EMPLOYMENT TRIBUNALS

Claimant: Dr E Stockton

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Manchester **On:** 27 November 2023
28 November 2023
(in Chambers)

Before: Employment Judge K M Ross

REPRESENTATION:

Claimant: Mr Kennedy, Counsel
Respondent: Mr Price, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a worker within the meaning of Regulation 2 Working Time Regulations 1998, from 16 September 2020 to 4 August 2022

2. On termination of the engagement on 4 August 2022 the claimant was entitled to accrued but untaken holidays on termination of employment.

3. The claimant is entitled to bring a claim under the Employment Rights Act 1996 on the basis there was an unbroken series of deductions from her wages from 16 September 2020 to 4 August 2022

4. The claimant is not required to give credit for any “rolled up holiday pay” from 16 September 2020 – 4 August 2022.

5. The claimant is only entitled to recover any loss for two years prior to the presentation of her claim on 22 December 2022.

6. The method for calculating holiday pay on termination of employment is as set out in Regulation 16 Working Time Regulations and on the basis of the calendar year principle.

7. The case will proceed to a remedy hearing on a date to be fixed.

REASONS

Introduction

1. The claimant is a doctor. She worked for the respondent as a Locum Bank Doctor from September 2020 until August 2022. She undertook regular locum shifts for the respondent until her final shift on 4 August 2022.

2. The claimant seeks accrued, untaken statutory leave entitlement on termination of the engagement pursuant to the Working Time Regulations and section 13 Employment Rights Act 1996.

3. For the respondent it is agreed the claimant was a worker within the meaning of ERA 1996 in respect of daily assignments completed by the claimant but the claimant's claim that she was a worker during the period September 2020- 4 August 2022 in accordance with her agreement with the Respondent's Bank Register is denied.

4. The case was managed by Employment Judge Brewer on 14 March 2023 (pages 48-53). Employment Judge Brewer identified the issues.

5. The issues were further refined and agreed with counsel at the outset of the hearing today.

Evidence and Witnesses

6. I had a bundle of documents with some additional documents supplied electronically on the day of the hearing.

7. I also had witness statements and heard from the claimant, Mr Reeve and Ms Broughton for the respondent. There was also an agreed witness statement from Dr Robertson who did not attend.

The Law

8. The relevant law is at Regulation 13,16, 30 Working Time Regulations 1998, the Working Time Directive Article 7, section 13(1) and section 23(1)-(3), section 27 and section 27A Employment Rights Act 1996.

9. Both counsel had helpfully provided me with a bundle of authorities which comprised:

- Clark v Oxfordshire Health Authority [1998] IRLR 125;
- Little v BMI Children Hospital [2009] 4 WL UK 440;
- Robinson-Steele v RD Retail Services Limited C-131/04 and C-257/04 (ECJ);
- Uber BV v Aslam [2021] ICR 657;
- Harpur Trust v Brazel [2022] ICR 1380;

- Chief Constable of Northern Ireland v Agnew [2023] UKSC 33;
- Smith v A J Morrisroes & Sons Limited [2005] ICR 596;
- Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229;
- Sejpal v Rodericks Dental Limited [2022] EAT 91.

The Issues

10. We agreed that the Tribunal would determine the principles as set out the issues below and that there would be a separate remedy hearing, if required, to address the calculation of any loss. The issues were as follows:

Employment Status

(1) Was the claimant working under an "umbrella" contract for the respondent? The claimant says she was. The respondent says she was not. (The respondent agrees the claimant was a worker during each separate daily assignment she worked for the respondent).

(2) If there is an "umbrella" contract the claimant's position is that the claimant worked between (i) September 2020 to August 2021; and (ii) 20 August 2021 to August 2022 in one continuous period. During period (i) pre August 2021 the claimant was not paid holiday pay at all – she says it was not identified at all so the respondent is not entitled to offset it. In period (ii) the claimant accepts the respondent paid "rolled up" holiday pay on a 12.07% basis but there was an underpayment of holiday because the calculation basis is incorrect.

(3) If there is an "umbrella" contract the respondent's position is that there is no difference between period (i) and period (ii) but that the August 2021 date is important because the respondent says this case is distinguishable from the **Harpur** case, and in the alternative even if **Harpur** applies, the calculation shows there is no deduction/underpayment.

Time Limits

(4) The claimant says even if the claimant was not a worker between assignments, given the series of assignments these should be looked at on a yearly basis in accordance with **Agnew**.

(5) If there was a series of contracts, not a "umbrella" contract, the respondent says the chain is broken and there is an out of time issue. If there is an "umbrella" contract, was there a series of deductions as in **Agnew**?

(6) How does the statutory long stop provision of two years apply to this case (the Deduction from Wages (Limitation) Regulations 2014)? The respondent says the alleged deductions which occurred more than two years before the claim was presented are outside the time limit.

Set Off

(7) Is the respondent entitled to set off "rolled up" holiday pay against holiday pay entitlement which accrued between September 2020 and August 2021 under the principle in **Robinson-Steele**?

The Facts

11. I find the following facts.

12. The claimant graduated from Lancaster University Medical School in 2018 and began her foundation training at East Lancashire NHS Foundation Trust. I find that the claimant had the same substantive post with the Trust between 1 August 2018 and 4 August 2020. She worked in the Emergency Department for the last eight months of her two year foundation training.

13. I find the claimant began working as a locum doctor at the East Lancashire Hospitals NHS Trust ("the Trust") in September 2020 whilst also studying for a Masters in Medical Education.

14. I accept the claimant's evidence to find that many junior doctors at this stage in their training choose to take what the claimant described as a "third foundation year" working as a locum whilst deciding in which area of medicine they wished to specialise .

15. I find the claimant became aware of the opportunity to work as a locum doctor in conversations with other doctors.

16. I rely on the evidence of Mr Reeve that in 2018 regulations came into force which provided that junior doctors could only work a maximum of one in three weekends instead of one in two weekends as had previously been the case. As a result, across the NHS, Trusts found their substantive workforces could not deliver the medical services required as their available substantive workforce was reduced by a third. A solution adopted by many Trusts, including the respondent Trust, was to rely on bank staff to fill the vacant shifts at the weekends. The Respondent had its own "Bank" of locum staff.

17. I rely on the claimant's evidence that she commenced locum shifts in September 2020. I find there is no formal documentation concerning the terms of her locum work which was provided to her when she commenced those shifts. I find there is a detailed list of shifts which is not disputed at pages 196-197 of the bundle. The first shift was on Wednesday 16 September 2020 and the claimant worked regularly until 4 August 2022. The list of shifts shows that the claimant often worked four or five shifts per month usually during the week and sometimes on a Sunday, usually for 12 hours. The only gap in the period is between 3 June 2021 and 4 August 2021 (pages 196, 164 and 165). The claimant cannot now recall the exact reason for that gap but thinks it very likely it was when the dissertation was due for her Masters Degree.

18. The claimant only undertook locum work within the Emergency Department for the Trust at both Blackburn and Burnley Hospitals.

19. There was no dispute that the system for offering shifts to the claimant was by email. An example of one of these emails dated 7 July 2022 is at pages 217-218 of the hearing bundle. Any shifts offered to the claimant which she wished to work were accepted by the claimant replying promptly to the Trust also by email and the claimant would then proceed to work that shift. The claimant said that she received an email with offers of shifts daily. If she wanted to work, she responded. If she did not want to work, she did not respond. On a very occasional basis the claimant said when the Trust was desperate for staff she received a phone call asking her if she would be willing to work.

20. I find the claimant completed a timesheet for each shift she completed. An example is at page 141 of the bundle. The claimant completed the date and the hours of the shift, the number of hours claimed for, and indicated whether or not she had taken a break. The shift was then authorised by another doctor, normally the Registrar. I accept the claimant's evidence that so far as the rate was concerned, she inserted the rate a medical colleague informed her she should insert. She said to the best of her recollection when she started it was £40 per hour normally, £45 for a twilight shift and more for a night shift but she did not normally work a night shift.

21. The claimant also explained that there were tier levels relevant to rate of payment. Tier 1 was a first year foundation doctor; tier 2 was a doctor in the second year of their foundation; tier 3 was a doctor with further training and tier 4 was a doctor with higher training again. By January 2022 the claimant was graded as tier 3 (see page 175). Earlier timesheets record the claimant as being FY2 which the claimant understood to mean she would be paid at tier 2. The claimant confirmed that the first tier 3 shift she worked is evidenced at p145.

22. I find that the claimant was paid monthly on or around 25th of the month for the period ending on the 20th of each month (see page 66).

23. I find there is no reference to holiday pay on the claimant's payslips, and that is not disputed.

24. I rely on the claimant's evidence to find that the first time she received any written documentation regarding her engagement as a locum junior doctor by the respondent was a letter dated 20 August 2021 (pages 59-60 of the bundle). The letter of engagement informs the claimant:

> "Whilst you are working on behalf of the Trust you must adhere to the appropriate Trust policies including health and safety, Human Resources (e.g. whistleblowing, disciplinary procedure and respect at work) and operational and clinical policies."

25. This letter states:

> "You are not an employee of the Trust and are not entitled to any benefits such as occupational sick pay. This does not affect your right to statutory holiday entitlement, statutory sick or maternity pay."

26. The letter states that the services the claimant provides to the Trust are "on an ad hoc basis". It goes on to state:

> "This means that whilst the Trust will try to give you as much notice as possible when offering work, there is no obligation on the part of the Trust to provide such work for you, nor for you to accept any work so offered. All work is on a day-to-day basis with payment made only for hours worked. However if the Trust cancels your working arrangements within a 24 hour period, you will be paid for the hours you would have worked within that 24 hour period."

27. The letter also states that the claimant will be "paid at the applicable Trust rates". It goes on to state:

> "All Trust rates are inclusive of statutory holiday entitlement (see attached Trust Medical Extra Duty Rates). Any amendments to your salary will be determined by the Trust. Your salary will be paid monthly in arrears by bank credit."

28. Within the bundle there was a document entitled "Trust Medical Extra Duty Rates 10/5/2021" (page 62). The document details the applicable rate for a grade/tier of doctor at a particular period of time and, as the claimant described, whether it was a day shift, a twilight shift or a night shift. The document is not easy to read. In one column after the rate there is a column which states "HR" and then a column which states "WTR".

29. Mr Reeve said that referred to HR = hourly rate and WTR relates to Working Time Regulations (Holiday Pay) 12.07%) which he said could be found at the bottom of the document.

30. Mr Reeve suggested this document was available on the Trust intranet. The claimant was not asked if she had viewed the document on the intranet. The claimant's evidence was that she received the rates card in or around August 2021 and that in or around May 2022 she contacted the BMA about holiday pay after colleagues had said to her that holiday pay should be itemised separately on her payslip and that she should be entitled to it.

31. The claimant gave no evidence of ever being cancelled by the Trust and indeed her evidence was that shifts were plentiful. The claimant said to the best of her recollection she had only cancelled twice: once was when she was ill, and the other time was when her partner had booked a holiday for her as a surprise. She had been booked to work on 16 and 17 August 2022 but she contacted the Trust on 4 August to cancel those shifts (see pages 219 and 220).

32. The claimant agrees she last attended a shift on 4 August 2022. She explained that she had intended to continue taking some shifts from the respondent as a locum doctor when she commenced work as a Paediatric Doctor in West Yorkshire in September 2022. However, her hours there and the length of time spent travelling meant that in the end she has not done so. The claimant said she was aware of the paragraph in her engagement letter which stated:

> "Please be aware that following your addition to the casual bank register if you do not work a shift for any six month period, you will be removed from the register and will have to reapply for the post."

33. The claimant gave evidence that during the period she was working as a locum doctor for the respondent her only other paid employment was as a tutor at Lancaster Medical School. She did six sessions per year between September 2021 and August/September 2022.

34. Mr Reeve confirmed that the claimant was supplied with a hospital pass/fob and did not have to return that at the end of each shift.

35. The claimant also explained that she completed a table of mandatory training for the respondent. She had access to an online portal at home where she did that training, in or around April 2021. She explained she was not paid to do that training.

Applying the Law to the Facts

36. I turn to the first issue, which is employment status.

37. There is no dispute in this case that each of the 80 or so individual shifts which the claimant worked for the respondent between 16 September 2020 and 4 August 2022 were individual assignments where the claimant was a "worker" within the meaning of regulation 2(1) Working Time Regulations 1998 and/or section 230(1)(b) Employment Rights Act 1996. Regulation 2(1) states:

> "'Worker' means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment; or
>
> (b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly."

38. The first issue for me therefore is whether the claimant was working under am "umbrella" contract for the respondent. The claimant says that there was an overarching contract between the claimant and the respondent arising out of her engagement to work for the respondent as a locum junior doctor. The respondent says that there was no such contract.

39. I remind myself that the statutory test for establishing "worker" status under the Working Time Regulations 1998 is essentially the same as the statutory test for establishing worker status under section 230(3)(b) Employment Rights Act 1996. In a recent case of **Sejpal** the EAT stated:

> "The entitlement to significant employment protection rights depends on a person being a worker. Deciding whether a person is a worker should not be difficult."

40. Unfortunately, that is not always the case. However, Taylor J went on to state:

> "Determining worker status is not very difficult in the majority of cases, providing a structured approach is adopted and robust common sense is applied. The starting point and constant focus must be the words of the statutes. Concepts such as mutuality of obligation, irreducible minimum, umbrella contracts, substitution, predominant purpose, subordination, control and integration are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases or relevant only to a component of the statutory test. It is not a question of assessing all the concepts, putting the results in a pot and hoping that the answer will emerge; the statutory test must be applied according to its purpose."

41. He then went on to quote Baroness Hale in **Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730**:

> "There is not a single key to unlock the words of the statute in every case. There can be no substitute for applying the words of the statute to the facts of the individual case."

42. I therefore start with the words of the statute. Under WTR regulation 2 "worker" means "an individual who has entered into or works under (or where the employment has ceased, worked under) (a) a contract of employment; or (b) any other contract, whether express or implied, and (if it is express, whether oral or in writing) whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly".

43. In this case the claimant agreed to work for the respondent as a locum junior doctor. At the time she agreed to do this there was no documentary evidence of the agreement or contract. The claimant was aware of the opportunity to work for the respondent because she had heard about it from medical colleagues. The letter dated 20 August 2021 clarifies the nature of the agreement from that date onwards. It is not disputed that the agreement was that the claimant was added to the casual bank register which meant that the Trust could offer her opportunities to work. There was no obligation for them to offer work and there was no obligation for the claimant to take the work.

44. So, for the claimant to be a "worker" under this statutory provision she must have (a) entered into "any other contract, whether express or implied (and if it is express whether oral or in writing) whereby the individual undertakes to do or perform personally any work or services for another party to the contract".

45. The first question is: has the claimant entered into a contract, whether express or implied (and if it is express whether oral or in writing). I find that the claimant did. I find in this case that the agreement between the Trust and the claimant for the claimant to work for the Trust as a locum doctor, on a casual basis was indeed an agreement with mutual obligations (see **Quashie v Stringfellows**

Restaurants Ltd [2013] IRLR 1999: "Every bilateral contract requires mutual obligations. They constitute the consideration from each party necessary to create the contract."

46. The obligations referred to included the obligations for the claimant to follow the Trust's policies as set out in the engagement letter of 20 August 2021. The claimant also gave evidence that there was an expectation she would undertake training whilst on the register. In return the Respondent offered work and agreed to pay the claimant if cancelled within 24 hours of her shift starting , and agreed she was entitled to statutory sick pay and provided her with a key/fob.

47. The key question is whether, by agreeing to be engaged as a locum junior doctor on the respondent's casual bank register, the claimant was "undertaking to do or perform personally any work or services for another party to the contract", which is the next question.

48. At this point I step back and apply "robust common sense" as suggested by Tajlor J. The individual daily assignments completed by the claimant for the respondent (where the respondent agrees she was a worker) only make sense in the context of the overarching agreement between the claimant and the Trust. The agreements are symbiotic. It is artificial to suggest that the agreement between the claimant and the Trust to work for them on the Casual Bank Register is entirely disconnected to the separate to the daily assignments.

49. The respondent says she was the claimant was not "undertaking to do or perform personally any work or services for another party to the contract". The respondent says she was simply agreeing to go onto the Bank Register and she was not undertaking to do or perform personally any work or service for another party to the contract. They rely on the fact that at this stage there is no "wage work bargain" and no mutuality of obligation because the claimant has not agreed to attend on any shift – she simply has the opportunity to do so if the work is offered to her.

50. By contrast, the claimant's representative says the principle in **Nursing & Midwifery Council v Somerville [2022] EWCA Civ 229** applies, and there is no prerequisite of "mutuality of obligation" in the sense of there being an obligation for the putative worker to accept and perform some minimum amount of work for the putative employer as a prerequisite for satisfying the definition of worker status in section 230(3)(b) of the 1996 Act and regulation 2(1) of the Working Time Regulations. For the respondent, Mr Price says that is not an accurate reading of **Somerville**.

51. I remind myself I must be guided by the words of the statutory Regulations. I remind myself of the guidance of the Higher Courts that when interpreting a statutory right I must have regard to the purpose of the legislation and I must not apply commercial contract terms. The Working Time Regulations derive from the Working Time Directive. The principle of the Working Time Directive in relation to leave is to enable a worker to take rest and recuperation from their labours. It is also, in the case of paid remuneration on the termination of engagement, to allow the worker to take a period of paid rest before new engagement.

52. I turn to the **Somerville** case. The claimant was appointed as a Panel Member and Chair of the Fitness to Practice Committee of the respondent council,

which was the Regulator for nurses and midwives in the UK. The Tribunal found that there was both an overarching contract covering the claimant's period of appointment and a series of individual contracts when hearings were assigned to him. The Tribunal found that the claimant was a worker but was not an employee.

53. The respondent's appeal was unsuccessful at Court of Appeal. The Court of Appeal did not disturb the Employment Tribunal's finding.

54. **Somerville** is authority for the proposition that there is no requirement for an individual to undertake to do an irreducible minimum of work (applying **Uber v Aslam)**. I am therefore satisfied on the facts of this case that there was an underlying contract for the provision of work which the claimant as the putative worker undertook to carry out personally and that applying Somerville there is no requirement to do an irreducible minimum of work. In reaching this finding I take into account that the overarching or global agreement between the Trust and the claimant that the agreement between the claimant and the Trust in relation to the Bank Register must be read in the context of the individual assignments because the obligations of the claimant during these assignments was underpinned by the overarching agreement in terms of each parties obligations to the other as described in paragraph 46 above.

55. Therefore for the sake of completeness I turn back to the statutory test and ask myself three questions:

(1) Was there a contract in operation to provide work or services? The answer to that is yes. The agreement between the claimant and the Trust was, from a practical point of view, exactly such an agreement.

(2) Was there an undertaking to do so personally? Again, the answer is yes. The claimant was a doctor. There was no doubt that she was agreeing that she would be personally to work for the respondent at their hospitals in the A & E Department.

(3) Was the respondent a professional business client or customer of a business carried on by the claimant? Clearly the answer is no and that is undisputed.

56. At paragraph 48, I remind myself the Somerville Judgment states crucially:

> "There is no need and no purpose served in seeking to introduce the concept of an irreducible minimum of obligation in the way defined by the respondent."

57. At this point I deal with the case of **Windle [2016] EWCA Civ 459**. The Court of Appeal distinguished that case and in **Aslam** it was distinguished as a case where the intermittent nature of the work was so great that the correct categorisation was self-employed not worker. The statement was:

> "Where an individual only works intermittently or on a casual basis for another person that may, depending on the facts, tend to indicate a degree of independence or lack or subordination in the relationship whilst at work which is incompatible with worker status."

58. That is not the suggestion here. There was no lack of subordination.

59. I turn finally to deal with some of the older cases such as **Cornwall County Council v Prater [2006] ICR 731**; **Helyer Brothers v McLeod & Others [1987] ICR 526**; **Clark v Oxfordshire Health Authority [1998] IRLR 125**; and **Carmichael & Another v National Power PLC [1999] ICR 1226**.

60. These were cases where the claimants sought to establish that they were employees, not workers. The test under the Employment Rights Act 1996 for an employee is not the same as the statutory test for a worker. The worker definition is deliberately wider than the employee definition and as **Sejpal** suggests, what is important is the application of the statutory wording. Accordingly, those cases do not provide assistance here.

61. I therefore find the claimant was a worker within the statutory meaning between 16 September 2020 and 4 August 2022.

62. Finally, the respondent suggested that the lack of a specific agreed termination date was fatal to a finding of worker status. I am not satisfied that is the case. It is true that neither party specifically contacted the other stating the agreement was at an end. I find as a matter of fact that the agreement ended on the last date the claimant worked for the respondent.

63. I find that the Respondent did have a term in the agreement stating that if she did not work a shift in any six month period that the claimant would be removed from the Register and would have to “reapply for the post” p60 but there is no evidence that the Trust contacted the claimant to effect that term.

64. In any event I am not satisfied, applying the statutory test as I have done, that the lack of a notified termination date is fatal to a finding of worker status.

65. I turn to the next issue: If there is an “umbrella” contract the claimant's position is that the claimant worked between (i) September 2020 to August 2021; and (ii) 20 August 2021 to August 2022 in one continuous period. During period (i) pre August 2021 the claimant was not paid holiday pay at all – she says it was not identified so the respondent is not entitled to offset it. In period (ii) the claimant accepts the respondent paid “rolled up” holiday pay on a 12.07% basis but there was an underpayment of holiday because the calculation basis is incorrect.

66. I have found there was an umbrella contact in the sense the claimant was a worker from September 2020 to 4 August 2022.This issue relates to rolled up holiday pay which I have dealt with below in this Judgement. In so far as the calculations are concerned it was agreed that there would be a separate Remedy hearing where the calculation of holiday pay would be determined.

67. The next issue was: If there is an “umbrella” contract the respondent’s position is that there is no difference between period (i) and period (ii) but that the August 2021 date is important because the respondent says this case is distinguishable from the **Harpur** case, and in the alternative even if **Harpur** applies, the calculation shows there is no deduction/underpayment.

68. I turn to consider the **Harpur** point. Under regulation 14(1) and (2) a worker is entitled to a payment in lieu of holiday where his or her employment is terminated during the course of the leave year and on the termination date the proportion of statutory annual leave he or she has taken under regulations 13 and 13A is less than the proportion of the leave year that has expired.

69. Where a worker is entitled to pay in lieu of holiday entitlements regulation 14(3) provides that the sum due shall be determined either by the terms of a relevant agreement or by reference to a statutory formula set out in regulation 14(3)(b).

70. The statutory formula at regulation 14(3)(b) provides that the calculation is (A x B) – C where A is the minimum period of leave to which the worker is entitled under regulation 13 and 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.

71. Regulation 14(3)(b) states that the amount of pay in lieu of holiday shall be calculated in the same way as holiday pay under regulation 16.

72. Regulation 16 provides that a "week's pay" for holiday pay purposes is calculated in accordance with sections 221-224 ERA 1996.

73. If the worker does not have "normal working hours" at the time when the leave is taken, holiday pay is calculated by reference to average remuneration over the previous 52 weeks. As a 52 week period includes any weeks during which no remuneration was payable, those weeks are disregarded and an earlier week must be brought into the calculation (section 224(3) ERA).

74. Harpur Trust v Brazel [2022] confirms that the method of calculation is as stated in the Regulations and if that method of calculation is more advantageous to a worker who works irregular hours, that is not a reason to fail to apply the statutory method of calculation**.**

75. I remind myself that the 12 week period ending on the calculation date was extended to 52 weeks for the purposes of calculating pay for statutory annual leave under WTR SI 1998/1833 regulation 16 as from 6 April 2020.

76. The calculation date for the purposes of calculating accrued but untaken holiday on termination of employment is the termination date which I have found is 4 August 2023.

Time Limits

77. I now turn to the next issue, which is time limits. The first issue here is that the claimant says even if the claimant was not a worker between assignments, given the series of assignments, these should be looked at on a yearly basis in accordance with **Agnew**. I have found the claimant was a worker during the entire period I do not need to determine this issue as it is no longer relevant.

78. The next time limits issue is: If there was a series of contracts, not a "umbrella" contract, the respondent says the chain is broken and there is an out of time issue. If there is an "umbrella" contract, was there a series of deductions as in

Agnew? The respondent says there was a break in the chain when the claimant did not work between June and August 2021.

79. I have found there was an umbrella contract, so the issue is whether the chain was broken between June and August 2021.

80. I remind myself that the claimant has brought a claim for failure to pay accrued but untaken holiday on the termination of her engagement with the respondent. As the claimant is entitled to do, the claim has been brought under the Employment Rights Act 1996 section 13 – the right not to suffer unauthorised deductions:

> "(1) An employer shall not make deductions from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract; or
>
> (b) the worker has previously signified his agreement or consent to the making of the deduction."

81. In determining the amount of the deduction, I must consider what is "properly payable" under the contract.

82. Section 23 of the Employment Rights Act 1996 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 is applied by virtue of section 18(2); and
>
> (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 was made.
>
> (3) Where a complaint is brought under this section in respect of:
>
> (a) a series of payments;
>
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in a series or the last of the payments so received."

83. **Agnew** is authority that the rule in Bear Scotland that there cannot be a gap of more than three months no longer applies.

The Supreme Court confirmed the position that "series" should be given its ordinary English meaning and that what should be included in a series was a question of fact:

> "The word 'series' is an ordinary English word and that broadly speaking it means a number of things of a kind, and in this context a number of things of a kind which follow each other in time. Hence whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact and in answering that question all relevant circumstances must be taken into account including in relation to the deductions in issue, their similarities and differences, their frequency, size and impact, now they came to be made and applied, what links them together and all other relevant circumstances."

84. I am satisfied that from the time the claimant started working for the respondent as a locum doctor on the bank register in accordance with the agreement she reached with them, there was no reference on her payslip to holiday pay. I found the evidence of Mr Reeve to be somewhat inconsistent in relation to whether or not there had been a document prior to 20 August 2021 sent to a locum junior doctor recording on the statement of engagement the position in relation to holiday pay. In any event I find the claimant to be a clear, straightforward and honest witness giving concessions where necessary and entirely accept her evidence to find that she never received a statement of engagement when she started with the respondent as a locum in September 2020 and no such document has been disclosed.

85. I am therefore satisfied that in the first period up to 20 August 2021 the claimant had not received any information at all about holiday pay. I find that there was nothing in writing sent to her, that she was unaware of any rate card and completed the rate of pay on her time sheet as advised by medical colleagues and had not seen any documentation or information in relation to holiday pay. There was nothing about holiday on her payslip which she received each month.

86. The position changed slightly in August 2021 because at that point it was implicit in the terms of engagement document which the claimant received that the claimant was entitled to statutory holidays: "This does not affect your right to statutory holiday entitlement…" and in the first paragraph "all Trust rates are inclusive of statutory holiday entitlement (see attached Trust Medical Extra Duty Rates)". However, although the rate document refers to holiday pay it is very difficult to read and it is hard to see how the respondent has arrived at that figure for holiday pay rate (p62). There continued to be no reference on the claimant's payslip to holiday pay.

87. I am therefore satisfied that on each occasion the claimant was paid (which was normally each month) there was a series of deductions where there was no indication of what she had received by way of holiday pay.

88. The respondent asks me to find that there was a break in the series when the claimant did not work for a period of approximately two months between 3 June 2021 and 4 August 2021. I am not satisfied that that amounted to a break for these purposes.

89. It was a relatively short period of time when the claimant who was working for the respondent on a locum basis did not work for them but I have found her contract as a worker with the respondent continued to subsist during this period; it was simply a time when she did not attend a shift. She received no pay so there was no deduction. When she resumed her shifts, she resumed being paid and continued to receive no holiday pay. The types of deductions are all the same and they are factually linked to the predecessor deduction.

90. I am therefore satisfied that there was a series of deductions as in Agnew and the claimant's claims are therefore within time.

91. I turn to the third time limits issue – how does the statutory long stop provision of two years apply to this case (the Deduction from Wages (Limitation) Regulations 2014)? I am satisfied that the Regulations apply and deductions which occurred more than two years before the claims were presented are out of time. The claimant presented her claim on 22 December 2022 and therefore claims which relate to two years prior to that date are out of time.

92. I turn to the final issue: is the respondent entitled to set off rolled up holiday pay against holiday entitlement which accrued between September 2020 and August 2021 under the principle in **Robinson-Steele**?

93. I consider the answer to that question is no.

94. I remind myself that looking at **Robinson-Steele** and the predecessor cases, for an employer to be given credit for rolled up holiday payments there must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked. This is best evidenced by:

- The provision of rolled up holiday pay being clearly incorporated into the contract of employment;
- The amount allocated to holiday pay being identified in the contract, and preferably also in the payslip; and
- Records being kept of holidays taken and reasonably practicable steps being taken to ensure that workers take their holidays.

95. I find that in the period prior to August 2021 there was simply no reference to holiday pay at all in any agreement between the claimant and the Trust or in her payslips. Accordingly, the respondent is not entitled to rely on "rolled up holiday pay".

96. The position in the second period is slightly different. The claimant was informed in the engagement letter that "all Trust rates are inclusive of statutory holiday entitlement (see attached Trust Medical Extra Duty Rates)".

97. However the documentation is very hard to understand. In the document marked Trust Medical Extra Duty Rates, there is a column marked HR and another column marked WTR in a spreadsheet with numerous columns. There is no asterisk or anything to take the reader to the bottom left of the table. However, the assiduous reader can find there in very small writing: HR = Hourly Rate WTR = Working Time

Regulations (holiday pay 12.07%). The engagement letter does not provide any more clarity except to say that rates are inclusive of statutory holiday entitlement – "See attached Trust Medical Extra Duty Rates" p59.

98. I am not satisfied that this meets the requirement in Robinson -Steele so the respondent is not entitled to credit for any payments made from August 21 by way of rolled up holiday pay.

Employment Judge K M Ross

Date: 18 December 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
21 December 2023

FOR THE TRIBUNAL OFFICE