EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101816/2023

Hearing held by CVP at Dundee on 4 July 2023 and 26 July 2023 (in chambers)

Employment Judge McFatridge

Mr B Yakap	**Claimant** **In person**
D A Baillie Limited	**Respondent** **Represented by:** **Ms J McLaughlin,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) The respondent unlawfully withheld wages from the claimant in the sum of Eight Hundred and Eighteen Pounds and Forty Pence being paid holidays accrued but untaken as at the date of termination of employment. The respondent shall pay the said sum of Eight Hundred and Eighteen Pounds and Forty Pence (£818.40) to the claimant.

(Two) The claimant's remaining claims are dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had suffered unauthorised deductions of wages whilst working for the respondent and that he was due various sums from them following the termination of his employment both in respect of holiday pay and unpaid overtime payments. The respondent submitted a response to the Tribunal in which they denied the claims. With regard to the claim for overtime payments they noted that the claimant was claiming double time on Saturdays and triple time on Sundays and they advised that at no time had his contract of employment entitled him to such enhanced rates of pay. With regard to the claim relating to holiday pay it was their position that substantial parts of this claim were out of time. It was also their position that the claimant had insisted on payment arrangements which differed from the normal way they paid their employees in that he was paid a higher hourly rate which included payment for the claimant's 5.6 weeks' holiday entitlement in the year and also included within it provision that no deductions would be made for the claimant's accommodation.

2. At a case management preliminary hearing which took place on 5 May 2023 the claimant clarified the claims he was making which are as set out in paragraph 2 of the note issued following that hearing. The final hearing took place on 4 July 2023. Parties thereafter made written submissions which I considered in chamber on 26 July 2023. At the hearing on 4 July, which took place over CVP, the claimant was assisted by an interpreter who also interpreted the evidence of the claimant's witness. The Tribunal is grateful for the assistance given by the interpreter. The claimant gave evidence on his own behalf and he then led evidence from his partner, Ms Dzhoykeva. Evidence was then led on behalf of the respondent from Mr Baillie a Director of the respondent and Ms Alison Barker the respondent's Office Manager. A joint bundle of productions was lodged. On the basis of the evidence and the productions I found the following facts relevant to the claim to be proved or agreed.

Findings in fact

3. The respondent operates a farm based near Glenfarg in Perthshire. They grow various crops including potatoes. They require a casual workforce to work at various times of the year and over the years have recruited many of these from overseas. They provide accommodation on the farm.

4. They have a standard form of contract which is a zero hours' contract. It provides for a minimum hourly rate and an overtime rate payable after 48 hours worked in the week. It states that holiday entitlement is payable in the usual way in accordance with the Agricultural Wages (Scotland) Order. It notes that the working hours will be variable depending on weather plus state of the crop and no hours are guaranteed. There are no set or standard hours of work and there is no guarantee of any minimum hours. Attached to this is a note regarding accommodation which sets out the rules regarding accommodation in the farm provided in mobile homes or caravans which are usually shared. It notes that a facility charge will be charged for accommodation per day which will be deducted from wages. Examples of the contract used were provided and lodged at pages 37-43, 44-50, 74-80, 68-73.

5. The normal pattern was that workers would come to work on the farm for a period and then leave usually to go back home to wherever they were from. It was the respondent's practice to issue them with a P45 when they left and to issue a fresh contract to them when they arrived. This would be the case even with employees who had a pattern of leaving for a period and then returning on a regular basis. The respondent regarded them as temporary seasonal workers.

6. In or about 2018 the claimant and his partner Ms Dzhoykeva came to work for the respondent as temporary seasonal workers. The respondent sought to have the claimant sign a contract in the respondent's standard form but the claimant refused to sign this. He said that he wanted to be paid for his holidays at the time they were earned. He also said that he did not want any deduction to be made for accommodation. He made it clear that what he wanted was to receive the maximum payment at the time he was working and for there to be no deductions made from this.

7. The respondent always found it somewhat challenging to obtain seasonal workers. The farm has a rural location and there is no substantial pool of locally available labour. Mr Baillie of the respondent reluctantly decided that he would accept the claimant's request. Accordingly, he agreed that the claimant would be paid an enhanced hourly rate of pay to take account of the fact that this included the claimant's holiday entitlement. The claimant was also paid at a flat rate with no deductions such as would normally be made for accommodation charges and utility bills. Initially in 2018 other employees were also paid in this way although latterly the respondent stopped offering this. The other employees paid in this way would only be allowed to be paid this way if they specifically requested it.

8. Holiday pay was worked out on the basis of 10.8% of the usual hourly rate. The enhanced hourly rate payable to the claimant was based on this with a small deduction for the costs which would usually be covered by the standard deduction for accommodation.

9. The claimant worked on these terms until around December 2018 when he left to go on holiday. The pattern repeated in 2019 and in 2020. During the period covered by the present claim the claimant came back to work on the farm in or about January 2021. On this occasion he was issued with a copy of the respondent's particulars of employment but he did not sign these. As is usual he left employment on or about 1 August 2021. He was given his P45 in the usual way. As usual, when discussing the matter with Mr Baillie and with Ms Barker the Office Manager he and his partner would say they were leaving and not give any date when they were coming back or indeed confirm that they would definitely be coming back at all. Ms Barker, as she normally did, said to the claimant that she would hope to see him again. Matters were never definite. Ms Barker was aware that the claimant invariably bought a one way ticket home to Bulgaria at this time. The claimant was not employed by the respondent between 1 August 2021 and 5 September 2021. The claimant then returned under a new contract in September 2021. Once again he was issued with the respondent's standard form contract. Once again he refused to sign it. His partner, Ms Dzhoykeva was issued with a similar contract but did sign it. This contract was lodged (pages 37-43). Once again the arrangement

was that the claimant was paid an enhanced rate of pay on the basis that this included rolled up holiday pay calculated at an additional 10.8% of what would have been paid on a standard contract. Once again no deductions were made for accommodation or utility bills. The claimant remained working on this contract until December 2021. He then left to go back to Bulgaria. He was given a fresh P45. Once again he did not give the respondent a date when he would be coming back or confirm that he would definitely be coming back. Once again the respondent's understanding was that he had bought a one way ticket to Bulgaria.

10. The claimant did return to work for the respondent in or about January 2022. Once again he refused to sign the standard contract. Once again the respondent's Mr Baillie and the claimant agreed that the claimant would be paid on the same basis as before with rolled up holiday pay and no deductions for accommodation or utilities.

11. The claimant worked on this basis until around 1 August 2022 when this contract came to an end. The claimant was issued with his P45. Once again the circumstances in which he left were that he did not give any date when he would be returning or specifically state he would definitely be returning. Once again the respondent became aware that he had booked a one way ticket only to Bulgaria.

12. The claimant returned to the farm on or about 8 September 2022. Once again the claimant refused to sign a contract on the standard terms. Once again he was given an enhanced rate of pay which was based on the fact that he would be receiving rolled up holiday pay calculated at an additional 10.8% of what he would normally be paid. During these negotiations the respondent's Mr Baillie indicated that utility prices had gone up considerably and the respondent were no longer prepared to support a situation where the claimant was not required to pay for utilities used in the caravan which he shared with Ms Dzhoykeva. The respondent indicated they would give the claimant an additional rise in his hourly pay rate but that the claimant would be responsible for paying the electricity bill. Part of the concern was that with the claimant and his partner having no responsibility for paying the electricity bill there was no incentive on

their part to try to keep the electricity consumption down. The claimant and Ms Dzhoykeva were extremely unhappy with this state of affairs.

13. The claimant left the employment of the respondent on 28 November 2022.

14. Thereafter the claimant contacted Citizen's Advice Bureau and obtained certain advice relating to holiday pay. During these conversations he was told by the Citizen's Advice Board that he was entitled to be paid overtime at the rate of double time on Saturday and triple time on Sunday.

15. The respondent never paid any of their seasonal workers overtime at the rate of double time on a Saturday and triple time on a Sunday. They paid overtime at time and a half for all hours worked in excess of 48 hours in the week. This was the basis on which the claimant had been paid overtime during every single period he had been employed with the respondent. It was the basis on which the claimant was paid for overtime hours worked in the period from 5 September to 28 November 2022. The claimant had in fact been very keen to maximise his income and on numerous occasions had requested the respondent for more hours. All overtime hours which the claimant had worked had been paid to him at the rate provided in the claimant's contract of employment namely time and a half for all hours worked over 48 hours in the week. There was no contractual or legal obligation on the respondent to pay the claimant overtime at the rate of double time on a Saturday or triple time on a Sunday.

Observations on the evidence

16. Both the claimant and Ms Dzhoykeva maintained that they had not been employed on a series of temporary contracts as alleged by the respondent but that they had one overarching contract of employment which had commenced around 2018. It was their position that employment had been continuous and that during the various periods when they admitted to being away from the farm they were on holiday. The respondent's witnesses indicated that the position was as set out in my findings in fact above. I preferred the respondent's version of events basically because despite maintaining that he was working on one continuous contract the

claimant accepted that he had received a P45 at the end of each period of employment. He also accepted that on returning to the farm each time he negotiated with Mr Baillie. He accepted Mr Baillie's position that he refused to sign the new contracts with which he was presented each time. It was the claimant's position that he was unaware that the deal he struck with Mr Baillie, which was never reduced to writing, included rolled up holiday pay. On the other hand, he accepted that he had never actually received any holiday pay over and above his hourly rate and he accepted that prior to leaving the respondent's employment for the last time he had never questioned this. The claimant also did not dispute that on each occasion he had purchased one way tickets back to Bulgaria. The claimant disputed Ms Barker's statement to the effect that each time he and Ms Dzhoykeva left it was by no means certain that they would return. He accepted the precise date was not agreed but stated that he always said that he and Ms Dzhoykeva would be back at some point. I preferred Ms Barker's evidence as being more likely. She spoke of giving the claimant and Ms Dzhoykeva a lift and always saying to them 'hope to see you back again'.

17. It appeared to me that based on the facts admitted by the claimant and supported by the evidence of Ms Dzhoykeva where relevant that the inescapable conclusion was that the claimant was employed on a series of contracts rather than a single contract as maintained. Overall, I did not accept the claimant's assertion that he was unaware that the hourly rate he negotiated with Mr Baillie each time was inclusive of rolled up holiday pay. Given the overall circumstances I considered it more likely than not that he was well aware of this. I believe he was also aware that there was some legal dubiety about whether this was legal and when he finally left he took advice as to how to make a financial claim in relation to this.

18. With regard to the overtime issue the claimant and Ms Dzhoykeva readily accepted that at no time had he or any-one else ever been paid double time on a Saturday or triple time on a Sunday. The claimant accepted he had not heard of anyone else on the farm being paid in this way. He made it clear that the sole basis for this claim was that he had been told by the CAB that this was what he was entitled to as a matter of law. I accept that

he was simply working on the basis of what he had been told albeit this information was erroneous.

Discussion and decision

Issues

19. The claimant sought payment of holiday pay which was due to him but had been unlawfully deducted for the period of two years prior to the termination of his employment with the respondent. He sought a sum in respect of wages unlawfully deducted in that it was his position that he was entitled to be paid for overtime at the rate of double time on a Saturday and triple time on a Sunday. The claimant did not lodge a copy of any calculation of the sums due with the bundle of productions but during the hearing he referred to an email he had sent to the Tribunal on 28 June 2023 with which he had included various productions and in which he also included a statement of the overtime hours he had worked. He indicated that he was claiming a total of £10,000 in respect of holiday pay and overtime. There was no detailed calculation of holiday pay provided and apart from giving various dates and the number of hours worked there was no detailed calculation of the overtime payments claimed. With regard to the holiday pay claim the key issue was to determine whether or not all or part of his claim was time barred. This involved an initial determination as to whether the claimant was employed on a single contract of employment as maintained by the claimant and Ms Dzhoykeva or on a series of separate contracts as maintained by the respondent. A second key issue would be to determine whether, if it was determined that the claimant had not been paid for holidays at the time they were taken or at the termination of his employment, whether the respondent could set off from any sum due the amount they had paid in respect of rolled up holiday pay.

20. With regard to the overtime issue the key point was whether the claimant had any legal entitlement, whether under contract or, as he maintained, by operation of law, to be paid double time on a Saturday and triple time on a Sunday. I shall deal with each of the claims in turn.

21. The time limit relating to claims for unlawful deduction of wages is contained in section 23 of the Employment Rights Act 1996. This states

"(1) A worker may present a complaint to an Employment Tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)) ….

(2) Subject to subsection 4 an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction is made ….

(3) Where a complaint is brought under this section in respect of –

(a) a series of deductions or payments …..

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months the tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable."

22. In this case the claimant did not present his claim until 23 February 2023. The claimant commenced early conciliation on 12 January 2023, the ACAS certificate being issued on 27 January 2023. The claimant is entitled to additional time in respect of the early conciliation regulations but any deductions made prior to 13 October 2022 would be outwith the three month time limit. The start of the time limit depends upon the type of deduction. Where there is an actual deduction the time limit runs from that date. Where there is an underpayment or a complete failure to pay the time limit runs from the contractual due date for payment (*Arora v Rockwell Automation Ltd EAT 0097/06*)

23. My view is that the claimant was due to be paid in respect of any holidays accrued but untaken as at the last day of his employment which I understood to be 28 November 2022. This claim is therefore in time in respect of any holiday pay he was due to be paid on 28 November 2022.

With regard to payments of holiday pay due prior to the claimant commencing his final period of employment on 5 September 2022 I considered that these must be regarded as well out of time. I do not believe that they can be regarded as in any way part of a series of deductions as they were made under separate contracts of employment which were terminated. I would therefore agree with the respondent's primary position as set out in their submissions that the only holiday pay claim which the Tribunal has jurisdiction to hear is a claim in respect of the holiday pay which ought to have been paid to the claimant when he left his employment on 28 November 2022. On the basis of the evidence the claimant had not taken any holidays at all during his period of employment which ran from 5 September to 28 November 2022. I do not agree with the claimant that there would be an entitlement holiday pay between 1 August and 5 September. On my findings of fact the claimant was not on holiday at this point. The claimant's employment with the respondent had ended on 1 August 2022 and recommenced on 5 September 2022.

24. I should say that if I am wrong about there not being a series of deductions either because I am wrong about the claimant being employed on a number of separate contracts rather than one overarching contract or if I am wrong in deciding that deductions made under separate contracts of employment cannot amount to a series of deductions then I would note that as discussed by the respondent the rule in the case of ***Bear Scotland Ltd and others v Mr David Fulton and others UKEATS/0047/13*** would apply.

25. If I am wrong about the law and the deductions were to be regarded as a series of deductions notwithstanding that they were made under two separate contracts then in my view a deduction would have been made on or about 1 August 2022 when the claimant left his employment. In terms of regulation 14 of the Working Time Regulations he would have been entitled to be paid the balance of any holiday pay due at that time. This is more than three months prior to the date of the final (and only other) deduction which took place on 28 November 2022. Accordingly, this deduction would also be out of time in any event.

26. Even if I were to accept the claimant's contention that he was working under one overarching contract (which I do not) then the same provision would apply. If the claimant was truly on holiday between 1 August and 5 September then he ought to have been given his holiday pay at the start of his holiday on 1 August. Again, this is more than three months prior to the date of the final deduction. Given there is a break of more than three months it cannot count as a part of a series of deductions.

27. My view therefore is that the claimant was due to be paid holiday pay on or about 28 November for the annual leave accrued during the period of his employment from 5 September to 28 November. His entitlement to holiday pay arises from the Working Time Regulations and in particular he is entitled to a sum calculated in terms of regulation 14 of the Working Time Regulations 1998. I have used the government's holiday pay calculator based on the claimant having started work on 5 September and finished on 28 November 2022 and working a five day week. The figure would have been the same had I used a six or a seven day week.

28. There was no agreement or clear evidence as to the claimant's actual average weekly pay. He lodged a number of payslips but not all of them. On all of the payslips lodged during this period he was working around 80 hours per week. He was paid at the rate of £10.50 per hour. Based on the information I have his net pay was around £620 per week. I consider it appropriate to use this figure. This would mean that the claimant is entitled to £620 x 6.6 ÷ 5 = £818.40. When the claimant left employment on 28 November he was entitled to be paid this sum in terms of regulation 14 of the Working Time Regulations given that he had taken no paid annual leave during the final period of his employment which lasted from 5 September to 28 November 2022.

29. The respondent made the point that they were entitled to offset from this amount the sums which had been paid to the claimant by way of rolled up holiday pay. They quoted the case of ***Lyddon v Englefield Brickwork Ltd EAT/0301/07*** as being authority for the proposition that where there is a mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked then it is appropriate to offset this sum against any holiday pay which may be due to an

employee under regulation 14. In that case the EAT held that the issue depended on whether the payments were contractual and met the criteria of transparency and comprehensibility laid down by the ECJ in the case of ***Robinson-Steele v RD Retail Services Ltd [2006] ICR 932***.

30. A key point in the ***Robinson-Steele*** case however was that ECJ clearly found that if there is no separate payment identified referable to holidays there can be no subsequent allocation of part of the remuneration to holidays even by agreement. The court also clearly found that article 7 of the directive precluded the payment for annual leave within the meaning of that provision from being made in the former part payment staggered over the corresponding annual period of work and paid together with a remuneration for work done rather than the form of a payment in respect of a specified period during which the worker actually takes leave.

31. As is well known the ECJ were concerned that the purpose of the directive is to ensure that workers have the health benefits of regular paid leave. There is a public policy in avoiding situations where that purpose is negated by the payment of rolled up holiday pay which is not in any way linked to the period of leave.

32. In this case I note that the pay slips which were lodged do not show any apportionment of the sum paid to identify a portion which is clearly identifiable as holiday pay. Furthermore, the key point of the directive which underpins the Working Time Regulations was being circumvented.

33. The ***Robinson-Steele*** case was quite clear that set off is excluded where there is no transparency or comprehensibility and that the burden of proof in that respect is on the employer. The employer's position in this case which I accepted was that there had been a discussion at the start of each contract whereby the parties had agreed that the claimant would be paid an additional sum added to his hourly rate to take account of the holiday pay entitlement. I do not however find that anything was done after that to clearly identify the holiday pay payments being made to separate these in any way from general payments. In the circumstances I do not consider that it is possible for the respondent to set off any sums which they now

say was paid in respect of rolled up holiday pay. The claimant is therefore still due to be paid £818.40 in respect of unpaid holiday pay.

Overtime payment

34. With regard to the claim for overtime payment it is clear that the claimant would only be entitled to this if he was entitled to be paid at the rates claimed either in terms of his contract or by operation of law.

35. It was clear that in this case there was no written contract of employment because the claimant refused to sign the written contract which was tendered to him by the respondent. The agreement reached was entirely verbal. It was not even alleged by the claimant that there had been any verbal agreement that the claimant be paid double time on a Saturday and triple time on a Sunday.

36. There was no suggestion that such a clause could be imported into the contract by custom and practice. It was absolutely clear that there was no custom and practice that employees be paid double time on a Saturday or triple time on a Sunday.

37. The claimant was quite clear in his evidence that he had only inserted this part of his claim because when he consulted the CAB afterwards they told him that as a matter of law he was entitled to be paid double time on a Saturday and triple time on a Sunday. The claimant was unable to identify any legal rule of law which granted him this entitlement and I have to say that I am entirely unaware of any such rule of law myself. Generally speaking the rule is that rates of pay and enhanced rates of pay are matters where the parties are free to contract whatever they wish. The Agricultural Wages Acts do provide certain minimum rates of pay and do provide that employees must be paid overtime at a certain minimum rate however they say nothing about the rate being double time on a Saturday and triple time on a Sunday. The hourly rates are set by statutory instrument each year and currently the hourly rate and overtime rate is considerably less than the claimant was being paid. It follows that the claim for overtime pay fails.

38. The claimant is entitled to be paid £818.40 in respect of holidays accrued but untaken as at the date of termination of his employment. His claim in respect of any other sum of holiday pay is time barred. His claim in respect of overtime is not well-founded and is dismissed.

Employment Judge : I McFatridge
Date of Judgment : 10 August 2023
Date sent to parties : 14 August 2023