EMPLOYMENT TRIBUNALS

Claimant: Mr N Sumner

Respondent: Sentinel Group Security Ltd

Heard at: Bristol (remotely by VHS) **On:** 9 December 2022

Before: Employment Judge Leverton (sitting alone)

Representation

Claimant: Miss Dominika Benton, Consultant
Respondent: Mr Craig Johnson, Citation Limited

RESERVED JUDGMENT

The claim for payment in lieu of unused annual leave under regulation 14 of the Working Time Regulations 1998 (SI 1998/1833) is not well founded and is dismissed.

The claim for a shortfall in holiday pay under section 13 of the Employment Rights Act 1996 (unauthorised deductions from wages) was presented out of time and is dismissed.

REASONS

The claims

1. The Claimant brings a claim for holiday pay. There are two elements to his claim:

    a. 20 days' leave during his final two leave years were booked on days when he would have been carrying out voluntary overtime instead of working his basic contractual hours, which meant that he was not given an effective opportunity to take his full leave entitlement and is

due a payment in lieu on termination under regulation 14 of the Working Time Regulations 1998 (SI 1998/1833);

b. the holiday pay that he received for those 20 days' leave was calculated with reference to his basic hourly rate of pay for his normal working hours and did not fully reflect his normal remuneration over the previous 12 months.

2. The Claimant clarified at the start of the hearing that his claim was limited to these two matters. He had raised various other issues relating to his holidays in correspondence with the Respondent, and he confirmed that those matters had been resolved. The Respondent had recently paid him for four days' leave owing to him from 2020, and for eight public holidays on which he had worked in 2021 and 2022 without receiving days off in lieu.

Evidence and procedure

3. The hearing was conducted remotely. There were witness statements from the Claimant and from the Respondent's witnesses, Mr David Tugwell, Account Supervisor, and Ms Jane Eden, HR and Compliance Manager. All three gave oral evidence, and I was provided with a 104-page bundle of documents.

4. The hearing started late because one of the Respondent's witnesses experienced technical difficulties joining. In addition, the Claimant was not able to provide full details of the payments that he was claiming. I issued directions at the end of the hearing requiring him to do so within seven days and giving the Respondent an opportunity to comment within a further seven days. Owing to these factors, I was not in a position to deliver oral reasons at the conclusion of the hearing and I reserved judgment.

Findings of fact

5. The Claimant was employed by the Respondent as a patrol and response officer from 19 October 2020 until 26 June 2022. His written particulars of employment stated that his normal contractual hours were 42 hours per week. It was expressly provided that those hours could be varied to meet the needs of the business and that the Claimant 'may be required to work a reasonable amount of overtime hours'. He was initially paid £8.95 per hour, increasing to £9.15 per hour in April 2021 and £9.75 per hour in April 2022. Payment was made monthly in arrears on the twelfth day of each month.

6. Mr Tugwell's evidence was that, in February 2021, he asked the Claimant to cover for a colleague who was off work by taking on a 12-hour day shift for five days a week, to which the Claimant agreed. Thereafter the Claimant worked the additional shifts, often putting in a working week of 60 hours or more. In March 2021, the absent employee returned to work and moved permanently to the night shift. At that point, Mr Tugwell asked the Claimant to work the additional shifts on a permanent basis. The Claimant agreed to continue 'until further notice' but his contract was not amended.

7. The Claimant's evidence was that he agreed to work the extra shifts as a temporary arrangement to cover staff shortages, and that the overtime was

purely voluntary. He said there was no set pattern to the extra hours he worked. The overtime shifts would be notified to him by Mr Tugwell up to four weeks in advance, but there could be last-minute changes, sometimes as late as the day before a shift.

8. On the basis of the above evidence from Mr Tugwell and the Claimant, I do not accept that there was an agreement to vary the Claimant's normal or basic hours of work. My findings of fact are that the Claimant's basic contractual hours continued to be 42 hours per week, and any shifts worked over and above those basic hours amounted to overtime. That overtime was not guaranteed, and the Claimant did not consent to work the extra shifts on a permanent basis. Nevertheless, I am satisfied that the conversation between the Claimant and Mr Tugwell in March 2021 gave rise to an expectation on both sides that overtime would be offered by the Respondent and carried out by the Claimant until further notice by either party.

9. The Claimant's contractual leave year ran from 1 January each year, and he was entitled to 20 days' annual leave plus eight public holidays. He booked holidays by sending a text or making a verbal request to Mr Tugwell. His holiday requests were sometimes refused, depending on the needs of the business, but in those circumstances he was permitted to take leave on a different date. Holiday request forms were provided by the Respondent but Mr Tugwell did not require the Claimant to fill them out, and in practice the Claimant did not do so.

10. When he put in a holiday request, the Claimant would specify the days of leave that he wished to take. He sometimes asked for leave on a day when he knew that otherwise he 'might well' (in his words) be working overtime, as distinct from his basic contractual hours. If it transpired that he had already completed 42 hours' work in a week when he had booked a day's leave, his argument before the tribunal was that there was an onus on the Respondent to refuse his holiday request, to simply give him that day off as a non-working day, and to ensure that he took his annual leave entitlement at another time.

11. The Claimant's statement of terms and conditions provided that holidays would be paid at the normal basic rate for the employee's normal hours of work. However, the employee handbook stated that shift workers or workers without fixed hours would have their holiday pay calculated by reference to their average pay over the past 12 weeks. The Claimant's evidence, which I accept, was that he was paid £117 for a day's leave, based on a working day of 12 hours multiplied by his (most recent) hourly rate of £9.75; this was supported by copies of his payslips. He argued that his holiday pay should instead have been calculated by reference to his average earnings for the previous 52 weeks.

12. Ms Eden was not clear about the basis on which the Claimant's holiday pay had been calculated. She told the tribunal that she did not have sight of employees' payslips, and that the Respondent's payroll department was responsible for calculating holiday pay. Ms Eden had no involvement in the process and by her own admission she could not be sure that the Claimant's holiday pay had been correctly calculated.

Legal framework

Annual leave and holiday pay

13. Under regulation 13(1) of the Working Time Regulations 1998 (SI 1998/1833) ('WTR'), a worker is entitled to four weeks' annual leave in each leave year. Regulation 13A confers an entitlement to a period of additional leave of 1.6 weeks. The worker's aggregate entitlement under both these provisions is subject to a maximum of 28 days.

14. Regulation 13(3) WTR provides: '*A worker's leave year, for the purposes of this regulation, begins – (a) on such date during the calendar year as may be provided for in a relevant agreement…*'.

15. The right to payment for statutory annual leave is set out in regulation 16 WTR, while regulation 14 provides a right to payment for untaken leave where a worker's employment is terminated during the course of the leave year.

16. Regulation 16 WTR provides for statutory holiday pay to be calculated according to the 'week's pay' formula in sections 221 to 224 of the Employment Rights Act 1996 ('ERA'). For workers without normal working hours, pay and remuneration are averaged over a period of 52 weeks (previously 12 weeks, presumably hence the reference to 12 weeks in the Respondent's employee handbook) and overtime is therefore taken into account. But for workers with normal working hours, on a literal application of the domestic provisions, the holiday pay calculation does not always reflect all regular payments received. For example, overtime does not count except where it is both compulsory for the worker and guaranteed by the employer – S.234 ERA.

17. However, the case law of the European Court of Justice (ECJ) has established that the entitlement to four weeks' paid leave under Article 7(1) of the EU Working Time Directive (No.2003/88), which is implemented into domestic law by regulation 13 WTR, must be calculated by reference to the worker's normal remuneration – see, in particular, **British Airways plc v Williams and ors** 2012 ICR 847; **Lock v British Gas Trading Ltd** 2014 ICR 813. To the extent that the domestic provisions do not achieve the result envisaged by the ECJ case law, they must be read purposively so that additional payments are taken into account in the calculation of holiday pay in so far as they form part of the worker's normal remuneration. This applies only to the four weeks' leave due under regulation 13 WTR, not the additional leave under regulation 13A. The Court of Appeal's judgment in **East of England Ambulance Service NHS Trust v Flowers and ors** 2019 ICR 1454 confirms that regular, predictable payments for voluntary overtime should be factored into the calculation.

Timing of leave

18. Can an employer insist that workers take their annual leave at times when they would not, in any event, have been required to work? In **Sumsion v BBC (Scotland)** 2007 IRLR 678 the claimant, who worked in television production, was contractually required to take every second Saturday off as

leave. No production was scheduled for those days. The EAT held that the employer was nevertheless entitled to nominate every second Saturday as leave. In doing so, it relinquished the right to call on the claimant to work, thus relieving him of the obligation to keep himself available.

19. The case of **Russell and ors v Transocean International Resources Ltd and ors** 2012 ICR 185 establishes that the same analysis is capable of applying even where the worker would not otherwise be under an obligation to be available for work. There, the Supreme Court held that the statutory holiday entitlement of a group of workers employed on offshore oil rigs was capable of being satisfied by the provision of regular onshore field breaks that were part of the shift working pattern. The Court rejected the argument that a period when a worker would not otherwise be working cannot count as annual leave. This proposition is reinforced by the Supreme Court's recent judgment in **Harpur Trust v Brazel** 2022 ICR 1380.

Effective opportunity to take leave

20. The ECJ has held that an employer must give a worker an effective opportunity to take annual leave – **Kreuziger v Land Berlin** Case C-619/16; **Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu** Case C-684/16.

21. In **Smith v Pimlico Plumbers Ltd** 2022 IRLR 347 the Court of Appeal held that a worker can only lose the EU-derived right to paid annual leave if the employer can show that it gave the worker the opportunity to take paid annual leave, encouraged the worker to do so, and informed the worker that the right would be lost at the end of the relevant leave period. If the employer cannot show that it took these steps, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.

Remedies and time limits

22. The three-month time limit for issuing a claim for unpaid holiday pay under regulation 30(1)(b) WTR runs from the date on which it is alleged that the payment should have been made, and there is no provision for linking a series of underpayments.

23. However, a holiday pay claim can also be framed as a claim under section 13 ERA, which prohibits unauthorised deductions from wages. In such a case, a claim can cover a series of deductions, and the three-month time limit runs from the last deduction in the series. The relevant provisions are set out in section 23 ERA:

> *'(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…*

(3) Where a complaint is brought under this section in respect of – (a) a series of deductions… the references in subsection (2) to the deduction… are to the last deduction… in the series.

(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.'

24. Section 207B ERA deals with the effect of Acas early conciliation on time limits for bringing employment tribunal claims. It provides:

'(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a 'relevant provision').

(2) In this section – (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.'

Discussion and conclusions

Did the Claimant receive his full statutory leave entitlement?

25. The Claimant contends that 15 days of his annual leave entitlement in 2021 and five days in 2022 (20 days' annual leave in total) were booked on days when he would otherwise have been working overtime shifts. He says these days of leave entitlement should instead have been granted as time off from his basic working week of 42 hours. He argues that the 'leave' he received on those days was not genuine time off work because there was no obligation on him to work overtime, and the Respondent has therefore failed to afford him an effective opportunity to exercise his statutory rights. Relying on **Smith v Pimlico Plumbers Ltd** (above), he says he is entitled to carry forward and accumulate the 20 days' leave, which were effectively unused, and to receive a payment in lieu of them under regulation 14 WTR on the termination of his employment.

26. In response, the Respondent argues that the Claimant was free to request annual leave and could take it when he wished, within the constraints that one might expect within a commercial organisation. He booked leave, took the time off and received holiday pay; he has received his full entitlement and is not owed anything more.

27. I do not accept that the Respondent denied the Claimant an effective opportunity to take statutory annual leave. It was the Claimant who requested leave on days when, by his own admission, he knew he might well otherwise be working overtime. If the overtime arrangement had been wholly voluntary, as the Claimant suggests, it would have been open to him simply to decline to carry out the overtime and take the day off without pay, saving his paid annual leave for use on another occasion. He chose instead to book leave. That was because he wanted the time off work, and he knew that if he did not request annual leave, the Respondent might well put him down for overtime.

28. Once the Claimant had been allocated an overtime shift, there was a mutual expectation that he would work on that day, and in practice that was what generally happened. That was the effect of his agreement with Mr Tugwell in March 2021. But even if the overtime arrangement had been wholly voluntary, as the Claimant contends, the scheduling of annual leave on days that turned out to be overtime shifts would not have been in breach of the WTR. The case of **Russell and ors v Transocean International Resources Ltd and ors** (above) establishes that workers can be required to take annual leave at a time when they would not otherwise be under an obligation to be available for work.

29. I conclude that the Claimant was not denied the opportunity to take 20 days of his statutory annual leave entitlement during his final two leave years. He took the leave and was paid for it, and it follows that he is not entitled to receive a payment in lieu of unused leave under regulation 14 WTR on the termination of his employment.

Holiday pay

30. The Claimant also contends that the holiday pay he received for those 20 days was calculated with reference to his basic hourly rate of pay for his normal working hours. He says that this did not reflect his average pay over the last 12 months. There was therefore a failure by the Respondent to

ensure that his holiday pay reflected his normal remuneration, as required by the ECJ case law.

31. Following the tribunal hearing, in compliance with my directions, the Claimant's representative produced a spreadsheet setting out the gross and net pay received each month and the total hours worked by the Claimant in 2021 and 2022. Holidays were paid at the rate of £9.15 per hour from April 2021, producing a daily rate of £109.80 (£9.15 x 12 hours), and at £9.75 from April 2022, producing a daily rate of £117. Based on his normal remuneration over the 52 weeks prior to each occasion on which holiday pay was granted, the Claimant calculated the total shortfall for the 20 days that were in dispute as £214.62 (gross). (There were no gaps of more than three months between any of the alleged deductions and so it was not necessary for me to consider recent case law on that point.) The Respondent did not accept this calculation and maintained that the Claimant had been paid correctly for the leave that he had taken.

32. As noted above, a claim for unpaid holiday pay under section 13 ERA can cover a series of deductions; in such a case, the three-month time limit for bringing a claim in section 23(2) ERA runs from the last deduction in the series. Section 207B ERA (extension of time limits to facilitate Acas early conciliation) applies for these purposes.

33. The final day of annual leave in respect of which this complaint was brought was 4 April 2022. The Claimant's holiday pay for that day was due to be paid in arrears on 12 May 2022. Taking into account the period of Acas early conciliation, which ran from 13 July 2022 (the date when the early conciliation request was received by Acas) to 10 August 2022 (the date on which the certificate was issued), the last day for him to issue the tribunal claim was 10 September 2022.

34. The claim was presented to the tribunal on 11 September 2022. This was not a problem in relation to the Claimant's main argument, namely that he had been denied the right to take annual leave and was due a payment in lieu under regulation 14 WTR. The time limit for bringing that claim ran from his termination date of 26 June 2022, and that claim was therefore brought within the primary three-month time limit.

35. However, it does present an issue in relation to the claim for a shortfall in holiday pay, which must be framed as a claim for unauthorised deductions from wages because it concerns a series of deductions over a period of 18 months. The Claimant does not seek to argue that it was not reasonably practicable for him to present that claim on time. He had taken legal advice about his holiday pay entitlement in April or May 2022, and he had raised the matter of his holiday pay with Ms Eden in a series of emails in May and June 2022. In those circumstances, there appears to have been no obstacle to his presenting the claim within the relevant time limit.

36. I have rejected the regulation 14 claim for the reasons already given. There was no valid claim for unused holidays arising on termination of employment, and the last in the series of earlier alleged deductions from holiday pay took place on 12 May 2022. The claim under regulation 16 WTR relating to that series of deductions should have been lodged by 10

September 2022. (The same would apply to any claim under Reg 30(1)(b) WTR relating only to the final alleged underpayment.) I conclude that the regulation 16 claim was presented one day out of time and must therefore be dismissed.

Employment Judge Leverton
Date: 9 January 2023

Judgment & Reasons sent to the Parties:
17 January 2023

FOR THE TRIBUNAL OFFICE