Neutral Citation Number: [2025] EAT 2

Case No: EA-2023-000602-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 January 2025

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

EAST LANCASHIRE NHS TRUST

Appellant

- and –

IMRAN AKRAM

Respondent

- -

- -

Mr Adam Ohringer (instructed by **DAC Beachcroft LLP**) for the **Appellant**

Ms Melanie Tether (instructed by **Thompsons Solicitors LLP)** for the **Respondent**

Hearing date: 10 October 2024

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JUDGMENT

Revised

SUMMARY

Unlawful deduction from wages, Working Time Regulations

The Appeal relates to the choice made by the Employment Tribunal as to the correct way the working year should be divided (working days chosen over calendar days). This appeal is premature because, in any calculation of holiday pay, there is a multiplier and a multiplicand. In this case the choice of working days gives a multiplier but not the multiplicand. Without that multiplicand there is no final figure which can be identified as holiday pay nor whether there has been any payment for an amount less than required by law. The Appeal is dismissed.

Per Curiam

An Employment Tribunal must apply the calculator given in the Working Time Regulations along with the statutory definitions it references. The first step is to calculate the correct weekly pay. After reaching this figure the Employment Tribunal is able to calculate daily or hourly pay by reference to the actual wages that are earned.

The principle that underpins holiday pay is that a worker should receive no less when on holiday than they would receive when working. The final figure arrived at by an Employment Tribunal can be subjected to a simple sense test when multiplied that figure should be equivalent to the amount earned when working in a relevant reference period.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. This is the respondent's appeal against the judgment of Employment Judge Aspinall and members which was sent to the parties on 2 May 2023. I will refer to the parties as they were before the Employment Tribunal (ET) as claimant and respondent. The respondent is represented by Mr Ohringer, the claimant by Ms Tether both of counsel. I have read their respective skeleton arguments and heard their oral submissions in support.

GROUNDS OF APPEAL

2. There are two grounds of appeal: the first is that the ET erred in deciding that the factor for dividing the year to calculate holiday pay was the number of working days. The respondent contends it should have concluded that the correct divisor was the number of calendar days. The second ground is that the ET erred in relying on s.222 of Employment Rights Act 1996 (ERA 1996) in order to arrive at the correct factor for division, as this does not set out the divisor but solely what amounts to a week's pay.

EMPLOYMENT TRIBUNAL FACTS

3. The claimant had been employed by the respondent from 1 November 2013 as a Phlebotomist. His contract incorporated provisions from the NHS document referred to as Agenda for Change. Key provisions of the contract are: that the annual salaries of monthly paid employees are paid each calendar month at one twelfth of the annual salary; where staff work shifts other than seven and a half hours, annual leave should be calculated on an hourly basis and will include regularly paid supplements along with payments for work outside normal hours. This was to be calculated on the basis of what an employee would receive at work. For those employees, such as the claimant, who have irregular hours, the reference period should be based on the previous 52 weeks.

4. The claimant's contract was for a 37.5 hour week but he worked a rota which differed from week to week. The amount he was paid differed depending on the shift. His rota was prepared by management with shifts of varying duration, sometimes exceeding 7.5 hours. There was an enhanced payment for unsocial hours and the claimant was not required to work on rest days, if additional shifts were worked they were considered overtime.

5. The claimant was paid 1/12 of his gross annual salary each month added to which were enhanced pay related to the shifts worked in the previous month along with overtime. All payments would be identified on the claimant's pay slip. When the claimant took annual leave his pay would include both basic pay and enhancements

6. The respondent's method of calculation differed in respect of the basic and enhanced aspects of pay.

a. The basic element was calculated first by dividing the annual gross pay by twelve. Then, taking the month in which the annual leave was taken, the monthly figure was divided by the number of days in the month to arrive at a daily rate. Consequently the daily rate would differ depending on the number of days in the month. The leave days taken were multiplied by the daily rate of the particular month.

b. Enhanced pay during leave was calculated by adding together the previous 52 weeks of enhancements. The figure arrived at was divided by 365 days to arrive at the daily rate. That daily rate was then multiplied by 7 to give a weekly rate which was then divided by 37.5 to give an hourly rate. That figure was then multiplied by the number of hours that would have been worked according to the rota.

7. The claimant took part in industrial action in May and June 2021 which resulted in him working some shifts but not others. The claimant had previously booked leave for a total of 6 days in June 2021. The claimant complained that he had been underpaid holiday pay.

8. The ET, having set out the relevant elements of the Working Time Regulations and sections of the ERA 1996, concluded that the claimant's daily rate should be calculated on the basis of working days per year, however indicated that it was unable to calculate the correct amount of pay due because of lack of evidence and that this would have to be revisited.

9. The ET considered that the claimant fell into the category of worker described in section 222 of the ERA 1996 because it had accepted the claimant's evidence along with documentary material that he worked a rota that differed from week to week and month to month. The ET accepted that his pay differed depending on the number, duration, day of the week, and timing of the shifts to which he was allocated. Further the ET concluded that the claimant was not required to work except as allocated on the rota. It was, essentially, conceded by the respondent that the claimant fell into the category described in section 222.

10. The ET considered that it did not have the relevant evidence to reach a conclusion as to whether the claimant had in fact been underpaid by the respondent's method of calculation and postponed the decision on remedy to a further hearing.

SUBMISSIONS
The Respondent

11. The respondent, contends that a day's holiday pay should be calculated by using the same approach when asking how many days holiday entitlement a worker has. It is contended these are two sides of the same coin. When a worker has not worked the full year there is a method of calculation which calculates days based on the proportion of the

year worked, it only makes sense to use the same approach in respect of the amount of a day's holiday pay.

12. The respondent contends that the claimant's working week is a seven day week, albeit he would work as little as 2 and as many as 4 days in a week. The argument continues if the claimant wanted to take a week of leave he would need to block out the entire week, therefore 7 days. The respondent contends the claimant is in a different position to someone with set working days who only needs to book out those days. It is on that basis that the correct annual divisor should be 365 days.

13. The respondent contends that section 222 ERA 1996 is a method of calculating a week's pay and is not a cipher for calculating a day's pay. In terms, the calendar week that the section refers to does not require an ET to consider the number of days worked, only the overall figure for the week. A person working a two day week or a 5 day week is in no different position under section 222 ERA 1996 as it is the amount earned during the week as a whole which is considered. The correct amount of holiday pay for the day is only what is payable for a day under the contract of employment. The respondent notes that section 235 ERA 1996 refers to a week as a calendar week.

The Claimant

14. The claimant contends that this appeal is premature; the ET has not reached its conclusions on the correct amount of holiday pay and as such there is no purpose to the appeal.

15. In particular, the claimant takes issue with the respondent's contention that the claimant being contracted to work 7 days a week means that a calculation should be made on that basis. The claimant contends that the reality of the claimant's work should be

examined and although required by contract to work on any day of the week this did not equate to every day of the week. The claimant argued that the respondent, having accepted that the claimant was correctly described as a s.222(1) employee, had no legitimate basis upon which it could consider that the ET would not calculate wages in accordance with the approach in that section in combination with the WTR. In fact the ET had acknowledged that nothing might be due.

16. The claimant contends that the respondent's ground of appeal as to the divisor for a daily rate is not related to s.222 which sets a weekly rate calculation not a daily calculation. The correct approach to daily rates was to adopt working days and not calendar days, because the entitlement to leave relates to periods of work under the contract not notional periods of work. Ms Tether made the following telling submission about the method adopted by the respondent "*a divisor for calculating holiday pay based on calendar days is not capable of producing holiday pay compatible with the WTR unless the employer pays the employee separately for the days which the employee would not have worked even if he had not been on leave*."

THE LAW

17. Regulation 16 of the WTR, insofar as relevant and in the form that applied at the time of this decision, provided:

> *"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.

(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."

18. Section 222 ERA 1996 provides:

"Remuneration varying according to time of work.
(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.
(2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.
(3) For the purposes of subsection (2)—
(a) the average number of weekly hours is calculated by dividing by 52 the total number of the employee's normal working hours during the relevant period of 52 weeks, and
(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.
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19. Section 235(1) ERA 1996 defines a week for the purposes of the wages part of the Act as:

> *"(i)n relation to an employee 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 employee, a week ending with Saturday*."

20. In ***Chief Constable Of Northern Ireland v Agnew &Ors.*** [2023] UKSC 33 there is confirmation that the approach to calculating holiday pay, when using a daily rate, is to use the days a claimant actually works. This is in accordance with EU jurisprudence in ***Hein v Albert Holzkamm GmbH*** (C-385/17) [2019]. It is notable that in reference to the definition of a week in s.235 above the Supreme Court in ***Brazel v Harpur Trust*** [2022] ICR 1380 indicated that in respect of the WTD the correct approach to the definition of week would need to be interpreted in accordance with decisions of the CJEU, but that insofar as the WTR allowed a more generous amount of leave it was that which governed the payment of leave. Importantly, the choice of incorporating the definitions in the Employment Rights Act of a week's wage was a policy choice made by Parliament and the regulations should be construed as allowing those methods of calculation set out in the regulations not others that were suggested by the Appellant.

21. The respondent relies on a number of authorities which conclude that a calendar year should be used for calculation. ***Thames Water Utilities v Reynolds*** [1996] IRLR 186 refers to the Apportionment Act 1870 to reach that conclusion. However recognising that the approach taken after the introduction of the WTR was different, ***Leisure Leagues Ltd v Macconachie*** [2002] IRLR 600 and ***Yarrow v Edwards Chartered Accountants*** (UKEAT/0116/07) make it clear that the EAT took the view that working days ought to be the basis for calculation given the new statutory framework.

22. ***Hartley v King Edward VI College*** [2017] ICR 774 (which was about the deduction of pay for strike days) decided that teachers were entitled to a day's pay based on a calendar

year. However, the factual foundation was that the teachers worked consistently over and above their notional working days.

23. As the respondent submitted the essence of the case law is that in deciding what holiday pay is due it is necessary to compare like with like. That, in essence, is what the case law points to. The rights under the WTR are for the employee to receive, when taking leave, what the employee would have received if working.

DISCUSSION

24. I have come to the conclusion that the claimant is correct and that this appeal is premature. In any calculation there is a multiplier and a multiplicand. Here the ET has selected the multiplier but not the multiplicand. It is not until the multiplicand is chosen that the correct figure can be identified as being the wages for holiday pay appropriate to be paid and whether there has been any deduction.

25. I am constantly surprised how the calculation of holiday pay proves such a difficult topic. The principle is simple, a person should receive no less when on holiday than they would receive when working. The calculation should, therefore, have a simple sense test available: if the figure arrived at, for the week, day or hour is multiplied correctly, it should be equivalent to the amount earned in a relevant reference period.

26. That means that the multiplicand and the multiplier can be flexible; it is the relationship between the two that counts because both play a part in the calculation. To work out a daily rate of pay could involve using a daily divisor of 365, 240, or some other figure. The employer could choose instead to use an annual hourly divisor. Whatever figure is chosen does not matter until the multiplicand is also chosen. Whatever figures are used the calculation must return to close to the figure for actual work in the relevant reference period.

27. However, given the decision in ***Brazel,*** I must add a caveat to the above. Whatever method of calculation is used by the employer, the ET must apply the calculator from the WTR. That means using the method of calculation set out in the Regulations and the statutory definitions it references. The ET must, in the first instance, calculate the correct weekly pay. It is after this calculation is made that the ET is then in a position to calculate daily or hourly pay by reference to the actual wages that would be earned in the relevant period worked.

28. That means, for instance, if in the average working week £500 is earned by working an average 4 days, the daily rate could be calculated as £125. If the annual earnings are £26,000 the sense test would be by multiplying the number of days worked by 52 weeks; 208. If the daily rate is then multiplied by that figure £26,000 is reached. If in contrast the decision was made to divide the £500 to reflect contract at seven days the daily figure would be £71.43 (rounded), however consequently 7 would be multiplied by 52 weeks at 364 days again to arrive at a figure close to £26,000. However, in respect of the latter, Ms Tether's submission is correct, the employee would have to be paid the daily rate for the days he would have worked, but also for the days he would not in order for the figure to be correct.

29. On that basis both grounds of appeal are dismissed.