

JJE



EMPLOYMENT TRIBUNALS

Claimant: Mr S Caspall

Respondent: Matrix Control Solutions Limited

Heard at: East London Hearing Centre

On: 12 March 2018

Before: Employment Judge Goodrich (sitting alone)

Representation

Claimant: In Person
Respondent: Stephen Chegwin, Solicitor

JUDGMENT

The judgment of the Employment Tribunal is that:-

The Claimant's claim for holiday pay fails and is dismissed, as further set out below.

REASONS

The claim and Issues

1. The background to this hearing is as follows.
2. The Claimant presented his employment tribunal claim on 12 December 2017. Before doing so he had, as required, obtained an early conciliation certificate from ACAS. This covered the period from 31 October 2017 to 13 November 2017.
3. In box 8.1 of his claim form, the Claimant ticked that he is owed holiday pay.
4. The Claimant's details of claim included the following points:-

- 4.1 On 9 August 2017 he wrote to the HR Manager for Matrix Control Solutions Limited, Lois Long, regarding holiday pay.
 - 4.2 In the letter he requested that Matrix pay him for his holiday pay based on average pay over the previous 12 working weeks. Previously he had been on secondment on a pay of £104,305 per annum, up until 24 July 2017, when he transferred from his secondment returning to employment paid at £66,188 per annum.
 - 4.3 His understanding of the law for workers who have normal working hours but whose pay varies from week to week, (e.g. the case for him, transferring from secondment to prior position), holiday pay is calculated by taking average pay to the worker over the previous 12 weeks.
 - 4.4 He had therefore requested that he was paid for holidays (taken between 25 July 2017 and 4 September 2017) using the average calculation for the previous 12 working weeks.
 - 4.5 Lois Long responded by stating that he had normal working hours in both the Netherlands and UK, his pay had not varied to the time at which he had worked or the amount of work done, and that the 12 weeks average calculation did not apply.
 - 4.6 Giving details of the dispute between him and Lois Long and his attempts to resolve it.
 - 4.7 He was entitled to £2422.19 underpaid holiday pay.
5. The Respondent entered a response disputing the Claimant's claim. Amongst the points made in the response, were the following:
- 5.1 The Claimant's contract of employment included the following terms namely
 - 5.1.1. The Respondent's holiday pay year is 1 January – 31 December each year.
 - 5.1.2. The Claimant's holiday entitlement is 25 working days during each completed holiday year and 8 UK public holidays in addition.
 - 5.1.3. Conditions relating to the taking of annual leave are shown in the Respondent's employee handbook which confirms that "holiday pay will be at your normal basic pay unless otherwise shown on your statement of main terms".
 - 5.1.4. The Claimant was seconded initially from 2 January 2016 until 31 December 2016, working on the Respondent projects in the Netherlands and the secondment subsequently extended in 2017.

- 5.1.5. The terms of the secondment included an annual salary, payable in monthly instalments, 40 hours per week on a 10 days on, 4 days off basis.
 - 5.1.6. Setting out terms on which the Claimant was seconded.
 - 5.1.7. Setting out what they contended were relevant provisions in the Working Time Regulations 1998 and Employment Rights Act 1996.
 - 5.1.8. After secondment the Claimant changed post, took an agreed salary reduction and was paid for holidays taken after changing post at the rate for that post, which was the correct amount of holiday pay.
6. At the outset of the hearing I discussed with the parties the issues I needed to decide.
 7. The Claimant confirmed the case he had set out in his claim form, explaining that when his secondment ended and he came back to the UK on a lower salary he had accumulated 20.5 days holiday and time off in lieu. He took 21 days off within 12 weeks of returning and should have been paid for those days at the rate he was on during his last 12 weeks of his secondment, not the salary he was on when he returned.
 8. Mr Chegwin, on behalf of the Respondent confirmed the case that had been set out in the response. The Claimant's pay did not vary within the meaning of Employment Rights Act and the provisions relating to a twelve week period did not apply.
 9. The issue for me to decide was, therefore, the rate of pay to which the Claimant was entitled for 20.5 days that the Claimant had accrued through a combination of annual leave and Time Off In Lieu ("TOIL") for the part of 2017 that he was seconded to work for the Respondent in the Netherlands.

The relevant law

10. Article 7 of the Working Time Directive, Directive 2003/88/EC provides :

"Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."
11. Regulation 13 of the Working Time Regulations contains the entitlement required by Article 7 to 4 week's annual leave in each leave year. Regulation 13A gives an additional entitlement, above that required by Article 7, to an additional 0.8 weeks.

12. Regulation 16 of the Working Time Regulations 1998 provides:

- “(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 221-224 of the 1996 Act shall apply for the purpose of determining the amount of a weeks pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).*
- (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 for references to the worker’s contract;*
 - (c) as if the calculation date was the first day of the period of leave in question; and*
 - (d) as if the references to Section 227-228 did not apply”.*
- (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 to a period of leave towards discharging any liability of the employer to make payments under this regulation in respect of that period; and conversely, any payment remuneration under this regulation in respect of the period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.”*

13. Section 221 of the Employment Rights Act (“ERA”) provides

- “(i) This section and sections 221 and 223 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 employees 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 employees remuneration for employment in normal working hour (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 12 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.

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

14. Section 222 contains provisions as to remuneration varying according to time of work. These provide:

“(i) This section applies if the employee is required to work under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or times of the day, which differ from week to week or over a longer period so that remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2) The amount of a weeks 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 amount of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of 12 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 12 weeks.

(4) In sub section (3) “the relevant period of 12 weeks” means the period for 12 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.”

15. In the case of *British Airways Plc -v- Williams [2011] IRLR 948 (CJEU)* it was held that a pilot is entitled during annual leave not only to the maintenance of his basic salary, but first, to all the components intrinsically linked to the performance of the

task which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.

16. In the case of (*Lock -v- British Gas Trading Limited (2) [2016] IRLR 946 (CA)*) it was held that the Working Time Regulations could be interpreted so as to require Mr Lock's commission earnings to be taken into account when calculating his holiday pay.

The Evidence

17. On behalf of the Claimant I heard evidence from the Claimant himself.
18. On behalf of the Respondent I heard evidence from Ms Lois Long, HR Manager for the Respondent.
19. In addition I considered the documents to which I was referred being the bundles of documents provided by the Claimant and Respondent respectively.

Findings of Fact

20. There are no great disputes as to the relevant findings of fact. I set out only those I consider relevant and necessary to determine the dispute required to determine. I have, however, considered all of the evidence provided to me and I have borne it all in mind.
21. The Claimant, Simon Caspall, commenced employment with the Respondent on 29 August 2011.
22. The Respondent, Matrix Control Solutions Limited, is an energy management company, providing energy management services and solutions to its clients.
23. The Claimant had a statement of terms of conditions of employment. These provided that the statement, together with the employee handbook (except where the contrary is expressly stated) sets out his terms and conditions of employment, which might be amended or varied from time to time with notification of such amendments or varying via an update to the employee handbook if the change was minor, or informing him in writing if the change was more substantial.
24. Amongst the contents of the statement of terms and conditions of employment were the following provisions:-
 - 24.1 Your normal hours of work are 40 per week, 8.30am-17.30pm Monday to Friday with a 60 minute unpaid break each day.
 - 24.2 You may be required to work overtime when authorised and as necessitated by the needs of the business. Additional hours will be paid

at the agreed rate but must be approved by your line manager.

- 24.3 Your holiday year begins on 1 January and ends on 31 December each year.
- 24.4 You will receive a paid annual leave entitlement of 25 working days during a complete holiday year.
- 24.5 In addition to the annual holiday entitlement, you will be allowed to take bank holidays (the UK bank holidays reference being made to the UK bank holiday dates).
- 24.6 In the event of you working on any of the above public/bank holidays, in addition to the normal days pay, you may either be paid at time and a half the hours worked or you may be given one day off in lieu, at our discretion. The date when the day off in lieu is to be taken is to be mutually agreed with us.
25. One part of the Respondent's employee handbook contained provisions on holiday entitlement and conditions. One of the paragraphs contained the following statement:
- "Your holiday pay will be at your normal basic pay unless shown otherwise on your Statement of Main Terms."*
26. Until the period of secondment, to which I refer below, the Claimant was appointed to the position of "Project Manager – MEP".
27. On 2 January 2016 the Claimant accepted a secondment to the Netherlands, initially for a period of 1 year commencing on 2 January 2016.
28. Ms Long wrote to the Claimant, your letter dated 12 January 2016, setting out details as to his secondment including that:
- 28.1 Your salary for the duration of your secondment will be £98,318 (this was a substantial increase on his salary in the UK which was £64,260 per annum at the time).
- 28.2 You will be paid a sales commission bonus of £25,000 in the January payroll.
- 28.3 Your shift pattern will be on a 10 days on / 4 days off basis.
- 28.4 At the end of the year you will transfer back to your previous role with the company, on your pre-secondment salary.
- 28.5 Should overtime be necessary this will be remunerated at a flat single time rate and subject to approval by Phil Middlebrook. As a higher salaried employee you will not normally be eligible for overtime payments, any

overtime under 10 hours per week will not be claimable.

28.6 Your annual leave entitlement will remain the same but you will adhere to the Dutch public holidays during your secondment.

28.7 All other terms and conditions remain the same as per your current contract of employment”.

29. The Claimant’s secondment did not end after one year and was extended into 2017. Mr David Lewis, Managing Director, wrote to the Claimant in a letter dated 16 January 2017 setting out terms on which his secondment was to be extended. These included the following terms:

29.1 Your secondment will be extended to the end of 2017, dependent on there being sufficient work.

29.2 Your salary whilst on secondment will increase to £104,305 per annum with effect from 1 January 2017, but will reduce to your UK salary £66,188 if you return to the UK within the year.

29.3 A bonus payment £15,000 will be paid to you in the January payroll.

29.4 A payment of £12,289.88 will be paid to you in the January payroll with regards to the recent overtime you have done.

30. The Claimant’s secondment in the Netherlands ended on 24 July 2017 and the Claimant returned to work for the Respondent in the UK.

31. The reasons for the secondment ending are disputed between the parties. It is unnecessary, however, for my purposes to make any finding of the fact on why the Claimant transferred back to the UK.

32. During the time that the Claimant was working in the Netherlands during 2017 he took 14.5 days leave. This comprised 9.5 days annual leave and 5 days leave falling on Dutch public holidays. On some of the Dutch public holidays concerned, the Claimant worked. In addition he had worked additional hours to the extent that he had accumulated an additional 16 days of overtime work that he was subsequently to take of work by way of time off in lieu. So far as I was made aware, the Claimant did not make a request for holiday in the Netherlands that was refused.

33. For the 14.5 days leave taken whilst on secondment the was paid at his 2017 rate of pay as described in the letter from Mr Lewis dated 16 July 2017 to which I have referred above.

34. Between 25 July 2017 and 2 October 2017 the Claimant took 21 days off, which is the period to which this dispute relates. These days are described by the Claimant as being a combination of time off in lieu, which were a combination of Dutch public

holidays that he had worked and authorised overtime amounting in total to 16 days; and a proportion of his contractual annual leave that had accumulated but not being taken during the part of 2017 that he worked in the Netherlands).

35. The Claimant explained, in the course of being cross examined, that he was open to having time off in August because he has a family.
36. The Claimant's rate of pay for the 21 days in question was at his contractual rate of pay of £66,188 being his rate of pay in the UK after returning from his secondment to the Netherlands. As referred to above in my description of the Claimants claim form, he and the Respondent entered into a dispute as to whether the Claimant was entitled to the rate of pay of his lower salary when he returned to the UK (as the Respondent contends); or his higher rate of pay whilst at the Netherlands which the Respondent contends.

Closing Submissions

37. Both the Claimant and Mr Chegwin, for the Respondent, gave oral submissions.
38. Before Mr Chegwin gave his closing submissions, I asked him whether there was any European case law to which he would be referring. In response Mr Chegwin stated that the European case law was irrelevant and the only relevant provisions were the Working Time Regulations and the Employment Rights Act. This was not helpful, particularly in the limited time available for the hearing and with an unrepresented Claimant, as a more helpful approach would have been to have gone through some of the recent case law, such as the case of *Lock –v- British Gas Trading Limited*, and to have explained why it was not relevant.
39. Mr Chegwin's closing submissions included the following points:-
 - 39.1 The Claimants position was wrong. If time of in lieu (TOIL) accrued it was treated as additional holiday and paid at the rate in force at the time the leave was taken.
 - 39.2 Early in 2017 the Claimant was paid a one off payment for 2016 that was overtime worked towards the end of the year and it was not sufficient time to take time off in lieu. Employees were usually expected to take time off in lieu.
 - 39.3 Regulation 16(1) of the Working Time Regulations ("WTR") refers to a week's pay.
 - 39.4 Regulation 16(2) WTR refers to sections 221 – 224 ERA applied.
 - 39.5 Regulation 16 (3)(c) provides that the calculation date should be the first day of the leave in question.
 - 39.6 Therefore holiday pay should be calculated in accordance with the ERA and

the calculation date is the first day of holiday.

39.7 Section 221 (1) ERA applies when there are normal working hours for the employee. Under his contract of employment the Claimant had normal working hours.

39.8 Section 222(1) ERA did not apply.

39.9 The Claimant was entitled to a fixed salary, his pay was static it did not vary accordingly to work done and section 222(2) ERA applied.

40. The Claimant's submissions included the following points:-

40.1 He did not understand how he earned £12,000 overtime in January 2017 at the previous year's rate but not at his previous rate of pay after returning to the UK.

40.2 He was on two different salaries and he believed that he fell under the 12 weeks rule to calculate his pay on the previous 12 weeks.

40.3 All he was trying to do was to ask for a fair payment.

Conclusions

41. So far as domestic law is concerned, I accept Mr Chegwin's submissions to the extent that, unless there is a conflict between the Working Time Regulations, Employment Rights Act and Article 7 of the Working Time Directive that requires a different interpretation to the UK's legislation than the ordinary meaning of the UK legislation, the Claimant's claim fails. In addition to his reasoning, I add the following points.

42. The Claimant worked additional hours and days whilst on secondment between January and July 2017. Unlike, however, for overtime worked in 2016, for which he was paid overtime amounting to slightly over £12,000, the Claimant did not ask for (so far as I was made aware), or receive, any overtime payment for the overtime on Dutch public holidays worked in 2017 whilst on secondment. Instead, he took time off in lieu on his return to the UK.

43. Even whilst on secondment during 2017, therefore, the Claimant worked normal working hours in accordance with Clause 9.1 of his contract of employment in the UK, together with the variations to that contract set out in the Respondents letters dated 12 and 16 January 2017.

44. The effect of the Claimant transferring back to the UK was to revert to the terms of his original (without the variations brought in during his secondment) contract of employment.

45. The calculation date for his rate of pay is, therefore, the calculation date described

in Regulation 16 (c) WTR, namely the first day of the leave in question. For the dates in question, the Claimant had reverted back to a UK salary.

46. On returning to the UK the Claimant was carrying out a different job to the one performed in the Netherlands.
47. The differences in the Claimant's pay between his job in the Netherlands and in the UK was not due to his pay varying with the amount of work done, but to him performing two different jobs, on two different salaries.
48. Unless, therefore, Article 7 and the relevant case law interpreting those provisions operate so as to "trump" the meaning of the Working Time Regulations in sections 221(2) ERA, the Claimant's claim fails.
49. By the time the Claimant ended his secondment in the Netherlands he had taken 14.5 days leave. In *Bear Scotland Limited –v- Fulton* it was held that additional leave provided by Regulation 13A WTR was subject to the regime provided for by Sections 220-4 and 234 ERA. At best, therefore, the Claimant's entitlement to a higher rate of pay would attach only to 5.5 days leave, not the 21 days for which he is claiming.
50. Does Article 7 and the interpretation provided to it by the CJEU and UK case law provide for the Claimant to be paid at his seconded rate of pay or the 5.5 days that constitute the balance of 4 weeks pay to which Article 7 requires?
51. I have concluded that they do not. The purpose of the Directive is to ensure that employees or workers are not deterred from taking holiday by being paid at a lower rate of pay than their normal rate of pay, including all the components intrinsically linked to the performance of the tasks which he is asked to carry out. In the Claimant's circumstances he would be better paid if he had taken more than the appropriate accrued amount of holiday, rather than slightly less. If I had been provided with evidence that the Claimant had applied for and been refused leave whilst on secondment in 2017 in the Netherlands, my conclusions might be different.
52. I have sympathy for the Claimant in that it does appear harsh for him to work additional hours whilst in the Netherlands and be paid at the lower rate of his UK salary. Nonetheless, I am required to interpret the statutory provisions, together with relevant case law and where relevant, the Claimants contract of employment. My interpretation of these is that the Claimants claim fails, for the reasons given at the start. I do also wonder whether, the sums involved, the ill feeling that it appears to have caused the Claimant has been worth the sums of money involved for the Respondent.
53. It might possibly have been arguable, although I express no concluded view on this, that time off in lieu is not holiday and payment for it should be treated differently to holiday. The Claimant, however, based his case on the time off in question as forming part of his holiday entitlement. His details of claim referred to his claim being for holiday pay. His document in his bundle of documents in which

he made his calculations of holiday and time off in lieu that had accrued was described in his index as "*Holiday Breakdowns*"; and the pages of the documents concerned were described by him as being his holiday balance until the end of his secondment. The holidays described in his document were a combination of the annual leave he was entitled to; and the time off in lieu he had accrued by the end of the secondment. Both parties, therefore, treated the time in question and based their cases before me as being holiday pay.

Employment Judge Goodrich

23 May 2018