Neutral Citation Number: [2023] EAT 42

Case No: EA-2021-000073-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 May 2023

Before :

HIS HONOUR JUDGE WAYNE BEARD

- -

Between :

MR STEVEN CONNOR **Appellant**

- and –

CHIEF CONSTABLE OF THE SOUTH YORKHIRE POLICE **Respondent**

- -
- -

Joseph Bryan (instructed under the auspices of Advocate) for the **Appellant**
Aaron Rathmell (instructed by **South Yorkshire Police** and **Humberside Police Legal Services**) for the **Respondent**

Hearing date: 10 January 2023

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JUDGMENT

SUMMARY

A relevant agreement as to the calculation of final holiday within the working time regulations cannot be an agreement which would permit an employer to pay less than that which would be required under the regulations. Regulation 14 provides a method of calculation for the purposes of regulations 13 and 13A for an incomplete leave year. The entitlement to annual leave, and payment, are not modified by regulation 14. The regulation provides a formula of calculation which promotes the right to annual leave and the attendant payment for holiday. The phrase "such sum as may be provided for the purposes of this regulation in a relevant agreement" refers to any agreement that provides a formula which is in keeping with the rights provided for in the regulations.

HIS HONOUR JUDGE WAYNE BEARD:

PRELIMINARIES

1. I shall refer to the parties as they were before the Employment Tribunal (ET) as Claimant and Respondent. This is an appeal against the Judgment of Employment Judge S J Davies in respect of a claim pursuant to the Working Time Regulations 1998 (WTR) for holiday pay post-termination of employment. The original grounds of appeal were considerably broader, however following a preliminary hearing before Jason Coppel KC a single ground of appeal was permitted to advance to this hearing. That ground relates to two distinct questions: first, whether there is a default method of calculation for the payment of accrued holiday pay on termination and, secondly, whether an agreement can make provision for a payment that is less favourable to an employee than any default calculation which is established.

2. I have been provided with a bundle of documents running to 85 pages and a bundle of authorities which contain 4 extracts from statutory materials, two documents referred to as other materials and 18 authorities. I have read the skeleton arguments of counsel and heard oral submissions from both.

THE RELEVANT FACTS

3. The Claimant was employed by the Respondent between 1 November 2002 and 29 May 2020 when he was dismissed. He had been suspended from work on 8 February 2019 and was signed off ill with depression and anxiety on 20 February 2019, he never returned to work. The Claimant's entitlement to sick pay became exhausted and, following this, an application was made for him to be paid in lieu of holiday. After some exchange of correspondence, the Claimant was paid a sum in lieu based on 288 hours. On termination of his employment it is common ground that he was entitled, pursuant to regulations 13, 13A and 14 of the WTR, to be paid accrued holiday pay. The calculation of his holiday pay made by the Respondent was on the basis of 40 hours and 42 minutes accrued. It

is this latter sum which is the subject of this appeal.

4. The Claimant's contract incorporated the following term relating to payment on termination of employment:

> "*Employees may, on termination of employment, be entitled to payment for untaken annual leave or for other accrued time off. Advice on such entitlement obtained from HR Shared Service in the first instance.*
> *Payment will be based on 1/365th of annual salary for each day's leave. Any payment will be subject to the usual statutory reductions*."

The Claimant worked a regular 37-hour week with salary paid in monthly instalments. It is common ground that on termination the Claimant's annual salary was £29,064.00. During the course of his employment, as would be expected, he received the equivalent sum for a week of holiday as he would for a week working. However, upon termination, the calculation was made on the basis of the above term and so he was paid less than he would have been had he taken the holiday.

THE EMPLOYMENT JUDGE'S FINDINGS

5. The Employment Judge found that the rate of pay that applied to termination was that set out in the contractual term above and that the contractual term was part of a relevant agreement for the purposes of the WTR. On that basis the calculation that had been reached by the respondent on the basis of the 40 hours 42 minutes had been correctly calculated (the parties agree the arithmetic is correct subject to this appeal).

STATUTORY PROVISIONS

6. Both parties agree that the EU Working Time Directive and its case law continue to apply, notwithstanding Brexit, pursuant to the European Union (Withdrawal) Act 2018, in the absence of regulations disapplying the same: see **Harpur Trust v Brazel** [2022] I.C.R. 1380, para. 2.

7. The Working Time Directive 2003/88/EC provides at Article 7:

> **"Annual leave**
> **1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.**
> **2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."**

8. Regulations 13 and 13A set out entitlement to annual leave. Regulation 13 was made directly implementing the Working Time Directive and 13A was a later addition; they provide:

> **REG 13**
> **----- a worker is entitled to four weeks' annual leave in each leave year …**
>
> **REG 13A**
> **a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).**
> **(2) The period of additional leave to which a worker is entitled under paragraph (1) is**
> **… (e) ---- 1.6 weeks.**
> **(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days …"**

9. Regulation 14 WTR provides so as far as relevant:

> **(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).**
> **(3) The payment due under paragraph (2) shall be–**
> **(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or**
> **(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula– $(A \times B) - C$**
> **Where A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;**
> **B is the proportion of the worker's leave year which expired before the termination date, and**
> **C is the period of leave taken by the worker between the start of the leave year and the termination date.**

Regulation 16 WTR provides so far as is relevant:

> **(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A at the rate of a week's pay in respect of each week of leave.**
> **(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) ----.**

10. The WTR provides interpretation at regulation 2 which sets out that a relevant agreement:

> **"--in relation to a worker, means a workforce agreement which applies to him,**

> **any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer …"**

11. The relevant sections of the Employment Rights Act 1996 (the ERA) provide so far as is relevant:

> **s. 221**
> **(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.**
> **(2) -------- if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.**
> **----------**

The remainder of the sections deal with methods of calculation.

SUBMISSIONS

12. Mr Bryan for the Claimant relied on **Leisure Leagues UK Ltd v Maconnachie** [2002] IRLR 600 as support for the contention that under the ERA there is a working assumption that calculation will be based on the hours actually required to be worked and not the number of hours in a 24-hour day or a seven-day week. That case expressly distinguished **Thames Water Utilities v Reynolds** [1996] IRLR 186, a case which predated the WTR and where a calendar day (1/365th) calculation was used. This reasoning, it was argued, was followed in **Yarrow v Edwards Chartered Accountants** UKEAT/0116/07/RN which adopted the **Maconnachie** approach. The thrust of the argument is whatever the provisions of the Apportionment Act 1870 (AA) the modern approach is set out in the, relatively, modern legislation, which reflects modern working conditions. Using the Calendar day as opposed to working day calculation would reduce holiday pay below normal remuneration which is in conflict with the purposes of the European Directive from which the WTR derives.

13. It was also argued that, dependent on circumstances, calculation on the calendar basis could lead to absurdities such as holiday pay being payable at a rate less than the minimum wage. In dealing with the line of authorities relied upon by the Respondent and in particular **Hartley v King Edwards VI College** [2017] 1 WLR 2110 it was argued that these decisions did not apply to like situations nor

were they engaged with the WTR provisions. In particular, there were factual findings about the times teachers would usually work which would not apply in the Claimant's case. The application of the AA in those cases was appropriate in the absence of the different statutory considerations under the WTR. In addition Mr Bryan contended that **Amey v Peter Symonds College** [2014] IRLR 206 had decided that the AA can be excluded by an express term or necessary implication where a contract "*established a relationship between work time and pay which was inconsistent with accrual over each and every calendar day*"; Mr Bryan argued that was the case here.

14. In dealing with regulation 14 WTR, and the meaning of "*relevant agreeme*nt", Mr Bryan referred me to Harvey on Industrial Relations and Employment Law (Div CI, para. [154]) where the editors consider that:

> *whilst the point is technically open, the obligation of courts and tribunals to construe UK legislation purporting to give domestic effect to a Directive in such a way as to do so, if possible, points strongly to the conclusion that reg 14(3)(a) is to be interpreted as only permitting payment under a relevant agreement of an amount equivalent to the pay the worker would have received had he or she taken as leave the period in respect of which the payment in lieu is made.*

Referring then to a number of decisions arising out of the application of the Directive both in ECJ and UK court decisions, Mr Bryan contended that the construction of regulation 14 when considering the words "*for the purposes of this regulation in a relevant agreement*" and the approach that was taken in **Stringer v Revenue and Customs Commissioners** (Case C-520/06) [2009] 2 CMLR 27 is that the right to leave and payment for leave are two aspects of a single right where the worker should receive payment on leave which is comparable to that received when working. In particular he made reference to **Chief Constable of the Police Service of Northern Ireland v Agnew** [2019] NICA 32, [2019] IRLR 782, a case from the Northern Irish jurisdiction which pointed out that 20/365 (division based on days) was less than 4/52 (division based on weeks) and that the result would be under-compensation.

15. Mr Rathmell submits that the appeal is for a minimal sum compared to the figure paid. He argues that the 1/365th calculation approach by the EJ follows the contractual agreement, the relevant term of which is not subject to appeal. That, he contends, must be a relevant agreement for the purposes of regulation 14 and contends this was a finding of fact which was not subject of this appeal.

16. It is further argued that the provisions in the WTR do not require a particular divisor to be applied. Making reference to *Harvey*, Division CI Working Time, paras 195–197.02 Mr Rathmell points to the fact that different divisors have been applied dependent on analysis of the facts. The point is made that the Supreme Court in **Hartley** (above) accepted the analysis of the AA made by the Court of Appeal that it applied to employment contracts generally with salaries accruing daily but being silent on the rate at which salary accrued. However, the Supreme Court, overturning the rate of 1/260th in favour of 1/365th did so because of the specific contractual obligations, so that it could not be said that only a five-day week was worked. The Supreme Court holding further that the AA applied unless there was an express provision excluding it.

DISCUSSION

17. I note that the Regulations and the Directive refer to calculation of holiday based on weeks, save for the complication that regulation 13A then creates a limit of days. That is unsurprising, the purpose of the legislation is to give breaks from working time. The legislation affects three major elements of working time, short breaks during work, the breaks between workdays and the longer breaks that are expected where workers take holidays. I should mention one caveat to the calculation based on weeks; when adding entitlement under regulations 13 and 13A together there is limitation which is expressed as 28 days. That is instructive in itself, as 5.6 weeks, when based on a five-day week, is exactly 28 days. The history of the development of the legislation may be of some interest here. Regulation 13 was introduced to ensure compliance with the directive. Section 13A was introduced as some employers were using bank holidays as part of the calculation of four weeks and the then government considered it necessary to bring the UK more in line with other advanced EU economies as to the amount of holidays to be given.

18. Most of the authorities I have been referred to involve cases where a wage is made up of various elements and this complicates the base figure. In my judgment where, as it would appear to be the case here, there is an annual salary with no extras, the simple calculation of a week's wages will be to divide the annual figure by 52 to reach a multiplicand. Thereafter, the proportion of the leave year that has elapsed will (less any leave taken) provide a multiplier. The calculation of correct payment requires the starting point to be the working week, and/or proportion thereof, that would be paid if someone was working. That is then multiplied by the figure reached by application of the formula within the statute. Therefore, it is only the interpretation of regulation 14(3)(b) and the "*relevant agreement*" that can impact on this.

19. It is the time taken off work that is important to fulfil the health and safety purpose underpinning the legislation; it is not the calculation of payment for that time off. The calculation of payment for that time off has been seen as necessary because it would undermine the purpose of the legislation if the amount paid could differ to the usual level of pay. That must, it appears to me, mean that the natural interpretation is that any payment which falls below the usual level of pay will not be in accordance with the WTR regulations. That conclusion raises the question if there is any reason for there to be a difference between pay in work and the final pay which regulation 14 operates upon.

20. It is notable that regulation 14 is simply providing a method of calculation supporting regulations 13 and 13A where the leave year is incomplete. It is, in my judgment, in that sense a supplement to regulations 13 and 13A. It appears to me that the rights granted to an entitlement to annual leave, and payment, are not, therefore, modified by regulation 14. The purpose of the regulation is to provide a formula of calculation which promotes the right to leave and the attendant payment for holiday. That being the case it seems to me that the reference to "*such sum as may be provided for the purposes of this regulation in a relevant agreement*" must refer to any agreement

that provides a formula which is in keeping with the rights provided for in the regulations. In those circumstances a relevant agreement cannot provide for a calculation which would mean a person is paid less than the usual amount they would have been paid for working when holiday pay is calculated. In my judgment the Employment Judge's interpretation of the phrase "relevant agreement" was too literal, the result of that interpretation would tend against the purpose of the regulations. On that basis the appeal succeeds.

21. Having sent the parties a draft of this judgment I asked that they agree a figure for the unpaid leave or provide their respective submissions if they could not agree; the parties, unable to agree, have provided written submissions.

22. Mr Bryan for the claimant submits that given the calculation of 40 hours 42 minutes is accepted as correct by both parties that equates to 5.5 days unpaid holiday. This is based on a calculation of a 37.5 hour week worked over 5 days as being 7.4 hours per day. He contends that the daily rate would be £111.79 based on a 1/260th division of annual salary of £29,064.00. This achieves a sum of £614.85 from which the claimant accepts deduction should be made of £319.96 according to his pay slip, leaving a figure of £294.89 to be paid. Mr Bryan also argues that interest should be awarded pursuant to s. 24 Employment Rights Act 1996 (as this was also an unlawful deduction of wages claim) because the tribunal can compensate any financial loss sustained which is attributable to the matter complained of; Mr Bryan contends a rate of 8%.

23. Mr Rathmell also relies on the claimant's annual salary £29,064.00 which he equates to a gross weekly salary of £558.92. He then contends that the weekly salary multiplied by 5.6 weeks gives a combined WTR pay of £3129.95. His next argument is that the proportion of the leave year which has expired as at the date of termination at 8 weeks is15.39% of the year which as a percentage of £3,129.95 amounts to £481.70. He contends that the amount already paid by respondent to claimant

previously was £437.95 leaving a sum owing to the claimant of £43.75. The respondent argues that the claimant's approach is attempting to combine favourable elements of EU WTD law with the respondent's administrative assumptions for calculating total annual leave down to the hour and minute. Mr Rathmell argues that the respondent's contractual liability was discharged, as found the ET. However, as the contract has, by this judgment, been supplanted by WTR. He argues that WTR reg. 16(5) remains relevant quoting: "*Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period*". Mr Rathmell argues it is not appropriate to award interest.

24. Given my judgment a strict approach would be to remit the matter to the ET for calculation and to make any further, necessary, evidential findings. However, in my judgment, given the sums involved, that would not be in keeping with the overriding objective and I will therefore conduct the calculation and order the amount to be paid on the basis of the findings before the ET.

25. Both counsels, I consider, have overcomplicated the approach to calculation. It appears to me that as I have decided that the WTR applies it is the WTR method of calculation which must be applied to the payment of holiday pay in this case. The regulations provide that the formula $(A \times B) - C$ is to be applied: A is the period of leave to which the worker is entitled under the regulations B is the proportion of the worker's leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date. In this case the entitlement is 5.6 weeks in 52 and the period which has passed is 8 weeks. On that basis one week of employment is 0.11 weeks of leave and 8 weeks is 0.88 weeks of holiday. £29,064.00 per annum divided by 52 gives the weekly gross pay £558.92, which multiplied by 0.88 is £491.85. I

must take the gross and not the net pay already paid by the Respondent. This is because the difference has been paid to the inland revenue via PAYE on behalf of the Claimant and he would be entitled to a repayment from HMRC of any overpaid sums. £437.95 has already been paid leaving a figure of £53.90 unpaid.

26. The Claimant seeks the payment of interest at 8%. I am not persuaded that s. 24 Employment Rights Act 1996 would apply to interest in the way it has been argued. The section covers compensation for any financial loss sustained by him which is attributable to a complaint. It appears to me that this would require evidence of any actual loss sustained, not a loss of opportunity to gain interest but evidence of an account and the interest that could be earned from it along with evidence that the money would have been invested in that way so that a proper finding could be made to compensate for the loss.

27. On that basis I will order the Respondent to pay to the Claimant the sum of £53.90 within 21 days of the date of the order.