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THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms M Neilson

v

Dentons UKMEA Legal Services

Heard at: London Central

On: 30 October 2017

Before: Employment Judge Goodman

Members: Mr R Pell
Mr J F Nobleunn

Representation:

Claimant: Ms C Rayner, Counsel

Respondent: Ms A Mayhew, Counsel

RECONSIDERATION RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the Judgment sent to the parties on 22 December 2016 is varied after reconsideration as follows:

1. The respondent is ordered to pay the claimant holiday in the sum of £1,668.46.
2. Holiday pay is not to be calculated by including annual bonus.

REASONS

1. This was a reconsideration hearing on two applications, one by the Claimant and one by the Respondent. The Tribunal by gave a decision with oral reasons at the conclusion of a hearing on 20-21 December 2016, and written reasons were sent to the parties on 10 March 2017.

That decision included that the Claimant's claim for holiday pay was out of time, but a declaration was made as to ongoing entitlement to holiday pay.

2. The claimant applied for reconsideration of the decision that her holiday pay claim was out of time. The respondent applied to reconsider the inclusion of bonus payments in the calculation of holiday pay.

Claimant's application

3. We deal first with the application by the Claimant to reconsider the decision for a holiday pay claim was out of time. The Claimant wrote to the Tribunal twice making applications to reconsider. In the first one, on 5 January 2017, she said she had some emails from her former solicitors that her daughter had discovered, about the time she tried to go to ACAS. No more detail was given. In a Rule 72 consideration on 9 January, it was decided that as there was no explanation why these emails had not been brought to the attention of the Tribunal at the time, there was no reasonable prospect of establishing that it was in the interest of justice to reconsider.
4. After being sent the detailed reasons for the decision, the Claimant applied again, and on this occasion disclosed that she had been to ACAS on an earlier occasion than had previously been known. On this basis, the Tribunal ruled (sent to parties on 10 March 2017) that it would be in the interest of justice to reconsider the Respondent's application (on grounds that they had not had a proper opportunity to argue the point about including bonus in holiday pay) and then that while it was surprising that the Claimant had not brought the existence of an earlier Early Conciliation Certificate to the attention of the Tribunal before, (not least in August 2016 when her claim against one of the Respondents she had named was struck out because there was no Conciliation Certificate, and again at a case management hearing) it was decided that it would be in the interest of justice to reconsider it at the same time as the Respondent's application.
5. There are two relevant tests in law about time limit for claims. The test for the claim under the Employment Rights Act for wages and holiday is whether it was not reasonably practicable to present a claim within three months, as

extended for early conciliation. The second test in respect of the claim brought under Section 15 of the Equality Act 2010 is whether it is just and equitable to allow the claim to proceed out of time. The latter is more lenient to late Claimants.

6. The relevant facts are that the claim is for pay for holiday which the Respondent allowed the Claimant to take in December 2015 and January 2016, 40 days, being two years' entitlement. The last date when it should have been paid was the 31 January 2016, the Tribunal having today had available a sequence of payslips which showed that payday was routinely the last day of the month, that being the last of series of non-payments. The Tribunal decided on analysis of the contract documents that she was entitled to holiday pay, and only disallowed the claim it because it was out of time, taking 31 January as the date from which time runs, to 30 April, subject to the early conciliation provisions and in particular Section 207 (B) of the Employment Rights Act 1996.
7. As we now know, the Claimant in fact went to ACAS on 21 April 2016. She named as her employer Dentons EMEA LLP and a certificate was issued for that named respondent, for which Day A was 21 April 2016 and Day B was 4 June 2016. The Claimant issued proceedings on 4 July 2016, and having regard to the wording of Section 207 (B) (4) we consider that it was just in time by virtue of that certificate.
8. However, Dentons EMEA LLP was not the employer. There was scope for confusion about the identity of the Claimant's employer: this is clearly shown in an email she sent to ACAS, who presumably would have asked her some questions about it, which has been introduced by the Respondents today. The ACAS Conciliator wrote to the Respondent's Gilla Harris, (the Claimant's boss) on 3 May 2016, notifying them of a claim made, and reproduced in italics the text of the email from the Claimant which says: "Thank you for your email, my response to your questions are as follows:-

1. Dentons UKMEA LLP is the name of my employer. However, my payslips states Dentons UKMEA Legal Services on it.”

She then answered a number of questions about the nature of the dispute, and identified Ms Harris as the partner in Dentons UKMEA LLP who was her boss.

9. We also know that on the 20 May 2016, the Claimant went to ACAS again for early conciliation, this time naming Dentons EMEA Legal Services as her employer. A certificate in this name was issued for which Day B was 4 July. Calculated by reference to *that* certificate, the claim she presented was out of time.
10. When she presented her claim to the Employment Tribunal, she identified both LLP and Legal Services as Respondents, but gave the same Early Conciliation Certificate number for both, that of the later certificate which had named Legal Services. The matter was referred to the Regional Employment Judge, on the basis that the Amendment Regulations of April 2013 require a separate certificate for each Respondent. The claim against LLP was struck out on the basis that there appeared to be no Early Conciliation Certificate.
11. That letter was sent to the Claimant on 10 August 2016. It included the set of questions and answers which would have guided her to the procedure to adopt if she thought that this decision was wrong, in particular if the Claimant had noted that she had been struck out on the basis of not having got an Early Conciliation Certificate when she had. The Claimant however took no action; she says that this is partly because of her underlying depression and anxiety, a prolonged and relapsing condition, and also because at the time she was particularly stricken as her mother was ill, and we know that her mother died around 29 August 2016, so assuming that she was ill during that month the Claimant’s decision on what to do with that letter of 10th August is likely to have been affected by the fact of her mother’s death.

12. There was a Case Management Hearing to identify the issues in September 2016. The time issue had been identified on the ET3 by the Respondent: in their calculations the matter was out of time. The factors that would have to be considered as to whether it would be just and equitable to extend time, were identified on the Case Management note, but referred to the later certificate and as identified it was not known to anyone other than the claimant (and possibly the respondent) that there was a certificate until the Claimant made her reconsideration application.
13. Why was the Claimant in doubt, when she wrote to ACAS, about who her employer was? She identified LLP as her employer, but said her payslip was Legal Services. It is now common ground that she was employed by Legal Services, which then provided her services to LLP. On reviewing the documents we concluded this may have been obscure to a reasonable employee, even to one who was not depressed.
14. In the original hearing bundle we have the contract terms of employment which nowhere identifies the employer, though of course the employer had a different name at that stage in any event.
15. The list of additional benefits talks about Wilde Sapte, the name of the previous firm.
16. There is a letter to the Claimant in July 2011 about bonus which comes from SNR Denton UK Services and states in the small print that "SNR Denton UK Services is an unlimited company registered and part of a collective trade name for an international legal practice known as SNR Denton". That would not say Legal services was her employer.
17. There was another letter to the Claimant dated July 2013 on letterhead paper headed Dentons, and in small print Dentons UKMEA Legal Services, about salary and bonus from a Dentons UKMEA Legal Services Team Leader.
18. There is correspondence between Zurich Insurance and Dentons LLP about the Claimant's entitlement to PFI which the Claimant would have seen as

part of her claim, which is about her salary replacement and appears to come from LLP.

19. The Respondent relies on an item placed in the reconsideration bundle, an email sent by Ms Harris on behalf of Dentons UKMEA Legal Services, copy to the Claimant's daughter and the Claimant's Landlord connectathomelet.co.uk, sending copies of Ms Neilson's last three payslips. The payslips all talk about UKMEA Legal Services, a point of which the Claimant was of course aware.

20. Drawing on the collective experience of the Tribunal, we are all aware of cases where employees may be in real doubt as to the correct identity of their employer, and that mischief was one at which the law on naming the employer in the statutory terms and conditions was aimed. Often in the public sector a series of TUPE transfers means that it may not be clear who the employer is at the time, or in the private sector with a TUPE transfer (as here perhaps) or where there are group companies and trading names which lead employees to be in genuine uncertainty. It seems to us that on the basis of the documents, the Claimant may have been genuinely – and reasonably – uncertain. She may have believed that Legal services as identified on the payroll documents was a payroll company and that her correct employer was LLP. In the course of her work as a legal secretary she will constantly have been signing off documents in the name of LLP rather than Legal Services, as may have identified herself as an employee of the company she worked in and for. It seemed to us this was relevant to whether it was reasonably practicable for the Claimant to go to ACAS with the correct name of the company in April 2016. Looking at a person's state of mind rather than what is physically possible, it seemed to us that any employee in the circumstances and having been sent these documents, might not know that she was employed by Legal Services not by LLP.

21. To us it is also a relevant factor that when the Claimant became aware - and this is likely to have come from Ms Harris herself telling ACAS that Legal Services was her employer and not LLP - she then went back to ACAS to get

a certificate in the correct number. Her only errors were (1) not identifying both numbers on the Claim Form and (2) failing to bring that to the attention of the Tribunal when sent the strike out letter on 10 August 2016, or any point thereafter.

22. She was represented by Stuarts Law at least up to February 2016. At that stage she told the Respondent that they were not involved; they may have been involved in the background but they are not named on the Claim Form, For a litigant in person to be confused on this point is unsurprising.
23. Her depression is also relevant. We have referred in the main reasons to the fact that from time to time the Claimant has been able to reason perfectly ably and to present argument and understand matters. We do not have detailed medical evidence of how it affected her and when, because the disability is admitted. The witness statements are not always clear, but we do understand from this hearing that her mother was ill and died towards the end of August, which would account against the background of depression, for not bringing the discrepancy to the Tribunal's attention at that point.
24. With regard to what reasonably practicable means, we are aware of the case law to the effect that this is a test for the Tribunal of what is practicably possible, rather than what was just and equitable, the more lenient test set out for the Equality Act. We are entitled to take into account of what is practicable the fact of a state of mind, as well as what is physically practicable. Having regard to the Claimant's state of mind as to the identity of her employer, it can well be said that it was not reasonably practicable for her to present in time when she went to ACAS on 21 April.
25. We take further into account case law on the application of the early conciliation provisions – *Compass Group v Morgan (2017) ICR 73* - to the effect that the purpose of the provisions is to ensure that Claimants have “structured opportunity” for approaching ACAS, and that Claimants who go to ACAS in good faith and make honest mistakes should not be penalised for some technical error in that respect. It seemed to us that the Claimant had

good reason not to be aware that LLP was in fact her employer, she presented a claim in the alternative, and overlooked that she had in fact got certificates for both. It seems to us clearly possible that had she identified the error in August 2016 and that she had a certificate for LLP, that claim would not have been struck out, and if so, a Tribunal would then have considered the reasonable practicability point. To conclude, we considered first of all that in the interests of justice it is a decision that should be reconsidered, on the basis that the Claimant had been to ACAS, and that most people would consider that to rule out her claim on a technicality because she had not produced it at the time for the reasons set out would not just, and secondly, having regard to the legal test of whether it would have been presented in time, our conclusion is that it was not reasonably practicable, by reason of the uncertainty, and that this claim should be allowed to proceed.

26. Having decided therefore that she was entitled to be paid 40 days holiday the last payment of which should have been received by her on 31 January 2016, and that this claim is in time, we looked to calculate that. Her pay at the time was £36,150 per annum gross, and by contract, holiday pay was calculated as $1/260^{\text{th}}$ of the annual payment. We calculated 40 days pay on that basis to be £5,561.53. We then had to allow for the fact that she was getting a PHI payment, which we found in our decision should be set off against the liability for holiday pay. Her PHI payment was calculated as 70% of her salary, so it seemed to us that the correct award for the balance of holiday pay due is 30% of the £5,561.53, meaning an award of £1,668.46.

Respondent's Application

27. The second part of this decision concerns the Respondent's application to reconsider the decision made that the annual bonus paid to secretarial staff should be included in the calculation of holiday pay.
28. The basis of the application for reconsideration was that the Respondent was not on notice that the Claimant was seeking to include bonus in the calculation of holiday pay. As recited in the reconsideration decision sent to

the parties on 10 March 2017, the claim originally identified and as clarified at the Preliminary Hearing was whether “(holiday) pay to be calculated by reference to her PHI payments or to her contractual pay”. The Claimant had not at that stage seen the text of any bonus scheme. At the hearing, the Claimant handed in a written submission of some length called “Claimant’s Defence of a Hearing”. In a section headed “Working Time Directive” at paragraph 28 she said: “Normal pay can include overtime and bonus and this should be considered when working out an employee’s normal remuneration”. The Respondent submission was made without taking that point into account. That point was raised at a very late stage, buried in a brief statement, not amplified by argument, in a long document. The schedule of loss did not identify it either. The conclusion on the review under Rule 72 therefore was that the issue had not been adequately identified such that the Respondent could address it:

“Understandably it was hard to analyse at the preliminary hearing because the details of the scheme are not available. The Claimant’s submission on the point was brief and not developed. It is possible the Tribunal may have reached another conclusion had the point be argued. It would have been fair for the Tribunal to invite the parties to address this on the point. It is in the interests of justice that the panel reconsiders the inclusion of bonus in the calculation of holiday pay after giving the parties an opportunity to set out their argument on this”.

29. At this hearing both sides have had an opportunity to present developed submissions on whether bonus should be included in the calculation of holiday pay or not.
30. As set out in the original decision, secretarial staff received a bonus which was a percentage of their salary if the firm as a whole met certain fixed term targets. It was not related to their own efforts, or the amount of time they were at work. The terms under which bonus was paid was set out in paragraphs 15, 16 and 17 of the original Judgment and Reasons sent to the

parties on 10 March 2017: this was paid in July based on the 12 months accounting year ending the May before that. A bonus payment would be pro-rated to reflect part time working, maternity leave, and unpaid leave, and new entrants had to have worked 3 months. Some individuals would not get bonus at all: those subject to disciplinary action or performance improvement, or who left before the July pay day or handed in their notice before the 1st July, plus those with less than 3 months service by the end of the year. Documents in the reconsideration bundle showed that in July 2014 and July 2015, the firm met its targets and a bonus was paid to staff considered eligible.

31. The Tribunal concluded in paragraph 20 that the Claimant was not entitled to be paid bonus for periods when she was not at work or in receipt of company sick pay, but did conclude that holiday pay should be calculated by a proportion of the bonus that would have been paid had she been at work. It is that second part that the Tribunal is invited to reconsider after reviewing further argument.
32. As set out in the original decision, the amount of holiday pay is stated in regulation 16 of the Working Time Regulations 1998 to be at the rate of a week's pay, by reference to sections 221 to 224 of the Employment Rights Act 1996. Section 221 is that about where pay does not vary with the amount of work done in the period, and "is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week". Section 222 deals with employees whose pay differs from week to week because it relates to which days of the week he has worked, or which times of day he has worked. In that case, a reference period is taken of 12 weeks and an average worked out.
33. In the original decision the Tribunal considered the holiday pay cases, *British Airways plc v Williams* [2011] IRLR 949, *Bear Scotland Limited & Others v Fulton & Others* [2014] UKEAT 0047/13/0411 and *Lock v British Gas* [2016] EWCA Civ 983. In addition at this hearing the Tribunal was further referred

to *Patterson v Castlereagh Borough Council* [2015] IRLR 721, a decision of the Northern Ireland Court of Appeal, and to the *Dudley Metropolitan Borough Council v Willetts* [2017] IRLR 870, a decision of the Court of Appeal.

34. The thrust of the Respondent's argument was this is a section 221 case, because pay does not vary with the amount of work done or the times of day or the week at which it is done. It has to be decided purely by reference to the contract of employment. In connection with the different and sometimes difficult factual scenarios thrown up by these cases, the Tribunal was taken to the final paragraph of *Lock* which referred specifically to the possibility of an annual bonus case, and raised the question "there may indeed be a question as to what his normal remuneration is and whether it is calculation ought to reflect the fact of his annual bonus and if so, how". It continues: "there may also be questions as to what, in any particular case, is the appropriate reference period for the calculation of the pay". *Lock* however was not proposing to answer these questions.
35. The Respondent then developed an argument as to the underlying purpose of holiday pay being that of making sure that employees actually take holiday and so get a rest from work. The Tribunal was referred to the decision in *Williams* (the British Airways pilot case) about taking a representative period and whether it would be right to take a 12 month reference period. We were asked to heed the *Patterson v Castlereagh* on the rationale behind the 2003 directive,

"as declared in paragraph 44 of the *Bear Scotland* decision and consistent with the principles explained about the CJEU, that a worker should not have any disincentive placed in his path that may lead him to not taking his holidays – if he comes to expect a certain level of pay as normal, then he should receive that during his holiday period. Whilst from the purely practical viewpoint, this may smack more a theory rather than reality in most instances, it is the rationale

that purportedly underpins the directive and drives the case law thereon”.

36. *Dudley Metropolitan Borough Council v Willetts* returned to this point. Reviewing the cases in the opinion of Advocate General Trstenjak, reference is made to *Robinson-Steele v RD Retail Services Limited* that: “the level of holiday pay must correspond exactly to that of normal remuneration”, and in connection with *Stringer v HM Revenue and Customs & Another*: “it is necessary to ensure in this regard that the worker does not suffer any disadvantage as a result of deciding to exercise his right to annual leave. A prime example of such a disadvantage is any financial loss which ... would deter him from exercising that right”. CJEU had endorsed that opinion in *Williams* that: “an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU Law”, although “it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment”. It was the basis of the decisions in *Lock* and *Bear Fulton* that what was normal remuneration (paragraph 40) was that “it must have been paid over a sufficient period of time. This will be a question of fact and degree”.
37. The Respondent also argued the difficulties of the practical consequences for the employer in that the bonus decision was made once a year looking back over 15 months and that it would be difficult to assess prospectively when how much bonus should be included in the calculation of holiday.
38. The Claimant argued the bonus scheme was part of the contract of employment and so part of the pay for section 221. It was contractual because (1) if she had been at work she would have received it in those years; (2) it was a long-standing scheme, paid regularly, and (3) in previous years staff had received something even if targets had not been met; these discretionary payments were made to satisfy the expectations on both sides.

39. It is argued that the reference period was not a difficulty because the bonus that was paid related to all weeks, whether working or on holiday, so an employer would simply pay that fraction of the annual bonus pay that was represented by one week. The remuneration payable included 4 weeks' holiday. Holiday pay should include a part of the annual bonus and be increased by that amount.
40. The Claimant too relies on the dicta in *Dudley Metropolitan Borough Council v Willetts* about disincentives if a Respondent is correct in not including bonus and holiday pay, it is an indisincentive if: "any time you are away we will reduce by 4 weeks and the effect is discriminatory". The tribunal was urged to take a broad view, that to fragment pay between normal salary and bonus would be unduly restrictive.

Discussion

41. The Tribunal reached the following conclusions.
42. All contractual remuneration was at a fixed rate per annum, and did not vary with the amount of work done or time of the day or week in which it was done.
43. The bonus scheme had its own conditions, as set out. Those conditions relate to particular circumstances such as whether the employee is a satisfactory worker, or about to leave, or has in fact been at work (the conditions for maternity leave and longer term sickness absence). Payment does not, we note, depend on how much holiday an employee has taken.
44. If we focused on the purpose of holiday pay, and the underlying rationale for the various decisions made on commission, voluntary overtime, compulsory overtime, and references to employers trying to fragment payments so as to minimise their obligation to pay holiday pay, we concluded that this bonus scheme was not in this group. It was very clear from the provisions for payment of bonus that it made no difference to an employee's entitlement to

bonus whether he took holiday or not. Whether bonus was included or not included in the holiday pay, did not enter into an employee's decision whether to take holiday, as holiday would be calculated by reference to his normal remuneration (whether that includes the bonus payment or not) regardless whether he decided to take 2 days holiday or the full entitlement. Bonus would not be affected by the amount of holiday he took either. A rational employee would not decide whether to go on holiday by reference to the effect of that on any payment of annual bonus.

45. To some extent that outcome is confirmed by the subsidiary argument raised by the Respondent, that in putting bonus in the calculation of holiday pay, there was an element of double recovery. Those who were entitled to bonus because of conditions unrelated to their hours of work or even their individual effort would be doubly rewarded.
46. We concluded, following full submissions on the point, that we had been wrong to allow that bonus should have been included in normal remuneration when calculating holiday pay.

Employment Judge Goodman on 10 November 2017