EMPLOYMENT TRIBUNALS

Claimant: **Mr P Aldous & Others**

Respondent: **HTC Plant Limited & HTC Wolffkran Limited**

Heard at: **Sheffield** **On:** **14 and 15 February 2017**

Reserved Decision: **16 February 2017**

Before: **Employment Judge Burton**

Representation

Claimants: Mr S Healy of Counsel

Respondent: Ms J McNeill QC

RESERVED JUDGMENT

1. In so far as these Claimants can establish that they have sustained loss these complaints of unlawful deductions of wages are well founded.
2. In determining the quantification of each Claimant's claim the parties should follow the principles as set out in the reasons attached to this Judgment. Subject to any applications for reconsideration that may be made these proceedings are stayed generally until 30 June 2017 to enable the parties to endeavour to settle these individual claims. The parties are to keep the Tribunal informed of developments and, at any event, are to report the current position by that date.

REASONS

1. There are before this Tribunal a large number of claims brought by crane drivers and electricians formerly employed by HTC Plant Limited but now employed by HTC Wolffkran Limited. These claims arise out of, what is conceded, an unlawful holiday pay scheme operated by HTC Plant Limited, the liability for which has now passed to HTC Wolffkran Limited pursuant to the Transfer of Undertaking Regulations.
2. As a consequence of prior case management decisions the parties have agreed six test Claimants and it is their claims that are before me at this hearing. Those Claimants are Mr Gareth Law, Mr Ross Wilbraham, Mr Jeff Gwynn, Mr Michael Duffy, Mr Alain Dolan and Mr Norman Dunmow.
3. The parties are agreed that, certainly in relation to these six test Claimants, I am only concerned with the issue of the holiday pay that these Claimants should have received during the holiday year commencing on 1 January 2014.

4. Each of these Claimants is represented by Mr Sam Healy of Counsel, the Respondents by Ms Jane McNeill one of Her Majesty's Counsel. At an earlier directions hearing it was determined that this hearing should be listed before a full Tribunal. Perhaps by way of an administrative error the matter was listed before myself as a judge sitting alone. Both representatives gave their consent to the matter proceeding in that way.

5. I have heard evidence from five of the six test Claimants, Mr Dunmow did not attend at the Tribunal and Mr Healy made application to rely upon Mr Dunmow's signed witness statement as his evidence. Ms McNeill opposed that application suggesting that Mr Dunmow's claim should be struck out by reason of his non attendance. I determined that it would be a disproportionate response to dismiss his claim, in reality in relation to those issues that I am asked to resolve at this hearing the relevant facts are not in dispute and in so far as I need to look at Mr Dunmow's specific position in relation, for example, to the dates he took leave those matters are documented within the bundle and are not, as far as I am aware, in the least bit controversial.

6. Although this matter was listed on the basis that I would determine the totality of the six test Claimants' claims at the outset both representatives agreed that I should, instead, determine the principles that should apply in assessing each of these Claimants' losses, if such there were, on the basis that the parties could then apply those principles not only to these test Claimants but to all the other Claimants as well.

7. Again, in further discussion with both Counsel, it was agreed that I would limit my findings to deal with only two issues, being the principle issues that divide these parties the first being in relation to limitation the second being in relation to the Respondent's right to set off.

8. For a number of years the Respondents (I use that word to include both the First Respondent in relation to the events of 2014 and the Second Respondent in relation to assessing their liability for these claims) operated a holiday pay accrual scheme. This was a scheme that had been negotiated with and agreed by the relevant trade unions, this being a fully unionised workforce. The existence of the scheme was referred to in the company handbook, the Respondents also explaining within that handbook with some precision precisely how the scheme operated and how the holiday pay accrual payments were calculated. That handbook was incorporated within each of these Claimants' contracts of employment. From time to time the scheme would be the subject of variation after appropriate negotiations with the trade unions involved and the Respondents would notify each of the Claimants in writing of the fact that such variations had been agreed as would, in all probability, the trade unions involved. As is clear from the evidence I heard from these five Claimants they had a good understanding of the way that the scheme operated, they may not have had a detailed understanding of the way in which the accrual payment was calculated but it was perfectly clear that they could have obtained that information either from the Respondents or from their Trade Union if they so wished.

9. The holiday year ran from 1 January to 31 December. For each week worked by an employee the Respondents allocated a sum of money which would go into that employee's holiday fund. That sum of money was calculated on the basis that it would represent payment for the holiday allowance that that employee had accrued during that week. That calculation was, however,

based only on the earnings that would be received over a 50 hour week which included 38 hours at basic rate, 10 hours at time and a half and one hour at double time. No allowance was made within that calculation for additional overtime hours that were frequently worked by these Claimants not was any allowance made for a number of other bonuses or benefits that they were entitled to receive whilst at work. The Respondents, accordingly, concede that in the light of the law as it is currently understood those payments did not comply with the requirements of Regulation 13 of the Working Time Regulations and that they did not reflect the employee's normal pay.

10. The holiday pay was not, however, automatically paid out to the employees (as it would have been, for example in a rolled up holiday pay scheme) but was maintained in a designated fund to the credit of each individual employee. It was open to any employee at any time to ask the Respondents to make a payment to him out of that fund. Each week each Claimant had to complete a timesheet, if he wanted a payment out of his holiday fund he would make a note of that on the timesheet and the appropriate payment would be made to him on the next pay day. I have seen examples of these requests, sometimes the employee would ask for a specific sum of money, sometimes he would ask for a specific number of weeks pay and sometimes he might ask for the whole of his fund to be paid out to him.

11. Provided that there was sufficient money within each individual employee's fund the money requested by him would simply be paid out, tax being deducted upon that payment being made. There were no restrictions in relation to those payments, there was no maximum or minimum payment that would be made save that it would, in most instances, be restricted to the amount left in that employee's holiday fund. There were no restrictions as to the reasons why payment was being requested. On occasions it is clear that Claimants may ask for a payment out of the fund because they were about to go on holiday but equally, on other occasions, payment was requested simply to meet the need for that employee of cash for whatever reason he may have. If there was money left in any employee's holiday fund by the end of the year the balance would automatically be paid out to the employee on the pay day prior to Christmas.

12. What was clear to me when hearing the evidence of the individual Claimants was that although they knew full well that the derivation of these payments lay within their entitlement to holiday pay they did not see that as being the principle reason for using that fund. Some simply saw it as a form of savings going into a Christmas fund which would be paid out to them at that time of the year subject to their availability to draw out sums of money for whatever reason during the course of the year. It was also clear to me that the existence of this scheme created a disincentive to these Claimants to take holiday. Not only would they earn far more if they worked for a week than they would receive from the Respondents if they asked for payment out of a weeks pay from the holiday fund but also by not taking holiday they would accumulate additional pay. As Mr Healy submits the Christmas payment in reality compensated the Claimants for not taking paid holiday.

13. Each employee was entitled to 26 days holiday of which six days were public holidays. If one of the Claimants was away on holiday for a week he would receive no pay from the Respondents unless he requested payment out of his holiday fund. In relation to public holidays if he did not work on that day within his next week's pay slip would be shown a sum of money equivalent to 10

hours work. If he worked on a public holiday he would receive not only his day's pay for the work that he had done but that additional payment for 10 hours work. I understand it to be conceded that the payment made for each bank holiday would be sufficient to meet each employee's entitlement to Regulation 13A holiday pay but not to Regulation 13 leave. As will be discussed later on in this decision, therefore, whether that payment amounted to an underpayment may depend upon how many days leave that employee had already taken prior to that public holiday.

14. As I have previously said Ms McNeil concedes, on behalf of the Respondents, that the nature of that holiday pay scheme was unlawful (as explained by the European Court of Justice in **Robinson – Steele v RD Retail Services Limited** [2006] ICR 932) and that the way in which the accrued holiday pay was calculated did not accord with the principles set out by the European Court in **Lock v British Gas Trading Limited** [2014] ICR 813.

15. The two issues which I am being asked to resolve are, firstly, what are the principles that should apply in determining what periods of annual leave during the course of 2014 these Claimants can include within the claims before the Tribunal and which periods of holiday leave are excluded by reason of being out of time. Both representatives agree that I should apply the principles that emerge from the decision of Langstaff J in **Bear Scotland Limited v Fulton** [2015] ICR 221 whereby if, when looking backwards from the last act of unlawful deduction a gap of more than three months exists before the next such act any preceding acts are out of time subject to the Tribunal's jurisdiction to extend time if it was not reasonably practicable to bring these claims. There are no applications being made asking this Tribunal to exercise that power.

16. Ms McNeil submits that the appropriate approach for me to adopt is that conventional approach whereby I should identify the last act of unlawful deduction and then go back through each employee's leave history during that holiday year in order to identify whether such three month gaps appear. If they do she submits that I am precluded from making any award in relation to any previous periods of leave taken.

17. It is Mr Healy's submission that these Claimants are entitled to be compensated for each period of leave that they have taken during that holiday year by reason of the fact that when each week the Respondents made an inadequate addition to the Claimants' holiday fund there was thereby an unlawful deduction of wages and as that happened every week no part of these claims can be regarded as being out of time.

18. In determining that issue I firstly refer to the relevant rights that each employee had in relation to holiday pay. Pursuant to Regulation 13 of the Working Time Regulations:-

> *"A worker is entitled to 4 weeks annual leave in each leave year"*"

19. Pursuant to Regulation 13A:-

> "*A worker is entitled in each leave year to a period of additional leave*".

20. Pursuant to Regulation 16(1):--

> *"A worker is entitled to be paid in respect of a 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*".

21. It therefore follows that when each of these Claimants took leave they were entitled to be paid in respect of that period of leave. In the same way that when they did a weeks work they would be entitled to a weeks pay on the following pay day so it was that if they took a weeks holiday they were also entitled to be paid a weeks holiday pay on the next pay day.

22. I then turn to section 13 of the Employment Rights Act 1996 ("ERA") which says as follows:-

> *"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, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction*"

23. Mr Healy refers me to the well known decision of **Delaney v Staples** [1991] ICR 331 which is authority for the proposition that a complete failure to pay still constitutes a deduction of wages.

24. I then refer myself to section 23(2) ERA which says as follows:-

> *"An Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of 3 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*"

25. Accordingly I conclude that, in circumstances where an employee took annual leave but, as generally happened, was not paid the next week in respect of that period of annual leave, on that date (that is the date of non payment) there was an unlawful deduction of wages.

26. The situation is different in relation to public holidays. On those days the employees were paid albeit an amount that was not **Lock** compliant. The principles enunciated in **Lock**, however, only apply to annual leave taken pursuant to Regulation 13 that being four weeks worth of annual leave. Once again the parties agree that I should adopt the principles suggested by Mr Justice Langstaff in **Bear Scotland** and work on the assumption that an employee takes Regulation 13 leave before starting his Regulation 13A leave.

27. It follows, therefore, that if the employee takes a period of annual leave on a public holiday and that period is within his first 20 days of annual leave there will have been an underpayment of holiday pay which again would amount to an unlawful deduction.

28. Where an employee takes a period of leave, which is a public holiday, within the last six days of his entitlement he would have been paid his holiday pay entitlement for Regulation 13A annual leave and so no unlawful deduction would then arise.

29. If one of the Claimants worked a public holiday but received that day's pay in addition to the wages rightfully paid for having worked that day it seems to me that that additional day's pay needs to be regarded in just the same way as those sums that have accrued to his holiday fund. Instead of the pay accruing to his fund it is being paid out to him but as it is not attributable to any actual

period of leave it should simply be regarded in the same way as a payment out of the holiday fund.

30. For those reasons I find no justification for Mr Healy's submissions that an unlawful deduction occurred from week to week firstly because the notional allocation of a sum of money to each employee's holiday fund did not amount to a payment in respect of "*any period of annual leave*" (Regulation 16) and, at any event, for the purposes of calculating limitation pursuant to section 23. I have to look at "*the date of payment of the wages*" not at the date when a notional sum of money became available to the employee to draw upon should he so wish.

31. I should perhaps also deal with the position in relation to monies that a Claimant might have drawn from his holiday fund whether that be to enable him to take holiday or for any other reason.

32. If, for any other reason, the payment of that money from the employer to the employee is not "*paid in respect of any period of annual leave*" and cannot, therefore, be regarded as payment of holiday pay pursuant to Regulation 16. I suppose that if, by chance, a Claimant drew down on his holiday fund a sum of money which was equal to or more than his entitlement to holiday pay in respect of a period of holiday that he had taken or was about to take that would amount to a payment which complied with the Respondent's obligations pursuant to Regulation 16 and so no claim in relation to that period of leave would arise.

33. I then turn to the issue of set off.

34. In short it is the Respondent's position that where a liability exists to any of these Claimants in relation to unpaid or underpaid holiday pay they are entitled to be given credit in relation to some or all of the money that has been paid to each of the Claimants during that holiday year out of their holiday fund. There is an issue as to what part of that payment would be appropriate to be used for that purpose. It is the contention of Mr Healy that the Respondents are not entitled to any credit for those payments that each of the Claimants had received.

35. My starting point is Regulation 16(5) of the Working Time Regulations which says as follows:-

> *"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*".

36. There is no dispute but that the money that was paid to each of the Claimants out of their holiday fund amounted to contractual remuneration. The question that then arises is whether it is contractual remuneration paid to the Claimant "*in respect of a period of leave*". Ms McNeil takes me to the decision of the Employment Appeal Tribunal in **Marshalls Clay Products Limited v Caulfield** [2004] ICR 436 when issues in relation to the entitlement to set off under Regulation 16(5) were considered. The various categories of arrangements were considered at paragraph 14 of the Judgment of Mr Justice Burton and it is clear that the arrangement before me in this case is a Category 4 type, namely a "*contract providing for a basic wage or rate topped up by a specific sum or percentage in respect of holiday pay*".

37. At paragraph 37 of his Judgment, dealing with Category 4 situations Mr Justice Burton says as follows:-

> *"Our conclusion is however that, in principal, a Category 4 contract, providing for payment of holiday pay, in respect of an express holiday entitlement, but accruing throughout the year, is indeed an entitlement to "contractual remuneration in respect of a period of leave" albeit that it is not, and in Marshalls Clay cannot, at the stage of its payment be specifically appropriated to any particular period, and is not paid at the time of such leave, but wholly or in part in advance of it. However we are satisfied that there must be contractually a specific sum, or percentage, allocated to holiday pay:*
>
> > *(a) in order to ensure that there is payment under Regulation 16(1), and/or to prove that there has been payment under Regulation 16(5)*"

38. Mr Healy takes us to the latter part of that paragraph in the Judgment in which Mr Justice Burton provides "*guidance for the future to employers, and indeed trade unions and employees, with regard to rolled up holiday provisions, in order both to minimise the risk of any such contractual remuneration not qualifying under Regulation 16(5) and, in particular, with a view to health and safety*". Mr Healy refers me then to the last of those items of guidance being *"reasonably practicable steps must be taken to require the workers to take their holidays before the expiry of the relevant holiday year*".

39. It is common ground that in this case these Respondents took no steps to require these Claimants to take their full holiday entitlement and many did not. That does not however, in my view, preclude these Respondents from taking advantage of Regulation 16(5) in relation to the holiday pay that they paid out to each of these Claimants during that holiday year. It must be remembered, as Ms McNeil points out, that in the decision of **Marshalls Clay** Mr Justice Burton determined that rolled up holiday pay could comply with the regulations and the guidance given by him in fact related to those factors which would be taken into account in determining whether any such arrangement was lawful. That position was subsequently superceded by the European Court decision of **Robinson Steele** where it was determined that rolled up holiday pay was not compliant with the appropriate directive which is, in part, why these Respondents concede these claims. That does not impact upon their entitlement to seek a set off pursuant to Regulation 16(5).

40. Turning then to Robinson Steele the Judgement of the European Court says as follows:-

> *"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"

41. I therefore then have to ask myself the question did this accrued holiday pay scheme meet the test of transparency and comprehensibility. Mr Healy submits that it does not relying, I think, upon the proposition that when that final balancing payment was made in December the employee had no means of knowing what proportion of that payment related to annual leave that he had taken and what proportion, in a sense, was attributable to additional remuneration for not having taken annual leave. Mr Healy submits that as the evidence shows that this scheme did provide a disincentive to these Claimants to take annual leave it is inequitable for these Respondents to be entitled to rely upon payments made by them which have that effect.

42. As however Ms McNeil submits that is the reason why the Respondents concede that this scheme was unlawful and failed to comply with Article 7 of the Directive. That does not mean that the Respondents cannot take advantage of the sums of money pursuant to Regulation 16(5) provided that they meet that test of transparency and comprehensibility.

43. In my judgment transparency involves a process whereby it is clear to the Claimants that the sums of money allocated to their holiday fund are specific sums allocated for that specific purpose. The handbook, incorporated within their contract, makes that clear and each week on their pay slip they see how much has been allocated for that week against the entry "*holiday balance*". Thus it was abundantly plain to these Claimants precisely what these Respondents were doing and indeed when each of the Claimants gave evidence they clearly had a very good understanding of the system that operated.

44. To meet the test of comprehensibility that means that the scheme must be capable of being understood. Whether each Claimant actually understood precisely how that weekly payment was calculated is not to the point provided that the means were available to them to understand that matter. The handbook provided an example of a calculation to enable them to understand the amount of the payment. If there were any doubts their trade union could have assisted them. In order to know how much they had in their holiday fund they could either have totalled the entries in each of that year's payslips and deducted the payments that had been made out of that fund, which also appeared on their pay slips, or they could have telephoned the Respondent's pay roll department who, I was told, could very quickly have provided them with that information.

45. I am therefore satisfied that these Respondents are entitled to be given credit for the holiday pay that they have actually paid out to each of these Claimants during that holiday year.

46. The next question that needs to be answered is to resolve the question of what proportion of that pay can properly be used by the Respondents as a set off. Ms McNeil suggests that the appropriate way is to pro rata the total amount paid during the year by ascertaining the number of days leave in relation to which the Claimant can claim under these proceedings, and provide an appropriate proportion of the holiday pay as against the 20 days annual leave that that holiday pay was meant to cover. For example if, as Ms McNeil submits, Mr Law has a claim in relation to three days leave taken in December, all earlier claims being out of time, I should total the amount of

holiday pay that he received during the course of that year and allow the Respondents 3/20th of that pay as a set off against the liability that the Respondents have in relation to those three days leave. In that way she submits that I am permitting the Respondents to set off that proportion of the holiday fund referable to the accrued holiday pay which is the subject of this claim.

47. I respectfully do not agree with that approach. Firstly, as a minor point, I think the Respondents are entitled also to add into the holiday fund money paid to any of these Claimants in relation to public holidays which they in fact worked and were paid for. Secondly that approach fails to take into account the fact that some of these Claimants may not have taken their full, Regulation 13, 20 days leave. Thirdly that approach fails to take into account the fact that that proportion of the holiday fund attributable to earlier periods of holiday taken still amount to an underpayment in relation to those periods of leave.

48. In my judgment the appropriate way of identifying how much of the holiday fund should be available to the Respondents to use as a set off for any liability that arises by reason of an unlawful deduction of wages is to firstly total the amount of holiday pay paid to each Claimant in relation either to annual leave taken but not paid for together with any payments received by that Claimant in relation to any additional pay paid to any Claimant in relation to public holidays which they worked. The parties then need to identify what periods of annual leave were taken during 2014 but have been excluded from these claims as being out of time. They should then calculate how much holiday pay should have been paid to the Claimant in relation to those periods of leave and then deduct that sum from the total paid, the Respondents being then entitled to set off the balance.

49. By adopting that approach, it is right to say, the issue of limitation becomes of less significance because although the Respondent's primary liability is reduced in relation to those out of time claims so will be the amount that is available to them as a set off against those claims that are within time.

50. It is my understanding that in relation to the six Claimants there is agreement between the representatives as to what periods of annual leave during 2014 in relation to each of these Claimants are out of time and accordingly I anticipate that by adopting these principles the parties will be able to reach rapid agreement in relation to the sums of money to which each of these Claimants are entitled.

51. By reason of the fact that these have been agreed as test Claimants these principles shall also be applicable to all other Claimants in order that the totality of these claims can be resolved.

52. Accordingly, subject to any applications for reconsideration that may be made, I stay these claims generally for a period of time to enable the parties to seek to settle all these individual claims.

Employment Judge Burton

Date 2 March 2017

Sent on 6 March 2017