# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Singh & Others

**Respondent:** DO & CO Event & Airline Catering Limited

**Heard at:** Bury St Edmonds (by CVP) **On:** 16, 17, 18, 22 & 26 July 2024
[panel] 23, 24 & 25 July 2024

**Before:** Employment Judge Maxwell
Mrs Buck
Mr Moules

**Appearances**
For the Claimants: Ms Crew, Counsel
For the Respondent: Mr Samson, Counsel

# JUDGMENT

1. The notice pay claims made by Mrs Didi and Mr Singh are well-founded and succeeds. The amounts due will determined at a remedy hearing.

2. The holiday pay claims made by Mrs Didi and Mr Singh are well-founded and succeeds. The amounts due will be determined at a remedy hearing.

3. Ms Teper's claim of pregnancy and maternity discrimination with respect to dismissal is dismissed on withdrawal.

4. Mr Dass' claim of direct age discrimination with respect to dismissal is dismissed on withdrawal.

5. Pursuant to rule 36, this judgment will be binding upon and apply to the claims for notice and holiday pay pursued by the other Claimants whose claims have been case managed as part of this large multiple, subject to the right of the parties to apply within 28 days for an order that it is not binding and shall not apply in their cases.

# REASONS

## Introduction

Claims

1. This hearing was listed to determine the notice pay and holiday pay claims of the following Lead Claimants:

    1.1 3306686/2021 Mr Manjinder Singh;

    1.2 3306687/2021 Mrs Reeta Didi;

    1.3 3305566/2021 Mr Tony Bullock;

    1.4 3312508/2021 Mr Jonas Manerskas.

2. The hearing was also listed to determine the claims of discrimination with respect to their dismissals of:

    2.1 3305311/2021 Mrs Katarzyna Teper

    2.2 3300860/2021 Mr Sarbjit Dass

3. The claim of Mr Manerskas had previously been dismissed on withdrawal. Mr Bullock had withdrawn his claims in part and there was no notice pay or holiday pay claim from him before us. During the connected unfair dismissal hearing, which took place in the two weeks before this case started, Ms Crew advised that Ms Teper withdrew her discrimination claim. Finally, at the beginning of this hearing, Mr Dass indicated that he wished to withdraw his discrimination claim.

4. The net result of the withdrawals was that we were left with only two of the Lead Claimants proceeding with money claims and none alleging discrimination.

5. Given we will not be in a position to adjudicate upon the discrimination claims of any Lead Claimants, our decision in this judgment cannot apply to the discrimination claim of other Claimants.

Applications

6. On the afternoon of day 1, the Respondent applied for orders requiring the Claimants to disclose their bank statements (for a period of circa 7 months) and to update their schedules of loss. A similar application was made in writing on 28 May 2024, which was refused. Mr Samson sought to renew this.

7. We decided not to entertain any application other than with respect to the Lead Claimants in their money claims. These were the claims currently before us. If and to the extent that further case management orders are required in connection with other Claimants or claims, this can be addressed at a later date.

8. The money claims of the Lead Claimants are limited to notice pay and holiday pay. As Ms Crew said, the calculation of the sums due in this regard ought to be a straightforward exercise. The real issue appears to be the factual question of whether and when the Claimants received their notice. If they received notice in writing, then subject to having been given their contractual or statutory notice in full, they would have no entitlement to a further payment on the expiry of that notice. Similarly, if they were told to take annual leave at particular times, that may have served to reduce the balance due on termination, perhaps to nil. If the Respondent's letter was not received or was received late, then an entitlement to notice pay or holiday pay may remain, whether in whole or part.

9. The Lead Claimants had produced schedules of loss that appeared to be in an appropriate form. To the extent the Respondent challenges the sums claimed, then the Tribunal will adjudicate upon that. Inadequate schedules, if they are, would appear more likely to prejudice the Claimants than the Respondent.

10. It was unclear why the Respondent sought disclosure of the Claimants' bank statements. Income from other sources is not relevant to the money claims. As far as the receipt of notice or holiday monies from the Respondent is concerned, that is something which should be capable of being established by reference to payslips. Only if there was a dispute as to the fact of a payment shown actually being made should it be appropriate and necessary to resort to bank statements.

11. We appeared to have the relevant payslips for the Lead Claimants, namely their final payslips. There was no appearance of any failure of disclosure by the Claimants in this regard. Given Ms Crew had not been given advance notice of the Respondent's intention to renew this application and the Lead Claimants were not themselves present at the hearing when Mr Samson raised this, she was unable to take instructions.

12. In any event, the Respondent is the author of the payroll and would appear to be in a better position to access these documents and put them in evidence. The Respondent ought to be able to access its payroll records and provide this information itself. A similar point can be made about bank statements. The Respondent could ask its own bank to provide details of the payments made from its account to that of the Claimants.

13. The application was refused. Schedules of loss have been provided. The Respondent should be better placed to provide the payslips. We are not persuaded the bank statements are relevant or necessary to determine the claims.

Cross-examination

14. As had been the pattern during the connected hearing, much of the cross-examination consisted of propositions being put based on documents the witness had neither authored nor been a party to. These points could more helpfully have been made in submissions.

15. In the course of his cross-examination of one of the Claimants, Mr Samson began to explore whether they had failed to give credit for benefits received. It was difficult to see how that could relate to the issues before us at this hearing.

Mr Crew raised an objection and at that stage Mr Samson said he had thought it appropriate to cross examine on the unfair dismissal remedy. This was surprising, given the Judge had explained the unfair dismissal remedy would be determined at a later date. Cross-examination on this point was stopped.

Daily Rate

16. During closing submissions, the Judge confirmed that the daily rate with respect to any unpaid notice or holiday would be a matter for remedy.

## Facts

17. The general background to this dispute is set out in our findings on the unfair dismissal and protective award claims. Mrs Didi and Mr Singh were also Lead Claimants in that case.

Employment

18. Mrs Didi began working for Gate Gourmet in 2000. She TUPE transferred to DHL in 2010. On 1 October 2020, she again transferred, this time to the Respondent. Mr Singh began working for Gate Gourmet in 2004. He too transferred to DHL in 2010 and then to the Respondent on 1 October 2020. There is no dispute that these various transfers served to maintain the Claimants' continuity of employment.

Annual Leave

19. Mr Singh and Mrs Didi were both former DHL employees and entitled to 33 days of annual leave each year. No contract was produced for either Claimant. We did, however, hear evidence from Mr Bullock, who was also a former DHL employee, and were provided with his contract of employment. Material terms included:

> **5.0 TOTAL HOLIDAY ENTITLEMENT**
>
> **5.2 Your total entitlement will be calculated as follows:**
>
> **Total Annual Leave Entitlement, including Public Holidays**
>
> **33 days pro rata per annum**
>
> **[…]**
>
> **5.4 All periods of Annual Leave must he agreed in advance with your Line Manager, for further information regarding the process for booking and taking annual leave please refer to the Handbook or discuss with your line manager:**

20. It is likely and our finding that Mr Singh and Mrs Didi enjoyed the same standard contractual terms in this regard. It is, therefore, apparent they had a contractual benefit to paid holiday. Given a 5-day working week would result in 28 days of annual leave under WTR, any entitlement above that could only be contractual.

21. Whilst we were referred to a Gate Gourmet contract which provided that leave must be taken within the year, the DHL contract was silent on this point. We heard no evidence about the approach adopted in practice at DHL and whether or not employees were allowed to carry this forward.

22. It was common ground the annual leave year ran from 1 January to 31 December.

23. When cross-examining Mrs Didi, Mr Samson took her to a document which he said showed her outstanding annual leave entitlement for 2020 was 20 days and she must, therefore, have taken 13 days leave (i.e. prior to the transfer). Mrs Didi did not agree. Her evidence was she had taken 6 days of annual leave, all of which were prior to March of that year. The Judge asked whether the document being referred to was ELI provided by DHL. Mr Samson said it was either ELI or derived from ELI. We note this document had not been commented upon by any witness for the Respondent and its provenance was uncertain. Documents of this sort are only as reliable as the information that was entered originally and it did not include any detail of when the Claimant was alleged to have taken these 13 days holiday. We preferred Mrs Didi's evidence about this, which was consistent with her email challenging holiday pay written shortly after receiving a breakdown from the Respondent. Having an entitlement of 33 days and having taken 6 days off, the outstanding balance of Mrs Didi's 2020 leave at the end of that year was 27 days.

24. Mr Singh's schedule of loss included an entitlement to 41 days annual leave. There is no evidence to support this figure and we find he is wrong about that. His entitlement was the same as that of Mrs Didi and Mr Bullock, namely 33 days. Mr Singh said he did not take any holiday and we accepted his evidence on this. Despite also transferring from DHL, his name was not included in the document on which Mrs Didi had been cross-examined (or at least the part of that which appeared in the hearing bundle).

Variation Clause

25. The DHL contracts of Mrs Didi and Mr Singh also included a variation clause:

> **20.0 CHANGES TO TERMS AND CONDITIONS**
>
> **20.1 Although these particulars are correct at, and effective from, the date of appointment, the Company may make reasonable changes to your terms and conditions of employment that are necessary for maintaining the efficient running of the business.**
>
> **20.2 Where such changes affect you personally, the Company will try to ensure that you will be given reasonable notice in writing. Such changes will be deemed to have been accepted and agreed by you unless you notify the Company of any objection in writing before the end of the notice period.**
>
> **20.3 Changes of a general nature will be advised by way of notice to all employees.**

Dismissal Letters

26. On about 29 November 2020, the Respondent began to send letters to those selected for dismissal because of redundancy. Some of those letters were received late and some not at all. Whilst we do not have reliable evidence about precisely whether and if so when all of these letters were actually sent (the Respondent called no witness who dealt with the practical mechanics of this exercise) we accept it is likely that some of the fault for delay or non-receipt was due to Royal Mail rather than the Respondent. For the avoidance of doubt, we saw no evidence of any default by the Claimants (i.e. not opening their post or failing to provide an up to date address to their employer). Given the Respondent had encountered unreliability in the delivery of correspondence by Royal Mail recently during 2020, it is surprising that it did not use a tracked service or some other more reliable method for sending such important information. We note that when Ms Pettitt was responding to the appeals, she used tracked post.

27. Mr Singh received his dismissal letter (dated 29 November 2020) on 15 January 2021, at which point he read it.

28. As far as the content is concerned, Mr Singh's letter appears to be typical. With respect to the notice period and annual leave it provided:

> **You will receive your 12 weeks contractual notice period. Your last date of employment will therefore be January 31, 2021.**
>
> **Due to the current circumstances, the Company is requiring employees to take some of their annual leave. You are required to take 4 week's annual leave, during your notice period. Your period of annual leave will commence on January 1, 2021 and will continue up to and including January 31, 2021 which is your last date of employment. Please accept this letter as notice of this requirement to take your annual leave, in line with the rules on working time.**
>
> **Upon termination of your employment, you will also receive pay in lieu of any outstanding holidays you have accrued but not taken during this holiday year, if applicable. This will be paid within your final wage. If you have taken more than your accrued holiday entitlement, this will be deducted from your final wage.**
>
> **You will also be paid your redundancy payment in your final wage. Your redundancy pay is calculated based upon your length of service (capped at 20 years), your age, and your weekly wages (subject to a maximum of £538 per week).**

29. As we have previously held, this letter giving express notice of dismissal was effective to terminate Mr Singh's employment on 31 January 2021.

30. Each of the letters to which we were referred, included the employee's notice period, termination date, an instruction to take 20 days annual leave and payment for any untaken leave accrued in 2020 to be made on termination in January 2021.

31. Asked whether it appeared the Respondent had agreed to allow untaken 2020 leave to be carried forward into 2021, Ms Pettit said it did. This was consistent with the Respondent's calculations and the way in which she dealt with the appeals.

32. Mrs Didi did not receive such a letter. We addressed her individual circumstances in our decision on her unfair dismissal claim. She was summarily dismissed on 8 March 2021, following correspondence with the Respondent about her status.

December Leave Instruction

33. The hearing bundle included a notice dated 7 December 2020 instructing an employee to take annual leave 1 week or 5 days pro-rata in the case of a part-time worker, in the week commencing 21 December 2020. This included an acknowledgement of receipt slip dated 14 December 2020, with a redacted name and signature. There was no evidence that such a notice was received by either Mrs Didi or Mr Singh.

Payslips

34. Mrs Didi's payslip for January 2021 included:

> **Basic Pay £1246.55**
>
> **Holiday Pay £178.74**
>
> **SRP £6472.44**

35. Mr Singh's payslip for January 2021 included:

> **Basic Ray £1432.28**
>
> **Holiday Pay £736.12**
>
> **SRP £5839.39**
>
> **PEN EE £324.36**
>
> **Shift Allowance £101.30**

36. There is no dispute about the fact of these payments being made to the Claimants.

Clarification of Payments

37. Following receipt of his dismissal letter, Mr Singh telephoned the Respondent. He requested a breakdown of his redundancy pay, notice pay and annual leave. In response to this, he received an email of 12 February 2021 from the Respondent's HR department, which included:

> **Please see attached copy of the letter for your reference and below break down of your payslip.**
>
> **• Basic Pay = £ 1432.28**

**• Holidays* pay = £736.12**

**Holidays entitlement 2020 = 32 days**

**Holidays entitlement 2021 = 2.75 days**

**Holidays booked = 0 days**

**Holidays taken during your notice period as required by the business = 20 days**

**Holidays taken in December = 5 days**

38. Although not set out expressly, the Respondent's calculation of Mr Singh's holiday pay appears to have been:

38.1 32 + 2.75 – 20 – 5 = 9.75 days.

39. Leaving to one side whether it was correct for the Respondent to have deducted 25 days leave said to have been taken in December and January, the approach adopted for accrued untaken annual leave was that this was carried forward from 2020 into 2021. This is consistent with the termination letter sent to Mr Singh.

40. Following her correspondence with the Respondent, Mrs Didi received an email on 8 March 2021 which included:

**• Basic Pay = £ 1246.55**

**• Holidays* pay = £ 178.24= 2.75 days**

**Holidays entitlement 2020 = 33 days**

**Holidays entitlement 2021 =2.75 days**

**Holidays booked = 13 days**

**Holidays taken during your notice period as required by the business = 20 days**

41. In Mrs Didi's case it appears the Respondent's approach to holiday pay was:

41.1 33 + 2.75 – 13 – 20 = 2.75 days.

Appeal

42. By an email of 7 April 2020, Mrs Didi appealed against her dismissal. She also challenged the quantification of her holiday pay:

**2. Last year I had only taken 6 days not 13 days (these were taken in Feb 2020 - in March we entered lockdown) annual leave - the rest is all outstanding, I have NOT been notified until your email below that I have been made redundant and take the email below as your first and official notification of redundancy, therefore all of my AL minus 6 days from 2020 is owing to me, plus the entitlement for 2021**

43. Following their meeting, Ms Pettitt wrote to Mrs Didi on 6 May 2021 rejecting her appeal. The basis of calculation with respect to her holiday pay was as it had been previously.

44. Whilst Ms Pettitt did not allow any of the appeals against dismissal, in some instances (not the Lead Claimants) she did allow this with respect to the quantification of monies due. We accept her evidence, namely that she did this in cases where the employee had been able to produce documentary evidence, such as a postmarked envelope, to corroborate what they said about late receipt of the termination letter. She made adjustments with respect to notice pay and holiday pay, where such notice had been absent or insufficient because of delayed delivery. Her work was signed off by Ms Skelton.

**Law**

Notice of termination

45. With respect to dismissal, insofar as material section 95 of the **Employment Rights Act 1996** ("ERA") provides:

> **95.— Circumstances in which an employee is dismissed.**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) [...], only if)—**
>
> > **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
> >
> > **[…]**

46. The question of when notice in writing takes effect was addressed in **Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] ICR 882 SC** per Baroness Hale:

> **30. The other case is the decision of the Court of Appeal in the Gisda Cyf case [2009] ICR 1408 . The majority, Mummery LJ with whom Sir Paul Kennedy agreed, approved the decisions in Brown v Southall & Knight and McMaster v Manchester Airport plc , but expressly on the basis that they were construing the statutory definition of "the effective date of termination" in section 97(1) the Employment Rights Act 1996 or its predecessor, for the purpose of unfair dismissal claims, rather than applying the law of contract; it did not follow that the correct construction of the statute was controlled by contractual considerations: para 33. Lloyd LJ dissented: in his view resort should first be had to the general law on contracts of employment. The appeal tribunal cases cited above had distinguished between those where the employee had given notice to the employer and those where the employer had given notice to the employee. In the first category were George v Luton Borough Council and Potter v RJ Temple plc (see para 26 above), where it was held that an employee's notice was effective when received by his employers even if it had not been read. In the second category were all those cases where an employer's notice had been held only to take effect when the employee had received and read, or had a reasonable opportunity to read, them. He took the view that the latter category of cases was wrongly decided and the same rule should apply to both.**

**[…]**

**39. In my view the approach consistently taken by the appeal tribunal is correct, for several reasons:**

**(1) The above survey of non-employment cases does not suggest that the common law rule was as clear and universal as the trust suggests. Receipt in some form or other was always required, and arguably by a person authorised to receive it. In all the cases there was, or should have been, someone at the address to receive the letter and pass it on to the addressee. Even when statute intervened in the shape of the Interpretation Act, the presumption of receipt at the address was rebuttable. There are also passages to the effect that the notice must have been communicated or come to the mind of the addressee, albeit with some exceptions.**

**(2) The appeal tribunal has been consistent in its approach to notices given to employers since 1980. The appeal tribunal is an expert tribunal which must be taken to be familiar with employment practices, as well as the general merits in employment cases.**

**(3) This particular contract was, of course, concluded when those cases were thought to represent the general law.**

**(4) There is no reason to believe that that approach has caused any real difficulties in practice. For example, if large numbers of employees are being dismissed at the same time, the employer can arrange matters so that all the notices expire on the same day, even if they are received on different days.**

**(5) If an employer does consider that this implied term would cause problems, it is always open to the employer to make express provision in the contract, both as to the methods of giving notice and as to the time at which such notices are (rebuttably or irrebuttably) deemed to be received. Statute lays down the minimum periods which must be given but not the methods.**

**(6) For all the reasons given in Geys [2013] ICR 117 it is very important for both the employer and the employee to know whether or not the employee still has a job. A great many things may depend upon it. This means that the employee needs to know whether and when he has been summarily dismissed or dismissed with immediate effect by a payment in lieu of notice (as was the case in Geys ). This consideration is not quite as powerful in dismissals on notice, but the rule should be the same for both.**

47. Separately from notice in writing, an employee may be dismissed by their employer's conduct; see **Sandle v Adecco UK Ltd [2016] IRLR 941 EAT** per HHJ Eady:

**41. […] Whilst we can see why an ET might look for express language before finding a dismissal under section 95(1)(a) — the employer's decision to terminate the contract should be unequivocal — and we can see a real danger from lack of certainty, we accept that certainty is not the only relevant criterion. A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the**

> **test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee ( Kirklees ), by the issuing of the P45 ( Kelly ) or by the ending of the employee's present job and offer of a new position ( Hogg ). In each of those cases, however, there was a form of communication; the employee was made aware of the conduct in question, conduct that was inconsistent with the continuation of the employment contract and in circumstances where there were no other contraindications. The question is: given the facts found by the ET, given what was known to the employee and to the relevant circumstances of the case, what is the conclusion to be drawn? Has the employer communicated its unequivocal intention to terminate the contract?**

48. We do not construe **Sandle** as being limited to the specific examples taken from other cases, rather the principle might apply to any conduct of the Respondent which the employee was aware of and that was inconsistent with the continuation of the employment contract. The question for the Tribunal is whether the employer communicated an unequivocal intention to terminate the contract.

## Holiday Pay

49. Holiday pay may be statutory or contractual. Where statutory, this is governed by the provisions of the **Working Time Regulations 1998** ("WTR"). At the material time this included:

> **13.— Entitlement to annual leave**
>
> **(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.**
>
> **[…]**
>
> **(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–**
>
> > **(a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and**
> >
> > **(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.**
>
> **(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).**
>
> **(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.**

> **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).**
>
> **[…]**
>
> **(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.**

50. Regulations 13 and 13A reflect the "use it or lose it" rule. The object of the Directive underpinning WTR is to ensure that workers take and benefit from periods of annual leave, as opposed to rolling them over to the following year or receiving payment in lieu. Exceptions to this general approach have been recognised by the ECJ including where an employee is unable to take annual leave because they are on sick leave or their employer does not permit them to take paid holiday; see **Stringer v Revenue and Customs [2009] ICR 932** and **King v Sash Window Workshop 2018 ICR 693**. As a result of the pandemic, WTR was amended to include regulation 13(10) permitting leave to be carried forward where it was not reasonably practicable for the worker to take leave in the year.

51. Mr Samson also referred us to **Maschek v Magistratsdirektion Der Stadt Wien [2016] IRLR 801**. In that case the ECJ held that a worker whose employment relationship ended by an agreement under which he would continue to receive his salary but was required not to report to for work in the period preceding his retirement, was not entitled to a payment for untaken annual leave save unless he had been unable to take leave due to illness.

52. Regulation 15 allows for the employer to direct when leave may be taken, providing sufficient notice in this regard is given:

> **15.— Dates on which leave is taken**
>
> **[…]**
>
> **(2) A worker's employer may require the worker–**
>
> > **(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A; or […]**
>
> **on particular days, by giving notice to the worker in accordance with paragraph (3).**
>
> **(3) A notice under paragraph (1) or (2)–**
>
> > **(a) may relate to all or part of the leave to which a worker is entitled in a leave year;**
> >
> > **(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and**

> **(c) shall be given to the employer or, as the case may be, the worker before the relevant date.**
>
> **(4) The relevant date, for the purposes of paragraph (3), is the date–**
>
> **(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and**
>
> **[…]**
>
> **(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.**

Variation

53. Terms and conditions of employment may be varied by agreement between the parties. Such variations might be made expressly or by implication; as far as latter is concerned a term might be implied from custom and practice, the way in which the parties conducted the contract in practice or for business efficacy.

54. Where in an employment contract the employer has reserved a right to vary terms and conditions, this may in some circumstances be done unilaterally by the application of that clause. Separately, terms might be offered by an employer and a binding agreement established without the need for any express acceptance, especially where the variation is an advantage to the employee. In **Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394**, a group announcement was made about bonus entitlement, which the employees subsequently sought to enforce. Dismissing the employer's appeal, per Elias LJ:

> **98. […] as Lord Justice Bowen observed in the Carbolic Smoke Ball case (supra, p.269), ".. as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself." In that case the mode of acceptance was held by implication to be actually performing the conditions attached to the offer. Here, in my view, it is plain that the employer has dispensed with the need for any response to the offer at all. This was a promise without any disadvantage, actual or potential, of any kind to the employees. Nobody hearing the promise made in this announcement would for one moment expect the employee to be able to benefit from it only if he or she positively accepted the offer. It would be a wholly formal and unnecessary exercise; the only sensible implication is that all employees who might potentially benefit from the promise would be deemed to have accepted it.**
>
> **[…]**
>
> **100. […] It follows that even if there was no unilateral change pursuant to clause 1.4 of the contract, there was in any event a binding contractual obligation to pay bonus payments in the usual way at least to the limits of the guaranteed fund.**

55. Where acceptance of an offer is required, this might be found in the employee continuing in their employment (i.e. not resigning) without objection to a proposed variation. Such a conclusion will be more likely where the employer's

proposal has immediate application; see **Solectron Scotland Ltd v Roper [2004] IRLR 613 CA** per :

> **30. The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.**
>
> **31. So, where the employer purports unilaterally to change terms of the contract which do not immediately impinge on the employee at all – and changes in redundancy terms will be an example because they do not impinge until an employee is in fact made redundant – then the fact that the employee continues to work, knowing that the employer is asserting that that is the term for compensation on redundancies, does not mean that the employee can be taken to have accepted that variation in the contract.**

## Conclusion

Notice Pay

56. Both of the Claimants were entitled to 12 weeks' notice of dismissal, as they had considerably more than 12 years' continuous employment.

57. Mr Singh received notice of dismissal on 15 January 2021. This told him that his employment would terminate on 31 January 2021. Having been received before the stated termination date, the letter was effective to achieve that end. Mr Singh did not, however, receive the notice of dismissal to which he was entitled. Having been entitled to 12 weeks' notice he got 2 weeks. This was a breach of contract. By way of damages, he is entitled to 10 weeks' pay and any other contractual benefits he would have received during that period. The quantification of his loss will be dealt with at a remedy hearing.

58. Mrs Didi was summarily dismissed on 8 March 2021, by the Respondent's email of that date. Having been entitled to 12 weeks' notice she got none. This was a breach of contract. It follows, therefore, she is entitled to 12 weeks' pay and any other contractual benefits she would have received during that period. The quantification of her loss will be dealt with at a remedy hearing.

59. Whilst it is only necessary for us to make findings with respect to the remaining two Lead Claimants, we indicate the following provisional views with respect to factual issues addressed during the hearing before us that might be relevant to other Claimants:

59.1 where an employee got a P45, this would likely to be effective to summarily terminate their employment on the day it was received and read or the employee had a reasonable opportunity to do so;

59.2 where an employee received a payslip which included the words "statutory redundancy payment", that would likely be effective to summarily terminate their employment on the day it was received and read or the employee had a reasonable opportunity to do so;

59.3 where an employee received the Respondent's letter after the date provided for termination within it, there would likely be a summary dismissal with effect from the date when it was received and the employee had a reasonable opportunity to read it;

59.4 where an employee was not paid at all on the day their pay would ordinarily have been due, there would likely be a summary dismissal with effect from the date when it was not received and the employee had a reasonable opportunity to check for payment;

59.5 where an employee received a larger than usual sum from the Respondent and / or a payslip saying "SRP", that on its own may be ambiguous and unlikely to terminate employment.

60. The views set out above are provisional rather than final. Furthermore, even if this represented the correct general approach to be adopted, it might be displaced in individual circumstances by contraindications. Whilst the receipt of a P45 would usually amount to an unambiguous termination, we note that at the consultation meeting on 28 September 2020, Ms Higginson, Mrs Didi and various other trade union or employee representatives were told by Ms Skelton that there had been a problem with the data received from DHL and some employees had been sent P45s in error (i.e. when they were not dismissed). Those in attendance at this meeting who subsequently received a P45 but no letter explaining they had been selected for redundancy may have cause to doubt whether it had been issued correctly or by mistake. The point would, however, need to be determined on a case by case basis. For the avoidance of doubt, however, a simple misunderstanding on the part of an individual with no more would not suffice, since the approach to construing a dismissal, whether express or by the employer's conduct, is an objective one.

Holiday Pay

61. Our findings with respect to the leave year, annual entitlement, leave taken in 2020 and non-receipt of the December leave instruction are set out above. At year end, Mr Singh had 33 days outstanding and Mrs Didi 27 days. The real question in that regard, is whether that leave was carried forward into 2021, such that the Respondent was required to account for it when their employment terminated.

62. The position as far as WTR is concerned is that the Claimants could not carry forward the leave. The policy behind this position is intended to ensure that workers actually take annual leave during the year and can benefit from this. This end will not, ordinarily, be achieved if employees carry this forward or

receive a payment in lieu. There are limited exceptions to this general rule, to which we have referred the our summary of the law. Ms Crew on behalf of the Claimants does not contend that such an exception applied in their cases. In particular, she did not seek to rely upon the specific provision with respect to Covid. Whatever their subjective beliefs, she does not say it was not reasonably practicable for the Claimants to take leave in 2020.

63. The question then is whether the Claimants' WTR rights are supplemented in this regard by contractual terms.

64. In his closing submissions, Mr Samson said the Claimants' claims did not include contractual holiday pay. We do not agree. Their claim form addresses holiday pay in a minimalistic fashion. The box for holiday pay at section 8.1 is ticked. The particulars of claim simply say:

> **6. The Claimants also bring claims for notice pay, redundancy pay, and accrued holiday pay.**

65. The claim form is silent as to whether the Claimants sought accrued holiday pay under WTR or contract. Such complaints are commonly pursued in both ways. In a case where there is a contractual entitlement which is greater than the statutory minimum, the additional element could only be pursued in contract. We are satisfied the Claimants' pleading in this regard is sufficient to allow for a claim under the regulations and in contract.

66. Whilst the parties may not agree to vary WTR rules, they may agree to additional benefits above and beyond those provided for by the regulations. Here, as previously noted, both Claimants enjoyed additional leave as a contractual benefit.

67. The Claimants' written DHL contract did not address whether leave had to be taken in the year or could be carried forward. We heard no evidence about the previous practice in this regard, whether employees of DHL were allowed to rollover untaken leave from one year into the next and if so, to what extent. In the absence of same, we cannot imply a term allowing for this from custom and practice. Whilst we know what the Respondent did at the point of dismissal, we do not know how DHL had approached such matters previously. A term implied in this way, must be reasonable, notorious and certain. Given the absence of any evidence about previous practice, we could not be satisfied that a term in this regard was notorious, which is to say well known. We cannot say the Claimants continued in their employment with DHL, knowing its practice was to allow carry forward of annual leave and reasonably believing they had the benefit of a contractual entitlement in that regard. Similarly, we cannot read back from the conduct of the Respondent at the point of dismissal, to find this is evidence of an original agreement between the Claimants and DHL.

68. In Mr Singh's case, he received the Respondent's letter on 15 January 2021. In addition to giving him notice of dismissal, the letter also told him that on termination, he would be paid for accrued untaken annual leave in 2020, less the leave he was instructed to take in January.

69. To the extent the carry forward of leave involved a departure from Mr Singh's existing contractual rights, then the Respondent's letter proposed a variation to his terms. Such a variation would fall within the wording at clause 20.1 "the Company may make reasonable changes to your terms and conditions of employment that are necessary for maintaining the efficient running of the business". It was reasonable to allow employees to carry over leave in the unprecedented circumstances of 2020. This was done by the Respondent as part of a package of measures, including the requirement to take leave in January 2021, intended to achieve the required number of redundancies and crystallise its liability in that regard. The clause included that the Respondent would try to give reasonable notice and acceptance would be "deemed" absent an express objection. We find Mr Singh's contractual terms were varied to allow carry forward of untaken leave, by the Respondent utilising clause 20.1.

70. Consistent with the approach in **Atrill**, per Elias LJ, this also appears to us as a case where even in the absence of a right on the part of the Respondent to effect unilateral variation, we would have found an agreement on the basis of offer and acceptance. The offer to carry forward leave being made by the Respondent in its letter to Mr Singh and him continuing in employment without objecting to that proposal until 31 January 2021 amounting to acceptance. Unlike the position in **Solectron**, the Respondent's proposal did have immediate effect. The Claimant was to be dismissed for redundancy and this was part of the package of measures that would achieve that end and determine the monies due to him.

71. Whilst the Claimant queried the breakdown of payments made to him, he did not object to the proposed carry forward of annual leave or the instruction to take a period of leave in January to be deducted from this. Mr Singh continued in his employment until 31 January 2021, in circumstances whereby he had accepted the proposed variation. The variation agreed was:

> **Upon termination of your employment, you will also receive pay in lieu of any outstanding holidays you have accrued but not taken during this holiday year, if applicable. This will be paid within your final wage. If you have taken more than your accrued holiday entitlement, this will be deducted from your final wage.**

72. The words "this holiday year" mean 2020. Whilst Mr Singh did not receive it until 15 January 2021, it was intended to be sent on 29 October 2020. Ms Pettitt understood carry forward to have been agreed by the Respondent. She became involved in this matter shortly before the first dismissal letters were sent. This was the basis upon which she dealt with the appeals.

73. It follows, therefore, that Mr Singh carried forward 33 days leave from 2020 into 2021. To this must be added the 2.75 days the parties agree accrued in January 2021. This results in a sub-total of 35.75. From this must be deducted the leave he was instructed to take. He received the letter on 15 January 2021, at that point only was he instructed to take annual leave. He could only follow that instruction to the extent of taking annual leave in the last two weeks of that month, which is to say 10 days. The WTR double day notice provisions would not apply to the carried over leave, since that was purely contractual. Mr Singh

was, therefore, entitled to be paid for 35.75 – 10 = 27.75 days of accrued untaken annual leave.

74. Following his cross-examination, Mr Singh said he was entitled to 16 days leave. Although he did not volunteer a rationale for this, it appears to us likely he arrived at that figure by deducting the 25 days of leave the dismissal letter said he had to take and on which he had just been cross-examined by Mr Samson, from the 41 days he believed he was entitled to carry forward. For the reasons set out, we have found he is wrong on both counts. He did not start with 41 days and nor was he required to account for 25 taken as holiday, given his late receipt of the 20-day instruction and non-receipt of the 5-day instruction.

75. Mr Singh is entitled to a sum representing the difference between 27.75 days at the relevant daily rate, less the amount actually paid (which appears to have been calculated on the basis of 9.75 days). The exact amount to be awarded to him as damages in breach of contract will be determined at a remedy hearing.

76. Mrs Didi did not receive a copy of the Respondent's letter. It follows, her contract cannot have been varied in the way Mr Singh's was. She did not carry over any leave into 2021. Nor did she receive an instruction to take leave. In the period from 1 January until her dismissal on 8 March 2021, she was employed for 67 days and, therefore, accrued 67 / 365 x 33 = 6.06 days' annual leave. Mrs Didi is, therefore, entitled to be paid a sum representing 6.06 days at the relevant daily rate, less the amount actually paid (which was calculated on the basis of 2.75 days). The exact amount to be awarded to her as damages or under WTR will be determined at a remedy hearing.

<u>Unlawful Deductions</u>

77. Ms Crew confirmed there was no separate claim for prior unpaid wages, this complaint related to the Claimants' complaints about notice pay and holiday pay.

78. A failure to give adequate notice of dismissal gives rise to a claim in damages for the pay that would have been received. This is not wages for the purposes of a claim for unlawful deductions. Similarly, compensation for accrued untaken leave on termination of employment, whether under WTR or contractual is not wages.

79. It follows, therefore, that the unlawful deductions claims could not have succeeded in any event.

EJ Maxwell

Date: 28 August 2024

Sent to the parties on:

…29 August 2024.
For the Tribunal Office:

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|---|---|
| 3306685/2021 | Mrs Bhavana Patel |
| 3306686/2021 | Mr manjinder singh |
| 3306687/2021 | Mrs reeta didi |
| 3306690/2021 | Mr martinho pereira |
| 3306691/2021 | Mr bhupinder dhillon |
| 3306693/2021 | Mr kuldip shukla |
| 3306696/2021 | Mrs jaswinder parmar |
| 3306697/2021 | Mrs rani virk |
| 3306706/2021 | Mrs harjinder khella |
| 3306707/2021 | Mr mindaugas povilaitis |
| 3306712/2021 | Mr bhavin amin |
| 3306716/2021 | Mrs manjit dill |
| 3306721/2021 | Mr sarbjit lidhar |
| 3306724/2021 | Mrs nancy martins |
| 3306725/2021 | Mr jaswinder mehta |
| 3306730/2021 | Mr hardeep singh |
| 3306731/2021 | Mr thomas ward-horner |
| 3306732/2021 | Mrs damanti bahadur damanti bk |
| 3306733/2021 | Mr avtar singh |
| 3306736/2021 | Mr baljit jhawer |

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| 3300871/2021 | Miss Virginija Pakalnyte |
| 3306519/2021 | Mr Carl Fernandes |
| 3306532/2021 | Mr Aleksejs Brengulis |
| 3300859/2021 | Mr Sherin Damodaran |
| 3302792/2021 | Mr Emile Kubwimana |
| 3315398/2020 | Mr PL Rotaru |
| 3315420/2020 | Mr I Ganchev |