EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106433/2023

Held in Glasgow on 19 March 2024

5 **Employment Judge Russell Bradley**

Mr Gordon Dyer **Claimant**
In Person

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Renfrew Warehousing & Distribution Ltd **First Respondent**
Not present and
Not represented

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Renfrew Transport Services Limited **Second Respondent**
Represented by:
Mr A Watt -
20 **Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

25 1. The complaint that the second respondent has made deductions from the claimant's wages (holiday pay) in the period 24 October 2021 to 15 September 2023 in contravention of section 13 of the Employment Rights Act 1996 and Regulation 16 of the Working Time Regulations 1998 is well founded; and

30 2. The respondent is ordered to pay the claimant the sum of **THREE THOUSAND SEVEN HUNDRED AND FOUR POUNDS AND TEN PENCE (£3704.10)** under deduction of any income tax and national insurance contributions due on that sum.

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REASONS

Introduction

1. By notice dated 15 January 2024 this final hearing was fixed to consider merits and if appropriate remedy. The claim is for holiday pay. The claimant's employment as a driver is continuing.

2. By way of brief history, the ET1 was presented on 24 October 2023. It named only the first respondent. An ET3 with Grounds of Resistance was lodged for it on 29 November by Peninsula. It denied the claim. It referred to "*the claimant's contract of employment*". The next day, 30 November, the first respondent was struck off the Register of Companies. On 12 December it was dissolved. On 18 January 2024 the claimant (having learned of the dissolution) sought leave to add the second respondent. He set out his basis for doing so including the sharing by the respondents of a trading name, addresses and telephone numbers. Following notice to it of the claim on 12 February, the second respondent lodged an ET3 with Grounds of Resistance on 11 March. Peninsula was instructed by the second respondent to lodge its ET3 and Grounds, which they did. The second respondent asserted that it was not, and had never been, the employer of the claimant. Mr Watt confirmed that he appeared only for the second respondent.

Evidence and witnesses

3. Peninsula produced a bundle of 84 pages, emailed to the tribunal on 18 March. It was received by the claimant that day. He had contributed some material to it. With Mr Watt's agreement the claimant added what became **pages 86 to 102**. The claimant explained that in January he had sent the material to the respondents' solicitor but for some reason it had not been included. Page 85 was excluded as it was correspondence headed "*without prejudice.*"

4. I heard oral evidence from the claimant and he was cross-examined He was referred to various materials within the bundle.

5. The claimant gave his evidence in an honest and candid way. I had no reason to doubt that he was telling the truth. He was genuine and sincere. He made concessions where appropriate.

6. The second respondent relied on evidence from Murray Roxburgh a self-employed consultant. While I had no doubt that he gave an honest account, his evidence was of no relevance to the question of any sums due to the claimant. He gave some background evidence about matters relating to the respondents.

The claims and issues

7. The single claim was for arrears of holiday pay. It became clear from the claimant's evidence that it was for a number of "*underpayments*" of holiday pay in the two year period between 24 October 2021 and the date of presentation of his claim. The ET1 claims £5,087.00. The claimant amended his claim to be £4,108.96 as totalled on **page 67**. Put shortly the claim is that on each occasion of 14 periods of leave (which total 99 days) in that 2 year period the rate of pay did not reflect the average number of hours worked in the appropriate reference period of 52 weeks. The claim is for the shortfall between what was paid and what the claimant says was due.

8. I identified that the claim should be considered under Part II of the Employment Rights Act 1996 and the Working Time Regulations 1998. I refer to the relevant extracts below. The issues were:-

    a. In respect of the periods of alleged underpayment for annual leave specified by the claimant, were the payments made to him less than that to which he was entitled in terms of Regulation 16 of the 1998 Regulations?

    b. If so to what remedy is he entitled by virtue of Regulation 30 and/or section 20 of the Employment Rights Act 1996?

    c. If the answer to question 8a is yes, is the second respondent liable to pay any compensation due to the claimant?

Case Management Order issued on 17 April 2024

9. On my initial consideration after the hearing of the bundle items spoken to by the witnesses and their other oral evidence I considered it necessary to seek further information from the claimant. In summary the Order sought more detail on the method by which the sum sought was calculated. The Order said that the second respondent was at liberty to comment on the information provided by the claimant within 7 days of receipt of it. On 18 April the claimant provided answers to the seven questions asked in the Order. By 30 April the second respondent had not commented on that information.

10. The answers were a further explanation of a spreadsheet which **was pages 66 and 67** in the bundle. It provides the detail of the various alleged underpayments in the two year period of the claim. The claimant also provided an amended version of **pages 66 and 67**. It reflected some of his answers. The effect of the changes was to reduce the (gross) claim from £4108.96 to £3704.10.

Findings in fact

11. From the discussion prior to evidence on uncontentious issues and from the evidence that I heard and its reference to material in the bundle, I made the following findings in fact.

12. The claimant is Gordon James Dyer.

13. The first respondent is Renfrew Warehousing & Distribution Ltd. It was a company incorporated under the Companies Acts. On 30 November 2023 it was struck off the Register of Companies (**page 73**). On 12 December 2023 it was dissolved (**page 73**). Its registered office was 3 Transport House, Argyll Avenue, Renfrew (**page 74**).

14. The second respondent is Renfrew Transport Services Limited. It is a company incorporated under the Companies Acts. Its registered office is 3 Transport House, Argyll Avenue, Renfrew (**page 76**). Both companies traded using the trading name “”*Always Freight Solutions*” (see **pages 59 and 60** as examples). They shared; business premises and telephone numbers.

15. On or about 20 March 2017 the claimant began employment as a driver. He had prior employment between 2005 and 2009. He continues in employment. His understanding is that he is (and always has been) employed by the second respondent. He was not issued with anything in writing as being a contract or a statement of terms of employment. In his view the document indexed as "*copy contract of employment - first respondent*" (**pages 49 to 59**) and asserted to be his contract could not be his. It is not his for at least two reasons. First, and while an attempt at redaction had been made, the signature is not his (on **page 59**). Second and again subject to an attempted redaction it appears to bear a date in June 2016 which is prior to his start date. The claimant also noted that while its first page (**49**) did not show the identify of the parties, its last page (**59**) showed that it had been issued by the second respondent. The claimant understood that when he was employed in March 2017 he was employed by the second respondent (as **pages 49 to 59** seemed to suggest).

16. The claimant's hours of work varied and vary between about 40 and 80 per week. His work includes deliveries across Europe. Throughout his period of employment he sent his timesheets to Mandy Alcroft. He believes that she is the wife of the owner of the second respondent. He believes that the owner of the second respondent is Andrew Alcroft.

17. The claimant understood that his holiday year began on 1 April and ended on 31 March.

18. In about March 2020 the claimant was furloughed. In about October 2021 he returned to work.

19. In about January 2022 the first respondent took on the responsibility of paying salary and other payments to the claimant. The claimant learned from HMRC's income tax portal that income tax was being paid by the first respondent relative to the payment of his salary. He also learned from his pension provider that pension contributions were being paid by the first respondent.

20. The claimant understood that the first respondent asserted that his employment (and the employment of colleagues) transferred from the second respondent to the first respondent in or about April 2022. The claimant understood that no consultation (or the provision of information) occurred relative to the alleged "*TUPE*".

21. In the period beginning on 31 December 2021 and ending on 15 September 2023 the claimant took 99 days paid leave (**pages 66 and 67, column 3).** There was no gap of more than three months between any two periods of that leave. In the period between 31 December 2021 and 4 April 2022 his hourly rate of pay was £8.91. In the period between 5 April 2022 and 27 February 2023 his hourly rate of pay was £9.50. Thereafter his hourly rate of pay was £10.55 (**pages 69 to 71**). The number of days on each occasion of leave varied between 1 and 5. On each of those occasions the claimant was consistently paid for 8 hours per day at the relevant rate of pay. The hours for which he was paid as paid leave on those occasions is shown in column 7 on **pages 66 and 67**. Those hours do not accurately reflect the average hours worked by the claimant in the preceding 52 weeks. Accordingly, on each occasion on which he was paid for leave the claimant was underpaid. Column 6 of **pages 66 and 67** record the correct "*holiday hours*" for each week of claim.

22. On 5 June 2023 Kenny Alcroft on behalf of the first respondent wrote to the claimant (**pages 60 and 61**). It recorded an outcome to a grievance, and a followed a meeting about it on 25 May 2023. It recorded that the claimant's issues/concerns were (1) "*You feel you have not been given the weekly hours you believe you're contracted to and (2) You wish to be paid back any hours short of 40 per week from the start of the financial year and going forward.*" In the claimant's opinion that grievance and its outcome is irrelevant to the issues in this case.

23. On 21 December 2023 Kenny Alcroft on behalf of the first respondent wrote to the claimant (**pages 63 and 64**). It bears to relate to a claim for "*underpaid A/L*". It set out a calculation of leave carried forward in a period beginning from April 2020. It suggested that the total leave due to the claimant in the four year period beginning in April 2020 and ending in

March 2024 was 100 days. Its basis for doing so was (i) to accept that the claimant was entitled to carry over 4 weeks (20 days) based on UK Government regulations in relation to untaken leave during COVID lockdown periods but (ii) to assert that by reference to the "*Employee Handbook*" the other 1.6 weeks were not permitted to be carried over. It notes that "*since the end of furlough you have used 99 days*." The letter asserts that the permission to take the full entitlement carried over was an error.

24. The claimant continues to do work for a business which trades as Allways Freight Solutions. The first respondent (which traded under that name, see **page 60**) is dissolved. The claimant's work is performed for the second respondent which trades under that name. It is his employer.

25. The material within **pages 88 to 102** while not spoken to were extracts from the ACAS website.

Submissions

26. Both parties made brief oral submissions. Mr Watt (quite properly) confined his witness questions and submission to whether the second respondent was liable for the claim.

The statutory framework

27. I took account of Regulations 16 and 30 of the Working Time Regulations 1998. I do not repeat them. I also took account of sections 13, 23A, 24, 27 and 230 of the Employment Rights Act 1996.

Discussion and decision

28. Part II of the Employment Rights Act 1996 provides protection of wages. Section 13 (and other sections in Part II) refers to "*an employer*". Section 230(4) of that Act provides that "*In this Act "employer" in relation to an employee or worker means the person by whom the employee or work is (or, where the employment has ceased, was) employed*. Wages includes holiday pay (section 27(1)(a).

29. In the Working Time Regulations 1998 "*employer*" in relation to a worker, means "*the person by whom the employee or work is (or, where the employment has ceased, was) employed*."

30. In answer to a cross-examination question, the claimant agreed that prior to January 2022 he was employed by the second respondent. But he did not accept that his employment had transferred from the second to the first respondent. I have found that while the identity of the party paying salary changed to the first respondent, the second respondent was, remained in the period in dispute, and indeed remains the claimant's employer. There was no evidence to suggest that any asset or business transferred between the respondents by virtue of which TUPE applied. On that analysis, the second respondent remained liable to pay any unpaid holiday pay. I do not accept the second respondent's answer to the claim which was (as pled **pages 47 and 48**) that the claimant had never been employed by it and as such was not owed holiday pay.

31. In my view therefore, the single issue argued by the second respondent (that it is not liable for any underpayment claimed) is not well-founded. If there are underpayments, the second respondent as employer of the claimant is liable for them.

32. Regulation 16 of the 1998 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 he or she is entitled under Reg 13 (basic leave) or Reg 13A (additional leave). A "*week's pay*" is calculated in accordance with sections 221-224 of the 1996 Act, with modifications. In the case of a worker who has no normal working hours under the contract in force on the calculation date, a week's pay for paid leave purposes is calculated by reference to the average remuneration over the previous 52 weeks in respect of which the worker received remuneration. Regulation 30 provides that a worker may present a complaint to this tribunal that his employer has failed to pay him the whole or any part of any amount due to him under Regulation16(1).

33. The claimant's case is that he did not have normal working hours. That assertion is borne out by the data on **pages 66 and 67**. Of the weeks shown there in the period 8 October 2021 to 13 October 2023 when he

was not on paid leave his working hours per week varied between 41 and 65. It appears that there were only 8 occasions in that period of over two years where the claimant worked the same hours in 2 consecutive weeks.

34. In his ET1 the claimant refers to The UK Government website and quotes that "*Employees with no fixed hours should have their holiday pay worked out by taking the average pay from the previous 52 weeks (only counting weeks in which they were paid)".* That reflects the position taking account of Regulation 16 and section 224 read together.

35. There is no doubt that the claimant took as paid leave the 99 days which form the basis of his claim. Mr Alcroft confirmed that in his letter of 21 December 2023 (**pages 63 and 64**). Whether or not they were taken in error is in my view irrelevant. For completeness, I should say that I did not accept that they were taken in error because the Handbook was not produced and the claimant did not accept that its reference was correct.

36. I acknowledge that Regulation 13(10) of the 1998 Regulations allows workers to carry over only basic annual leave (that is four weeks) when it was not reasonably practicable for them to take it due to the effects of coronavirus. The ET1 form asserts (**page 19**) that the claimant had accrued 56 days (that is of course 28 days per year over two years) after being furloughed. As per Regulation 13(10) his "*statutory*" carry over entitlement was limited to 8 weeks, and therefore only 40 days. But it is clear that the claimant was permitted to take and did take 99 days paid leave in the relevant period. His claim is that he was not paid at the relevant rate for each occasion of leave, those occasions totalling the 99 days.

37. I accept that the spreadsheet (**pages 66 and 67**) and the updated version of it are not primary evidence. In particular, the information in columns 2 and 3 (number of hours worked in various weeks and the number of holiday days taken in the weeks of claim) are not vouched. That said, the total of column 3 is 99 which corresponds with Mr Alcroft's letter of 21 December. I accepted the claimant's evidence that the number of hours worked in column 2 is accurate. I also accepted his answers to the Order that his "*average hours calculation*" uses 5 days per week to calculate that

average. The claimant was not paid holiday pay for each period of leave within his claim at a rate which reflected the hours i.e. worked out by taking the average pay from the previous 52 weeks (only counting weeks in which they were paid). The respective underpayments are shown in column 8 of the amended schedule. They reflect the correct applicable rates of pay. They total £3704.10. The claimant accepted that his entitlement is to be paid the net version of that sum. The judgment above reflects that position.

38. The second respondent is therefore liable to pay to the claimant the net version of £3704.10. I have also made a declaration as per Regulation 30 of the Regulations and section 13 of the 1996 Act.

39. The answers to the issues therefore are (a) yes, (b) a declaration and an order for compensation and (c) yes, the second respondent is liable to pay the compensation due to the claimant.

Employment Judge:	**R Bradley**
Date of Judgment:	**07 May 2024**
Entered in register:	**07 May 2024**
and copied to parties	