



EMPLOYMENT TRIBUNALS

Claimant: Mr S Newbold
Respondent: Wilson James Limited
Heard at: Leicester Employment Tribunal
On: 24 November 2023
Before: Employment Judge Welch

REPRESENTATION:

Claimant: In person
Respondent: Mr M Chadwick (Consultant)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

Wages

1. The complaint of unauthorised deductions from wages in respect of sick pay is not well-founded and is dismissed.

Holiday Pay

2. The complaint in respect of holiday pay is not well-founded and is dismissed.

RESERVED REASONS

1. The claimant has been employed by the respondent as a security guard since 13 September 2017.

2. On 17 January 2023, the claimant issued proceedings in the Employment Tribunal following a period of early conciliation that started on 28 November 2022 finished on 9 January 2023. The claim was for unpaid holiday pay and unpaid sick pay. The respondent defends the claim.
3. The claimant was ordered to provide a schedule of the actual amounts he was claiming in respect of holiday pay and wages on 24 May 2023. The claimant provided a document entitled, "My workings out" which confirmed that he was claiming £246.85 in respect of unpaid holiday for the current holiday year but wished this to be backdated for two years. Also, he was claiming four days' sick pay in the sum of £528.96.
4. Following a postponement of the original hearing, the case was listed for a final hearing before me. The hearing took place at Leicester Employment Tribunal and both sides attended in person.

The hearing

5. The respondent had prepared a file of documents for use at the hearing, a copy of which had previously been sent to the claimant. The claimant had also prepared two folders of documents which included a number of documents which were not relevant to the claims I had to decide. The claimant had not brought along an additional copy of his folders but confirmed that he had sent these documents directly to the respondent's HR department. I ensured that the respondent was able to see copies of any documents the claimant relied upon.
6. I was provided with witness statements for the claimant and Mr Martin Page, a security office on the same site as the claimant, who gave evidence for the

claimant. I was also provided with a witness statement from Mr Mark Chalmers, Senior Security Operations Manager, who gave evidence on behalf of the respondent.

7. All witnesses gave sworn evidence and were questioned by the other side and myself, where appropriate.
8. The hearing was listed for 3 hours. Having heard all of the evidence and the submissions, we went slightly over the 3 hour listing, with the agreement of both parties. It was not possible to give a Judgment on the day, so I reserved my decision.

Findings of fact

9. The claimant has been employed as a security guard by the respondent since 13 September 2017. The claimant 's contract of employment signed on 8 October 2018 stated that at clause 6:

“Hours of Work and Working Time Regulations

*6.1 Your average hours of work are **56** hours per week. Due to the nature of your role, you may from time to time be expected to work additional hours in order to ensure that your duties are satisfactorily completed. Your normal hours of work will vary from time to time depending on your current Site Assignment.”*

10. It was agreed by all parties, and accepted by the claimant whilst giving evidence, that his average weekly contractual hours were 56 hours per week, as stated in his contract of employment.
11. The claimant’s contract of employment went on to provide for, what it called, a discretionary sick pay scheme that, *“After probationary period but less than five*

years' service with the company", four weeks' company sick pay would be payable. It went on to state,

"One week's [company sick pay] is equal to your contractual working week at your basic rate, inclusive of Statutory Sick Pay [SSP] entitlements. Payment of [company sick pay] commences from day four of sickness. You will not be paid [company sick pay] for the first 3 working days of any period of sickness absence."

12. Clause 9 of the claimant's contract of employment provided:

"HOLIDAYS

9.1 Your paid annual leave (holiday entitlement) per leave year will be calculated based on the following entitlements.

Date	Annual Leave Entitlement
<i>From 1 April</i>	<i>Weekly hours 56 x 5.6 weeks (if on assignment in England or Wales) = 313.6 pro rated and Inclusive of bank Holidays"</i>

13. The respondent operates a rolling shift system which they refer to in their advertisements for the security guard role as a "21 day rolling rota, 0700 to 1900 and 1900 to 0700." The advertisements state that the working hours are 56 hours per week. The claimant was unhappy with the use of this phrase since the "21 day rolling rota" implied to him that it was 21 working days whereas the shift

pattern the respondent used included rest days on which the employee would not be required to work within its 21 day rolling pattern.

14. The shift system used by the respondent involved the claimant, and his colleagues working a shift pattern of 7 days working followed by 3 rest days followed by 7 days working followed by 4 rest days. This pattern ultimately repeats every 3 weeks.
15. The claimant believes that the respondent uses a 4 week rota system (as evidenced in his documents), as the three week shift system outlined by the respondent in its statement only accounts for what he classes as 2 working weeks of 7 days each and yet he is paid monthly on the 11th of each month for the whole month. He considers that the respondent uses two different systems for calculating holiday pay and sick pay which disadvantages employees, since the rotas from April 2022 until March 2023 show week numbers 1 to 4 in the headings. These week numbers have been removed from the rotas for the months after March 2023.
16. The claimant believes that the three week shift system set out in the table in Mr Chalmers' statement would result in a shortfall in employees covering the work required to be done since the security guards are required to work more than 14 working days in any calendar month.
17. I do not consider this to be the case. I accept the evidence of Mr Chalmers that the 3 week shift pattern repeats every 3 weeks and continues for the whole year. This means that the claimant and other employees working on this pattern would between them provide security guard cover for the whole month and are paid for this.

18. The claimant was off sick for 26 working days which, from the rotas provided, appears to have been from 26 May 2022 until 30 June 2022. The dates stated by the respondent in the hearing were 12 June to the beginning of July 2022 but in any event, it was agreed that the claimant had had 26 days' sickness.
19. The claimant had been paid for 19 days' sickness, the first three days been waiting days under both the statutory sick pay scheme and also the respondent's company sick pay scheme.
20. The claimant accepted in the hearing that he was entitled to 4 weeks' company sick pay, which is set out in his contract of employment. The claimant's case was that his contractual working week consisted of seven working days. I believe this is on the basis that he was contracted to work for seven days in one stretch. The respondent stated that the claimant's contractual week was 4.67 working days, which it had calculated using an average of the three week shift system. I accept that the claimant's average working week was 4.67 days per week, since it cannot be the case that the claimant's contractual working week was seven days a week.
21. The respondent had therefore calculated four weeks' company sick pay as 4 x 4.67 days, being 18.68 days' sick pay. The respondent had rounded this up to 19 days and the claimant accepted that he had been paid 19 days' sick pay.

Submissions

22. Both parties addressed me orally on the case. The respondent's submissions in brief were that holiday pay had been paid in full. The claimant accepted he was entitled to 5.6 weeks' holiday and that his average weekly hours were 56 per

week. There was no suggestion that he had not been paid 313.6 hours' holiday pay per year. The claimant's assertion that he was entitled to 336 hours' holiday pay would mean that he would be entitled to 6 weeks' holiday pay.

23. Turning to the sick pay claim, the respondent's primary submission was that the claimant was not entitled to any additional company sick pay. His average days of working per week were 4.67 and he had been paid 19 days' company sick pay which accorded with his contract of employment. However, the claim had been presented out of time and should the primary submission fail, then this claim should not succeed in any event.
24. The claimant's submissions referred to ACAS guidance which he read out which stated that the, "statutory minimum holiday entitlement was 5.6 weeks, usually made up of 28 days."
25. The claimant contended that the respondent was working from different systems. This was because the 21 day rotation put forward by Mr Chalmers did not tally with his contract, the job advertisements or the claimant's pay. On the three week pattern provided, this did not include 21 working days and is different from the rotas which have been provided to the Tribunal. Mr Chalmers had confirmed that the pattern he included in this statement included rest days and the claimant did not work on rest days.
26. Mr Chalmers's calculations only include 2 working weeks and not the full 21 working days used for the respondent's contract, P60, job advertisements etc. There is a week missing on Mr Chalmers' calculations and they do not tally, unlike the claimant's calculations.

27. If off sick, employees should lose 3 days' pay and then be paid for sickness absence up to 4 contractual weeks' pay. The claimant contends his contractual week is 7 days a week, and, therefore, he should have been paid in full for his remaining sickness absence of 4 additional days' pay. The claimant did not understand why the respondent used a 3 week rota on 4 week month.
28. The claimant said that other employees within the respondent's organisation had agreed with him that he was correct in his calculations.
29. Finally, the reason his sick pay claim was late was because he had to follow a process, and this process was delayed by the respondent.

Law

30. Regulation 13 of the Working Time Regulations 1998 provides

"Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year...."

31. *"Regulation 13A Entitlement to additional annual leave*

(1) Subject to regulation 26A and paragraphs (3) and (5), 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) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) *The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.*

32. The Working Time Regulations 1998 provide at regulation 16

“Payment in respect of periods of leave

(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) [and the exception in paragraph (3A)].*

(3) *The provisions referred to in paragraph (2) shall apply—*

(a) *as if references to the employee were references to the worker;*

(b) *as if references to the employee's contract of employment were references to the worker's contract;*

(c) *as if the calculation date were the first day of the period of leave in question; ...*

(d) *as if the references to sections 227 and 228 did not apply.*

(e) *subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—*

(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.]

[(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.

(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.]

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract (“contractual remuneration”) [(and paragraph (1) does not confer a right under that contract)].

(5) 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.”

33. Section 13 ERA provides protection for employees in respect of unlawful deductions from wages. It provides:

“(1) An employer shall not make a deduction 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 a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

...

(3) 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 the 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....”

Conclusion

34. I am satisfied that the claimant was entitled to 5.6 weeks' holiday pay each year. As the claimant has accepted he works an average of 56 hours per week when considered over a yearly basis, then his holiday entitlement per year is 313.6 hours. He has been paid his full entitlement and therefore this claim must fail.
35. The claimant appears to have come to the false conclusion that he was entitled to 28 days' holiday per year, which when working 12 hours per day equates to 336 hours. I do not accept that to be the case. His contract is based on the statutory minimum holiday entitlement and I consider that it has been correctly calculated and paid.
36. Turning to sick pay, it cannot be the case that a contractual week consists of seven days. Whilst I accept that the claimant worked for seven days at a time, it is clear that his contractual working week was averaged over a period of three weeks such that his contractual working days were 4.67 days per week. As he was entitled to contractual sick pay of four weeks' pay, he was entitled to 18.68 days' company sick pay and confirmed that he had been paid 19 days' sick pay. Therefore, I do not consider that the claimant is entitled to any further company sick pay.
37. In light of these findings, the claimant's claims are dismissed.

Case Number: 2600152/2023

**Employment Judge Welch
24 November 2023**

Judgment sent to the parties on:

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For the Tribunal:

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