EMPLOYMENT TRIBUNALS

Claimant: Mr I Houghton

Respondent: Sime Darby Oils Liverpool Refinery Limited

Heard at: Manchester (remotely, by CVP) **On: 27 April 2023 & 19 May 2023 (in chambers)**

Before: Employment Judge McCarthy (sitting alone)

REPRESENTATION:

Claimant: **Mr E Stenson (Counsel)**
Respondent: **Mr S Peacock (Solicitor)**

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

2. The complaint of unauthorised deductions in respect of holiday pay is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form presented on 12 August 2022 (having entered early conciliation on 6 July 2022 and received a certificate against the respondent dated 12 August 2022) the claimant complained of unauthorised deductions from wages and breach of contract in respect of his alleged accrued but untaken leave.

Preliminary Issues

2. At the beginning of the hearing, before I heard any evidence, I had to consider two preliminary issues. The first issue was to determine whether the claim includes a claim for breach of contract as contended in the claimant solicitors e-mail of 16 March 2023 and if it did not (and if such an application is pursued) whether the claimant should be given leave to amend his claim.

3. Having considered the parties submissions, and for the reasons given at the hearing, my determination was that the claimant's claim did include a claim for breach of contract and so it was not necessary for the claimant to apply for leave to amend his claim. But I gave Mr Peacock permission to ask any supplemental questions of the respondent's witnesses regarding the breach of contact claim. Mr Peacock confirmed that breach of contract had already been addressed in the respondent's witness statements and the respondent was ready to deal with the breach of contract claim.

4. The second issue related to a paragraph 5 in the respondent's Amended Grounds of Resistance (43). Mr Peacock explained that this paragraph needed to be deleted as the position had changed when preparing the respondent's witness statements. The payment the claimant had received was not a payment for accrued holiday but a payment to ensure that the claimant had been paid for all the shifts he had worked up to his termination payment. The respondent referred me to page 149 in the bundle which gave an explanation of the payment. The claimant's representative, Mr Stenson, submitted that this was an amendment application. For the reasons given at the hearing, I did not agree with Mr Stenson's submission. I considered that the respondent was not seeking to amend its Amended Grounds of Resistance by adding a new basis of defence, it was, in fact, removing one of its defences as it was no longer accurate. I considered that the respondent was acting in accordance with its duties to the Tribunal, to correct the position with regard to its amended Grounds of Resistance as it was no longer accurate. The claimant's counsel confirmed that the claimant had been aware of the respondent's position prior to the hearing and had already had an opportunity to discuss it with his client. The claimant was therefore happy to proceed without any break.

Claims and Issues

5. The claimant brings claims for:

   a. Unlawful Deductions of Wages under sections 13 to 27 of the ERA 1996
   b. A Declaration under Regulation 30 of the WTR 1998
   c. A claim for breach of contract in respect of his contractual holiday entitlement

6. The issues to be determined by the tribunal were discussed and agreed with the parties following my determination of the preliminary issues. The Issues were:

Jurisdiction

6.1 Does the Tribunal have jurisdiction to hear the Claimant's Claims in respect of his historical payments for accrued but untaken annual leave? The Claimant avers that he has submitted his claim within the appropriate statutory time limits. The Respondent asserts that some of the alleged deductions are out of time.

6.2 Were the claims presented in time, namely within 3 months of the date of the deduction, or where there has been a series of deductions, within 3 months of the date of the last of them?

6.3 Do the deductions form part of a series of deductions?

6.4 Has this series of deductions been broken by a gap of more than 3 months between any 2 of the disputed deductions relied upon?

6.5 If the claims, or part of them are time barred, has the Claimant satisfied the tribunal that it was not reasonably practicable to submit the claims within time?

6.6 Does The Deductions from Wages (Limitation) Regulations 2014, SI 2014/33 22 apply to limit how far back the Claimant can claim payment for accrued but untaken annual leave?

Unlawful Deductions of Wages/Declaration Under Regulation 30/Breach of Contract

6.7 What was the Claimant's entitlement to paid annual leave for the current leave year (1st January 2022 to 29th June 2022)?

6.8 What was the Claimant's entitlement to paid annual leave for historical years?

6.9 Was there a practice of allowing such unused leave to be carried over into the next leave year?

6.10 Does the case of Russell -v- Transocean Resources Limited 2011 UKSC 57 apply in the Claimant's case?

6.11 Was the Claimant "on-call" for 4 of the 6 days he had off in any 10-day period?

6.12 Which days are relied upon by the Respondent as annual leave days taken by the Claimant in both the current leave year and historical years?

6.13 What, if any notice was a) given by the Respondent or b) given by the Claimant to take annual leave?

6.14 Was the 18-day break in the 2 summer months regarded as annual leave?

6.15 Was the Claimant only allowed to take 18 days' leave each holiday year. If this is correct, was the Respondent in breach of contract by not allowing the Claimant to take his contractual holidays throughout his employment?

Remedy

6.16 Is the Claimant entitled to pay for accrued but untaken holidays?

6.17 If the Claimant's claim for holiday pay succeeds, and the Claimant is entitled to holiday pay, how much holiday pay is the Claimant entitled to?

6.18 Is the Claimant entitled to a declaration that the deductions were and are unauthorised

6.19 Is the Claimant entitled to compensation pursuant to Regulation 30 of the Working Time Regulations, or otherwise for accrued leave and/or

6.20 An order for payment of the amount of the deductions.

6.21 Did the Respondent act in breach of contract

Procedure/Documents and evidence heard

7. This was a hearing where the parties, their representatives and witnesses participated remotely via CVP. I heard oral evidence from the claimant on his own behalf. I also heard oral evidence from Mr Richard Town (General Manager), on behalf of the Respondent.

8. During the hearing I was referred to documents within a bundle of documents which contained 262 pages and was provided with written witness statements for both witnesses. Mr Peacock, also provided me with a skeleton, a copy of the Employment Appeal Tribunal's judgment in the case of **Mr M Craig, Ms Taylor v Transocean International Resources, Transocean International Resources Limited and Others v Mr T L Russell and Others** and a legal update from PLC on the Supreme Court decision in **Russell and others v Transocean International Resources Ltd and others [2011] UKSC 57**. Mr Stenson, the claimant's representative provided me with a copy of this Supreme Court's Judgment. in Russell & others v Transocean International Resources Limited.

9. At the conclusion of the evidence each party made oral submissions.

10. The hearing was listed for one day. On 19 May 2023, I sat in chambers to continue my deliberation's. The parties were not required to attend the Tribunal on 19 May 2023.

Factfinding

11. The relevant facts are as follows. Where I have had to resolve any conflict of relevant evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

12. The claimant, Mr Ian Houghton, was employed by the respondent, Sime Darby Oils Liverpool Refinery as a Packaging Technician from 1 November 2016 until 29 June 2022. As a Packaging Technician he worked in the packing plant production plant. The claimant was receiving a gross weekly salary of £715.85 when he left the respondent's employment by reason of his resignation.

13. The claimant was a shift worker and received the same monthly salary regardless of how many shifts he had undertaken during that month. It was agreed that if the claimant was successful in his claim, the claimant's rate of holiday pay would be calculated in accordance with the formula in section 221(a) of the Employment Rights Act 1996.

14. Both Mr Stenson and Mr Peacock acknowledged that the facts were largely agreed.

15. The claimant accepted that at all times during his employment with the respondent he had been required to work on a "5 shift rota".

16. The respondent is involved with the production and sale of cooking oils such as deep frying oils for caterers and margarines for baking. The packing plant production plant is run on a 24 hour per day seven days per week schedule subject to shut downs and reductions in production such as at Christmas time. To accommodate this the claimant and others Packing Technicians were required to work on a 5 shift rota – meaning the rota was covered by five different teams containing 4 Packing Technicians (which was later reduced to three). This rota system had been in place since 2015. The claimant worked shifts of 12 hours including rest breaks.

17. During the years the claimant was employed the claimant agreed with the Mr Town's evidence that the respondent typically shut down for a period between Christmas and New Year and that the claimant was not required to work or be "on call" on such days and continue to receive his normal salary. Mr Town said that in thirteen years the respondent had not shut down over the Christmas period on three occasions only.

Contract of Employment

18. The claimant signed an "Contract of Employment" (the "Contract") dated 30 September 2016 (88-94).

19. The first substantive paragraph of the Contract, states that the claimant's "*principal terms and conditions of employment are set out in this Agreement. Further details on employment matters and terms and conditions of employment are set out in the staff handbook which is a non contractual document" (88)*.

20. The Contact states that the claimant's salary "*is based on working 5 shifts operating 24 hours/ day seven days per week"* (88) and at page 89 that the claimant's salary "*is based on an average working week of 42 hours, worked over a 5 shift system covering 24 hours per day and potentially 365 days per year"*. It also stated that his working pattern "*included all public holidays as normal working*".

21. The claimant's annual leave clause in his Contract stated:

"**3.2 Annual leave**

3.2.1 *The annual leave year runs from **1st of January to the 31st of December** each year. You are entitled to **264** hours (equivalent to 25 x 8 hr days and 8 bank holidays) paid leave in each year (pro-rated for part time employees) in accordance with the annual leave policy. The company reserves the right to plan up to 48 hours of the holiday entitlement per year to take account of potential shutdowns or reduced production, for example at Christmas and other times. In this case you will be required to take this time as part of your annual leave entitlement.*

When you are required to work on a 5 shift system all holidays are rostered within the shift pattern. [my emphasis]

3.2.2 Leave is to be taken at such time as may be approved by the Company and must be agreed in advance with your Line Manager in accordance with the Annual Leave policy.

3.2.3 During your first year of employment, for each complete calendar month of service you will accrue 1/12th of your annual leave entitlement. Thereafter your leave accrues on the basis of 1/52 of your annual leave entitlement for each week of service during that leave year. Leave should normally be taken during the current annual leave year. Should your employment terminate *for any reason, unused accrued annual leave should normally be taken during the period of notice. With the agreement of New Britain Oils payment may be made for unused accrued annual leave in accordance with the Annual Leave Policy. it is agreed that any annual leave taken in excess of your accrued entitlement will be calculated and deducted from your final salary payment.*

22. It was agreed that the claimant was entitled, under his Contract to 264 hours of paid leave per year (equivalent to 22 shifts of 12 hours) and that the holiday year ran from 1 January to 31 December each year. As a shift worker it was accepted that his annual leave was calculated in hours.

23. The claimant accepted that under his Contract all of his holidays were rostered within the shift pattern.

24. It was agreed that every summer under the summer schedule, all teams on the 5 Shift System were entitled to an 18 day break when they were required to work or be "on call" to provide cover. It was agreed that in each holiday year during his

employment, the claimant took 18 days of annual leave (216 hours) during the summer schedule.

25. Whilst the claimant accepted that he had received 18 days (216 hours) of annual leave in each holiday year, he contended that he was entitled to 264 hours of annual leave under his contract and so was due an additional 4 days (48 hours) each holiday year which he said could not be taken. He argued that he was only able to take 18 days (216 hours) of his annual leave entitlement.

26. The 18 day (216 hours) break was rostered into the annual rota so the claimant and other team members knew when their 18 day break would start and finish some months in advance and so could plan accordingly.

27. The claimant resignation became effective on 29 June 2022. He had worked just under six months of the holiday year and had left his employment before his scheduled 18 day break was due to start in the rota. The claimant stated that he had not taken any annual leave during the current holiday year and the last time he had taken annual leave was the 18 day break in the previous summer. There was therefore significantly more than three months between the two periods of holiday, if the claimant's annual leave was not all rostered.

28. I find that the claimant contract was a template contract used for all shift workers, but that it distinguishes between those who are contracted to work on a 5 shift system from other shift workers. Therefore, I find that the provisions under paragraphs 3.3.2 and 3.2.3 and the respondent reserving the right to plan up to 48 hours of holiday entitlement per year did not apply to the claimant as the contract makes clear (in the same clause 3) that all of his holidays were already rostered within the shift pattern.

Annual Leave Policy

23. The most recent Annual Leave policy which was in place when the claimant was employed is contained within the Company Policy Manual (97—100). The policy is dated 14 December 2020.

24. In the 'General' section the Annual Leave policy states that "*Holiday allowance for shift workers is calculated in hours. Shift workers are entitled to 264 (pro- rated for part timers) paid leave per annum (equivalent to 5 weeks and 8 bank holidays)".*

> *Employees are required to give as much notice as possible of any annual leave requested, and it must usually be one month. All annual leave dates must be approved in advance by the employee's line manager and agreement is subject to business requirements and maintaining adequate levels of cover.*
>
> *Except where an employee is absent on long term sick leave, all holiday must be taken during the holiday year in which it has accrued. There will be no payment in lieu of any holiday not taken (except on termination) unless business circumstances have prevented the employee from taking all his/ her annual leave entitlement during the annual leave year. In such cases payments in lieu are at the company's*

> *absolute discretion and must be approved in writing by the senior manager."*

25. The Annual Leave policy has a section entitled "Shift workers". It states:

> *"Employees who work a shift pattern are entitled to 264 hours per annum as annual leave. Public holidays form part of the normal shift working pattern and employees are required to work on public holidays should their shift fall on these days.*
>
> *As much notice as possible must be given of any annual leave requested, but must normally be at least one month. Annual leave requests are subject to line manager approval and subject to being no more than one person on annual leave on each shift.*
>
> *The company reserves the right to plan up to 48 hours of the holiday entitlement per year per person to take account of potential shutdowns or reduce production, for example at Christmas or other times. As much notice as possible will be given. Employees will be required to take this time as part of their annual leave entitlement."*

26. The Shift Worker section in the Contact does not specifically refer to those employees who are on a 5 shift system. However, given the agreed facts regarding how the shift worked in practice the communications at pages 57 and 81 of the bundle and the provision in the claimant's contract stating "When you are required to work on a 5 shift system all holidays are rostered within the shift pattern**"** I preferred the evidence of Mr Town that this section of the Annual Leave Policy does not reflect how annual leave worked in practise for Packing Technicians contracted to work on the 5 Shift System.

27. In the section entitled "Holiday Pay on termination of employment" it states:

> *"If the employee leaves the organisation's employment part way through a holiday year, he/she will be entitled to be paid for any accrued annual leave for that holiday year that has not been taken by the date of termination."*

28. I accepted Mr Town' evidence that for those who are not on a 5 shift System there is a "traditional" annual leave booking system in place for employees. This can be seen in the Annual Leave policy (97-100) and the claimant's contract (88-94). As referred to above the claimant's Contract differentiates between those on the 5 Shift System and other types of shift workers. It was also common ground that there was no system in place for those on the 5 Shift System to book annual leave.

Carry over

29. The claimant's contract does not contain any right to carry over accrued but untaken holiday from a previous annual leave year. The Annual Leave policy makes it clear, that other in specific circumstances, all holiday must be taken in the holiday year it was accrued. The 'General' section in the Annual Leave policy also states that "*The company is committed to ensuring the health and well-being of its employees and it is expected that all employees will take their annual leave entitlement*."

30. The claimant did not contend that he had accrued but untaken leave in previous holiday years because of long term sickness, the impact of the Covid-19 pandemic, paternity leave, or because he asked to take it and was refused permission and/or refused payment for it. There is no evidence the claimant ever asked to take the remaining 48 hours of contractual annual leave or complained about his annual leave being rostered within his shift pattern

The 5 Shift System

31. The claimant accepted that he was a shift worker required to work on a 5 shift system. The claimant was on the 'E' shift. The 5 Shift System consisted of five different teams of three people (it was originally four people).

32. In his submissions and skeleton, Mr Peacock's referred me to an example of how the 5 shift system was operated by the respondent.

33. The 5 shift system rota (other than during the summer schedule) followed a certain pattern in ten day blocks and these 10 days blocks would continue for 10 weeks before starting again in the same pattern as the previous 10 weeks.

34. In a standard ten day block the claimant and his team would work two day shifts and then two night shifts, they would then have a six day break. The first two days of the six day break were "Cover Days", there were then two days of "Guaranteed Rest" and then two further "Cover Days." The next 10 day block would then begin again with two day shifts of 12 hours. The day and night shifts lasted 12 hours (including breaks) and the day shift commenced at 6am and finished at 6pm, the night shift commenced at 6pm and finished at 6am.

35. The shift pattern changed in the summer months (the summer schedule) to ensure that all employees on the 5 Shift System were provided with a consecutive 18 day break from their shift. The claimant accepted that these 18 days were all non-working days and that he took 18 day annual leave at this time. When one team was on their 18 day break, other shifts would work 2 day shifts followed by two night shifts and then a four day break. Originally the four day break were all cover days but this had subsequently been changed so employees were only required to provide cover on one day of the four day break".

36. The claimant accepted in evidence that this was an accurate reflection of the five shift system.

37. I find that this meant the rota was predictable. An annual rota was prepared for all five teams and made available to employees, for example, in the mess room (221). In the hearing bundle the respondent has included the rotas for 2022- 2027 (175- 185) due to its predictability. This annual rota specified when the claimant was shift and specified "cover" days- when a member of the claimant's team could be called into work to cover for unexpected absence. It also specified when the claimant's guaranteed rest days were scheduled and the 18 day break. The claimant accepted that on "guaranteed rest days" and during the 18 day break he was free from all and any work obligations and was not subject to the possibility of being called on to work I find that the claimant would therefore have had notice of his non- working days some time in advance (including the 18 day break).

Guaranteed Rest Days

38. The claimant accepted that in each 10 day block (outside of the summer schedule) he had two days of guaranteed time off, when he was not required to work and not subject to the possibility of being called in. I find that these were non- working days and not working time.

39. In evidence, the claimant accepted that these days were available for annual leave and that he could do what he wished on these days. However, the claimant said he just regarded these two days as being equivalent to a weekend if he had worked Monday to Friday and treated them as such. He said he and his colleagues just saw these two days as "days off". The claimant was not contracted to work a five day week. He was contracted to work a 5 shift system covering 24 hours per day 365 days per year.

18 day break

40. The claimant accepted that all teams were given an 18 week break every summer and that he took 18 days (216 hours) annual leave during this time in every holiday year. During these 216 hours the claimant accepted he was not required to work and could do as he wished and he was not subject to being called on to work. I find that these 18 days (216 hours) were non- working days and not working time.

Focus/Training days

41. It was not in dispute that rostered into the annual rota were five training days. The claimant accepted that the respondent did not use all of the focus days but as they were always rostered on a cover day, the claimant said he was still on call.

"*Cover Days"*

42. These were days when the team was "on call" to provide cover for other shifts as and when required due to unexpected absences such as sickness absence. This was to ensure that the shift that was working had the full complement of staff.

43. The claimant contended that he considered himself to subject to the possibility of being called on to work on all four of the "cover days" and that these were not rest days. In evidence, he said that on every cover days he "constantly didn't know whether [he] would be called into work. Therefore, he could not organise any social activities and his " *time off was not his own*". He said he always felt he was on call on cover days.

44. However, I prefer the evidence of Mr Town that in practice the claimant was not "on call" on every cover day and that who was on cover on any particular "cover day" was self-regulated by the members of shift E and the four cover days were shared amongst the members of the shift, with one person being nominated to be "on call" on each day.

45. Mr Town gave evidence that within the six day break, each team of three people was expected to provide four day's worth of on call cover between them, but

in reality they were rarely asked to provide such cover. It was for each team to arrange amongst themselves who will be on call for each one of the four days – the teams were to self-manage themselves with regard to cover. Mr Town said that the respondent would normally expect one individual to cover one day each, which would mean that each individual team member would have 4 or 5 day break between shifts and one or two days of being on call. Only one person was expected to be "on call" from the team on each cover day. There would be a nominated person who was number one to provide cover and a reserve. The claimant said he understood Mr Town's evidence that if the claimant was not the person who was meant to be on call and was not the reserve, he could not be told off or sanctioned for not being available. The claimant accepted that in principle it was true that he couldn't be called back from a day out or holiday if he was the reserve or second reserve.

46. . The claimant confirmed he agreed that this is how the cover days worked in principle- he and other members of the team took turns to be the person "on call" for the team and decided amongst themselves who was "on call" on any particular cover day. He said that the team self -regulating who was on call caused arguments and difficulties, which he raised with management, he was told that the team needed to organise who provided cover on any particular day themselves. The claimant said that even if he was not the nominated person for a particular cover day he was still concerned about the person on call not picking up the phone if contacted- he said "it was a bit of a free for all". He said that he didn't consider any cover days as days off as he couldn't plan anything.

47. Therefore, I find that, in practice, the claimant had further days during the 10 day block when he was free of any work obligations and not subject to the possibility of being called on to work. I find that on Cover Days, when he was not allocated to be on call or the reserve, he was not subject to the possibility of being called in to work. Mr Town gave undisputed evidence that the whole team had never been called in to cover on the same shift and that it was rare for the claimant and other members of his team to be called in on cover days.

48. Having reviewed the rotas provided by the respondent (186 and 187), the claimant accepted that he (and the other Packing Technicians) was not asked to provide cover that regularly. The rotas show that in 2021 (which Mr Town gave unchallenged evidence was (together with 2020) a particularly bad year for sickness absence due to the Covid-19 pandemic) there were still only two Packing Technicians to provide cover on more than four occasions in that whole year.

49. I find that, other than in the summer months, the claimant had four "cover days" in every block of ten days. However, due to the rarity with which he (and others in his role) were asked to provide such cover, on the vast majority of the cover days the claimant was not working. However, if the claimant was the nominated team member on call, there was still a possibility of him being called on to work the first two hours of the day and so those two hours were not rest.

50. I find there is also evidence in these rotas that the claimant and his other team mates were sharing the on call days and there was some sort of cover rota in place:

a. in 2020, the claimant only had to provide absence cover on two occasions (2 October 2020 and 21 November 2020). There was also a

need for cover on 20 November 2020 but that was covered by another member of the claimant's team;

b. In 2021, the claimant provided absence cover on three occasions (6 March, 7 July and 4 September. The rotas show there was a need for cover on 7 March , 6 July and 5 September but these were covered by the other members of the claimant's team;

c. In 2022, the claimant worked for 6 months and was not required to provide any absence cover.

d. There is no evidence in the rotas of the claimant's team all being brought in to provide cover on the same day- only one member was ever called in.

51. The claimant accepted in evidence that even if he was the nominated person in his team to provide cover, there was a 2- hour window of being on call on each day of cover. If he was not contacted within 2 hours of the shift starting (e.g. 8am on a day shift) then he would know that he was not expected to provide any cover that day as that was the cut off time for contacting him. Whilst I accept that he was "on call" for those two hours and needed to be available, if he was not contacted within the two hour window he knew that the rest of the day was non- working time. The claimant accepted in evidence that if he was not called in he had 10 hours available on any such cover day to do what he wanted.

52. On the basis of evidence referred to above, I find there were significantly more than 264 non working hours rostered into the claimant's annual shift pattern.

53. The claimant accepted that he had two guaranteed rest days in every ten day block (other than during the summer schedule). During cross examination, he also accepted that if he wanted to go on holiday for the whole six day break he would just need to agree with his other team members that he would not be the nominated on call person on any cover days that week and the other members of his team would share being "on call" on those days instead.

54. The claimant also accepted that if he wanted to go on holiday for longer than six days he could also "swap" a day when he would have been working with a member of another team and add that on to either side of the six day break. The claimant accepted there was a swap board and that he had done this once before when he wanted to take time off when he would otherwise been on shift but it was a "headache". He accepted in evidence that others on the 5 Shift System used the swap system and agreed with their colleague not to be the nominated person to be on call on any of the cover days in order to go on holiday during the six day break or longer at a time other than during the summer schedule. The claimant felt that self managing who was the nominated person on cover days was a hassle and caused disagreements and would have preferred for cover days to be rostered by management. The claimant did not provide me with evidence that he was prevented from taking annual leave at any time during the holiday year other than his 18 day break.

55. **Other communications**

56. The respondent referred me to a letter dated 2 March 2015 which was sent to staff when the respondent decided to run the packing plant on a 24 hour day seven day per week schedule due to an uplift in customer demand (57).

57. As set out in the letter, to accommodate the new schedule, the respondent required packing plant staff to work on a five shift rota in a team of four people . The letter further stated that "*within this rota all holidays and time off are planned, should you require time off when rostered to work you should plan cover with your colleagues. Should any person on the shift be absent for whatever reason it is required that cover arrangements will be provided from other shifts as detailed in the roster in order to maintain the manning levels at four persons per shift. It is the responsibility of the covering shift to ensure that cover is available at all times. Arrangements for cover are to be made between the two shifts in question at the time. However the line manager still needs to be informed of any absence in line with the short term absence policy…No additional payments are made for this cover*".

58. The claimant did not commence employment with the respondent until November 2016 and, as Mr Stenson, submitted there was no evidence that he had ever seen a copy of this letter before these proceedings. The terms of this letter were not incorporated into his contract. However, in light of the admissions the claimant made during cross examination, I believe this letter is supporting evidence of the custom and practice in place with regard to the 5 shift system and annual leave.

59. I prefer the evidence of the respondent that it was clear to the claimant that his holiday entitlement was rostered into his shift pattern. His contract clearly states that " *when you are required to work a 5 shift system all holidays are rostered within the shift pattern*". When he undertook his Assessment Day for the role of Packaging Technician, I can see from the copies of the slides shown to applicants, including the claimant, that he was told about holiday being built in to the rota. There is a bullet point "*Holiday built into the shift Rota*" on the slide at page 81 which is addressing what the "*package*" is for the role. There is also a reference to Packaging Technicians operating within a "*self-managed team*") (72). Whilst I agree with Mr Stenson's submission that what was said to the claimant on his assessment day is not incorporated into his contract- there is an entire agreement clause in the claimant's contract- it does illustrate that the claimant had advance warning of the fact that his contract would contain such a clause and he would have understood what was meant by this term of his contract which said "*When you are required to work on a 5 Shift System all holidays are rostered within the shift pattern*". I find that given the contents of the assessment day and the fact his contract stated that all holidays are rostered within the shift pattern, he would also have appreciated that the references to booking time off and 48 hours notice did not apply to him as he was required to work the 5 shift system.

Statutory Holiday Entitlement

60. The claimant's statutory entitlement was 5.6 weeks leave per leave.

61. It was not disputed that the claimant's average working week (when averaged over the ten weeks of his shift pattern) was 33.6 hours. This was calculated by using the average number of shifts the claimant worked in the 10 week cycle.

62. The claimant's statutory entitlement (basic and additional) in hours was 33.6 x 5.6 = 188.16hrs.

63. The claimant contractual entitlement was 264 hours per holiday year and so the claimant's contractual entitlement exceeded his statutory entitlement pursuant to regulation 13(1) and 13A of the Working Time Regulations.

64. The claimant accepted in evidence that every summer he had an 18 day break and used 18 days of his annual leave entitlement during this break. As the claimant's contract states, his holiday is calculated in hours. The claimant used 216 hours of his annual entitlement of 264 hours during this 18 day break (calculated by multiplying the 12 hour shift length by 18). The claimant received his statutory entitlement in full during the 18 day break.

65. The claimant's union representative contacted the respondent after the claimant's resignation to enquire about the calculation used to work out what the claimant's was entitled to by way of a payment for accrued but untaken leave. The claimant said that he had worked the first six months of the holiday year but had not taken any annual leave.

66. The respondent sent a letter to the claimant dated 29 June 2022 (149) confirming that the claimant's "*shift pattern means holidays are consumed throughout the year, during days off between shifts and the 18 day break inclusive*". Therefore there was no accrued but untaken leave due.

Submissions

67. I considered closing oral submissions from both parties.

68. The respondent submitted that the claimant received substantially in excess of his statutory entitlement under the Working Time Regulations. Its overreaching position was that the time the claimant was not working within the 5 Shift System – any of the six days in the break between worked shifts when he was not called in to provide cover can be used to satisfy the contractual entitlement to annual leave.

Respondent's submissions

69. Mr Peacock referred me to **Russell v Transocean International Resources Ltd [2011] UKSC 57** and submitted that consistent with this case the "Guaranteed Rest" days is time available for annual leave and more than adequate to account for the additional 4 days holiday (or equivalent) hours each year claimed for. In the alternative the respondent argued that time when the claimant was not called in on one of the Cover Days in the rotation and no work was therefore undertaken was also time available for annual leave. Any period which was neither working time nor compensatory rest was a rest period and time available for annual leave

70. The Respondent submitted that a notice under Regulation 15 of the Working Time Regulations was not required in any particular form. In said that the contractual entitlement to holiday accrued in the six months of the holiday year as at the termination date was satisfied. The respondent also argued that if the claimant's position was accepted the tribunal did not have jurisdiction to consider the claimant's

claim for unauthorised deductions from wages as there was a gap of more than three months between the alleged deductions.

Claimant's submissions

71. Mr Stenson also referred me to **Russell v Transocean International Resources Ltd [2011] UKSC 57.** He submitted that no regulation 15 notices had been given by the respondent and/or that the respondent had not given adequate notice of mandated annual leave. He submitted Regulation 15 required the respondent to specify days and referred me to some case law on the provisions of notice and said that the claimant's case could be distinguished as in this case there was no specified days, the respondent was seeking to pick and choose which was not how Regulation 15 worked. He contended if the annual leave policy was looked at as a whole the line in the claimant's contract " When you are required to work on a 5 Shift System all holidays are rostered within the shift" simply meant that the claimant can ask for annual leave and it will be rostered. In terms of jurisdiction Mr Stenson argued that Bear Scotland was bad law and referred me to the Court of Appeal's "strong provisional view" in **Smith v Pimlico Plumber's Ltd 2022 IRLR CA**, regarding the case of **Agnew** (which is summarised in the Law section below. He submitted that the only days that could potentially and was effectively on call for all four cover days up to end of the 2 hour cut off point and that on call days were working time. He contended that the claimant did not know when he could take his annual leave so he had not been given adequate notice.

The Law

Unlawful deduction from wages

72. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that 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 in the worker's contract; or**
>
> **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction."**

73. A relevant provision in the worker's contract is defined by section 13(2) ERA as:

> **"(a) One or more written contractual terms of which the employer has given the worker a copy of 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 the worker in writing on such an occasion."**

74. A deduction is defined by section 13(3) ERA as follows:

> **"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."

75. Wages are defined by Section 27(1) ERA as follows:

"**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 of employment or otherwise…."

76. Section 23 ERA provides that a worker has a right to complain to an employment tribunal of an unlawful deduction from wages. However, pursuant to Section 23(2)ERA

"**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) ….
(3) Where a complaint is brought under this section in respect of –
(a) A series of deductions or payments, or
(b) …..

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 207(B) (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 was presented within such further period as the tribunal considers reasonable.

77. In the case of **Bear Scotland Ltd v Fulton and anor 2015 ICR 221 ERA**, Lord Justice Langstaff held that if there is a gap of more than 3 months between any two deductions in a chain of deductions, the series of deductions is broken. However, in **Smith v Pimlico Plumber's Ltd 2022 IRLR CA**, the Court of Appeal expressed "the strong provisional view" that the Northern Ireland Court of Appeal in the case of **Agnew** (who had declined to follow **Bear Scotland** and held the series was not interrupted) was correct on this point.

Breach of contract

78. A claim for breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Holiday Pay

79. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Working Time Regulations provide for 5.6 weeks leave in each leave year. (Regulation 13(1) and 13A) . The leave year begins on such date during the calendar year as may be provided for in a relevant agreement (Regulation 13(3)(a)).

80. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

81. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 of the Employment Rights Act 1996 with some modifications. In accordance with a series of cases including the Court of Appeal's Judgment in **British Gas Trading Ltd v Lock and anor 2017 ICR 1,** all elements of a normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European Law but not the additional 1.6 weeks leave which is domestic in origin.

82. Regulation 11(1) of the Working Time Regulations states that, subject to paragraph 2, a worker is entitled to an uninterrupted rest period of not less than 24 hours in each 7 day period during which he works for the employer.

83. Regulation 15 of the Working Time Regulations makes provision for notification as between employer and employee regarding annual leave:

15.-(1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker-

(a)to take leave to which the worker is entitled under regulation 13(1); or

(b)not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)-

(a)may relate to all or part of the leave to which a worker is entitled in a leave year;

(b)shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c)shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date-

(a)in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b)in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

(6) …

84. In accordance with the EAT case of **Mr M Craig, Ms Taylor v Transocean International Resources, Transocean International Resources Limited and Others v Mr T L Russell and Others** "*Notices under regulation 15 need not be in any particular form and need not be in writing. Employers are not obliged to give any notice under regulation 15. Nor are Employees"*.

85. Remedies are provided for in Regulation 30. They include

"30.

(1) A worker may present a complaint to an employment tribunal that his employer –

(a) Has refused to permit him to exercise any right he has under –

(i) Regulation …13(1)

(2) ..

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well founded, the tribunal –

(a) Shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(c) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of."

Discussion and Conclusions

86. I did conclude that I had jurisdiction to consider the claimant's claims of breach of contract. As the respondent accepted, the claimant's claim of breach of contract was presented within three months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation.

87. Given I had determined at the outset of the hearing that the claimant's claim did include a breach of contract claim, whether the Tribunal had jurisdiction to consider the claimant's unauthorised deduction claim had been superseded. However, having not accepted the claimant's position that he had not taken any annual leave since his 18 day break in 2021, the submissions regarding there being more than a three months break between deductions and the application of the principles in **Bear Scotland** fell away. I found that I did have jurisdiction to consider the claimant's claim but found that there was no deductions made in relation to holiday pay as the claimant had received the holiday pay to which he was entitled.

88. On the basis of my finding of fact and in accordance with the Supreme Court Judgment in **Russell,** I find that the claimant was granted the annual leave to which he was entitled under his contract of employment and the Working Time regulations.

89. The claimant's contractual leave was 264 hours per leave year (as set out in his contract of employment) pro-rated for incomplete leave years. This was equivalent to 22 shifts per holiday year. I found that the claimant's statutory leave entitlement under Regulation 13(1) and 13A of the Working Time Regulations 1998 was 188.16 in each complete leave year and therefore concluded that the claimant's contractual entitlement was greater than his statutory leave entitlement under the Working Time Regulations.

90. The claimant was entitled to 264 hours annual leave if he had worked the whole of the current leave year. As he left the respondent's employment on 29 June 2023, he had only worked 6 months of the current leave year (which ran from 1 January 2022 to 31 December 2022). I therefore concluded that the claimant's annual leave entitlement was 132 hours.

91. The claimant's Contract made clear that all of his annual leave entitlement was rostered into his shift pattern. It stated at clause 3.2.1 "*When you are required to work on a 5 shift system all holidays are rostered within the shift pattern."* Therefore, I concluded it was clear that annual leave was required to be taken by the claimant during certain periods when no work was undertaken.

92. The claimant's contract did not provide "specific designation" of the claimant's period of annual leave but I concluded that the claimant was given effective notice under Regulation 15 of the Working Time Regulations. This happened when he signed his Contract. I did not accept Mr Stenson's interpretation of clause 3.2.1 in the claimant's contract. I considered it was clear from a reading of the claimant's contract that that he was given notice by his employers, in clause 3.2.1 of his contract that they required annual leave to be taken out of breaks in the shift (such as guaranteed rest breaks and the 18 day break). The claimant agreed that all his holidays were rostered within the shift pattern. He accepted this in evidence and admitted that he used as

annual leave the 18 day break rostered into his shift which occurred each leave year during the summer schedule. The rota was predictable and followed a 10 week pattern. The claimant had access to the annual rota which clearly specified and gave advanced notice to the claimant of when the Guaranteed Rest Days and the 18 day breaks were to be taken in each leave year. Such breaks were not working time and the claimant accepted in cross examination he was free to use this time as he chose. In practice the claimant knew in advance that he had certain periods off and the Contract provided for a work pattern that had a generous period built into it during which the claimant could do as he pleased. This period was more than enough to satisfy the annual leave period.

93. In accordance with the EAT judgment in **Russell** notice is not required to be in any particular form or in writing.

94. I concluded that the following periods were time available for annual leave as these were times when the claimant was free of all or any work obligations and not subject to the possibility of being called on to work:

    a. "Guaranteed Rest Days";

    b. The 18 day break in the summer schedule;

    c. Any "Cover Days" which were not used for compensatory rest or the weekly rest period pursuant to Regulation 11(1) of the Working Time Regulations **and** when the claimant had agreed with the others members of his team that he was not the allocated person "on call" for that day or the reserve.

95. I concluded it was not the case that the claimant was only allowed to take 18 days leave at the end of each holiday year. Given the claimant received 2 days Guaranteed Rest Days in every ten day block for the entire year apart from during the summer schedule (which ran from July to mid- September in each holiday year, I agree with Mr Peacock's submission that these rest days on their own (given their frequency) are more than adequate to account for the additional 48 hours (4 days) contractual holiday entitlement (or equivalent hours) each year claimed for by the claimant (as the claimant accepted that he had been granted 18 days leave in the summer schedule each year. I therefore conclude that that the claimant's entitlement to annual leave was satisfied by periods when the claimant was not otherwise required to work.

96. there is no accrued but untaken leave in the leave years than pre-date the claimant's current leave year (which ran from January 2022 until the termination of his contract on 29 June 2022) and there was therefore no carry over (if this had been permitted). There was no deduction as defined in Section 13(3) of the Employment Rights Act 1996 and the claimant had received his full contractual entitlement to annual leave in each of the years which preceded the current holiday year.

97. I also agree with Mr Peacock's submission that the Guaranteed Rest days the claimant was granted between 1 January 2022 and his termination on 29 June 2022 are more than adequate to account for the 132 hours (11 days) of annual leave the claimant had accrued during those six months under his contact and the Working

Time Regulations. Therefore, I conclude that upon the termination of his employment the claimant had no accrued but untaken leave and therefore no deduction as defined in Section 13(3) of the Employment Rights Act and the claimant had received his full contractual entitlement. The claimant had worked for 6 months and in that time would have exceed rest days of 132 hours as every ten days in those six months 24 hours was available for annual leave. In addition, during those six months there would have been other rest days available for annual leave – such as cover days on which the claimant was not allocated as the on call person or the reserve, as the claimant worked on a self managed cover rota with other members of his team.

98. The claimant's complaints of unauthorised deductions from wages in relation to holiday pay and breach of contact are not well founded and are dismissed.

_____

Employment Judge McCarthy

Date: 30 July 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

31 July 2023

FOR THE TRIBUNAL OFFICE