



EMPLOYMENT TRIBUNALS

Claimant: Ms R O'Donnell
Respondent: DHL Services Ltd
Heard at: West Midlands (video hearing) **On:** 31st March 2023
Before: Employment Judge Steward

Representation

Claimant: In person
Respondent: Mr R Lassey (Counsel)

JUDGMENT

- a. The Claimants claim for Unlawful Deduction of Wages Fails.
- b. The Respondents Counter Claim for £8436.29 succeeds.

REASONS

Introduction

1. The claimant was employed by the respondent, a provider of logistics support to various customers throughout the United Kingdom and Ireland. The Respondent provides services to Jaguar Land Rover ("JLR") under a commercial contract at a number of sites operated and owned by JLR. The Claimant was employed at one such site, namely Solihull (the "Site") as a despatch clerk, from 11 September 2010 until 17 March 2021. Early conciliation started on 12 May 2021 and ended on 23 June 2021. The claim form was presented on 7 July 2021.
2. The claimant was originally bringing claims of pregnancy /maternity discrimination, disability discrimination for notice pay holiday pay and for 'other payments'. At a case management hearing on the 10th February 2023 the claims for disability discrimination were withdrawn. The claim for holiday pay and the Respondents counterclaim were to proceed to the final hearing. All previous claims had been withdrawn prior to the final hearing.

3. As a preliminary issue at this hearing the Respondents accepted the Claimants calculation of £3695.71 was the correct amount of holiday pay and they therefore amended the counterclaim to £8436.29
4. As far as the claim for holiday pay is concerned the respondent accepts the Claimant was entitled to holiday accruing from April 2018 until 17 March 2021 which but claims to be entitled to set off against it an overpayment of wages which left 3.5 days holiday pay due to the claimant which it had paid to her. The legal basis on which it claims to be entitled to make such a set off was contained in paragraph 4.3 of the Claimants contract of employment (dated the 10th January 2012 and signed by the Claimant.) which states
 - a. *For the purpose of the Employment Rights Act 1996 Section 13 you agree that the company may deduct from your remuneration (including from your final salary on termination) any sums whatsoever that you owe to the Company. You will be notified in writing of any overpayment before any deduction is made.*
5. The claimant had not understood that the respondent had made a contract claim of £9725.79 in paragraph 37 of the ET3. She told Employment Judge Woffenden at the Case Management Hearing on the 14th March 2022 she had not received the tribunal's letter dated 13 January 2022 which told her she had 28 days to send a response to that claim. I cannot see from the bundle that she has ever responded to the counterclaim. Employment Judge Woffenden had ordered this by the 6th June 2022
6. It was carefully explained to the Claimant that the case could proceed by way of evidence or submissions as the issues were very narrow. Both parties agreed to submissions.

The Law

7. Section 27(1) of the Employment Rights Act 1996 defines "wages" as "*any sums payable to the worker in connection with his employment.*" Under this section, holiday pay is listed as a specific payment that is to be counted as wages.
8. The Working Time Regulations 1998 SI 1998/1833 provide workers with a guaranteed statutory right to paid holiday. Workers are entitled to a minimum of 5.6 weeks paid holiday in each leave year beginning on or after 1 April 2009. For the purposes of calculating holiday entitlement, the statutory 5.6 weeks entitlement is split into 4 weeks derived from EU law (which is set out in regulation 13 of the Working Time Regulations 1998 ("WTR"), and an additional 1.6 weeks from UK law (which is set out in regulation 13A of the WTR).
9. Regulation 16(1) provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which a worker is entitled.
10. Regulation 14 provides that where a worker's employment is terminated during the course of their leave year and at the date of termination, the proportion of leave the worker has taken to which the worker is entitled

under Regulation 13(1) is less than the proportion of the leave year which has expired, the employer shall make a payment in lieu of leave for a sum equal to the amount that would be due to the worker under Regulation 16.

11. The House of Lords decision in *Revenue and Customs Commissioners v Stringer 2009 ICR 985, HL* establishes that unpaid holiday pay due under Regulations 16 (1) or 14 (2) of the Working Time Regulations can be recovered by means of a claim for unlawful deductions from wages under section 23 of the Employment Rights Act 1996 in accordance with its time limit provisions.

Unauthorised Deductions from Wages

12. The law relating to unauthorised deductions from wages is contained in section 13 of the Employment Rights Act 1996, which provides:

“An employer shall not make a deduction from wages of a worker employed by him unless:-

- (i) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract [Section 13(1)(a)]; or*
- (ii) The worker has previously signified in writing his agreement or consent to the making of the deduction [Section 13(1)(b)].”*

13. Section 13 (2) states:

“In this section “relevant provision,” in relation to a worker’s contract, means a provision of the contract comprised –

- (i) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question or, [Section 13(2)(a)]*
- (ii) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion [Section 13(2)(b)].”*

14. Section 13 (3) provides that:

“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

15. In accordance with the Employment Rights Regulations 2018 SI 2018/1378, holiday pay is calculated by reference to the 52 weeks of pay prior to the calculation date (the first date of leave taken). Where there are no such weeks to take into account, it is the amount that fairly represents a week’s pay having regard to the factors specified in section 228 (3) of the Employment Rights Act 1996 which include any remuneration received by the worker in respect of the employment.

16. Regulation 30(1) of the Working time Regulations 1998 (“the WTR”) confers on a worker the right to complain to the Tribunal in the event that their

employer has failed to pay him the whole or part of any amount due to him under Regulations 14(2) or 16(1). Regulation 30(1)(b) stipulates that such claims must be presented within 3 months beginning with the date of payment of the wages from which the deduction was made, or where there has been a series of deduction, within 3 months of the last deduction in the series. An analogous provision appears under section 23(3)(a) of the ERA, where any underpayments of a claimant's holiday pay can potentially form part of the same series of deductions, whether the holiday pay be properly payable under Regulation 13 or Regulation 13A of the Working Time Regulations 1998 or the Claimants' contracts of employment.

17. The rate of holiday pay will be in accordance with the provisions of the contract or the WTR, whichever is the more favourable, as Regulation 17 of the WTR provide for an irreducible minimum entitlement.
18. Under R.25 of the Employment Tribunals Regulations 2013 a Claimants response to an employers contract claim shall be presented to the tribunal office within 28 days of the date that the response was sent to the Claimant. If no response is presented within that time limit R20 and R21 shall apply. No response was sent by the Claimant within the time limit and I considered R.21(2) which allows me on the available material to decide whether a determination can be made of the claim. I did not receive any application for such a determination before the final hearing and there was aspects of the claim that needed to be considered at the hearing. Therefore no judgment was made pursuant to these rules.

Findings

19. There is no dispute that the sum of £3695.71 was owed at the termination of the employment.
20. A leaver confirmation letter was sent to the Claimant on 23 March 2021. The Claimant's final day of employment was 17 March 2021. The Claimant received her notice pay (which totalled £2,548.45) and holiday entitlement for 2021 (3.5 days, which totalled £198.20) in her final payslip, in April 2021. The Claimant did not appeal the termination of her employment.
21. The Claimant had been on long term sick leave from November 2018 until the dismissal in March 2021. During this period, the Claimant received Company Sick Pay and Statutory Sick Pay for a total of 9 months.
22. After the Claimant's employment had been terminated, the Claimant raised a query with the Respondent's payroll team and informed them that she had been receiving her usual basic pay from the Respondent for several months. At no point before April 2021 had the Claimant informed the Respondent that she had continued to receive her salary during her sickness absence.
23. After investigation further, due to an administrative error, the Respondent had continued to pay the Claimant's full salary into her account during her

sick leave over a 12 month period, from August 2019 to August 2020. The total overpayment amount was £12,132.

24. As a result, the Respondent offset this overpayment against the Claimant's accrued 43.5 days of annual leave that the Claimant had accrued between November 2018 and December 2020.
25. The Respondents sent to the Claimant an email on the 1.4.21 from Matt Weight Account Director which said "I have reviewed all of the information and because we overpaid you for a period of 12 Months or so and made the decision to not pursue you for repayment, given the full circumstances that all monies from previous years are now considered closed and paid. Therefore, in my opinion, the 3.5 days is correct"
26. The Respondents in submissions stated that this was a pragmatic approach to bring matters to a close and did not fetter their legal right to pursue the amount should the Claimant pursue the Unlawful Deduction Claim. The Claimant subsequently decided to bring her claim. The Respondents rely on paragraph 4.3 of the Claimants contract to deduct from the amount owed to her the amount of the overpayment. However they are also entitled to bring a counterclaim for the amount which is still owing. The Claimant was given the opportunity to make her claim and to withdraw her claim but decided not to which is her right. However I accept what the Respondents say that at the termination of the employment, unbeknown to them at that time, they were owed over £12,000 from the Claimant in overpayments.
27. In the circumstances the Claimants claim must fail and there is no reason why the Respondents counterclaim shall not succeed.

Employment Judge **Steward**
31 March 2023

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.