (Protection of Employment) Regulations 2006. All of that would be expected if those entities genuinely were her employers. That there was no evidence that it did take place supported the view that the documents showing them as employer, payslips and purported terms and conditions, were a sham as they did not reflect reality.

101. Eighthly there were a large number of changes of proposed employer over the period. Why that was, either generally or in each case, was not explained save in Ms Kingshot's evidence which was inconsistent but latterly that the companies had ceased to trade. The relationship between the second respondent and each of them was not explained, although the second respondent contracted with them. Those contracts were not before me. This was also I consider evidence of sham transactions. It was further supported by the fact that the parts of the contracts that were before me,

from Greencolor Ltd, Little Missenden Ltd, and Zymanthorpe Ltd, the third, fourth and fifth respondents respectively, were firstly identically worded as to holidays, and secondly wholly inaccurately worded for the claimant. That is they had a holiday provision of the statutory minimum of 28 days, not the 37.5 days which it was not disputed she was entitled to, and secondly referred to the National Minimum Wage or National Living Wage, which was not what the claimant was receiving on any view even if there was rolled up holiday pay in a lawful sense. In any event the provisions in so far as they sought to contract out of rights that the claimant had were ineffective under section 230 of the Act.

102. Ninthly Ms Blake referred in evidence to the claimant working for them. The language was not consistent with the argument that it was not the employer, but rather reflected the reality that it was.

103. Tenthly Ms Kingshot could not say who she contacted at each of the proposed employers, being the supplier companies. That was very surprising if the employer was in reality those entities, with the last of those said to be the employer in February 2022. Her evidence was contradictory as to the relationship with those entitles. It was concerning that she said initially that she did not know why there were the changes of entity that there were, but later that it was because of the cessation of trading. It was the second respondent which engaged those companies, and decided the commercial terms to do so. The claimant had said in evidence that she had tried to contact those entities herself, without success, which I accepted. She had also asked the first respondent how to do so, without response. That again is surprising if those companies were truly her employer. I did consider the evidence Ms Kingshot gave that text messages had been sent to the claimant, and calls attempted to her, but the claimant denied that, the texts said to have been sent were not produced, and it was not clear which entity or entities had, if they had been sent, done so or what those texts had stated. I preferred the claimant's evidence that there had been no contact. This is all I consider consistent with those entitles only being a form of near-empty vessel by which pay calculated by the first respondent with deductions calculated by the second respondent was sent to the claimant, and statutory deductions and related issues such as pension attended to, but otherwise performed none

of the normal activities of an employer, such that in reality each of those entities was not the employer.

104. Eleventhly Ms Blake sought to rely on the terms of the first respondent's agreement with the second respondent, which included a provision to the effect that no one in the claimant's situation was an employee of the first respondent. But that was of no assistance in determining the issue before me in that respect. There was no suggestion that the claimant had seen that document.

105. I did have regard to the evidence, led in fact from the claimant, as to what HMRC had told her who her employers had been. I did not consider that to be determinative. The source of that information given to HMRC was not clear but likely to have been those entities or the second respondent. It was provided for purposes of taxation and related matters. It is consistent with the entities being described as 'employer' for tax purposes, not in the sense under the terms of the Act.

106. Taking all the evidence I heard, including consideration of evidence that was not before me but could have been, I concluded that the claimant was a worker employed by the first respondent for the purposes of the Act.

107. In coming to these conclusions I considered that the following words from the speech of Lord Leggatt in ***Uber*** are of assistance, as although the context of that case is different, similar considerations arise:

> "The general purpose of the employment legislation invoked by the claimants in the ***Autoclenz*** case, and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing). The paradigm case of a worker whom the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. In addition, however, the statutory definition of a 'worker' includes in limb (b) a further category of individuals who are not employees. The purpose of including such individuals within the scope of the legislation was clearly elucidated by Mr Recorder Underhill QC

giving the judgment of the Employment Appeal Tribunal in ***Byrne Bros (Formwork) Ltd v Baird*** **(2001)** ***EAT/542/01, [2002] IRLR 96, [2002] ICR 667****,* para 17(4):

> '[T]he policy behind the inclusion of limb (b) … can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* – workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position….”

(iii) For what period?

108. This was for the period from starting work for the Council, on 26 April 2019 to the end of her maternity leave on 4 February 2022. At that time she had a new role and arrangements for that were made by a different agency. The contract with the first respondent ended on that date.

(iv) Were there unlawful deductions from wages?

109. This was not a straightforward issue. There are a number of aspects to it.

(i) Holiday pay

110. I am satisfied that the contractual hourly rate was £18, being that stated by Mr Aitken and confirmed in the document provided to the claimant. It was not stated to be inclusive of holiday pay. Holidays were not mentioned on that document. The claimant had not been told that there was rolled up holiday pay. It was not transparent if that had been the intention. There was no indication in that document that it was. On the contrary, the natural

reading of it was that it was an hourly rate which would be applied for holiday pay as well, separately to pay for hours worked.

111. Separately, the calculation made by the first respondent for holiday pay, on what it called an AWR calculator, appears to me to be wholly wrong. It utilised as a basis for the calculations a notional salary for someone employed by the Council at the lowest level for such a role, and then applied 12.07%. That figure is appropriate for a full time worker working 5 days per week, who has the minimum entitlement under the WTR of 28 days per annum or 5.6 weeks. The claimant's entitlement was higher, as provided by the Council. It was to 37.5 days. It is the equivalent of 7.5 weeks as the claimant worked five days per week. That there was such holiday entitlement of 37.5 days per annum was not disputed, but in any event was a requirement given the terms of the AWR after a period of 12 weeks. That in turn meant that the claimant worked 44.5 weeks per year (52 – 7.5). It meant that the percentage of holiday pay was 16.85%, being 7.5 holidays divided by 44.5 weeks work, not 5.6 weeks holidays divided by 46.4 weeks work (that latter calculation being 12.07%). The first respondent did not appear to appreciate that at any stage. The re-characterising of her hourly rate in the payslip provided at £16.34 meant that £1.66 was allocated as holiday pay, if this was truly rolled up in that sense, but that was reached from the 12.07% figure, not the correct one of 16.85%.

112. Rolled up holiday pay is not consistent with the WTR and the Directive it implements, as the case law referred to above makes clear, and that same principle I consider applies to the part of the entitlement beyond the minimum, being the extra 9.5 days per annum the Council provided for. If there is to be an argument that what was paid to the claimant can be set off against the liability that there is, and if that argument has any prospect of being correct in law, it requires that there be transparent and comprehensible detail provided to the worker to show what the holiday pay arrangements are.

113. The detail given to the claimant was not transparent. The evidence before me did not show what the holiday pay element was, in that I did not have sight of a document stating that. It was separately not comprehensible.

The whole basis of what the first respondent did was, I consider, wrong in law. It undertook the calculations of pay and holiday pay on which the sums actually paid to the claimant were based. At no stage was the position on the calculation of holiday pay set out in an adequate manner. The payslips which were said to make the position clear were not before me, save for one. In any event, the one payslip before me showed a net rate of £16.34 which could not have been the correct calculation for holidays of 37.5 days per annum. It had been based on there being the minimum of 28 days per annum, which was wrong. No document had the correct calculation.

114. I did consider the terms of the email from the claimant on 16 November 2020. In that she asked that the hourly rate return to the original, being £18 per hour, rather than having holidays accrued. But that was based on the erroneous position taken by the respondents, particularly the first respondent, which had unilaterally reduced the payment from £18 per hour to £16.34 per hour. For the reasons given that was not on any possible view the correct figure, and was in any event unlawfully seeking to roll up holiday pay entitlements. The hourly rate had been £18, and that was, I consider, applicable to holiday pay. The respondents did not argue acquiescence, but had they done so I consider that that argument did not succeed. The claimant made clear on a number of occasions that she did not consider the calculations to be correct, and that she had agreed the rate with Mr Aitken at £18 per hour. The first respondent sought to explain matters but its Managing Director accepted in an email that agreement with her had not been reached. In any event the respondents did not lead evidence on any issue of acquiescence. The closest it came to was the claimant's email of 16 November 2020, but it came against the background of a dispute over the proper payments, which continued afterwards.

115. I also considered the argument from the first respondent that the Council would not have agreed to such an hourly rate, as it was higher than those of its own employees, but there was no direct evidence of that at all, it was only briefly mentioned in the evidence, addressed in more detail in submission, and it was contradicted by the document issued by the first respondent itself stating £18 per hour as the hourly rate. Adding holidays

to that certainly reduced the first respondent's profit margin, but I did not consider that there was anything in law that operated to prevent £18 per hour being the initial hourly rate which Mr Aitken had agreed with the claimant, and confirmed in documentary form.

116. I conclude that the arrangements were not within the terms of the WTR, were not lawfully compliant with those Regulations, and were not what had been agreed as to the Council policy of 37.5 days holidays per annum, and that the failure to pay the holiday pay due was a breach of section 13 of the Act. I concluded that the initial rate of pay was £18 per hour, and that it was not inclusive of holiday pay as the respondents argued. There were later pay increases.

117. The two respondents had not placed before me clear evidence of what had been paid to the claimant as to holidays, save as to two comments in an email which the claimant could not recall receiving or details of. It appeared to me however that the respondents had established that those sums had been paid, as one is supported by another email. On balance I considered that two sums to account of the liability had been paid, and required to be set off.

118. It appears to me clear that the claimant did not take any annual leave whilst on maternity leave, and accrued her entitlements to annual leave during that period, in any event. She returned to work on 4 February 2022 but her relationship with the first respondent ceased at that point. It was at that stage appropriate under Regulation 14 of the WTR for payment for accrued but untaken leave to be made.

119. I considered the terms of the 2014 Regulations. There is an argument that they are not effective in law as they may contravene the WTD, such that a purposive construction is required to remedy that contravention. But to pursue such an argument is I consider my stepping into the arena to argue a point for the claimant in an impermissible way, as that is different to issues as to the Tribunal's jurisdiction on which I require to be satisfied. I concluded that I required to apply those Regulations as they stand, and limit the claim to a period of two years.

120. I then considered the issue arising in ***Bear Scotland.*** In brief summary it held that for there to be a series of deductions for the purposes of the Act each deduction required to be no more than three months before the last in the chain of them. It is not consistent with another line of authority with regard to the factual nexus between the deductions being the issue as to what amounts to a series. The arguments over which line of authority is to be preferred did not appear to me to be material in this case as the claimant's evidence, which I accepted, was that she took holidays regularly, save for the period when on maternity leave, that she did so including public holidays and otherwise, and I inferred from her evidence that each deduction from pay was within that three month period prior to maternity leave. In so far as the maternity leave period is concerned that in effect prevented her from taking annual leave, she remains entitled to annual leave during that period, and I consider that it is necessary to construe the legislation such that she receives holiday pay both for the period on maternity leave, at the rate as if at work, and the earlier period broken by her maternity leave, in light of the terms of the authorities to which I refer above, in particular ***Merino Gomez***. In so far as I require to decide whether ***Bear Scotland*** is to be followed or not, I respectfully conclude that it is not. Annual leave is a right deriving from the Working Time Directive, a health and safety matter, and I consider that that authority does not accord with the purpose of the Directive. EU law including decisions of the CJEU remain in effect as retained law. I consider that applying the test in ***Gilbert*** there had been a series of deductions in the period from 4 February 2020 to the commencement of maternity leave, and that all of the sums claimed in that period fell within the jurisdiction of the Employment Tribunal.

121. This means that the pay that the claimant is entitled to for holiday pay is the underpayment, being an unlawful deduction from her wages, for the two year period prior to the end of maternity leave and the cessation of her contract with the first respondent, as I found there to have been. I calculate that below.

(ii) Retrospective pay rise

122. The next aspect sought was not paying her for a pay rise granted by the Council for 2021. It was not seriously disputed by the first respondent other than saying that it had not initially been clear if the claimant was included in it. There was one email from the Council that raised that issue, but it was resolved by email in February 2022, and confirmed again in July 2022. That also would accord with the law on those who are on maternity leave. I considered that the figures in the claimant's Schedule of Loss for this aspect had been proved. I have set out the sums for that below. That pay increase also has an effect on the calculation for holiday pay.

(iii) Pension contributions by employer

123. The final issue is pension contributions required under the auto-enrolment provisions. I had a concern over this issue. The proposed employer is said to have changed unusually regularly, seeking to use the 12 week commencement of employment provision each time not to pay employer pension contributions. There was not only no documentary evidence before me to explain this, but inconsistent evidence from the second respondent as referred to above. The three putative employers convened as respondents, the third, fourth and fifth respondents, did not appear or provide any evidence.

124. It appeared to me firstly that the agreements that the claimant required to accept electronically to access her payslips were sham documents, not reflecting reality, but secondly in any event may have been an attempt at avoiding the provisions of the Pensions Act 2008. I do not consider however that it is within the jurisdiction of the Tribunal to make an award. That is because the definition of wages in section 27 is to sums "payable to the worker". These sums are not. They are payable to the pension provider, in this case NEST, albeit for the benefit of the worker. Given the terms of the Act I consider that I cannot make any award for those sums. That is so even though the second respondent accepted that at least some of the sums sought were due. This is separately a matter that the claimant can raise, if she wishes, with the Pensions Regulator. If she does so that Regulator may consider, if it thinks it appropriate, whether the arrangements set out in this Judgment were in any breach of the statutory provisions.

(iv) Calculations of amount of deductions

125. Calculating the sums properly due to the claimant is not a simple exercise. That is partly as the source material to do so is not before me. I only had one payslip presented to me. Save for the email referred to above on payments made to the claimant on two occasions for holiday pay there was no other evidence of the claimant having been paid for holidays she took. Her email of 16 November 2020 indicates that she was paid at the rate of £18 per hour for part of the period, but that is the payment rate agreed with Mr Aitken and confirmed by him in the document he sent. For the reasons given, the first respondent did not in a lawful manner roll up holiday pay, if that is ever competent. It is possible that the two payments relate to a period or part of a period prior to the two year period of loss that I make an award for, but there is no evidence as to that, and it appears to me more likely that it was not.

126. I did have some documentation with regard to increases of rates of pay, and details in the Schedule of Loss from the claimant, to which she spoke in her evidence, and on which she was not cross examined to any material extent. I have followed the terms of the Schedule of Loss so far as I consider it appropriate to do so.

(a) Claim for holiday pay

127. I require to work from gross figures as I did not have any adequate information as to what the net figures for pay had been. The period which the claimant may claim for is restricted to two years from the terms of the 2014 Regulations addressed above. That means for the period from 4 February 2020. I shall address it in the periods for pay increases.

(i) There is two months in the period to 4 April 2020, when a pay rise took effect. That means that the entitlement is calculated at 37.5 days x 2/12 = 6.25 x £18 per hour x 7 hours per day = **£787.50**.

(ii) In the period from 5 April 2020 to 31 December 2020 the pay was at the rate of £18.54. For 7 hours per day that is a daily rate of £129.78. The period is a total of 270 days. The calculation is 37.5

x 270/366 (the year was a leap year) = 27.66 x £129.78 = **£3,589.71.**

(iii) In the period 1 January 2021 to 23 April 2021 the pay had been increased to £18.91 per hour. The daily rate is £132.37 per day. The days total 113. The calculation is 37.5 x 113/365 = 11.6. The sum due is 11.6 x £132.37 - **£1,535.49**.

(iv) The final period is for maternity leave, from 26 April 2021 to 4 February 2022. That is a total of 284 days. The calculation is 37.5 x 284/365 = 29.17 x £132.37 = **£3,861.23.**

(v) The total of all these sums is **£9,773.93.**

(b) Backdated pay rise

128. The claimant was clearly entitled to a pay rise of 2% for the period from 1 January 2021 to 4 February 2022. From 1 January 2021 to 23 April 2021 being the last day before she went on maternity leave, the increase is set out in her Schedule of Loss and amounts to £186.48. For the period on maternity leave the increase is applied to the sums that the claimant was paid. They are I consider set out accurately in the Schedule of Loss. I also took account of the figures in the excel spreadsheet from the respondent setting out what had been paid. The first six weeks were paid at 90% of earnings, and amounts to £69.93 underpayment, and the balance was at 50% and amounted to £213.68. The total of these sums is **£470.09.**

(c) Uplift

129. The claimant sought an uplift for an alleged failure to follow the ACAS Code of Practice. Whilst the claimant did seek to raise issues by email, I do not consider that she raised them in a manner that made it clear that she was making a grievance. That word was not used, and the words she did use indicated a wish that the matter be investigated, rather than challenged by way of a grievance. In any event, I did not consider that it was just and equitable to award an increase on the sums I have awarded.

(d) Terms

130. The Schedule of Loss sought a sum for not having a statement of terms and conditions, but that had not been the claim made in the Claim Form, nor was it identified at the Hearing held earlier, the claims having been set out in the Note of that hearing. I did not consider that such a claim was before me, and could not therefore consider whether or not to make an award. Whether that would have been done was also dependent on the view formed of the document issued by the first respondent which whilst not complete did provide some details that were required.

(e) Alleged overpayment

131. The second respondent and through it the first respondent argued that the claimant had been overpaid for maternity pay. It produced an excel spreadsheet showing what had been paid, and what sums allegedly were properly due. But the figures it produced were not correct. Firstly the figure for statutory maternity pay were those of a previous year, and not accurate accordingly. Secondly, the figures for occupational maternity pay generally were not explained. When Ms Kingshot was asked by the claimant to do so in cross examination, she could not. Thirdly, the figures in any event were at a fixed amount bearing no relation whatsoever to the Council's agreement that its maternity policy should apply to the claimant, as it made clear in writing, and in her evidence, which I accepted. The argument was I considered wholly inept, and I did not accept it.

(f) Payments for holidays

132. The first respondent produced an undated email which referred to payments made for holidays, which was supported by an email of 16 December 2020 to the claimant confirming that payment of £530.54 would be paid to her, with the undated email stating that it had been done on 18 December 2020. It said that there had been another payment of holiday pay of £882.00 on 8 January 2021. It appeared to me that there was, just, sufficient evidence of those payments, with the claimant not being able to recall the detail. The documents had however been exchanged, such that the position could have been checked by the claimant if disputed. I considered that those payments required to be set

off against the sums due for holidays. That reduces the sum for holiday pay to £8,361.39.

TOTAL

133. The total award for the unauthorised deduction from wages in respect of holiday pay is therefore £8,361.39, and for the back pay is £470.09. The total sum awarded is **£8,831.48.**

Penalty

134. Employment Tribunals have a discretionary power in certain circumstances to order employers who lose a claim to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

135. The provision is as follows:

> "**12A Financial penalties**
>
> (1) Where an employment tribunal determining a claim involving an employer and a worker—
>
> (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
>
> (b) is of the opinion that the breach has one or more aggravating features,
>
> the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).
>
> (2) The tribunal shall have regard to an employer's ability to pay
>
> (a) in deciding whether to order the employer to pay a penalty under this section;
>
> (b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.
>
> (3) The amount of a penalty under this section shall be—
>
> (a) at least £100;
>
> (b) no more than £20,000.
>
> This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—

(a) makes a financial award against an employer on a claim, and

(b) also orders the employer to pay a penalty under this section in respect of the claim.

(5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

(a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.

(6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

(a) considers together two or more claims involving different workers but the same employer, and

(b) orders the employer to pay a penalty under this section in respect of any of those claims.

(7) In such a case—

(a) the amount of the penalties in total shall be at least £100;

(b) the amount of a penalty in respect of a particular claim shall be—

(i) no more than £20,000, and

(ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount of the award.

But where the tribunal makes a financial award on any of the claims and the amount awarded is less than £200 in total, the amount of the penalties in total shall be £100 (and paragraphs (a) and (b) shall not apply).

(8) Two or more claims in respect of the same act and the same worker shall be treated as a single claim for the purposes of this section

(9) Subsection (5) or (7) does not require or permit an order under subsection (1) (or a failure to make such an order) to be reviewed where the tribunal subsequently awards compensation under—

(a) section 140(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with tribunal's recommendation),

(b) section 117 of the Employment Rights Act 1996 (failure to reinstate etc),

(c) section 124(7) of the Equality Act 2010 (failure to comply with tribunal's recommendation), or

(d) any other provision empowering the tribunal to award compensation, or further compensation, for a failure to comply (or to comply fully) with an order or recommendation of the tribunal.

(10) An employer's liability to pay a penalty under this section is discharged if 50% of the amount of the penalty is paid no later than 21 days after the day on which notice of the decision to impose the penalty is sent to the employer.

(11) In this section—

"claim"—

(a) means anything that is referred to in the relevant legislation as a claim, a complaint or a reference, other than a reference made by virtue of section 122(2) or 128(2) of the Equality Act 2010 (reference by court of question about a non-discrimination or equality rule etc), and

(b) also includes an application, under regulations made under section 45 of the Employment Act 2002, for a declaration that a person is a permanent employee;

"employer" has the same meaning as in Part 4A of the Employment Rights Act 1996, …….

"financial award" means an award of a sum of money, but does not including anything payable by virtue of section 13

"worker" has the same meaning as in Part 4A of the Employment Rights Act 1996, …….".

136. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

> "to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law".

137. The Explanatory Notes also comment on the factors that a Tribunal might take into account as follows:

> "An employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake."

138. I have considered the actions by the first respondent set out above, particularly in being informed of a pay rise for those including the claimant by the Council but not taking action to give effect to it, and that the maternity provisions applied to the claimant and not giving full effect to that, but also the manner in which it addressed holiday pay matters, failing properly to do so despite several attempts to raise the issue by the claimant, may warrant consideration of the imposition of a penalty. I am also concerned at the arrangements that were made with regard to the claimant set out above, which I have described as a sham and the use, which I accept was largely put into effect by the second respondent but which it did under contract with the first respondent, of a series of purported employing companies, some for short periods, which was unexplained save as to the suggestion of ceasing to trade, which gave the strong impression of an attempt to leave liability with an entity or entities unable to make any payment, which may not be exhaustive of the reasons for doing so. These and the circumstances overall may be aggravating features, although no decision on that has yet been taken.

139. Before I consider whether to issue such a penalty and if so in what sum, I propose to give the first respondent 28 days in which to make written representations as to why I should not do so, or if I do what the amount of the penalty ought to be, having regard to the circumstances and the first respondent's ability to pay such an award, all as provided for in section 12A itself. I shall reserve the decision on penalty for 28 days to allow the respondent to provide a written response accordingly. If the first respondent wishes to it may also seek an oral hearing to address the matter.

Conclusion

140. I have found for the claimant in part, and make an award against the first respondent for the following sums:

(i) Holiday pay for two years, including as accrued on maternity leave, and

(ii) Unpaid wages from 1 January 2021 in respect of a pay rise provided by the Council for the claimant.

141. The sums are awarded gross, for the reasons given above, and the first respondent may deduct sums necessarily due for income tax and account to HMRC and the claimant for the same, as provided for in the Judgment.

142. The claims against the second to fifth respondents are dismissed.

143. The issue of penalty is continued until after the first respondent has replied to the points above, if it wishes to.

144. In these Reasons I have referred to statute and case law none of which was put before me by the parties. If any of them consider that they have been prejudiced as a result, an application for reconsideration may be made under Rule 71 in order that representations on that law may be made.

Employment Judge: Sandy Kemp
Date of Judgment: 14 December 2022
Entered in register: 20 December 2022
and copied to parties