



EMPLOYMENT TRIBUNALS

Claimant: James Main
Respondent: SPaDental Limited
Interested Party: Timothy Alexander Close (in his capacity as the Trustee in Bankruptcy of James Russell Main)

Heard at: Bristol ET (via VHS) **On:** 23 March 2023

Before: Employment Judge Gibb

Representation

Claimant: James Williams (counsel)
Respondent: Jonathan Gidney (counsel)
Interested party: Jamie Cockfield

JUDGMENT

1. Timothy Alexander Close, in his capacity as the Claimant's trustee in bankruptcy, is added to these proceedings as an interested party.
2. The Claimant's claim for unpaid holiday pay under Regulation 16(1) of the Working Time Regulations 1998 ("WTR") is well founded and succeeds.
3. Under Regulation 30 of the WTR the Respondent is ordered to pay the gross sum of £83,573.78.
4. The Respondent is ordered to pay this sum to the Trustee.

REASONS

Introduction

1. The Claimant issued proceedings dated 27 March 2019 in which he claimed for unlawful deduction of wages / holiday pay pursuant to the Employment Rights Act 1996 (“ERA 1996”) and Regulation 16(1) of the Working Time Regulations 1998 (“the WTR”). It was common ground that throughout the period that the Claimant had worked for the Respondent, he had not been paid holiday pay.
2. In a judgment dated 17 May 2022 (“The Liability Judgment”) the Tribunal found that the Claimant was a worker for the period which he had worked for the Respondent as a dentist. Since handing down the Liability Judgment, the Claimant’s Trustee in Bankruptcy (“Trustee”) indicated that he wished to be joined to these proceedings.
3. The case was listed for a remedy hearing on 23 March 2023. The Tribunal was provided with the following additional material:
 - a. A remedy hearing bundle which was agreed between the parties.
 - b. Skeleton arguments from the Claimant and Respondent and an agreed bundle of authorities.
 - c. A skeleton argument and bundle of authorities on behalf of the Trustee.
 - d. Two schedules of loss and counter schedules of loss.
4. The issues between the parties were legal issues not factual issues and therefore no further witness evidence was required. The Tribunal heard submissions from counsel for the Claimant, the Respondent, and the Trustee.
5. At the end of the hearing, the Tribunal asked counsel to agree a list of issues. Although not entirely agreed, this list was sent to the Tribunal on behalf of the parties on 27 March 2023 and has been incorporated into the issues as set out below.
6. Following a discussion in correspondence, at the start of the hearing, the Trustee applied to be joined to these proceedings as an interested party in accordance

with rules 34 & 35 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules of Procedure”). The grounds for this were that the Claimant was made bankrupt on the petition of HMRC on 21 June 2017, which was discharged on 21 June 2018. The period of the bankruptcy fell within the Claimant’s period of claim. Any sums found due to the Claimant might therefore vest in the Trustee. The Claimant objected to the Trustee’s application and the Respondent remained neutral on the point.

7. Having heard the submissions from the Trustee and the Claimant regarding his being joined, the Tribunal ordered that the Trustee be joined as an interested party. The Trustee clearly has a legitimate interest in the outcome of this claim.

Issues

8. The following issues were before the Tribunal:

Issues relating to Holiday Pay

- a. Is the Claimant entitled to be paid for leave not taken and can it be carried over?
- b. Is the claim one for payment in lieu?
- c. Is there a two-year backstop in relation to the claim under s23(4A) of the Employment Rights Act 1996?
- d. Is there any contractual reason why the Claimant cannot carry over his leave entitlement from year to year?
- e. Can the Respondent rely on the “absent dentist charge” to offset any sums due, either as a contractual claim or as part of a “just and equitable” assessment of compensation?
- f. Can the Claimant interest at 8%? If so, for what period?

Effect of Transfer from the First Services Agreement to the Second Services Agreement

- g. As regards the end of the First Services Agreement in August 2017 and the start of the Second Services Agreement later that month:

- i. Is it now open to the Tribunal, in light of the original judgment dated 14 November 2019 (“the First Judgment”) and the Liability Judgment, to find that during the period of the First Services Agreement, the Claimant was employed by J Main Limited not the Respondent?
- ii. If the Respondent’s employer under the First Services Agreement was J Main Limited, does the Claimant’s claim for holiday pay as against the Respondent fail for the period covered by that agreement?
- iii. Is it open to the Tribunal, in light of the First Judgment and the Liability Judgment, to consider whether there was a termination of the Claimant’s employment in August 2017?
- iv. If so, was there a termination of employment on August 2017 and what were the consequences of that?

Effect of the Bankruptcy

- h. Is the Claimant’s claim a personal, proprietary or hybrid claim?
- i. If hybrid, what proportion of the claim is personal and what proportion is proprietary (or from what point in time should the claim be treated as personal)?
- j. If the claim is proprietary or hybrid, should the Tribunal order it to be paid to the trustee and if so, on what terms?

The Law

The Application of the Working Time Regulations

9. Regulation 13(1) of the WTR provides the right to four weeks paid annual leave each year. It cannot be replaced by a payment in lieu unless the worker’s employment is terminated: Regulation 13(9). Regulation 14 provides for compensation in relation to leave entitlement in the year of termination.

Regulation 16(1) confers an entitlement to payment in respect of periods of holiday leave to which the worker is entitled under Regulation 13.

10. The WTR distinguishes between claims. Regulation 16 is a non-payment claim, which is for payment in respect of holiday which has been taken but for which the worker has not been paid. Claims under Regulation 16 have been held to be "wages" claims within the meaning of section 23 of the ERA 1996 (*HM Revenue & Customs Commissioners v Stringer* [2009] UKHL 31, [2009] ICR 985 (HL)).

Can the Claimant Carry Over Leave Not Taken?

11. In *Smith v Pimlico Plumbers Ltd* [2022] EWCA Civ 70, the Court of Appeal referred to the well-established principal relied on by the CJEU in the case of *King v Sash Window Workshop* (Case C-214/16), that the rights to paid annual leave cannot be lost unless the worker has had the opportunity to exercise that right before the termination of the employment relationship. Giving the lead judgment Simler LJ stated:

"It seems to me that there is a clear analogy between workers who do not take leave, and those who take unpaid leave, where in both cases, their contracts do not recognise the right to paid leave and their employers refuse to remunerate leave. In both cases, like the worker who is prevented by illness from taking annual leave, they are prevented by reasons beyond their control from exercising the single, composite right. The worker who takes leave in these circumstances, knowing it is unpaid leave, will not derive the necessary rest and relaxation from it, because it is unpaid. Although the CJEU did not expressly address this case, there is nothing to suggest that the CJEU regarded the taking of unpaid leave as the exercise of the composite right to paid annual leave. On the contrary, the strong inference from the passages I have cited is that a worker whose employer disputes the right and refuses to remunerate annual leave would, even if he or she takes unpaid leave, also be seen as having been prevented, by reasons beyond his or her control, from exercising the composite right."

(paragraph 77)

She further noted:

“An employer who does not allow a worker to exercise the right to paid annual leave must bear the consequences. An arrangement or system where the worker's entitlement to paid annual leave could be extinguished in these circumstances would, in effect, validate conduct by the employer which unjustly enriched the employer at the expense of the worker's health. The fundamental principle which followed from these considerations is that where paid annual leave rights are not exercised over a number of consecutive reference periods because the employer disputed the right and refused to remunerate leave, rules or practices preventing the worker from carrying over and accumulating the leave until termination are precluded by the WTD.”

(paragraph 79)

The case therefore confirms an extension to the *King v Sash Window* (supra) principle which applies not only to workers who had taken no holiday at all, but also to workers who had taken unpaid holiday.

Payment in Lieu of Notice?

12. Regs 13(9)(b) and 13A(6) of the WTR provide that statutory leave cannot be replaced by a payment in lieu of notice. The main exception to this rule, discussed below, arises where the worker is owed outstanding holiday on the termination of their contract. In these circumstances, a payment in lieu is permitted by Article 7(2) of the WTR, which provides: *‘The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’*

13. In the case of *NHS Leeds v Larner* [2012] ICR 1389, cited with approval by the Court of Appeal in *Pimlico Plumbers* (supra), Mummery LJ summarized the applicable principles in *Stringer* (supra) including:

“37(7) After termination of the employment relationship, it is, of course, no longer possible for a worker to take paid annual leave for which that employer is liable: he has ceased to work for that employer. Provision is made in article 7(2) for entitlement to an allowance in lieu, but the article does not expressly lay down the way in which the allowance must be calculated: paras 56–57.

(8) "[W]ith regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship": para 61, ie the worker's normal remuneration."

14. Citing the case of *Kreuziger v Land Berlin* (Case C-619/16), Simler LJ noted that where employment is terminated, the corresponding absence of payment of an allowance in lieu of annual leave was a breach of article 7. She noted:

"Moreover, I disagree with Mr Jeans and the EAT that article 7(2) cannot be invoked to confer an allowance in lieu of leave taken but unpaid in the circumstances described. Such an allowance is an allowance in lieu of paid annual leave. First, it reflects the fact that the worker took the leave but was not paid for it (and so suffered uncertainty which reduced the benefit of the rest which the leave should have brought). Secondly, it reflects the employer's failure to establish and maintain a system to ensure that the worker's right to paid leave is recognised and the worker is actually in a position to take the paid annual leave to which he is entitled and which gives him the required rest and relaxation."

[paragraph 85]

Does the Two-Year Backstop Apply?

15. In *King* (supra), the ECJ considered that the Working Time Directive does not allow for national legislation to restrict a claim by a worker for carrying forward untaken holiday entitlement from one leave year to the next if the employer has prevented the worker from taking paid holiday leave in the first place. There is no time limit on this right to carry forward holiday or on the right to be paid for it on termination of employment.
16. This also means that time limits on a claim for holiday pay going back a number of years do not apply to claims based on an accumulation of unpaid holiday entitlement where an employer has prevented the worker from taking that leave. In particular, the two-year limit in section 23(4A) of the ERA 1996 does not apply. As was made clear in *Pimlico Plumbers* (supra), the right crystallises on termination of employment.

The Nature of the Claim

17. Pursuant to section 306 of the Insolvency Act 1986 ("IA 86") the estate of the bankrupt vests in his trustee in bankruptcy immediately on his appointment taking effect. By section 283(1), subject to exceptions, a bankrupt's estate encompasses "all property belonging to, or vested in the bankrupt at the commencement of the bankruptcy." Section 436(1) states that:

"'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

18. In the case of *Gwinnutt v George* (CA) [2019] EWCA Civ 656, Newey J giving the leading judgment distilled down a number of principles from the case law and the relevant ones are as follows:

"The following can, I think, be derived from the case law in respect of the 1986 Act and its predecessors:

*i) it is "legitimate and necessary to bear in mind the statutory objective" when interpreting the 1986 Act, albeit that "however desirable it may be to construe the Act in a way calculated to carry out the parliamentary purpose, it is not legitimate to distort the meaning of the words Parliament has chosen to use in order to achieve that result" (see *Bristol Airport plc v Powdrill* [1990] Ch 744 , at 758-759, per *Browne-Wilkinson V-C*);*

*ii) "[T]he statutory objective of the provisions of the 1986 Act" is that, "subject to certain specific exceptions, all a debtor's property capable of realisation should be vested in the trustee for him to realise and distribute the proceeds among the creditors" (*Patel v Jones* [2001] EWCA Civ 779, [2001] Pens LR 217 , at paragraph 39, per *Mummery LJ*). In a similar vein, *Mummery LJ* had noted in *Dear v Reeves* [2001] EWCA Civ 277, [2002] Ch 1 a couple of months earlier (at paragraph 39):*

"The purpose of divesting the bankrupt of his property, with certain

express statutory exclusions, and vesting the bankrupt's title to it in the trustee is to enable the trustee to realise the bankrupt's estate for the benefit of the creditors and to distribute it among the bankrupt's creditors in accordance with the statutory scheme contained in Chapter IV of Part IX of the 1986 Act";

iii) That approach accords with the "principle of public policy" that:

"in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to be taken in execution, legal or equitable, or not so subject, shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors"

(Hollinshead v Hazleton [1915] AC 428 , at 436, per Lord Atkinson);

iv) In keeping with that policy, "in successive statutes dealing with bankruptcy and insolvency the definition of 'property' has been progressively extended" (In re Celtic Extraction Ltd [2001] Ch 475 , at 486, per Morritt LJ);

v) The word "property" "is not a term of art but takes its meaning from its context" (In re Celtic Extraction Ltd , at 486, per Morritt LJ);

vi) The explanation of "property" given in section 436 "is not in truth a definition of the word 'property'" since the section "only sets out what is included" (Ord v Upton [2000] Ch 352 , at 360, per Aldous LJ);

vii) Section 436 is very wide in its scope. In the Bristol Airport case, Browne-Wilkinson V-C observed (at 759), "It is hard to think of a wider definition of property";

19. Notwithstanding the above principles, Newey J also notes that just because the

definition of property in section 436 is wide, not every asset will fall within the definition.

20. Most claims made to the employment tribunal are proprietary claims and these automatically vest. Claims which do not vest, and which will not fall within the bankruptcy estate, are those which are 'personal' to the bankrupt and have been described as those cases where:

"...the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property."
(*Heath v Tang* [1993] 1 WLR 1421 at 1423)

21. It is well-established law that claims for unfair dismissal, injury to feelings in discrimination claims and the right to a declaration in a discrimination claim are all personal in nature.

22. The third category of claims is those which are hybrid. They are claims which are part personal and part proprietary. In the case of *Ord v Upton* [2000] Ch 352 (CA), Aldous LJ called them 'hybrid claims' and held that these vest in the trustee in bankruptcy. The case is also authority for the principle that hybrid claims are treated as a single cause of action which vests in the trustee:

"In modern parlance Mr Ord's claim is a single cause of action. However I cannot accept Mr Doyle's submission that the cause of action is personal. It is a claim for damages for injury to his body and mind and also his capacity to earn and can therefore be considered as a "hybrid" claim, in part personal and in part relating to property. I have come to the conclusion that such an action vested in the trustee. It would only have remained with Mr Ord if it fell within an exception established by the authorities to be excluded from the definition of property now found in section 436 of the 1986 Act. To do so it must relate only to a cause of action personal to the bankrupt. All causes of action which seek to recover property vest in the trustee whether or not they contain other heads of damage to which the bankrupt is entitled. The authorities to which I now turn lead to that conclusion."

(Page 7)

23. In *Santos Gomes v Higher Level Care Ltd* [2018] EWCA Civ 418, the Court of

Appeal held that a claim under Regulation 30(4) of the WTR could not include a claim for injury to feelings. Giving the lead judgment, Singh LJ noted at paragraph 68:

“In my view, in the present type of complaint, the wrong committed by an employer is in substance the failure to give a paid break during the day. The net effect of that is that the worker is required to do work for a longer period of time than they are in substance being paid for. The natural remedy for that wrong is to make a payment of compensation for that time based on their rate of pay. That is what the employment tribunal decided to do in the present case, the parties having agreed the quantum.

69. Furthermore, I do not accept Mr Barnett's submission that this is the sort of contractual claim which exceptionally can attract an award of damages for injury to feelings, for example the “spoiled holiday” cases. The rationale for that exception in breach of contract cases is that there are certain types of contract where their underlying purpose is to provide enjoyment and pleasure for a person and, if such a contract is breached, the purchaser will have been denied the very thing they contracted to buy, something for which compensation should be given. That is not the present type of case. In the present context, as I have indicated, the mischief is that an employee is in effect required to work for no pay for the period of time which she does not have a paid break.”

Conclusions

(a) Is the Claimant entitled to be paid for leave not taken and can it be carried over?

24. I agree with the Claimant's analysis which accords with the case law set out above. The Respondent failed to allow the Claimant to exercise the right to paid annual leave. Simler LJ made it very clear at paragraph 79 of *Pimlico Plumbers* (supra) that where the right to paid leave is not exercised over a number of consecutive years because the employer refused to give paid leave, they are entitled to carry the untaken leave over. For the avoidance of doubt, the case law also makes it clear that this carry over continues until the right to paid leave crystallises on termination of the relationship. I am satisfied that the Claimant is entitled to be paid for leave not taken and that this right carries over year to year until his employment terminated in February 2019.

(b) Is the claim one for payment in lieu?

25. Again, I agree with the Claimant's submissions on this point that this is properly characterized as a claim for a payment in lieu. This case is not a claim for unlawful deduction of wages, as emphasized in *Stringer* (supra), but is a claim for unpaid holiday pay which has crystallised upon the termination of the employment relationship. It is a claim arising out of the WTD brought under the WTR and the principles established by the CJEU in *Kreuziger* (supra) and *King* (supra) apply. Article 7(2) of the WTD and 13(9) of the WTR permit such a payment.

(c) Is there a two-year backstop in relation to the claim under s23(4A) of the Employment Rights Act 1996?

26. As already noted, this claim arises out of the application of the WTR and not under the ERA 1996. In the circumstances, the case law makes it clear that the two-year backstop in section 23(4A) of the ERA 1996 does not apply to this type of claim and the Claimant is entitled to claim for the entire working period.

(d) Is there any contractual reason why the Claimant cannot carry over his leave entitlement from year to year?

(e) Can the Respondent rely on the "absent dentist charge" to offset any sums due, either as a contractual claim or as part of a "just and equitable" assessment of compensation?

27. I have considered these issues together, as they essentially represent different strands of the same argument. Can the Respondent rely upon any contractual provision to prevent carry over and whether the Respondent is entitled to rely upon the absent dentist charge ("ADC") to offset sums due.

28. The service agreements mirror each other closely and both provided (i) that leave could not be carried over to the following year and (ii) where the Claimant took leave in excess of his entitlement, he was liable to pay the ADC, which was calculated according to the cost of providing locum cover. During the hearing, Mr Gidney conceded that there was no contractual offset available but argued that the cost of the ADC should be considered as part of the just and equitable assessment.

29. For completeness, the Respondent could not seek to prevent, by operation of the contract, the Claimant carrying over leave. This is made clear by the WTD and was reiterated by the Court of Appeal in *Pimlico Plumbers* at paragraph 79. Nor do I consider that it would be correct to seek to offset any sums found due to the Claimant under the WTR by operation of the just and equitable rules. The caselaw makes it quite clear that an employer who does not allow workers exercise the right to paid annual leave must bear the consequences.

(f) Can the Claimant claim interest?

30. Both parties acknowledged that there is no express jurisdiction under the applicable statutory framework to award interest on the claims before me. The Claimant argued that the Respondent appeared to have conceded the issue in the counter schedule, but this was not accepted by the Respondent, who argued against the award of interest at the hearing.

31. The Claimant argued that the wording of Regulation 30 of the WTR was sufficiently broad to permit the Tribunal to make an award of interest. I see no reason in principle why this provision precludes the making of an award of interest on any remedy awarded under Regulation 30.

32. Accordingly, I rely on the following relevant factors:

- a. Throughout the relationship, both parties proceed on the basis that the Claimant was self-employed. This is not a case where the employer actively sought to prevent the worker exercising rights that the employer was aware of and the Claimant had not raised it as an issue. There was no suggestion by the Claimant that the Respondent had acted in bad faith.
- b. The Claimant paid tax on the basis that he was a self-employed person. Any issue regarding his status as a worker arose after his employment had terminated.
- c. There was no evidence lead as to any loss sustained by the Claimant over and above the loss of his paid leave.
- d. The Respondent's case is that there are sums outstanding due to it from the Claimant arising out of the application of the ADC.

33. In all the circumstances, having carefully considered what is just and equitable and with regard to the two specific limbs set out at Regulation 30(4)(a) and (b), I decline to make an award of interest. Given my findings in this regard it is not necessary for me to consider the Claimant's alternative argument in relation to the requirements of EU law which were set out in Mr Williams' skeleton argument.

(g) As regards the end of the First Services Agreement in August 2017 and the start of the Second Services Agreement later that month:

- 1. Is it now open to the Tribunal, in light of the First Judgment and the Liability Judgment, to find that during the period of the First Services Agreement, the Claimant was employed by J Main Limited not the Respondent?**
- 2. If the Respondent's employer under the First Services Agreement was J Main Limited, does the Claimant's claim for holiday pay as against the Respondent fail for the period covered by that agreement?**
- 3. Is it open to the Tribunal, in light of the original judgment dated ** and the Liability Judgment, to consider whether there was a termination of the Claimant's employment in August 2017?**
- 4. If so, was there a termination of employment on August 2017 and what were the consequences of that?**

34. The first question which must be addressed is whether I am precluded from considering these arguments by reason of findings made in previous judgments. In my view this can be answered very shortly. The Liability Judgment made findings that the Claimant was a worker for the duration of the period that he worked for the Respondent: paragraphs 62 & 63. Those findings are binding on the parties and the Respondent is therefore precluded from raising further arguments regarding status, particularly as those were not raised at the previous hearing.

(h) Is the Claimant's claim personal, proprietary or hybrid?

35. The Claimant's claim is brought pursuant to Regulation 16(1) of the WTR and Regulation 30 provides him with the route to his remedy. The wrong committed is the failure by the Respondent to provide paid holiday. As a result, the Claimant took *unpaid* holiday and the compensation for that wrong is to make

payment of recompense for the unpaid holiday taken based upon the Claimant's rate of pay. There is no element of compensation which falls within the categories set out in *Heath v Tang* (supra), which are by reference to pain felt by the bankrupt in relation to 'body, mind or character'. Damages awarded under the WTR are different to those awarded for slander, for example. In *Santos Gomes v Higher Level Care Ltd* (supra) the Court of Appeal concluded that a complaint under Regulation 30(4) was akin to a breach of contract claim and I have come to same conclusion in this instance.

36. As is made clear in the case law, the definition of 'property' in section 436 of the IA 86 is drafted widely. In my view, based upon my analysis of the Claimant's claim as being akin to a contractual claim, this is to be treated as being proprietary in nature and therefore automatically vests in the Trustee.

Quantification of the Sums Due

37. Given my findings above that this claim is properly categorized as a payment in lieu claim and not an unlawful deduction from wages, the appropriate schedule of loss is the Claimant's which is calculated on the standard percentage basis of 12.07% dated 11 February 2022. For reasons already given in this judgment, I do not accept the Respondent's arguments which seek to reduce this figure. In the circumstances, I award the sum of £83,573.78

If the claim is proprietary should the Tribunal order it to be paid to the Trustee and if so, on what terms?

38. The Trustee raised a number of further issues which he says justify the Tribunal ordering that any sums due should be paid directly to him rather than to the Claimant:

- a. The Claimant lacked locus to commence proceedings.
- b. The Claimant had not cooperated with the Trustee in relation to these proceedings or kept him up to date with progress.
- c. There was a concern that if any sums awarded were paid to the Claimant, those sums would be dissipated not paid to the bankruptcy estate.
- d. The employment tribunal was not the appropriate forum to resolve any

apportionment arguments.

The Claimant did not agree that these concerns were accurate.

39. I have considered all the circumstances, including the Claimant's own interest in the outcome. I note that the Claimant did commence proceedings without the requisite *locus* to do so and the allegations made by the Trustee, who is an officer of the court.
40. Rule 35 of the Rules of Procedure permits a tribunal to allow a party to participate in proceedings on such terms as may be specified, which accords the tribunal broad powers. Given that the Trustee is an officer of the court with a legitimate interest in these proceedings as found, and the concerns raised by him as set out above, I will order that the Respondent pays the sums awarded directly to the Trustee. It is not necessary for this Tribunal to make any further directions in relation to those monies as the Trustee is subject to the applicable provisions of the Insolvency Act 1986 in this regard.

K Gibb

Employment Judge Gibb

Date: 27 April 2022

Judgment & Reasons sent to the Parties: 10 May 2023

FOR THE TRIBUNAL OFFICE