

Neutral Citation Number: [2025] EAT 172

Case No: EA-2024-000182-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 November 2025

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between :

MISS ANN PALMER

Appellant

- and -

SURREY AND SUSSEX HEALTHCARE NHS TRUST

Respondent

The **Appellant** did not appear nor was represented
Amy Stroud (instructed by Bevan Brittan LLP) for the **Respondent**

Hearing date: 5 November 2025

JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in striking out a complaint in respect of holiday pay.

HIS HONOUR JUDGE JAMES TAYLER:

1. The issue in this appeal is whether the Employment Tribunal erred in law in striking out a claim for holiday pay that was defended by the respondent on the basis that it paid rolled-up holiday pay.
2. The appeal is from a judgment of Employment Judge Fowell, after a hearing on 18 January 2024. The judgment was sent to the parties on 22 February 2024.
3. The claimant was a healthcare assistant on a zero-hour contract with the respondent.
4. Some terms of employment were set out in a letter dated 22 October 2019. Under the heading “Pay”, it stated:

Band 2

Hourly Rate (£10.08)

In addition to this you will be paid the Working Time Directive of 12.5% of the hourly rate for all hours worked.

5. The letter included a clause that stated that as a casual worker the claimant would not be entitled to pay for sickness absence, occupational sick pay, or bank holidays not worked. There was no reference to an exclusion of any entitlement to holiday pay.
6. A sample payslip included an entry described as “WTD pay”.
7. The claimant submitted a claim form that was received by the Employment Tribunal on 9 June 2023, raising a number of complaints, one of which was the complaint seeking holiday pay. The box for holiday pay was ticked at section 8 of the claim form. The claimant set out a calculation for the holidays that she had taken, on the basis that she had received no pay for any of the holiday.
8. In July 2023, the respondent applied to strike out the claimant’s complaints.
9. On 20 July 2023, the claimant applied to amend to clarify her claim by contending that the reference to “WTD payments” was not stated to include holiday pay. The amendment application was not considered before the preliminary hearing. Although various other amendments were refused at the end of the judgment, the amendment in respect of holiday pay was not considered.

10. The Employment Judge dealt very briefly with the decision to strike out the holiday pay complaint:

Rolled up holiday pay

7. Dealing with those claims in turn, the first is the alleged breach of the Working Time Regulations 1998 concerning rolled up holiday pay. It is clear that this was the practice and was operated transparently. Her payslips show monthly entries for “WTD pay” at 12.5%.

8. In **Robinson-Steele v R D Retail Services Ltd** [2006] IRLR 386 the European Court of Justice held that Working Time Directive did not permit a rolled-up pay arrangement, although such rolled-up payment may be set off against any liability for holiday pay providing that it was paid transparently and comprehensibly as holiday pay.

9. In **Lyddon v Englefield Brickwork Ltd** [2008] IRLR 198, the Employment Appeal Tribunal decided that the payments in that case met this test, even though Mr Lyddon was not given any information when he started about the rate of holiday pay, or how it was to be calculated, and he did not receive a written contract. It was enough that his pay packet showed the amount of holiday pay that had been added to his basic wage.

10. In those circumstances I conclude that there is no reasonable prospect of the Tribunal finding that the arrangement was unlawful and that credit should not be given for the holiday pay received.

11. The claimant appealed against the strike-out decision. Only the ground in respect of holiday pay was permitted to proceed by Order of John Bowers KC, sitting as a Deputy Judge of the High Court, sealed on 6 August 2024. Judge Bowers stated that the holiday pay appeal was reasonably arguable, especially given that the claim was struck out.

12. The notice of appeal is not as clear as it could be, which is understandable because it was drafted by a litigant in person. There are two grounds in respect of holiday pay, both of which were permitted to proceed. Ground 1 was phrased as a failure to take into consideration a relevant factor, but essentially asserts that the tribunal interpreted the letter dated 22 October 2019 as if it referred to an entitlement to holiday pay, whereas it merely referred to a “Working Time Directive of 12.5%” of the hourly rate for all hours worked. On a proper analysis the claimant was challenging whether her claim for the totality of her holiday pay should have been struck out.

13. The second ground asserts that, if the payment was of rolled-up holiday pay that could be set

off the claimant's entitlement to paid holiday, the respondent failed to take into account the decision of the Supreme Court in **Harpur Trust v Brazel** [2022] UKSC 21, [2022] I.C.R. 1380. The respondent accepts that criticism and has recalculated the claimant's entitlement to holiday pay. It appears that, even if the respondent can offset rolled-up holiday pay, there is a small sum still outstanding that the respondent intends to pay to the claimant.

14. Shortly before the hearing, the claimant applied for this hearing to be converted to a video hearing, stating that she intended to attend from a public library and she wished to avoid the cost of attendance in the EAT. I rejected that application in an email sent to the claimant on the morning of the hearing:

The application for a remote hearing is refused. A public library is not an acceptable venue from which to attend a hearing in the EAT. The application was made extremely late, contrary to section 8.14.3 of EAT Practice Direction 2024. In your initial email first raising the possibility of a video hearing sent at 10.22 on 4 November 2025, you did not refer to cost and have not provided any evidence of the cost of travel or of your means. Your formal application was not made until 20.50 on 4 November 2025. I considered delaying the hearing to give you an opportunity to attend, but the Respondent's Counsel is not available this afternoon. In the circumstances I have decided to hear the appeal in your absence.

15. The law in respect of rolled-up holiday pay was considered by the ECJ in **Robinson-Steele v RD Retail Services Ltd** C-131/04 [2006] I.C.R. 932. The court held that such rolled-up arrangements were contrary to Directive 93/104 and so unlawful:

58 The Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work.

59 Accordingly, without prejudice to more favourable provisions under Article 15 of the Directive, the point at which the payment for annual leave is made must be fixed in such a way that, during that leave, the worker is, as regards remuneration, put in a position comparable to periods of work.

60 Furthermore, account must be taken of the fact that, under Article 7(2) of the Directive, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. That prohibition is intended to ensure that a worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety (see, to that effect, *R (Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)) v Secretary of State for Trade and*

Industry (Case C-173/99) [2001] ICR 1152, para 44, and *Merino Gómez v Continental Industrias del Caucho SA* (Case C-342/01) [2005] ICR 1040, para 30.

61 A regime such as that referred to by the questions at issue may lead to situations in which, without the conditions laid down in Article 7(2) of the Directive being met, the minimum period of paid annual leave is, in effect, replaced by an allowance in lieu.

62 It is appropriate to add that Article 7 of the Directive is not one of the provisions from which the directive expressly allows derogations: see BECTU, para 41. Therefore, it does not matter whether such a regime of paid annual leave is or is not based on a contractual arrangement.

63 It follows from all the foregoing considerations that the reply to the first question referred in each of Cases C-131/04 and C-257/04 and to the fourth question referred in Case C-257/04 must be that Article 7 of the Directive precludes the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave.

16. While finding that such arrangements were unlawful, the Court of Justice held that in limited circumstances payments that had been made under such arrangements could be set off against the entitlement to holiday pay.

64 By those questions, the referring courts are asking, in essence, whether Article 7 of the Directive precludes amounts paid to a worker as holiday pay under a regime such as that described in the preceding paragraph of this judgment from being set off against the entitlement to paid annual leave under that article.

65 The question is therefore whether payments in respect of minimum annual leave, within the meaning of that provision, already made within the framework of such a regime contrary to the directive, may be set off against the entitlement to payment for a specific period during which the worker actually takes leave.

66 In that situation, **Article 7 of the Directive does not preclude, as a rule, sums additional to remuneration payable for work done which have been paid, transparently and comprehensibly, as holiday pay, from being set off against the payment for specific leave.**

67 However, the Member States are required to take the measures appropriate to ensure that practices incompatible with Article 7 of the Directive are not continued.

68 **In any event, in the light of the mandatory nature of the entitlement to annual leave and in order to ensure the practical effect of Article 7 of the Directive, such set-off is excluded where there is no transparency or comprehensibility. The burden of proof in that respect is on the employer.**

69 The answer, therefore, to the second question referred in Case C-131/04 and the third question referred in Case C-257/04 must be that Article 7 of the Directive does not

preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker. [emphasis added]

17. In certain limited circumstances an employer may be able to set off against any sum that would be due to an employee in respect of holiday, sums that have been paid in a manner that is transparent and comprehensible, the burden of proof resting on the employer to establish that is the case.

18. In **Lyddon v Englefield Brickwork Limited** [2008] IRLR 198, Elias J, then President of the EAT, held that an Employment Tribunal had been entitled to find that arrangements were transparent and comprehensive even though there was no specific information about rolled-up holiday pay provided to the claimant when she commenced employment. The amount said to represent holiday pay was set out in every wage slip.

19. In every case there has to be a careful factual analysis of the circumstances in which an arrangement to pay rolled-up holiday pay came into existence and was operated in practice, in addition to analysis of any relevant terms of the contract.

20. In this case the terminology used in the letter of 22 October 2019 was vague, referring to “the Working Time Directive of 12.5%”.

21. The circumstances in which it is appropriate to strike out a complaint have been considered in many authorities. In the context of a complaint of unfair dismissal in **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330, [2007] ICR 1126, Maurice Kay LJ held:

29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words “no reasonable prospect of success”. It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.

22. Care must be taken before a complaint is struck out. Strike-out will generally be inappropriate

where there is any core of disputed fact.

23. The respondent accepted even if the sums paid referred to as “WTD Pay” in the pay slips were properly referable to holiday pay, the calculation would have to be undertaken again in the light of the Supreme Court Decision in **Harpur Trust v Brazel**.

24. I have concluded that the Employment Tribunal erred in law in striking out the complaint.

25. The Employment Tribunal held at paragraph 10 that there was no reasonable prospect of the tribunal finding that the arrangement was unlawful and that credit should not be given for the holiday pay received. It was wrong to say that the arrangement was not unlawful. **Robinson-Steele** makes it clear that such arrangements are unlawful. The question was whether the respondent could set off the sums that had been paid as “WTD Pay”.

26. The letter of 22 October 2019 was vague. The Employment Tribunal did not analyse the circumstances in which the arrangement was originally made, how it had been operated in practice and what the claimant had understood. It was necessary for the Employment Tribunal to determine whether the arrangement could truly be said to be transparent and comprehensible. The burden lay upon the respondent to establish that was the case. There was a core of disputed fact that meant that strike-out was inappropriate in the circumstances of the case.

27. Accordingly the appeal is allowed on both grounds 1 and 2. The matter will be remitted to the Employment Tribunal for redetermination. The error of the Employment Tribunal was fundamental and it is important that the claimant can be confident that the matter will be considered entirely afresh. Having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 I direct that the remission be to a differently constituted employment tribunal.

28. It will be a matter for the respondent to consider whether to pursue an application for strike out of this complaint in the Employment Tribunal or to proceed directly to the complaint being determined on the merits. In **Xie v e’quipe Japan Ltd** [2024] EAT 176, [2025] I.C.R. 417 I suggested there is much to be said for bringing such complaints to a relatively brief hearing at which they can be determined on the merits.