EMPLOYMENT TRIBUNALS

Claimant: Mr Mohamed Patel

Respondent: Diamond Bus (North West) Limited

Heard at: Manchester (hybrid hearing) **On:** 7 February 2022
8 February 2022
(in Chambers)

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person at the Tribunal
Respondent: Mr T Gosling (Counsel) by CVP

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's complaint in case number 2413360/2020 that the respondent made unlawful deductions from his wages by failing to pay him furlough pay at the correct rate for 3 May to 13 June 2020 is dismissed on withdrawal.

2. The claimant's complaint that the respondent made unlawful deductions from his wages by failing to pay the first 20 days of annual leave taken in each holiday year at the higher holiday pay rate succeeds.

Case number 2413360/2020

3. The respondent made unlawful deductions of £1097.36. It is just and equitable to increase that amount by 15% because of the respondent's unreasonable failure to comply with the ACAS Code. The total gross amount payable in relation to this case is **£1261.96**

Case number 2409239/2021

4. The respondent made unlawful deductions of £963.92. It is just and equitable to increase that amount by 5% because of the respondent's unreasonable failure to comply with the ACAS Code. The total gross amount payable in relation to this case is **£1012.11**

5. The respondent is ordered to pay the claimant **£2274.07** less deduction of appropriate tax and national insurance which the respondent is responsible for remitting to the appropriate authorities.

REASONS

Introduction

1. The claimant brings two cases against the respondent. Case number 2413360/2020 ("the First Claim") was filed with the Tribunal on 20 August 2020. Case number 2409239/2021 ("the second claim") was filed with the Tribunal on 22 August 2021. This was the final hearing of the two cases. It took place by way of a hybrid in person/CVP hearing. The Employment Judge and the claimant attended at the Tribunal. Mr Gosling and the respondent's witness and observers attended by CVP video link.

2. At the heart of both claims is the claimant's contention that the respondent failed to pay him holiday pay at the correct rate. Specifically, the claimant says all his holiday pay should have reflected the voluntary overtime which he worked on a regular and settled basis. The First Claim relates to holiday pay for annual leave from 11 September 2019 to 26 July 2020. The Second Claim relates to holiday pay for annual leave from 26 January 2021 to 22 May 2021.

3. Both claims also include complaints that the respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code"), and that any compensation the claimant is awarded should be increased to reflect that.

4. The First Claim also included a complaint that the respondent had made unlawful deductions from the claimant's furlough pay for 3 May 2020 to 13 June 2020. While I was reading the witness statements the parties were able to discuss the furlough pay complaint. Having done so, the claimant accepted that the difference between the amount of furlough pay he said he was entitled to and the amount the respondent had paid him resulted from the £2,500 per month cap on furlough pay. As a result, the claimant withdrew this claim at the hearing and I have dismissed it in today's judgment.

The issues in the case

5. It was not disputed that the claimant was entitled to 35 days' annual leave. That entitlement was made up of an entitlement under the Working Time Regulations 1998 ("the WTRs") and an additional entitlement set out in the claimant's contractual terms. For the purposes of this Judgment, it is useful to divide that holiday

entitlement into three elements because the legal position in relation to the elements is not the same. Those elements are:

- 20 days' annual leave under regulation 13 of the WTR ("the WTD leave");
- Eight days' additional leave under regulation 13A of the WTR ("the additional leave");
- Seven days contractual entitlement ("the contractual leave").

6. I have referred to the 20 days' entitlement under regulation 13 as the WTD leave because that entitlement is derived from the Working Time Directive. The respondent conceded that the claimant was entitled to be paid at "normal remuneration" for the WTD leave and that in this case "normal remuneration" included an amount reflecting his regular voluntary overtime. For convenience in this judgment I have called that holiday pay "higher rate holiday pay".

7. The respondent did not make the same concession in relation to the additional leave and the contractual leave. It said that the holiday pay for these days should be calculated excluding an amount reflecting the claimant's voluntary overtime. For convenience in this judgment I have called that holiday pay "lower rate holiday pay".

8. The List of Issues agreed between the parties following discussion with me were as follows:

(1) Was the claimant entitled to holiday pay for the additional leave and the contractual leave calculated based on "normal remuneration" inclusive of voluntary overtime?

(2) Which of the claimant's holidays were WTD leave, additional leave or contractual leave?

(3) If paragraph (1) is answered in the affirmative then the claim succeeds. If not, are the holiday pay deductions in the First Claim in time? If not, was it reasonably practicable for the First Claim to be presented in time and, if not, was it presented within such further period as the Tribunal considers reasonable (section 34 of the Employment Rights Act 1996 ("ERA"));

(4) Furlough pay – [this claim was withdrawn by the claimant during the hearing and so this issue is no longer a live one]

(5) Did the respondent unreasonably fail to comply with the ACAS Code on Disciplinary and Grievance Procedures ("the ACAS Code")? If so, would it be just and equitable to increase any award, and if so by what percentage up to a maximum of 25% (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992)("TULRCA"))?

9. Question (5) only arises if I find that any of the claimant's claims succeed – it is not a freestanding right to compensation.

Evidence

10. I heard evidence from the claimant and from Mr Mark Butler, who at the relevant time was the Operations Manager at the respondent's Bolton depot. Both witnesses had prepared two witness statements each, one relating to the First Claim and one relating to the second claim.

11. The parties had agreed one bundle of documents ("the Bundle") covering the First Claim and the second claim. It consisted of 386 pages (pages 373-386 being the claimant and Mr Butler's witness statements for the First Claim). References in this Judgment to page numbers are to page numbers in the Bundle.

12. There was very little dispute of fact in this case, the main points at issue depending on the application of the relevant law to the facts. The oral evidence I heard was therefore primarily in relation to the grievances raised by the claimant and how they were dealt with (or, in the claimant's case, not dealt with) by the respondent. I also heard evidence from the claimant relevant to the time limit issue (Issue (3)).

Findings of Fact

13. The claimant is a bus driver. He was employed by First Manchester Limited from 24 November 2014. On 11 August 2019 his employment transferred to the respondent. It was agreed that this was a TUPE transfer so that his continuity of employment and terms and conditions were preserved.

14. It was agreed that the claimant's holiday entitlement was 35 days made up of 20 days WTD leave, eight days additional leave and a further seven days contractual leave. It was agreed that the claimant's holiday pay was governed by the divisional framework agreement agreed between the respondent and Unite in July 2015 ("the Unite agreement"). The following terms in the Unite agreement are relevant to the issues I need to decide:

- The first 28 days of holiday in a relevant holiday year are calculated at the "new rate".

- Any additional holiday above that 28 days (so in this case the claimant's contractual entitlement) will be calculated using existing methods in force prior to 2015.

- The "new rate" will be calculated "by reference to Rostered Earnings plus any payment for hours worked for late running/finish and for starred rest days which the employee is prohibited from opting out of undertaking on the rota they are working on". (The parties were agreed that Rostered Earnings would not include voluntary overtime, only basic pay).

- A note (page 64) states that "the terms set out above do not affect the fact that the [respondent] treats the first 20 days leave taken in any holiday year (whether Bank Holidays or otherwise) as being the annual leave required by the EU Working Time Directive".

15. It was agreed that the claimant's holiday year ran from 1 April to the following 31 March. It was not always straightforward to identify the dates when the claimant had taken leave from the documents in the Bundle. I make the findings below based on the claimant's witness statements, his Schedules of Loss (pp.358-368 for the First Claim and pp.369-372 for the Second Claim) and the "Claimant's calculations document" (p.192).

Leave falling within the First Claim (11 September 2019 to 26 July 2020)

The 2019-2020 holiday year

16. In the holiday year 2019-20 the claimant took his full leave entitlement of 35 days. It is the respondent's case that the first 20 days were WTD leave, the next 8 days being additional leave and the final 7 days being contractual leave.

17. In this holiday year:

a. the first 20 days' leave were taken between 7 May 2019 and 11 September 2019 (inclusive). Only one of those days falls within the First Claim, 11 September 2019.

b. The next 8 days of leave were taken between 12 September 2019 and 22 January 2020 (inclusive). The last 7 days of leave were taken between 27 January 2020 and 15 February 2020 (inclusive). The respondent says this was additional and contractual leave and so payable at the lower holiday pay rate.

The 2020-2021 holiday year

18. In the 2020-21 holiday year the claimant did not take his full leave entitlement of 35 days. He was furloughed from 3 May 2020 until 13 June 2020 and had a period of extended sick leave due to an accident from August 2020 to January 2021.

a. In this holiday year, the parties were agreed that the first 20 days' leave were taken between 20 April 2020 and 11 March 2021 (inclusive).

b. 13 days of that leave were taken between 20 April 2020 and 26 July 2020 (inclusive) and fall within the First Claim. The remaining 7 days taken between 26 January 2021 and 11 March 2021 (inclusive) fall within the Second Claim.

Leave falling within the Second Claim (26 January 2021 to 22 May 2021)

The 2020-2021 holiday year

19. For this holiday year:

a. The 7 days of leave taken between 26 January 2021 and 11 March 2021 (inclusive) fall within the first 20 days of leave in this holiday year

b. The next 8 days of leave were taken between 12 March and 30 March 2021 (inclusive) and the final day of leave in that year taken on 31 March 2021. The respondent says this was additional and contractual leave and so payable at the lower holiday pay rate.

The 2021-2022 holiday year

20. In this holiday year:

a. The 7 days of leave taken between 15 April 2021 and 22 May 2021 (Inclusive) would all fall within the first 20 days of leave in this holiday year.

Findings of facts about the claimant's grievances

The 2020 grievance

21. The claimant submitted a written grievance by email on 6 December 2019 to Chris Rumley, then Operations Manager at the Bolton depot. (p.70). The email was headed "grievance regarding unlawful deduction of holiday pay" and set out the deductions the claimant said had been made from his holiday pay for 11-14 September 2019 and 13-17 October 2019. The email said that "in order to protect my position regarding any claims I would be grateful for a response as soon as possible."

22. A few days later Mr Rumley told the claimant he would look into the matter and if the claimant had been paid incorrectly would ensure that any monies owed would be paid. In mid to late December, Mr Rumley was moved to the Atherton Depot and Mr Butler took on his role as Operations Manager at the Bolton Depot. Before he left the depot, Mr Rumley had confirmed to the claimant that he had not forgotten about his email and had forwarded it to Mr Butler who would deal with it. I find, however, that Mr Butler did not respond to the grievance.

23. On 12 March 2020 the claimant submitted a further grievance by email to Mr Butler (p.71). It covered the deductions from 11 September 2019 to 15 February 2020. It did not refer back to the previous emailed grievance to Mr Rumley. Attached to it was a spreadsheet explaining how the claimant calculated the deductions made.

24. Mr Butler acknowledged that email on the same day, explaining that he was on leave until 19 March. He said he would "schedule within 7 working days and we will be in contact with you to hear your grievance" (p.76). The claimant acknowledged Mr Butler's email on that same day.

25. The claimant was furloughed from 3 May 2020 to 15 June 2020 and was on leave for two weeks before furlough began.

26. On 13 May 2020 the claimant sent Mr Butler a further email raising a grievance in relation to deductions from wages for those two weeks' leave. He

referred back to his grievance dated 12 March 2020 (although he did not "chase up" in the sense of noting he had not had a response). On the same day, Mr Butler responded by email to say that the Holiday Pay was worked out at his normal rostered duties and that C had received the average holiday payment that he was entitled to (p.83). There were further exchanges by email that day in which the claimant asked Mr Butler to "escalate his grievance to the next level" to which Mr Butler responded that he would arrange to hear the grievance once the respondent was back in normal operation (p.84).

27. The claimant returned to work from furlough on 15 June 2020. There was no evidence that Mr Butler took steps to hold a grievance meeting or otherwise progress the grievance. Mr Butler said he did not have a chance to do this before the claimant initiated ACAS Early Conciliation in relation to his claim in July 2020.

28. Mr Butler explains the failure to deal with the substance of the grievance by citing the impact of COVID on the respondent's business from March 2020 onwards. The respondent furloughed its employees in 4 tranches in March and April 2020. It continued to run a 24 hour service albeit one which reduced over time to about 50% of the normal service. Mr Butler says he took on the workload of 2 Staff Managers who were furloughed. He was responsible for ensuring the operation kept running. He said that this included dealing with matters of staff discipline.

The 2021 grievance

29. On 23 April 2021 the claimant raised a grievance and emailed it to Mr Butler. That grievance related to an underpayment of holiday pay for leave taken between 26 January 2021 and 16 April 2021. The grievance set out in detail how much the claimant calculated the underpayment to be in relation to each day's leave. He attached a spreadsheet showing how he had calculated those amounts.

30. Mr Butler did not respond until 13 May 2021. He had in the meantime, on 26 April 2021, referred the grievance to Kirstie Stuart, HR Manager. There was no evidence as to why there was a delay of over a fortnight until Mr Butler responded to the grievance in the email. Mr Butler proposed arranging the grievance hearing to take place on the following Tuesday 18 May, but the claimant was on annual leave until 25 May. Mr Butler replied on the same day setting 10.30am on Tuesday 25 May as the date and time for the grievance hearing. The claimant attended the respondent's premises on 25 May but was told that Mr Butler was not available to speak to him. Later that day he did manage to speak to Mr Butler, who said that he would try to sort out something for the next day. He did not do so and on 1 June the claimant emailed him again adding a grievance in relation to a further deduction for the leave he had taken on 18-22 May 2021. On the same day (1 June) Mr Butler emailed back and said that he was "arranging for the process to be started tomorrow afternoon". The grievance meeting was therefore set and took place on 2 June 2021.

31. Present at the grievance meeting were Mr Butler and Julie Briscoe, an administrative assistance, who took notes. At the grievance meeting the claimant explained that the reason he said he had been underpaid was that there had been a change in the law so that voluntary overtime should be included. Mr Butler told him

that because he had an outstanding court case (i.e. the First Claim) he could not do anything in case it would prejudice that case. The claimant said that he understood but that that part of the Tribunal case was "parcelled off". I take that to mean that his current grievance did not relate to the deductions which were covered by the First Claim. Mr Butler made it very clear that his decision was that he could not decide the grievance for fear of prejudicing the First Claim. He did not accept the claimant's argument that this grievance related to a separate matter. I find that Mr Butler did effectively deliver the outcome of the grievance during that hearing, i.e. that he told the claimant that it was not possible to resolve the grievance because of the pending First Claim.

32. On 24 June 2021 the claimant wrote to Mr Butler asking for his final decision regarding the grievance and copies of the minutes of the meeting. Mr Butler sent that by letter dated 16 June 2021 (page 183). I find that although the grievance outcome letter was dated 16 June 2021 it had not been sent to the claimant. It was not actually sent until the claimant had sent a further chasing email on 11 July. Mr Butler then sent the grievance hearing outcome letter and the notes by email on 12 July 2021.

33. The outcome letter confirmed that Mr Butler was unable to give the claimant an outcome due to the pending First Claim, which was due to be heard in February 2022. The letter said that the company grievance procedure regarding this matter was "at an end" until the Tribunal decision. In other words, the grievance decision outcome did not allow any appeal. Mr Butler had said in the grievance meeting that the claimant did have a right to appeal but that they would "tell you the same thing", i.e. that there was no point appealing.

Relevant Law

Unlawful deductions from wages

34. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 ("ERA") says:

> **"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or**
>
> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."**

35. S.27(1) of ERA says:

> **"(1) In this Part 'wages', in relation to a worker, means 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 or otherwise"**

36. S.13(3) of ERA says:

> **"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."**

37. in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

Holiday Pay

38. The WTR provide a minimum entitlement of 5.6 weeks annual leave. Reg.13(9) provides that it cannot be carried over in to the next holiday year. Unless the contract provides for a different holiday year, the holiday year will start on the date of employment and then start of the anniversary of that date.

39. In terms of the pay used to calculate holiday pay, the starting point is ss.221-224 ERA. However, in **Bear Scotland and ors v Fulton and ors 2015 ICR 221** the EAT held that overtime should count for Holiday Pay. That applies where the overtime was required of a claimant sufficiently regularly to be normal remuneration. That decision was based on the requirement for "Normal remuneration" being required for compliance with the Working Time Directive. Since only the 4 weeks' holiday in regulation 13 WTR derive from that EU law, the same "normal remuneration" rule does not apply to reg.13A of the WTR, i.e. the additional 1.6 weeks not required by EU law.

40. In **Flowers and others v East of England Ambulance Service NHS Trust [2019] I.C.R. 1454** the Court of Appeal confirmed that "normal remuneration" for the purpose of compliance with the Working Time Directive included overtime where the pattern of overtime work was sufficiently regular and settled and that there was no separate requirement that the hours of work were compulsory under the contract.

41. Under the rules set out in ss.221–224 ERA, overtime does not count towards normal working hours except where it is both compulsory for the worker and guaranteed by the employer — S.234(3).

Time Limits

42. S.23(2) of the ERA says that an unlawful deductions claims has to be brought before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or (in the case of a series of deductions) beginning with the date of the last deduction in that series.

43. That time limit is extended by the rules relating to ACAS Early Conciliation so long as Early Conciliation is begun within that primary three-month time limit (**Pearce v Bank of America Merrill Lynch and ors EAT 0067/19**).

44. If the claim is brought outside that time limit the Tribunal does not have jurisdiction to hear it unless the Tribunal is satisfied (i) that it was not reasonably

practicable for the claim to be presented before the end of the relevant period of three months and (ii) that it was presented within such further period as the Tribunal considers reasonable (s.23(4) of ERA).

45. When it comes to the meaning of "reasonably practicable", the courts have said that that means "reasonably feasible" **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal confirmed that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

46. When it comes to ignorance of one's rights that can make it not reasonably practicable to present a claim as long as that ignorance is itself reasonable. In **Porter v Bandridge Ltd 1978 ICR 943, CA,** the Court of Appeal, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. An employee aware of a right to bring a claim can be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** EAT.

Time Limits and Series of Deductions

47. 'Series of deductions' is not defined in the ERA. However, in **Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221, EAT** Mr Justice Langstaff held that a gap of more than three months between any two deductions will break the 'series' of deductions. Although that decision has recently been doubted by the Court of Appeal in the case of **Smith v Pimlico Plumbers**, the Court of Appeal did not overrule it. If there is a break of three months in the series of deductions then it appears to me that I am bound to find that time ran from the end of the deduction prior to that three month break.

48. In **Ekwelem v Excel Passenger Service Limited (UKEAT/0438/12/GE), para 31** the EAT held that:

> "A series does not cease to be a series because on analysis and on judgment it is concluded that some part of it is not unlawful. This was asserted to be a continuing act [in that case, also a series of unlawful deductions] and it was a continuing act. The fact that the claimant cannot succeed on some part of it does not mean that the case was time barred".

49. The EAT's Judgment in **Ekwelem** was approved by the EAT in **Jhuti v Royal Mail (UKEAT/0020/16/RN)** subject to the caveat that there must be at least one in time proven act that infringes the relevant provision.

Uplift in compensation for failure to comply with the ACAS Code

50. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A"), states at subsection (2):

> **'If, in the case of proceedings to which this section applies, it appears to the employment tribunal that**

> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'**

51. In **Acetrip v Dogra UKEAT/0016/20/VP (18 March 2019)** HHJ Auerbach in the EAT said at para 103:

> "There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part."

52. In **Slade and anor v Biggs and ors 2022 IRLR 216, the EAT** confirmed that the discretion given to a Tribunal by s.207A is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range of 25% should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

53. In **Slade**, the EAT suggested that a Tribunal in applying s.207A "might choose to apply a four-stage test:

> a. Is the case such as to make it just and equitable to award any ACAS uplift?
>
> b. If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
>
> c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
>
> d. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?"

Discussion and Conclusion

<u>To which leave days should the higher rate of holiday pay apply?</u>

54. The respondent conceded that the claimant was entitled to be paid at the higher holiday pay rate in relation to any WTD leave.

55. It said that based on the Unite agreement that means the first 20 days of leave in any holiday year. The claimant did not put forward an argument as to why that was not correct. For the avoidance of doubt I find the effect of the Unite agreement was that the first 20 days of leave taken in any leave year were WTD leave days.

56. The claimant argued that the higher holiday pay rate should also apply to (at least) the additional leave under WTR reg.13A. He submitted that the Unite agreement suggested that the whole of the 5.6 weeks of leave granted by the WTR should be treated in the same way and paid at the same rate. He submitted there was no difference in quality between WTD and non-WTD leave. The same rules applied as to when the leave could be taken. I have some sympathy with the claimant but I do not find anything in the Unite agreement which requires that the non-WTD leave should be treated the same way as the WTD leave when it comes to holiday pay.

57. The different rules applying to the WTD leave do not depend on the practical differences between that leave and the non-WTD leave. The difference derives from the fact that the leave entitlement in WTR reg. 13 has to be interpreted so as to comply with the WTD and the case-law based on it. That is why reg.13 WTD leave has to be paid at "normal remuneration" (including regular and settled voluntary overtime), disapplying the provisions on a "week's pay" in Part XIV Chapter II of the Employment Rights Act 1996 which otherwise exclude voluntary overtime from the calculation of holiday pay. That exclusion only applies to WTD leave however. I find there is no scope for me to re-interpret the rules about calculation of holiday pay applying to non-WTD leave to require regular voluntary overtime to be included.

58. I find, therefore, that it is only the first 20 days' leave taken in any leave year which should be paid at the higher holiday pay rate.

<u>Which of the leave days taken by the claimant should be paid at the higher rate?</u>

59. I have found that the first 20 days of leave in any holiday year is WTD leave which should be paid at the higher leave rate. Of the dates within the claimant's First or Second Claims, that means:

a. In the holiday year 2019-20: 1 day - 11 September 2019.

b. In the holiday year 2020-21: the 20 days from 20 April 2020 to 11 March 2021 (inclusive).

c. In the holiday year 2021-20: the 7 days from 15 April 2021 to 22 May 2021 (inclusive)

60. For the respondent, Mr Gosling confirmed that if I did find for the claimant, the respondent accepted the calculation of holiday pay due set out in his Schedule of Loss in relation to each period of leave.

The time-limit issues on the First Claim

61. For the respondent, Mr Gosling submitted that the First Claim was submitted out of time. His argument was that the only date for which the higher rate holiday pay was due in the First Claim was 11 September 2019. The deduction in relation to that day was made from the claimant's pay on 20 September 2019 so the three month time limit for bringing an unlawful deduction claim ran from then. ACAS early conciliation in relation to the First Claim started on 4 July 2020 so the Claim Form was significantly out of time when it was filed on 20 August 2020.

62. The claimant submitted that his claim was in time because it was made within three months of the last of a series of deductions. The claimant's case is that the last in that series was the deduction related to leave on 26 July 2020. That deduction was made from his weekly pay for 6 August 2020. Mr Gosling's response to that was that deductions which were found not be unlawful deductions could not count as part of such a series and so did not assist the claimant.

63. The first problem I find with Mr Gosling's argument is that it ignores the fact that the First Claim included a claim relating to a series of unlawful deductions made during the first 13 days of WTD leave for the holiday year 2020-2021, i.e. for the leave beginning 19 April 2020 up until a final deduction relating to the leave on 26 July 2020) in addition to the claim for the 11 September 2019.

64. The respondent's response to the First Claim does not concede that the 13 days between 19 April 2020 and 26 July 2020 are WTD Leave payable at the higher holiday pay rate. However, I find that the holidays for those 13 days were payable at the higher holiday pay rate and that the respondent has therefore made an unlawful deduction in relation to them. The time for bringing a claim would start to run from the last of those unlawful deductions i.e. the deduction relating to 26 July 2020 which was made on 6 August 2020. Early conciliation in relation to the First Claim was started on 5 July 2020, the EC certificate issued on 5 August 2020 and the claim issued on 20 August 2020, within the three-month time limit, being within three months from the last in the series of deductions. The claims in relation to those 13 days of leave taken in 2020-2021 are, I find, in time.

65. There is, however, a three month gap between the deduction on 11 September 2019 and the first of the deductions in the holiday year 2020-2021. Mr Gosling submitted that in calculating a series of deductions, no deduction could be included if it was actually lawful. If that is right then there would be a gap of more than three months between the September 2019 deduction and the series of deductions I have found to be in time from April 2020 onwards. It seems to me based on the authorities that when calculating whether there has been a series of deductions the focus is on the deductions rather than whether they are lawful or unlawful. The case of **Ekwelem v Excel Passenger Service Ltd (UKEAT/0438/12/GE)**, as I understand it, means that even if a deduction is subsequently found not to be unlawful it can count as part of a series of deductions for time limit purposes. That means that any "deductions" made between the unlawful deduction relating to the 11 September 2019 leave and the series of unlawful deductions relating to the holiday on 19 April 2020 onwards. The claimant's case is that there was a series of deductions relating to the leave dates

taken between 12 September 2019 and 15 February 2020. There is no three month gap between any of those deductions. Although I have found that those deductions from 12 September 2019 up to and including 15 February 2020 were not unlawful (because they were not WTD Leave and therefore payable at the lower holiday pay rate), they count as part of the series of deductions in light of the decision in **Ekwelem v Excel Passenger Service Ltd (UKEAT/0438/12/GE)**. On that basis I find that the deduction relating to the 11 September 2019 leave was part of a series of deductions the latest of which was on 6 August 2020 (relating to the leave on 26 July 2020). The claim was brought within three months of the end of that series and therefore the deduction relating to the 11 September 2019 is also in time.

Failures to comply with the ACAS Code

The grievances relating to the First Claim

66. When it comes to the grievances raised by the claimant in relation to the First Claim, I accept that COVID would have had an impact on Mr Butler's ability to progress the grievance from around March 2020 onwards. There was no real explanation about why the respondent (either through Mr Rumley or Mr Butler) did not progress the claimant's original grievance dated 6 December 2019. There was also no real explanation as to the delay from 15 June 2020 onwards when the claimant returned to work after furlough. The reason for delay during furlough (the absence of Staff Managers and Mr Butler having to cover their workload) would not seem to apply after that.

67. The ACAS Code provides that a grievance meeting should be held without unreasonable delay (para 33). That was not done in this case. Even being generous to the respondent and taking the date of 15 May 2020 as the date when the claimant "escalated" his grievance to a formal one as the starting point of the process there were no further steps taken to arrange a meeting even when the claimant had returned to work after furlough. The respondent took no further steps to progress setting up a grievance meeting. I do not find that the initiating of early conciliation by the claimant was a reason not to progress the grievance at least as far as holding grievance meeting. Even if it were, early conciliation was not initiated until 5 July 2020 giving at least 3 weeks form when the claimant returned to work after furlough to progress the grievance.

68. On that basis I do find that there was an unreasonable failure by the respondent to comply with the ACAS Code in relation to the grievance relating to the unlawful deduction of holiday pay in the First Claim. It failed to hold a grievance meeting or otherwise progress the grievance to outcome. I may in those circumstances increase the compensation for the matters in the First Claim if I consider it just and equitable to do so.

69. I have decided that it is just and equitable to increase the compensation. There were no steps taken to progress the grievance. That left the claimant with no option but to go to the Tribunal. Taking into account the size and resources of the respondent organisation but balancing against that the impact of COVID for some of the relevant period, I find that the appropriate increase of compensation is 15%. That reflects the fact that there was a failure to progress the grievance which

ultimately left the claimant with little option but to issue the First Claim. Bearing in mind the guidance in **Slade** I have decided not to award the full 25% uplift. That reflects the fact that Slade suggests that maximum amount should apply to the most egregious cases. It also reflects the fact that some of the delay was due to the impact of COVID but also to reflect the fact that the claimant's grievances did not relate to all the deductions included in the First Claim.

The grievances relating to the Second Claim

70. I find that there was an initial delay in dealing with the claimant's grievance. There was an initial delay of nearly three weeks before Mr Butler set up the grievance meeting. He then did not attend the grievance meeting set for 25 May and rearranged it for a week later. The grievance meeting did therefore take place about four weeks after the initial grievance was raised. The claimant then had to chase for the outcome of the grievance in writing. I did find, however, that the substance of the grievance outcome was given during the hearing itself. The letter giving the outcome did not refer to the claimant having a right to appeal. In the grievance meeting the claimant had been told that there was no point in appealing because any appeal hearing would reach the same conclusion, i.e. that there could be no outcome for the grievance until there had been a legal ruling on the issue of appropriate rate of holiday pay.

71. The claimant also raised a complaint about the outcome of the grievance. In answer to my question, he agreed that his issue with the outcome was that it was effectively kicking the issue into the long grass. The grievance meeting was in June and this hearing was not until seven months later. Mr Butler did not provide a reason for the delay in responding to the grievance initially or the complaint that he did not provide the outcome in writing. I do, however, find that a grievance meeting was held and the outcome was communicated during the meeting itself, albeit not perhaps definitively. The ACAS Code however (paragraph 40) states that following the grievance meeting a decision should be communicated to the employee in writing without unreasonable delay. That paragraph also sets out that the employee should be informed that they can appeal if they are not content with the action taken. That was not done in this case.

72. I do find that there were flaws in the way that the grievance was conducted. I do find that there was an unexplained delay in holding the initial grievance meeting. I do find that there was a failure to communicate the written decision without unreasonable delay (and without the claimant having to chase Mr Butler twice). I also accept that the claimant was not told he had a right to appeal. I do not think that the respondent can be criticised for the decision it took. Given that the issue at the heart of the grievance was the legal position as to entitlement to holiday pay, I do not think it was unreasonable for the respondent to take the view that that was a matter which would have to await a legal ruling from the Tribunal. I do consider, however, that there were unreasonable failures to comply with the ACAS Code and I that I may in those circumstances increase the compensation in relation to the Second Claim if I consider it just and equitable to do so.

73. The claimant conceded that he had not suffered a significant loss as a result of the delays in holding a grievance meeting and providing the written outcome. I do

not take the view, however, that it is incumbent on a claimant to prove loss in order to make it just and equitable for me to increase compensation. In any event, the delay did cause the claimant to have to chase Mr Butler for the outcome of the grievance and to set up the grievance meeting in the first place. I do take the view that the breaches of the Code in this case were more "technical" breaches than the complete failure to deal with the grievance in relation to the First Claim. However, taking into account the resources of the respondent I have decided it is just and equitable to increase the compensation in relation to the Second Claim by 5%. That reflects the fact that not all the deductions included in the claim were raised in the grievance.

Calculation of Remedy

74. I have found that there were unlawful deductions of holiday in relation to the leave dates I have set out in paragraph 59. Those dates should have been paid at the higher holiday pay rate.

75. Mr Gosling at the hearing confirmed that the respondent did not dispute the claimant's calculation of the amount of deduction in relation to each underpaid holiday day. I have set out in the table below the date to which the leave relates, the date of the unlawful deduction, the amount of the unlawful deduction and the amount after application of the uplift for failing to comply with the ACAS Code.

Leave Dates	**Deduction dates**	**Amount deducted**	**ACAS uplift**	**Amount awarded**
Leave year 2019-2020				
11 September 2019 (1 day)	20 September 2019	£90.91	15%	£104.54
Leave year 2020-2021				
20,21,22,24,25 April 2020 (5 days)	30 April 2020	£386.12	15%	£444.04
27, 28, 29, 20 April 1 May (5 days)	7 May 2020	£386.12	15%	£444.04
8 May 2020 (1 day)	14 May 2020	£83.54	15%	£96.07
14 June 2020 (1 day)	25 June 2020	£77.23	15%	£88.81
26 July 2020 (1 day)	6 August 2020	£73.44	15%	£84.46
Total deduction falling within the First Claim = £1097.36 **Total – deductions falling within First Claim (inc. 15% ACAS uplift) = £1261.96**				
26, 27 January 2021 (2 days)	4 February 2021	£141.95	5%	£149.05
18 February 2021 (1 day)	24 February 2021	£70.70	5%	£74.24

25 February 2021 (1 day)	4 March 2021	£70.35	5%	£73.86
8, 9, 10 March 2021 (3 days)	18 March 2021	£209.16 (£349.86 divided by 5 x 3)	5%	£219.62
Leave year 2021-2022				
15, 16 April 2021 (2 days)	15 April 2021	£136.85	5%	£143.69
18, 19, 20, 21, 22 May 2021 (5 days)	20 May 2021	£334.91	5%	£351.65
Total deduction falling within the Second Claim = £963.92 **Total of deductions falling within second claim (inc. ACAS uplift) = £1012.11**				
Total compensation payable for unlawful deductions = £2274.07				

Employment Judge McDonald
Date: 16 March 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
17 March 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case numbers: **2413360/2020 & 2409239/2021**

Name of case: **Mr M Patel** v **Diamond Bus (North West) Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 17 March 2022

"the calculation day" is: 18 March 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.