EMPLOYMENT TRIBUNALS

Claimant: Mr C Simon

Respondent: Pieroth Ltd

Heard at: Birmingham (by CVP) **On:** 21 July 2021

Before: Employment Judge Miller

Representation
Claimant: In person
Respondent: Mr T Stedman – Human Resources advisor

RESERVED JUDGMENT

The Claimant's claims of unlawful deductions from wages were presented out of time and it was reasonably practicable for the claims to have been presented in time. The Tribunal does not have jurisdiction to hear the claims and the Claimant's claims of unlawful deductions from wages are dismissed

REASONS

Introduction and claims

1. The claimant was employed by the respondent as a sales representative from 21 March 2001 until 4 December 2020. The respondent is a wine merchant and the claimant was paid on the basis of basic plus commission.

2. On 3 March 2021 the claimant made a claim to the Employment Tribunal that he had been underpaid his holiday pay. Prior to this the claimant started and completed early conciliation on 4 February 2021.

3. The basis of the claimant's claim was not immediately obvious from the claim form so the issues were clarified at the start of the hearing. Effectively, the claimant's claim is that he was entitled to 30 days holiday each year. Twenty of those days were flexible days that he could take on application and 10 were fixed days comprising of bank holidays and other days on which the respondent firm was closed.

4. The claimant said that he had been paid properly for the 20 flexible days but he had not received holiday pay for the 10 fixed days since 2007. His claim was therefore for holiday pay in respect of each of the 10 fixed days which he said he had not been paid since 2007.

5. The respondent's response in its ET3 was that the claimant had been paid properly for al his holidays. They said that the claimant had submitted a grievance in 2012 about this, the outcome of which was that the respondent took legal advice which conclude that the claimant had been paid for his holidays. The respondent therefore denied the claims.

The issues

6. Having discussed the claim with the parties, I determined that the issue for me to decide is whether the claimant has been properly paid, or paid at all, for the 10 days fixed holidays he had taken each year from 2007.

7. The claim is brought under section 23 Employment Rights Act 1996 (ERA) as an unauthorised deduction from wages. The claimant's claim was not clear as to the legal basis on which he brought his claim. The respondent had prepared it response and evidence on the basis of a claim under s 23 ERA. On his claim form the claimant has ticked the box "I am owed holiday pay" and says in his particulars of claim "Since the amendments [to the Working Time Regulations1998] in 2007, Pieroth have failed to pay me the right entitlement and failed to show the payments on my wages".

8. I concluded, therefore, that the basis of the claim was either as an unauthorised deduction from wages claim under the ERA or a claim for breach of the Working Time Regulations 1998 (WTR) under regulation 30 of the WTR. As the respondent had prepared for a claim under the ERA, the claimant was unclear on what basis he brought the claims initially and an ERA claim was potentially a more favourable claim to the claimant (in that past alleged underpayments could potentially be linked as a series of deductions, whereas a claim under the WTR requires a claim to be brought within 3 months of each alleged breach), it was in the interests of justice to treat the claim as being brought under s 23 ERA.

9. While discussing the basis of the claim, I raised the question with the parties whether this was in fact a breach of contract claim. Having heard representations, and for the reasons set out above I decided that it was not. The claimant then made an application to amend his claim to bring a breach of contract claim. That application was refused for reasons given at the hearing.

10. The issues for me to determine, therefore, are as follows:

11. Were the wages (being holiday pay in respect of 10 fixed days holiday each year) paid to the claimant on various dates from 2007 less than the wages (fixed holiday pay) he should have been paid?

12. Was the claim made within the time limit in section 23 of the ERA? Specifically:

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

b. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

13. Were any deductions made before the period of two years ending with the date of presentation of the complaint (4 March 2019)

14. Was any deduction required or authorised by statute?

15. Was any deduction required or authorised by a written term of the contract?

16. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

17. Did the claimant agree in writing to the deduction before it was made?

18. How much is the claimant owed?

19. Is the claimant entitled to an award for injury to feelings?

The hearing

20. The hearing was conducted remotely by CVP. The claimant attended the hearing and represented himself. The respondent was represented by Mr Stedman. The respondent produced witness statements from Mr Howard Falk, financial director and Ms Jayne Foster, company secretary for the respondent. Both Mr Falk and Ms Foster attended and gave evidence.

21. The claimant had not produced a witness statement. The respondent made an application that the claimant should not be permitted to give evidence as he had failed to comply with the case management order dated 19 March 2021.The claimant said that he had taken advice from the citizens' advice bureau and possibly some acquaintances who had read the case management order and interpreted that as the claimant only needing witness statements if he intended to call additional witnesses. That case management order says "the claimant and the respondent shall prepare full written statements containing all the evidence they and their witnesses intend to give at final hearing".

22. Although the claimant's first language was not English, it was clear that he has an extremely good grasp of English and he agreed, on reviewing the order, that it was reasonably clear that he ought to have provided a witness statement himself.

23. In my view, the respondent would have been prejudiced had the claimant now been able to give detailed oral evidence that should have been in a witness statement. Conversely, however, it was clear from the way the respondent has presented their case that they did know what the claimant's claim was about and had produced evidence accordingly. I therefore decided that the claimant's particulars of claim and schedule of loss would stand as his evidence in chief but he would not be permitted to add to that in oral evidence other than by way of responding to the respondent's cross examination.

24. I was also provided with two separate bundles of documents, one from each of the parties. The claimant's bundle comprised of 52 pages and the respondent comprised of 58 pages. The respondent also provided an additional page from the legal advice they said they had received in response to the claimant's 2012 grievance which had been missed from the bundle.

Findings of fact

25. There is little dispute in this case about the factual position in respect of the claimant's holiday. I will therefore set out the factual position, highlighting any points of dispute where they arise and making findings accordingly.

The claimant's holiday entitlement

26. The claimant was entitled to 30 days holiday per year. 10 of those days were on set days a year. This had been the position since the commencement of the claimant's employment. The claimant included in his bundle of documents an extract from what he said was his contract and this was not disputed. That is clear at paragraph 6.2 which provides

    "You are entitled to 30 days paid holiday during each holiday year or the pro rata equivalent if you work part-time. Of these 30 days 10 days, pro rata for part-time workers, will be on set days fixed by the Company at the beginning of each year. The set days will be on the usual public holidays as recognised in England and Wales with the exception of Good Friday which is considered to be a normal working day, plus 3 days between December 27th and 31st (to be specified each year)".

27. There is also a letter in the respondent's bundle dated 14 March 2011 from the respondent to the claimant setting out the company's approach to holiday entitlement. That effectively repeats the provision as set out in the extract of the claimant's contract. However, in respect of the fixed days it says:

    "You are not required to work on any of these bank holidays but you are paid. They are not recorded on your payslip, as is the general practice. Payment for holidays is calculated against the average income of the previous 12 weeks prior to the holiday, excluding quarterly and annual bonuses and extended periods of sick leave. Representatives' monthly sales targets are flexed. This acknowledges the number of bank holidays falling in each month. The consequential lower target gives representatives an even chance of reaching sales target each month, regardless of bank holidays taken off. Representatives, after year one, are paid on a + or -

basis, acknowledging a base income figure. Salary is based on the achievement of sales in comparison to target, with a guaranteed minimum in accordance with national minimum wage legislation".

28. This scheme is reflected in the witness statement of Mr Falk and he explains the method for calculating holiday pay for fixed holidays which applied throughout the claimant's employment with the exception of 2017 and 2018. (It is clear from the contract of employment that the respondent's leave year is a calendar year).

29. In 2017 and 2018, Mr Falk says, fixed days of holiday were paid separately and identified on employees' pay slips. The daily rate of pay for fixed days' holiday was based on an average of the previous 12 weeks income. This, it appears, is the same way in which holiday pay for the flexible days' holiday has always been paid.

30. In cross-examination, the claimant agreed that he did not intend to claim for the years 2017 and 2018. Mr Stedman said "so you are agreeing that 17 and 18 should be excluded from any complaint you have that you were paid holiday pay" to which the claimant responded "yes confirm that, changed income structure and fixed days on payslip".

31. I find, therefore, that there is no dispute that the claimant was paid correctly for the fixed days holidays in 2017 and 2018 and, further, that this refers to the two holiday years ending on 31 December 2018.

The respondent's scheme for calculating fixed days holiday pay

32. In order to understand the respondent's case in respect of payments for the fixed days holiday, it is necessary to consider their pay structure. Mr Falk's evidence, which was not disputed by the claimant, is that the pay structure is as follows:

"For each representative, a base salary for the year was set. For Mr Simon, in 2019, this was £1,770.83 per month (£21,250 per year). A 'sales adjustment' was applied, based on the amount by which earnings will be varied each month for each percentage point by which actual sales exceed or fall short of the target for that month. Mr Simon's adjustment base for 2019 was £212.50. So, for example, if Mr Simon achieved 7% of his annual target sales in April 2019 (target 6%), he would receive his base salary for that month plus £212.50 and if he achieved only 5% he would receive his base salary minus £212.50 (subject to the National Minimum Wage)".

33. The same figures applied for the year 2020. It is clear, therefore, that a sales representative's income can vary from month to month based on their sales. The claimant's undisputed evidence is that he was paid on 19th of the month after he worked (so, for example, he would be paid on 19 September for money earned in August).

34. Whether a representative earned commission, or experienced a deduction, depended on whether they met their target over the whole of the month.

35. It is clear from the record of pay for the claimant in the respondent's documents that in 2019 and 2020, the claimant was paid separately for flex

holidays but was not paid separately for fixed holidays. This reflects the evidence of Mr Falk who said in his witness statement that there is no payment specifically referable to holiday pay. I set out relevant figures extracted from that document

Month of payment (paid in arrears)	Flex days taken	Fixed days taken	Holiday pay identified on document (£)	Average daily pay in corresponding month	Average daily pay over previous 3 (or 12) months)	No. Week days in the month
Feb 19		1	0	78.62	131.96	23
May 19	5	1	373.70	103.14	74.74	22
June 19		2	0	72.21	82.53	23
Sept 19	10	1	923	105.69	92.30	22
Nov 19	3		285.45	96.57	96.14	23
Jan 20	2	5	204.80	144.02	102.30	22
Feb 20	2	1	234.86	88.83	117.43	23
May 20	4	1	413.92	88.74	103.48	22
June 20		2	0	84.91	102.26	21
Sept 20	10	1	1039.70	128.94	103.97	21

36. In respect of these pay records, the respondent sets out the equivalent daily rate of pay for each month based on the average over the preceding 3 or 12 months (subject to the rule change) and calculated over the actual month. The figures are set out in the table above

37. It is also clear that the claimant's gross pay was different for every month throughout the years for which records were provided. There are a number of different elements included on the pay document, none of which appears to equate to the monthly base salary figure of £1770.83 and no explanation for the calculation or identification of the figures was provided. However, in respect of the calculation of the flexible days' holiday, Ms Foster's undisputed evidence was that each days holiday is calculated as the average of (gross pay – car allowance) over the preceding three months (or 12 months since 2020). She says that the fixed days holiday is calculated by dividing the gross pay (less car allowance) paid in that month by the number of weekdays in the month.

38. I note that the car allowance was a fixed monthly payment that was paid to the claimant each month regardless of his working or leave arrangements.

39. The calculation of the daily rate includes the flex days holiday pay that has been paid.

40. I find that the claimant was paid a separate amount for flex days holiday but was not paid a separate amount for the fixed days holiday.

41. The respondent's evidence about the fixed days holiday is that it is accounted for in the setting of sales targets. Mr Falk gave as an example the December 2019 targets. The total target for the claimant for December is 6.25% of his total annual sales target. This is broken down as follows for each of the 4 weeks in December:

02/12 – 08/12	1.68%
09/12 – 15/12	4.25%
16/12 – 22/12	0.32%
23/12 – 31/12	0%

42. The company was closed from 23/12 – 31/12 so that it was not possible to make any sales during that week. Mr Falk confirmed that it would not be possible for the claimant to exceed his target in that week, as the respondent was closed so the claimant ought not to be working. However, it was the respondent's case that by reducing the target in this way, but still paying the claimant his base salary, they were accounting for the leave.

43. It is extremely difficult to understand how this works in the absence of any identified pay for the fixed days, so I put a hypothetical scenario to Mr Falk. If the claimant took the first three weeks in December as flex leave, on the figures in the tab above (bearing in mind that the claimant was paid in January 2020 for December 2019) he would have received £102.30 per day for each of those three weeks. On a five day working week, that amounts to 17 days at £102.30, totaling £1739.10.

44. For each of the remaining 5 days, and based on the evidence of Mr Falk and Ms Foster, I conclude that the claimant would receive sufficient additional pay to top his monthly gross salary up to £1770.83

45. This would give a monthly income of £1770.83 so that using the respondent's calculation as set out in their table (as extracted above) this would provide a daily rate for the fixed holiday days of a total of £1770.83 divided by 22 which is £80.49.

46. Although I did not go through this calculation in detail with Mr Falk in the hearing, he agreed that it did appear that the claimant got paid less for fixed holidays than for flex holidays.

47. It was not clear whether the claimant would in this scenario in fact be paid the base salary in respect of the five fixed days or just enough to take his monthly salary up to the base rate. In either case, however, it is clear that the claimant would in fact be paid less for his fixed days' holidays than his flex days.

Other issues

48. The claimant submitted a grievance in 2011 about his holiday pay, ostensibly in the same terms that he has brought his claim to the Tribunal. The respondent produced an outcome to that grievance including obtaining detailed legal advice about holiday pay.

49. The claimant said that he was due to meet with Mr Stedman in January 2012 to discuss the grievance but could not make it. He said thereafter that he did not pursue his grievance as he wanted to protect his income and job. In subsequent correspondence the claimant was still trying to arrange a meeting with Mr Stedman in March and April 2012 to discuss his grievance. There is thereafter further correspondence in which there is reference to the claimant speaking to his solicitors and/or ACAS. The claimant sent a further detailed letter of complaint dated 15 December 2012, referencing the Working Time (Amendment) Regulations 2007.

50. Mr Stedman responded to that letter inviting the claimant to a formal grievance hearing on 30 January 2013. There is no record of any further communications about the claimant's complaints after this. It was agreed that the holiday pay scheme for fixed days was the same at this time as it was from 1 January 2019.

51. In respect, particularly, about the timing of the claimant's claim he said that it was only once he had left his employment that he felt able to bring a claim as he was, prior to this effectively, worried about the impact of a claim on his continued employment. The claimant did not provide any explanation about the subsequent delay from the end of his employment to the presentation of his claim.

Law

Unauthorised deductions

52. Section 13 Employment Rights Act 1996 provides, as far as relevant:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, o
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

53. Section 23 ERA provides

(1) A worker may present a complaint to an [employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).]

54. Section 27 defines wages and provides as far as is relevant

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise

55. This means that a claimant may bring a claim to the employment tribunal that they have been underpaid holiday pay as an unauthorised deduction from wages claim. Holiday pay includes, by virtue of section 27(1) holiday pay payable under a contract or otherwise and this includes statutory entitlement to holiday pay in accordance with the Working Time Regulations 1998.

56. A claim must be brought within 3 months of the date on which the payment ought to have been made. The tribunal has the power to extend time where it was not reasonably practicable for the complaint to be brought within three months and where the claim was brought within such further period as the tribunal considers reasonable.

57. "Reasonably practicable" means something between reasonable and possible. In Palmer and Another v Southend-on-sea Borough Council [1984] ICR 372, the Court of appeal said

"In the context in which the words are used in the Employment Protection (Consolidation) Act 1978 , however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in Singh's case [1973] I.C.R. 437 and to ask colloquially and untrammelled by too much legal logic — "was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?" — is the best approach to the correct application of the relevant subsection".

58. In *Walls Meat co ltd v Khan* [9179] ICR 52, the court of appeal held, in respect of the meaning of reasonably practicable:

"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him".

59. In the case of *Birmingham Optical Group Plc. v Johnson* [1995] ICR 459, the EAT held that the fact that bringing a claim might detrimentally impact on an existing commercial relationship was not sufficient to make it not reasonably practicable to bring a claim.

60. The onus is on the claimant to show why it was not reasonably practicable for him to bring the claim within three months and ultimately, it is a question of fact for the Tribunal.

61. In deciding whether the claimant brough the claim within such further reasonable period the tribunal must consider all relevant circumstances, which requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted, having regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months. (See Harvey on Industrial Relations and Employment law, Division PI paragraph 276.05).

Statutory entitlement to holiday pay

62. By virtue of regulations 13 and 13A of the Working Time Regulations 1998 (WTR), a worker is entitled to 5.6 weeks annual leave per year (4 weeks under regulation 13 and 1.6 weeks under regulation 13A). A leave year runs from the date provided for in a relevant agreement which includes a binding contract of employment. These regulations also provide that leave may only be taken in the leave year in respect of which it is due, and except as provided in regulation 14, may not be replaced by a payment in lieu.

63. Regulation 14 provides:

(1) [Paragraphs (1) to (4) of this regulation apply where—]

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the

leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(A x B) – C

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

[(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.]

64. This provision means that a worker is entitled to a pro rate payment in lieu of any *untaken* leave at the point of the ending of their employment. It does not provide for a statutory right for payment in respect of leave *taken but unpaid or underpaid* outstanding at the termination of employment. It is clear that the only mechanisms for enforcing underpayment of holiday pay is under regulation 30 WTR (within three months of the underpayment on each occasion) or under s 23 ERA as set out above.

65. Regulation 16 WTR provides for payment during annual leave:

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].

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

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

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

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

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

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

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

(ii) in any other case, 52; and

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

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

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

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

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

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

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

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

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

66. Subparagraphs 3(e), 3(f), 3A and 3B were inserted with effect from 6 April 2020.

67. In respect of the calculation of a week's pay, section 221 ERA provides

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

(3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

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

(b) otherwise, with the last complete week before the calculation date.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

68. In *Lock v British Gas Trading Ltd* [2017] ICR 1, the court of appeal confirmed that in calculating normal pay for the purposes of holiday under regulation 13 WTR (4 weeks paid holiday) (but not regulation 13A -the additional 1.6 weeks paid holiday), the fact that wages fluctuated according to commission should be taken into account even though pay did not vary with work done. This means that in calculating pay for the four weeks annual leave under regulation 13 WTR, the average pay including commission paid over the preceding 12 weeks (or 52 weeks from 6 April 2020) prior to taking leave should be used.

69. Holiday pay for the remain 1.6 weeks under regulation 13A WTR should be calculated on the basis of normal pay excluding commission and any remaining contractual holiday pay should be calculated in accordance with the contractual provisions governing it.

Conclusions

Time

70. The only holiday payments in dispute relate to payments in respect of the fixed holiday days. The last fixed holiday day before the end of the claimant's employment on 4 December 2020 was in August 2020. Payment of all wages due in August was paid on 19 September 2020.

71. Pursuant to section 23 ERA, a claim in relation to any alleged non-payment on 19 September 2020 must have been brought by 18 December 2020.

72. There is no dispute that the claimant took a day's leave on the bank holiday in August 2020 so that a right to payment in respect of that leave does not arise under regulation 14 WTR. Regulation 14 only provides for a pro rata payment of untaken holiday, not for holiday taken but not paid for.

73. The claimant presented his claim to the tribunal on 3 March 2021 following one day of early conciliation on 4 February 2021. The claimant's claim is therefore 2 ½ months out of time. Even allowing for the fact that had the claimant commenced early conciliation within three months of the date of the last alleged deduction he would then had a further month to bring his claim, the date on which he commenced early conciliation was still one and 1½ months after the last date on which he could have brought his claim for unauthorised deduction from wages.

74. In my judgement, the claimant has not shown that it was not reasonably practicable for him to bring the claim earlier. The last date for bringing a claim was 18 December 2020. The claimant's employment finished two weeks prior to this. The claimant's only reason for failing to bring the claim earlier was that he said he was worried for his job. Even if this reason fell within "reasonable practicability" he still had two weeks within which to bring his claim, or commence early conciliation which would have conferred a further four weeks. It was, even if I were to accept the claimant's explanation for his reluctance to bring a claim while he was employed, reasonably practicable for him to bring a claim before the expiry of the three month time limit.

75. However, I have difficulty in accepting that the claimant was genuinely concerned about the impact of bringing a claim on his employment. The claimant had brought complaints extending over a year from 2011 and 2012 and clearly had alluded to taking legal action at that point. The respondent had shown itself to react responsibly to those complaints by obtaining legal advice, offering a grievance hearing and providing a detailed explanation to the claimant about its holiday pay policy even if the claimant did not accept it.

76. The claimant can have had no reasonable basis for concluding that bringing an employment tribunal claim would significantly prejudice his relationship

with the respondent. Even when the claimant raised the issue subsequently some years later the respondent merely referred back to its previous answer.

77. In any event, having regard to the case of *Birmingham Optical Group Plc. v Johnson* [1995] ICR 459, in my view concern about the impact of bringing claims on the claimant's ability to earn money is not a legitimate reason for delaying in bringing the claim. It is correct that bringing a claim against someone with whom the claimant has a contractual relationship may impact on that relationship but there is a clear statutory prohibition against subjecting an employee to detriment for bringing such claim. Although it may be reasonable for a putative claimant to be reticent about bringing such claim, the test is not one of reasonableness but of reasonable practicability. This reluctance did not, therefore, in my view amount to a substantive hurdle preventing the claimant from bringing his claim on time.

78. In any event, the claimant did not bring his claim in such period as I consider reasonable after the expiry of the time limit. Firstly, because he could have without any fear of reprisal brought the claim in time by bringing it between the end of his employment and expiry of the time limit, secondly because he waited a further three months during which period there was no reason at all for his delay to bring his claim.

79. Consequently, the claimant's claim that he was subject to unauthorised deduction from wages was brought out of time and I decline to exercise my discretion to extend time. The tribunal does not have jurisdiction to hear this claim and it is therefore dismissed.

Holiday pay

80. In light of my decision that the tribunal does not have the jurisdiction to hear this claim, it would not be appropriate for me to make any decisions or observations about the substantive matter in dispute. The claimant indicated in the course of the hearing that this was an ongoing matter of dispute with other employees and, in light of the absence of jurisdiction to hear this claim, it would be inappropriate for me to make any decisions that may impact on other cases.

Employment Judge **Miller**

30 July 2021