EMPLOYMENT TRIBUNALS

Claimant: Ms R Moore

Respondent: Hope Community Church

Heard at: Nottingham (by Cloud Video Platform) On: 4 December 2020

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr P Maratos, Consultant

JUDGMENT

The claimant's claim for unlawful deductions from wages fails and is dismissed.

REASONS

Introduction

1. This is a claim by Ms Moore that she was underpaid holiday pay by the respondent. Ms Moore represented herself and gave evidence. The respondent was rep[resented by Mr Maratos and he called one witness, Ms A Haines, Office Manager. There was an agreed bundle consisting of the pleadings, some correspondence and a number of wage slips. Ms Moore did not produce a written witness statement but was content to rely on the grounds of complaint set out in her ET1 as her evidence in chief. I had a witness statement from Ms Haines. Both parties made brief submissions at the end of the evidence. Because of the positions of the parties, Ms Moore is clearly anxious about the case and the respondent has a number of other staff members who may be affected by this judgment, I decided that a full explanation would be of assistance to the parties and thus reserved the judgment which I set out below.

Issues

2. The issues in this case are:

a. Was the claimant paid the correct amount of holiday pay in the 2 holiday years before submission of her claim?
b. If not, is she owed unpaid holiday pay?
c. If so, how much.

3. There is also an issue of time limits which I deal with below.

Law

4. There is of course a good deal of law relating to alleged unpaid holiday pay. The starting point is the worker's right not to suffer unlawful deductions from wages by virtue of ss.13 to 22 Employment Rights Act 1996 (ERA). In short, s.13 states that an employer shall not make a deduction from a worker's wages (as defined) unless the deduction is authorized by the contract, required by law or agreed by the worker.

5. S. 23 ERA states that a complaint to an Employment Tribunal in respect of unlawful deductions must be made within 3 months (subject to an extension for Early Conciliation) of the date the wages from which the deduction was made were paid. If it is argued that there was a series of deductions, then time runs from the date of the last payment from which a deduction was made. By virtue of s.23(4) ERA, a tribunal may hear a claim brought after the time limit if it is satisfied that it was not reasonably practicable for the claim to have been brought within the primary time limit and the time taken beyond that is reasonable.

6. The worker can only claim for the period of 2 prior years as a result of the **Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322**.

7. There is a significant amount of case law dealing with pay for annual leave and I refer to relevant cases below.

Findings of fact

8. I make the following findings of fact.

9. The respondent is a registered charity. As part of its community work it runs pre-school services. The claimant is employed as a pre-school worker. She started her employment on 9 September 2010. She remains employed.

10. The claimant is a term-time worker. She works and is paid for 38 weeks each year. However, in order to avoid peaks and troughs in the pay of erm-time workers, the respondent averages the workers' pay over 52 weeks. So, in short, the term-time workers get, and therefore claimant gets, their 38 weeks pay spread out over 12 months.

11. The claimant was allowed to take annual leave only in non-term time. She was never required to book holiday nor even to notionally allocate some non-term time as annual leave.

12. The respondent's position was that the claimant received a percentage uplift to her hourly rate of pay of some 14.54% as what is commonly termed rolled up holiday pay. The claimant's position was that neither she nor any of her term-time colleagues believed they received holiday pay.

13. The respondent pointed to the clause in the claimant's contract which says, among other things that:

> *"the rate for the spinal point quoted incorporates an enhancement factor of 14.54% in recognition of annual leave entitlement which should be taken outside of working hours (based on 5.6 weeks FTE annual leave entitlement)."*

14. The claimants wage slips, which are at pages 42 – 65 of the bundle, and run for 2 years from 30 April 2018 to 31c March 2020, do not show any payments of holiday pay nor do they show any percentage enhancement to basic pay as "rolled-up" holiday pay. They simply show a monthly payment referred to as "Salary 1".

15. On 31 March 2020 the respondent wrote to the staff of the pre-school. That letter appears at page 38 of the bundle. It states that there had been a "miscalculation regarding holiday pay" because changes to the rate of the National Minimum Wage (NMW). Ms Haines explained that the changes to the NMW had not been accounted for in the calculation of the rolled-up pay and over time the 14.54% had been eroded as an enhancement to such a degree that she said for the years 2018/2019 and 2019/2020 the term-time employees received little and at some point no enhancement at all, the enhancement designed to account for holiday pay had simply become basic pay.

16. In the circumstances, in the pay for the month ending 31 March 2020 the claimant was paid an extra £670.68 which the respondent says was one years' holiday pay based on 5.6 weeks at the rate of the claimant's basic weekly pay. The pay slip itself calls this sum "back pay". There is no reference to holiday pay. However, the letter referred to above, does clearly say that the payment was unpaid holiday pay and states it will be referred to in the pay slip as back pay. The claimant accepted that she had been paid all of her holiday pay although she confirmed that the pay slip was received before the letter so at the time of the payment, she was unclear what the payment was in respect of. In that context I note that what the clamant was seeking was holiday pay for the 12 months from April 2018 to March 2019. This is of course highly relevant because the respondent accepts that it has not paid the claimant any or most of her holiday pay for the year April 2018/March 2019. Mr Marantos argued that the claimant's claim was time barred because the respondent paid full holiday pay to the claimant for the subsequent 12 months, in full, which, as I have said, the claimant accepts.

17. Finally the parties agreed that given the term dates and the use of half terms in the longer terms (for which the claimant was not paid), there was no period of 3 months or more during the period 1 April 2018 to 31 March 2020 in which there was no non-term time.

18. Those then are the essential findings of fact. I turn to my conclusions applying the law to those facts.

Conclusions

19. In **Robinson-Steele v RD Retail Services Ltd and others 2006 ICR 932** ECJ, it was argued that payment for annual leave must take place at the time the holiday is actually taken. Arrangements to the contrary would either constitute a payment in lieu of annual leave contrary to Article 7(2) of the Working Time Directive (WTD), or be prohibited as a mechanism that imposes obstructions or restrictions on taking leave. Furthermore, in their view, the rolled-up holiday pay system discourages workers from taking annual leave at all. The ECJ said that it is unlawful for an employer simply to designate part of the remuneration that a worker already receives for work done as holiday pay.

20. The ECJ considered whether rolled-up payments can be lawful where they include a genuine element of holiday pay and pointed out that, while the WTD does not expressly lay down the point at which the payment for annual leave must be made, entitlement to annual leave and to a payment on that account are two aspects of a single right. The purpose of the requirement of payment for leave is to put the worker, during such leave, in a position that is, as regards remuneration, comparable to periods of work. Accordingly, the point at which the payment for annual leave is made must be fixed so that the worker is put in a position comparable to periods of work as regards remuneration. In other words, payment must continue throughout the statutory holiday period. The ECJ also took the view that rolled-up holiday arrangements in effect amounted to a breach of Article 7(2) WTD, which provides that, except where the employment relationship is terminated, the minimum period of paid annual leave may not be replaced by an allowance in lieu. The ECJ concluded that rolled-up holiday pay arrangements cannot be lawful in any circumstances.

21. However, the ECJ went on to state that Article 7 of the WTD did not preclude employers setting off genuine holiday payments paid under the rolled-up method against a worker's entitlement to payment when he or she actually takes leave. However, such sums had to have been paid 'transparently and comprehensibly, as holiday pay'. The burden is on the employer to prove such transparency and comprehensibility.

22. In the UK this issue was considered in **Lyddon v Englefield Brickwork Ltd 2008 IRLR 198, EAT**, in which the EAT decided that payments forming part of a worker's 'rolled-up' pay packet were made 'transparently and comprehensibly' in respect of annual leave so that they could be set off against the worker's entitlement to holiday pay. The employment tribunal, referred to the ECJ's decision in **Robinson-Steel** (above) stated that the key question was whether the payment of rolled-up holiday pay had been implemented by the respondent 'transparently and comprehensively'. It concluded that it had, noting that exact sums with regard to holiday pay were identified in the pay packets; that the claimant had accepted payment on that basis with no challenge; and, in particular, that the claimant had accepted without challenge the lack of any extra payment during the period of his

leave. In these circumstances, the tribunal concluded that there was no residual statutory holiday pay payable to the claimant. The claimant appealed.

23. The EAT examined the guidance from domestic case law. This was set out by the EAT in **Marshalls Clay Products Ltd v Caulfield and ors and other cases 2004 ICR 436, EAT**, and **Smith v AJ Morrisroes and Sons Ltd and other cases 2005 ICR 596, EAT.** In Smith, the EAT stated that, for an employer to be given credit for rolled-up holiday payments, 'there must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked'. The EAT said that this would be best evidenced by:

    - the provision for rolled-up holiday pay being clearly incorporated into the contract of employment;
    - the amount allocated to holiday pay being identified in the contract and preferably also in the pay slip; and
    - records being kept of holidays taken and reasonably practicable steps being taken to ensure that workers take their holidays.

24. Given my findings of fact, and taking account of the guidance from case law, it is clear to me that the system operated by the respondent at least covering the years we are concerned with in this case were not transparent and comprehensible. I accept that there is provision in the contract for a payment "in recognition of annual leave", but that seems to me to fall short of a provision for rolled up holiday pay. In stating the enhancement to be an enhancement "in recognition of annual leave", it is not unequivocally clear that any such enhancement is holiday pay. The amount of holiday pay is not identified in any pay slip and the claimant was never required to book or even indicate to the respondent when she was taking her annual leave, as opposed simply to being in a period of non-term time and thus not required to work. In those circumstances, I find that there was no transparent and comprehensible system for holiday pay operated by the respondent. On the facts I find that the claimant was only paid to work 38 weeks each year all of which was term time, she had 14 weeks non-term time, or holiday, for which she received no pay and thus I conclude that the respondent did not pay the claimant any pay in respect of annual leave at the time she took her annual leave.

25. That does leave the question of the letter of 31 March 2020 and the payment of £670.68 in "back pay" to the claimant on 31 March 2020. Did that amount to the respondent discharging its obligation to pay holiday pay?

26. As I have found, in the pay for the month ending 31 March 2020 the claimant was paid an extra £670.68 which the respondent says was one years' holiday pay based on 5.6 weeks at the rate of the claimant's basic weekly pay. The pay slip itself calls this sum "back pay". There is no reference to holiday pay in the pay slip. However, the letter referred to above, does clearly say that the payment was "backdated holiday pay: and confirms that it will be referred to in the pay slip as "back pay". The claimant accepted that she had been paid holiday pay for 2019/2020.

27. The significance of this is considerable because in a case involving a series of deductions, any correct payment breaks the series of unlawful deductions (see **Fulton and anor v Bear Scotland Ltd EAT 0010/16**).

28. I accept that the payment made to the claimant by the respondent on 31March 2020 did discharge their obligation to pay to the claimant 5.6 weeks holiday pay for the year 1 April 2019 31 March 2020. The date of the last deduction was in fact therefore when the claimant was paid on 28 February 2020, which is when time started to run in this case. The claimant did not contact ACAS for Early Conciliation until 17 June 2020 which is more than 3 months after the date of the last deduction. In that case the claim is out of time.

29. Given that the claimant's evidence was that she was always aware that she was not being paid holiday pay, and given the terms of the letter of 31 March 2020, in which it was clear that the respondent was not paying the claimant for any holiday prior to 1 April 2019, and given therefore that the last month in which there was an unlawful deduction was February 2020, the claimant should have contacted ACAS on or before 31 May 202. She did not contact ACAS until 17 June and gave no explanation for this delay. She did not say why it was not reasonably practicable for her to meet the time limit and I find that it was reasonably practicable. The claimant is articulate, she can clearly access the internet, she was aware of and used the services of ACAS. I find that she could have established the time within which she needed to start to make her claim at the latest when she received the respondent's letter dated 31 March 2020. In the circumstances the claim is out of time and the case is dismissed.

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Employment Judge Brewer

Date: 4 December 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE