



## EMPLOYMENT TRIBUNALS

**Claimant:** Dr H Dahwa

**Respondents:** Hywel Dda University Local Health Board

**Heard at:** Cardiff (by video)

**On:** 9 and 10 December 2024

**Before:** Employment Judge R Brace

### Representation

Claimant: In person

Respondent: Mr G Pollitt (Counsel)

## RESERVED JUDGMENT

1. The Claimant's worker status within the meaning of s.230(3)(b) Employment Rights Act 1996 and Regulation 2 Working Time Regulations 1998 only applied during the performance on each assignment.
2. The Claimant did not continue to accrue annual leave when not undertaking an assignment for the Respondent and the Claimant's last assignment was when she worked her last shift on 30 July 2021.
3. The Claimant's complaint for compensation for unpaid accrued annual leave under Working Time Regulations 1998 was not presented within the applicable time limit. It was reasonably practicable to do so. The complaint is therefore dismissed as the Tribunal has no jurisdiction to consider such a complaint (Reg 30(2) Working Time Regulations 1998).
4. The Claimant's complaint for unauthorised deduction from wages is also dismissed for lack of jurisdiction as the complaint was not presented within the applicable time limit when it was reasonably practicable to do so. Further, the complaint was presented more than two years after the last deduction (in any event (s.23(4A) Employment Rights Act 1996) and the Tribunal has no jurisdiction on that basis to consider the complaint of unauthorised deductions.

## Reasons

### Introduction

#### Background and claims

1. The Claimant is a registered General Medical Practitioner (“GP”) who had been engaged by the Respondent to provide medical bank services from March 2021. On 21 March 2024, the Claimant filed an ET1 claim form, which attached a Particulars of Claim in which she contended that she was a ‘worker’ under s.230(3) Employment Rights Act 1996 (“ERA 1996”) and was entitled to paid leave pursuant to Reg 13 and 13(A) Working Time Regulations 1998 (“WTR 1998”) [8].
2. She asserted that she had been denied the right to take the correct amount of paid holiday during her engagement as a worker by the Respondent in breach of Reg 16 WTR 1998 and claimed that this was an unlawful deduction of wages contrary to established caselaw including **Smith v Pimlico Plumbers Ltd** [2022] EWCA Civ 70, **Harper Trust v Brazel** [2022] UKSC 21 and **Chief Constable of the Police Service of Northern Ireland v Agnew** [2023] UKSC 33. She claimed compensation for the duration of her contract with the Respondent which she contended continued until terminated on 31 December 2023.
3. The Respondent resisted the claims within its ET3 Response [23]. It accepted that the Claimant was classed as a ‘worker’ when on assignment with the Respondent under their terms of engagement for medical bank workers “Terms of Engagement” and Medical Bank Register Principles and that the Claimant was entitled to paid annual leave but contended that the provisions for entitlement to paid annual leave under the WTR 1998 were set out in the Terms of Engagement, that such terms were clear that holiday would accrue only when on assignment.
4. They asserted that the Claimant had been paid for any remaining accrued but untaken leave on 20 September 2021 on the conclusion of the last assignment using a 12.07% calculation method. They contended that the Claimant provided her services as a worker under a series of contracts, with no continuing relationship or overarching contract between assignments and that there was no mutuality of obligation between assignments and none at all, in any event, after the Claimant’s last assignment which they contended was 27 August 2021 and that she was paid for accrued untaken leave on 20 September 2021. They resisted the claims on the basis that the Claimant had been paid what she was entitled to, denying her claims.
5. In the alternative, they pleaded that if the Tribunal accepted that the Claimant had remained engaged under a contract under she was removed from the Bank Register on 31 December 2023, the rate of pay for leave would be nil given that no work had been undertaken in any relevant reference period and/or this was not a case whereby the Claimant had been denied or prevented from taken

leave and that three leave years had ended since the Claimant last worked and that any leave had been lost and could not be carried over.

6. The Respondent further pleaded that the claims were time-barred.
7. At a case management preliminary hearing on 14 June 2024, Judge Harfield discussed such claims and listed the claims and issues within her case management order [36].
8. At that hearing the Claimant confirmed that her case was not that she accrued, but did not take annual leave, but that she did take annual leave throughout the overarching contract and that the annual leave that she took was unpaid or not fully paid to her and that payment was due to her on termination of her contract which she claims was 31 December 2023 and that she was bringing claims for alleged failure to pay holiday pay under Reg 16 WTR 1998 or in the alternative a claim for unauthorised deduction from wages contrary to s.13 ERA 1996.
9. Judge Harfield confirmed that her list of issues may require updating but that she had structured the list of issues to set out both the Claimant's and Respondent's position.
10. The Respondent filed an Amended Grounds of Resistance [51] pleading to the claims as now particularised, further pleading that the date of the Claimant's last assignment was 30 July 2021 (not 27 August 2021,) that she was paid for that last assignment on 20 September 2021 along with a payment for accrued untaken leave. They again pleaded lack of jurisdiction as any complaint under Reg 13, 13A and 16 WTR 1998 was out of time, as was any complaint under s.13 ERA 1996 (§10 Amended Grounds of Resistance [52]). In the alternative, they pleaded that if the termination date was 31 December 2023, there was no breach of the WTR 1998 or unlawful deduction by reason of the Claimant not having undertaken any work or received earnings in the 123 weeks preceding the date of issue of her claim.
11. After the case management hearing, the Claimant had been ordered to produce, and had produced, a breakdown of the sums claimed by way of Schedule of Loss. The Claimant subsequently produced three Schedules of Loss which were contained in the Bundle on 11 July 2024 [250] (which the amended Grounds of Resistance responded to,) 30 September 2024 [252] and 21 October 2024 [254].
12. The Claimant confirmed at the outset of the final hearing that she was relying only on that set out in her third Schedule of Loss on 21 October 2024 at [254] in which she claimed that she had taken 9 days' leave between 5 March 2021 and 27 August 2021 for which she was not paid correctly and which based her losses on the differential between the holiday pay that she had received (on the 12.07% calculation method) and leave entitlement, which she had calculated as 4 days per year, at an average wage per shift of £759. She did not claim for annual leave accrued in 2022 or 2023.

13. She claimed for 3 days' leave, which she stated she had taken in the calendar year 2020/21, and 4 days out of the 6 days' annual leave which she stated she had taken in the calendar year 2021/22.

#### The hearing

14. The hearing was conducted on Cloud Video Platform with all attendees joining by video link and with no particular difficulties. Due to the time that the evidence and submissions were completed, insufficient time was left for consideration of the evidence and caselaw for an oral decision to be given and the parties were informed that a reserved decision would be sent out.
15. The Claimant sought adjustments for her dyslexia and it was agreed that regular breaks would be put in place and that the Claimant might need more processing time to respond to questions. This was permitted and the Claimant confirmed that the breaks given had been suitable for her. She was also afforded additional breaks at the end of her questioning of each of the Respondent's witnesses to ensure that she was satisfied that she had asked all the questions that she wished to ask. The Claimant was also afforded a lengthier break after submissions were made by the Respondent's counsel and before she provided her submissions at the end of the two day hearing.
16. The Claimant had made an application on 3 November 2024 to amend her claim further to bring an additional and new breach of contract claim in relation to an alleged incident that had arisen in April 2021, an amendment which would further require her to demonstrate that she was an employee not just a worker. That application was considered on the morning of the first day of the final hearing and was refused. Oral reasons were provided on the day of the hearing.

#### Evidence

17. Oral evidence was heard from the Claimant and, on behalf of the Respondent:
  - a. Ms Bethan Griffiths, Senior Medical Workforce Manager, and
  - b. Dr Louisa Morris, Clinical Director, GP and Clinical Lead for Same Day Emergency Care ("SDEC").
18. All witnesses relied on written witness statements and were subject to questioning by the other party and some questioning by the Tribunal.
19. I also had regard to an agreed bundle of documentation ("Bundle") of 291 pages and references to documents in this reserved judgment are denoted by [ ].

#### **Findings of fact**

20. I made the following findings of fact, based on the balance of probabilities on the evidence before me.

21. The Respondent is a large NHS local health board in West Wales providing healthcare services through amongst others, community and general hospitals. It operates a Medical Staff Bank (“Medical Bank/Bank”) i.e. a list of individuals who have undergone the relevant necessary recruitment checks to be able to perform work for the Respondent, used to source staff to cover areas where there was insufficient staffing to meet the needs of a particular service. Persons listed on the Medical Bank are offered work to cover staff absences or vacancies or at times of increased activity across a range of services provided by the Respondent.
22. The Claimant is a registered GP and in February 2021 contacted the Respondent having become aware that there may be opportunities working within its SDEC unit, a unit designed to provide ‘same-day’ medical treatment or investigation to patients [61]. At that point, SDEC was operating on a trial basis and not employing permanent staff due to funding. She asked for an application to ‘*sign up as a locum*’ in Same Day Emergency Care Service (“SDEC”) and also the Respondent’s Minor Injuries Unit (“MIU”).
23. She subsequently completed a Medical Bank Worker Request Form [64] and was emailed by Ruth Jones (Medical Workforce Assistant) on 17 February 2021, who confirmed to her that she had been engaged as a Medical Bank Worker on the Respondent’s Bank Register of Medical Bank Workers. The email confirmed that the rate was £80 per hour and that the ‘*hourly rate is inclusive of an element of European Working Time Directive Regulation Annual Leave payment ... as set out in the Health Board’s rate card.*’ [70]. The engagement was stated to be subject to references and checks including a satisfactory occupational health check and completion of payroll documentation.
24. On 18 February 2021, the Claimant returned a completed Commencement Form [73] and Starter Form together with further relevant and miscellaneous documents [70].
25. On 24 February 2024, Dr Louise Morris, Clinical Lead for SDEC, sent an email to a number of recipients on the Bank including the Claimant, indicating that there was a rota of shifts and there was ‘*gaps*’ to fill. She indicated that a rota of shifts would be approved on a monthly basis and asked for their availability to work shifts for April 2021 as further dates were subject to funding.
26. Later that day, the Claimant confirmed that she was available for two days’ work in March and was also available for most dates in April and that she was keen to get some shifts booked in [75].
27. On 5 March 2021, the Claimant was sent a further email by Ruth Jones welcoming her onto the Medical Bank register [77] and attaching:
  - a. Terms of Engagement, which she was asked to sign and return (“Terms of Engagement”) [78];
  - b. MIU GP rate card (“Rate Card”) [91];
  - c. A document entitled Bank Register Principles (“Bank Register Principles”) [88];

- d. The most recent MIU rota, indicating that there were currently 4 vacant shifts; and
  - e. Claim forms that would need to be completed by the Bank worker in order to be paid.
28. The Claimant was asked if she would like to cover any vacant shifts.
29. The Claimant signed and returned the Terms of Engagement later that day by email [97].
30. The Terms of Engagement included, amongst others, the following provisions, that:
- a. The document was not an employment contract and did not confer any employment rights other than that they were a 'Worker' on the Bank (§1.3);
  - b. Registration commenced on 5 March 2021 and that the Claimant was engaged as a Medical Bank Worker (§2);
  - c. Remuneration was an hourly payment of £80 inclusive of an element of 'European Working Time Directive Regulation Annual Leave payment' as set out in the Health Board's Rate Card (§3);
31. In particular, clause 4 of the Terms of Engagement provided that Bank Workers were engaged by the Respondent on a casual basis for work within the specific service area for which they were engaged and that there was no obligation on Medical Bank Workers to accept the offer of hours offered, but that having done so they would be expected to work them and that failure to present for agreed duties, not giving sufficient notice or frequent cancellation of booked shifts without acceptable reasons, could lead to removal from the Bank (§4.3).
32. Further, Clause 4.7 provided that if a Medical Bank Worker had continuously refused the offer of Bank Work and/or had not worked on the Bank for a period of 6 months or more they would be removed from the Bank, and that the designated Bank Manager may write to the person asking them if they want to continue to be registered on the Bank. Clause 7 provided that the hourly rate was inclusive of payment representative the European Working Time Regulation annual leave entitlement at a rate of 12.07%.
33. The Bank Register Principles provided, amongst other matters, that:
- a. the work was ad hoc, not permanent and that workers were required at short notice often to provide emergency temporary cover (§1);
  - b. Workers had a right to raise a grievance, which would be dealt with in line with the procedures set out in the ACAS Code of Practice on Disciplinary and Grievance (§4);
  - c. Work on the Medical Bank was not counted as continuous unless it was full time and continuous for a period of not less than 3 months (§5); and
  - d. The hourly rate was inclusive of leave payment at the rate of 12.07% (§8).

34. To complete the picture, the Rate Card provided that the hourly rate was £70.35 and that annual leave payment (at 12.07%) was £9.65 such that the total hourly rate was £80 per hour. There were additional hourly rates for overnight and weekend and bank holidays [91].
35. The Claimant worked her first shift on 12 March 2021 [38] and it appears that by the end of March, hours for SDEC were altered to accommodate the higher number of patients using the service and that it was anticipated that for the foreseeable future the Claimant would be able to work and was generally rostered to work Fridays, as reflected in the internal email Dr Louisa Morris sent to staff on 18 March 2021 [136].
36. The Claimant responded the following day confirming that she was not available on 9 April 2021 and unsure about weekend work. She asked for shift timings for April and May [137]. She did not in fact work on 9 April 2021 and later that month also confirmed that she was unavailable on 2 April 2021 [139]. There was no challenge to the Claimant indicating that she could not work that date and I was not persuaded that there was any limitation on the Claimant's ability to refuse work, despite the rota that had indicated regular Friday availability.
37. Further the Claimant offered to work on 26 March 2021 but her offer was declined as the unit had no work to offer her [139].
38. On 29 March 2021, GPs including the Claimant were sent a further email by Dr Morris, listing some April shifts which required cover. The Claimant confirmed she would provide cover for one of those shifts, 13 April 2021 [140].
39. By the end of April 2021, Dr Morris had received confirmation of further funding to continue using Bank workers for SDEC for June and July 2021. Those working in SDEC, including the Claimant, were asked by Dr Morris on 28 April 2021 if they wanted to continue with their 'regular days' and whether they were any dates that they could not do [155]. She followed this up on 7 May 2021, with a populated rota for 3 May 2021-31 August 2021 asking for any dates of nonavailability or any further dates that they would like to do [156].
40. A few days later on 10 May 2021, the Claimant wrote to her indicating that she would like to '*stop doing SDEC for now so won't be available from end of July onwards*' [160]. The reasons for the Claimant deciding not to undertake further work on the Bank was not within my consideration as relevant for the purposes of these complaints and although the Claimant has included evidence within her written witness statement explaining her reasoning, no findings of fact are made in relation to that and the Respondent made no admissions in relation to them.
41. I found that there was nothing in these emails that indicated that this rota was set for the future three months or that the rota could not change subject to availability.
42. The Claimant gave verbal evidence that it was her 'understanding' from other colleagues that shifts could not be cancelled and that she was obligated to work

once rostered. That was the limit of her verbal evidence. She had not in fact cancelled shifts in the period from May to August.

43. I was not persuaded by the Claimant's evidence that she was obligated to work those dates and the evidence demonstrated the opposite, that even if rostered, shifts could be cancelled and workers could indicate that they were not available.
44. As a result of the Claimant's decision to no longer be available to work, the Respondent in the short term had no cover for a Friday and sought to advertise for a GP. Dr Louisa Morris asked Ruth Jones to contact all the GPs to see if there was any interest in picking up any sessions [168, 173]. By the end of May, the Respondent had sourced another GP to perform the work and the Claimant was removed from the rota circulations.
45. The Claimant has continued with work for various NHS bodies as a GP in the period since 2021, ( as she had also done during the same period that she had in fact provided work to the Respondent in March – July 2021,) as an employee or a worker and has not in fact contacted the Respondent's occupational health providers. Despite not referring to the issue in her pleadings or indeed in her witness statement (beyond her contact with them during her induction in March 2021,) the Claimant cross-examined the Respondent's witnesses on whether she could still avail herself of the services of the Respondent's occupational health providers during the period after July 2021.
46. Whilst the evidence was to an extent unclear from the Respondent's witnesses, this was not unexpected due to the lack of pleading from the Claimant or even reference in her own evidence leading to the Respondent's witnesses being taken by surprise by the issue. I accepted the evidence from Dr Louise Morris however, that if the Claimant had contacted the Respondent's occupational health provider in the period after June 2021, it was more likely than not that the provider would have enquired with the Respondent management as to whether the Claimant was entitled to contact them, for example asking about workplace adjustments and, once informed that she was not as she was not working for them at that point, would have referred the Claimant to her other and contemporaneous providers of work, as employer or organisation that engaged her as a worker. I accepted that as likely.
47. Further, I was not persuaded by the Claimant's evidence that she was covered by the Respondent's indemnity cover with the Welsh Risk Pool indemnity for the duration of March 2021- December 2023. Rather, any indemnity cover through the Respondent likely only covered her for the clinical work that she actually undertook for the Respondent on the specific assignments for them in the period from 12 March 2021 (her first session) to 30 July 2021, her last session. Any cover for other work was likely to be provided through other NHS providers when she worked as and when for them and not by the Respondent.
48. The Claimant did continue to receive emails and offers of work as late as March 2022 asking if she had any interest in doing SDEC sessions [224-241, 245]. She did not respond and at no time sought further work through the Bank with the Respondent following her last work day on 30 July 2021.



49. In the latter part of November 2023, the Respondent had removed the Claimant from its Bank list, as reflected in the completed 'Termination Form' [174]. The Termination Form indicated, on its face, that it was to be completed when an 'employee' is leaving the Health Board. Whilst such terminology was used, I found that this was simply because there was likely a lack of specific forms for workers and did not consider this to be relevant in my fact-finding regarding whether the Claimant was a worker for the duration of the engagement.
50. Whilst I did not hear evidence from Ruth Jones, who no longer works for the Respondent, I did have evidence from Bethan Griffiths, Senior Medical Workforce Manager, evidence which I accepted, that whilst the department aimed to review the Medical Bank every 6 months, this was not always undertaken particularly over the Covid-19 pandemic. I do not consider it necessary to make findings as to why there was such a delay in this case.
51. Either way, the document reflected that Ruth Jones had completed that form indicating that the Claimant's 'Last Working Day' was 21 November 2023. I found that on balance of probabilities, this was an error as the Claimant last was physically at work on 30 July 2021 (as defined in the Guidance Notes as being 'Last Working Day' [176]).
52. The Termination Form also stated that the 'Final Termination Date' was 21 November 2023 and that the reason for leaving was that she had not worked on the Medical Bank for over 6 months.
53. It also appears that completion of such a form generated a P45 for the Claimant, a P45 which was not sent to her until late January / early February 2024 [178] as on 1 February 2024, the Claimant emailed Ruth Jones indicating that she wished to raise an informal grievance as she had received her P45 that day. She stated that she did not agree to it being sent dated 31 December 2023 and asked if this could be reversed.
54. Ruth Jones emailed the Claimant back that day indicating that Medical Workforce was required to regularly cleanse its internal systems, including its ESR, and that part of that exercise was to clear all Bank staff that had not worked/been paid for 6 months or longer. The Claimant was asked if she wished to rejoin the Medical Bank.
55. The Claimant responded the same day. She did not answer whether she wished to rejoin the Bank but indicated that she wished to make a subject access request [181].
56. The Claimant did not subsequently pursue either a formal grievance or seek to rejoin the Respondent's Medical Bank. Rather, she entered into early conciliation on 1 February 2024 that ended on 23 February 2024 and on 21 March 2024 filed her ET1 claim at the Employment Tribunal [7].

## Submissions

57. The Respondent's counsel presented a Skeleton Argument and relied on the Respondent's Counter-Schedule of Loss [288]. I have not attempted to summarise those submissions but incorporate them by reference. Supplemental submissions were also permitted and I do not propose to repeat submissions where they are contained in the Skeleton Argument
58. In supplemental oral submissions, he reminded me that in each Schedule of Loss, the Claimant confirmed that she had taken leave but had not been paid for it and that the Claimant had claimed for 9 days' annual leave for the year from 12 March 2021, despite only working 24 shifts. He accepted that it was unfortunate that the Respondent had used a proforma Termination form and that terminology was confusing and erroneous.
59. With regard to the Claimant's reliance on the Welsh Risk Pool insurance he submitted that the Claimant had not given clear evidence on its operation and that it was plain and obvious that she could not rely on its terms more generally and only in respect of periods of working with the Respondent. He submitted that the issues regarding occupational health only became clear during cross examination and had the Respondent been aware that this was an argument that the Claimant was going to raise to demonstrate a continuing working relationship, there would have been more disclosure on what practices existed but that in any event the evidence was that in reality, the occupational health provider would ask why the worker needed their support and such support would not have been provided by the Respondent.
60. He submitted that as there was no mutuality of obligation, no obligation on either party between each assignment, then each assignment was a separate contract and the Claimant worked a series of one-day assignments. Counsel argued that **Pimlico Plumbers** (self-employed and no mention of holiday pay) was in stark contrast to the facts in this case, where the Claimant was a worker and was paid holiday pay for the work that she did undertake. He also argued that **Harper Trust** did not assist the Claimant as that caselaw related to term time workers. The Respondent's submissions on limitation were contained in the Skeleton Argument.
61. The Claimant submitted that she was on a continuous or umbrella contract i.e. a contract imposing mutual obligations whether or not she was working on an assignment and supported that position with an assertion that she did have entitlement to see Occupational Health at any time. She argued that **Harper Trust** referred to workers on irregular hours and was applicable to her case despite her not working term time only and that as a worker she would be entitled to four weeks' paid leave in accordance with the WTR 1998. She further relied on the decision in **Pimlico Plumbers** arguing that the Respondent had no register of leave and as a result she couldn't apply for annual leave and that as a result she was entitled to carry leave forward.

- 62. The Claimant also briefly referenced the EAT decision in **Addison Lee v Gasgoine** UAEAT/0289/17/LA in which the EAT upheld the Tribunal’s decision that the claimant in that case was a limb (b) worker within the meaning of Reg 2 WTR 1998 and in consequence entitled to holiday pay during the period when he was ‘logged on’ to the respondent’s app (the claimant in that case being a cycle courier), but did not articulate how it assisted her in this case.
- 63. At submission stage, she indicated that she considered that her Schedule of Loss was incorrect and that she now says that she should have calculated her leave entitlement from 12 March 2021, being the commencement of work and not on a calendar basis. On that basis, she was claiming that she should have been paid for 4 days’ leave per year as she only worked one day per week. She argued that applying **Harper Trust** her 2021 entitlement would have rolled over to date of termination being 31 December 2023.
- 64. The Claimant gave credit for the amount of paid annual leave entitlement that she had in fact received, acknowledging that she had received rolled up holiday pay using the 12.07% calculation method [246-249 ]and that for the period from 5/3/21-4/3/21, she had now calculated that she would be entitled to four days’ leave which she accepted that she had in fact taken as leave. She claimed the sum of £935.84 (£3036 less holiday pay received of £2,100.16) for the leave year March 21- March 22. She reiterated that she was not claiming anything from March 2022-March 2023 or March 2023- December 2023 leave years. She was further claiming the sum of £34.57 for pension contributions on that sum.
- 65. She made no specific arguments on any ACAS uplift.
- 66. She claimed that she had brought her claims in time as her ‘contract’ did not terminate until 31 December and there had been no indication that her contract had ended prior to that. As such, she did not look into claiming for holiday pay prior to that point and that as soon as she did know contract had ended, she applied to get holiday pay paid correctly.
- 67. She was asked to explain how she relied on **Agnew** but was not able to assist or to add anything other than it was authority for the proposition that a long series of deductions didn’t time bar a claim.

**Applicable law**

- 68. The relevant provisions of the Working Time Regulations 1998 are as follows:

Entitlement to annual leave

- 13.— (1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.
- (2) . . . . .

(3) A worker's leave year, for the purposes of this regulation, begins— (a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply— (i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

[. . .]

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) subject to the exception in paragraphs (10) and (11) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

#### Entitlement to additional annual leave

13A.—(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

[. . .]

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under

paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

- (a) the worker's employment is terminated; or
- [. . .]

Compensation related to entitlement to leave

14.—(1) Paragraphs (1) to (4) of this regulation apply where—

- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [F2regulation 13] [F3and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

- (a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

[. . .]

Payment in respect of periods of leave

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) and the exception in paragraph (3A).

[. . .]

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") (and paragraph (1) does not confer a right under that contract)].

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes

towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Remedies

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

[ . . . ]

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

69. I also reminded myself of the provisions of Sections 13, 14, and 23 Employment Rights Act 1996, which provide insofar as is material as follows:

13 Right not to suffer unauthorised deductions.

(1) 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 of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction

14 Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of— (a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

[ . . . ]

23 Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal— (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an [F1employment 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) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section

21(1) but received by the employer on different dates, 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.

### 27 Meaning of “wages” etc.

(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,

[ . . . ]

70. Whilst it is conceded that the Claimant was a ‘worker’ under s.230 ERA 1996, it was necessary to determine whether there was a contractual agreement between the parties at all between each assignment. Counsel was asked whether there was any specific authority he wished to rely on in relation to this issue. He did not, but indicated that mutuality of obligation was relevant to the issue of whether there was a contract subsisting between them at all between each assignment.

71. When considering what was the true agreement between the parties, I considered **Autoclenz Ltd v Belcher and Others** [2010] IRLR 70 CA and [2011] UKSC 41, reminding myself that how the parties define themselves in any written contract is of little relevance, that I should question what was the true agreement between the parties and take a purposive approach and **Uber BV and Others v Aslam Farrar & Others** 2021 ICR 657 CA – not only is the written agreement not decisive of parties’ relationship, it is not even the starting point for determining status. Specifically with regard to whether there was a global or umbrella contract between the parties, that continued to exist during periods when the Claimant was not working, I had regard to case law more relevant to whether casual workers could be employees although applicable in the worker context also, including:

a. The Court of Appeal decision in **Clark v Oxfordshire Health Authority** 1998 IRLR 125, CA, where a nurse who was retained by a health authority to fill temporary vacancies in hospitals did not have a global employment contract spanning her various individual engagements because there was no mutuality of obligation during the periods when she was not working. The Court of Appeal held that no contract of employment, whether it be given the name global, umbrella or any other name, could exist in the absence of mutual obligations subsisting over the entire duration of the relevant period. The fact that she was bound by an ongoing duty of confidentiality even during non-working periods was insufficient, since any such

obligation would have stemmed from previous single engagements, and no continuing obligation whatever would have fallen on the health authority;

- b. The House of Lords decision in **Carmichael and anor v National Power plc 1999** ICR 1226, HL, where it was held that casually employed tour guides had no contractual relationship at all with the tour guide operator when not actually working because there were no mutual obligations to offer and perform work. The documents that existed simply provided a framework for a series of successive ad hoc contracts of service or for services, which the parties might subsequently make. Their Lordships said that *'the parties incurred no obligations to provide or accept work, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other'*;
- c. The Court of Appeal decision in **Stringfellow Restaurants Ltd v Quashie 2013** IRLR 99, which reviewed the requirements for a global contract. There, Lord Justice Elias referred to **Nethermere (St Neots) Ltd v Gardiner and anor (above)** and **Carmichael** (above) as authority for the principle that, for a global contract to exist, it is necessary to show that there is at least 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements. He pointed out that the significance of the irreducible minimum is that it determines whether a contract exists at all during the periods of non-work; and
- d. The Court of Appeal in **Nursing and Midwifery Council v Somerville 2022** ICR 755, CA, in which the work of a fee-paid panel member on the NMC's Fitness to Practise Committee, was governed by a services agreement, which stated that the Claimant had the status of an independent contractor and that nothing in the agreement created a relationship of employer and employee. The NMC was not obliged to offer S a minimum amount of sitting dates and he was free to withdraw from dates he had accepted. An employment tribunal found that the Claimant was not an 'employee', since there was no irreducible minimum of obligation, but that he was a 'worker', there was a series of individual contracts that arose each time that he agreed to sit on a hearing and also an overarching contract in relation to him providing his services. The EAT upheld the Tribunal's decision, as did the Court of Appeal, finding that each time the NMC offered a hearing date and the Claimant accepted it, an individual contract arose whereby he agreed to attend the hearing and the NMC agreed to pay a fee. The tribunal had found that under each individual contract, the Claimant had agreed to provide his services personally, and that the NMC was not the client or customer of a profession or business carried on by the Claimant and that this was sufficient to entitle the tribunal to conclude that he was a worker.



72. Whilst the Claimant did not explain how she considered the following applicable to her case, she did refer to and relied on the following, which I gave consideration to:

- e. The Court of Appeal decision in **Smith v Pimlico Plumbers Ltd** 2022 IRLR 347, CA, where the Court of Appeal confirmed the European Court of Justice's judgment in **King v Sash Window Workshop and anor** 2018 ICR 693, ECJ, allowing a worker to carry over a right to payment for annual leave from one leave year to the next if the worker has been prevented from taking annual leave at all or has only been permitted to take unpaid annual leave. In an appendix to its judgment, the Court of Appeal suggested the following additional wording to be read into Reg 13 in order to reflect the effect of **Sash Window**: 'Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years';
- f. The Supreme Court's decision in **Harpur Trust v Brazel** 2022 UKSC 21, SC, that confirmed that the common practice of using the 12.07 per cent rate, as a rough-and-ready method of calculating holiday entitlement for workers with no normal working hours, was an unreliable approach and that the WTR 1998 did not permit the employer to cap leave entitlement at 12.07 per cent of annualised hours but simply required the straightforward exercise of identifying a week's pay in accordance with s.221–224 of the Employment Rights Act 1996 (ERA) and multiplying that figure by 5.6; and
- g. The Supreme Court in **Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors** 2023 UKSC 33, SC, a decision concerning claims for underpayment of holiday pay where the claimants sought arrears of holiday pay going back to 1998, in which the Supreme Court concluded that whether a claim in respect of two or more deductions constitutes a claim in respect of a 'series' of deductions was essentially a question of fact where all relevant circumstances must be taken into account, and also concluded that the EAT conclusion in **Bear Scotland Ltd v Fulton and anor** 2015 ICR 221, EAT, that a three-month gap between deductions breaks a series, could not stand as it was wrong to assume that a gap of more than three months between an act of which complaint is made and any acts which preceded it will necessarily extinguish any claimant's ability to recover in respect of the earlier acts.

## Decision

73. My first task was concluding whether the Claimant was engaged by the Respondent as worker under a series of individual assignments (as submitted by the Respondent) or whether the Claimant was engaged as a

worker for a continuous period from the commencement of her first shift to the termination of the engagement on 31 December 2024.

74. From 12 March 2021 to 30 July 2021, the Claimant performed a series and total of 24 assignments for which she was paid in July 2021 and September 2021.
75. I concluded that during this time the Claimant was engaged by the Respondent as a worker for a series of individual assignments, the last of which was 30 July 2021. I further concluded this to be the case despite the fact that the terms that she worked under each assigned were set out in a series of documents including and in particular overarching Terms of Engagement signed and returned to the Respondent by the Claimant on 5 March 2021.
76. Despite the overarching nature of the terms, which governed the relationship between the parties when the Claimant was working on each assignment, this was not in my mind sufficient to indicate any ongoing contractual obligation or relationship between the parties, either during the period from March to July 2021 or subsequently, between each assignment.
77. I had found that there was no obligation on the Respondent to offer the Claimant work and no obligation on the Claimant to offer her services. I further found that even though a form of roster or rota of work had been prepared by Dr Louise Morris, populated with designated shifts that the workers between then preferred to and could work, there was nothing in practice preventing either party from changing the nature of that regularity of work. In particular, there was nothing that prevented the Claimant from indicating that she was not available to work and could not work for dates that she had already indicated that she was available and rostered to work. Shifts in the period March-July 2021, that the Claimant had indicated she could work and had been included in the roster, were cancelled by the Claimant with no consequence for the Claimant.
78. Further, once the Claimant had indicated that she no longer wished to provide work to the Respondent, she was removed from the rota that had been prepared and there was no obligation to work such shifts. I had found that subsequently vacancies had been sent to the Claimant and she could choose whether to accept or refuse the work. She chose not to accept any further work, not responding to any of the contacts, and had not been obligated to do so.
79. I therefore concluded that despite the Terms of Engagement setting out the terms that would apply as and when the Claimant did provide her work (rate of pay, holiday pay etc.) there was no overarching or umbrella contractual obligation to either provide a minimum amount of work to the Claimant or for her to undertake a minimum amount of work for the Respondent. Rather, the Claimant was able to refuse to work any more shifts for the Respondent and did in fact not work for the Respondent after the final shift.

80. In coming to this conclusion, I took into account the Claimant's arguments but had not been persuaded that the Claimant had been able to utilise the Respondent's occupational health provider or indemnity cover during or in respect of periods when she was not providing work to the Respondent and this did not assist the Claimant in demonstrating that there was any overarching or umbrella worker contractual relationship.
81. This was also my conclusion despite my finding that she was not removed from the Respondent's Medical Bank/Bank until December 2023. I therefore concluded that that this was a case of assignment-specific work and there simply was no mutuality of obligation between assignments.
82. It is conceded that the Claimant was a 'worker' under s.230(3)(b) ERA 1996 once she attended a shift and that she was entitled to annual leave under Reg 13 WTR 1998. Their position is that she was paid to accrued annual leave under the 12.07% calculation method.
83. I did not accept the Respondent's submissions that **Harper Brazel** did not apply in the current case on the basis that it only applies to term time workers. Rather, I considered that the principles in the Supreme Court decision were potentially applicable to any worker that worked irregular hours and/or part-years where the use of 12.07% as a method of calculating holiday entitlement was arguably an unreliable approach. That said, I further concluded that this should and would only be considered if I had concluded that the Claimant's claim had been brought in time.
84. However, I further concluded that her claims, either under the WTR 1998 or ERA 1996 had not been brought in time.
85. I had not been persuaded that the Claimant's employment had 'terminated' on the termination of the Claimant on the Respondent's Medical Bank on 31 December 2023, such that the complaint was in time. Rather I concluded that at the end of each individual assignment, there had been a 'termination'.
86. In those circumstances, the Claimant should have brought her claim for compensation under WTR 1998 within three months (plus early conciliation) of each assignment on the basis that each assignment was potentially her last, and in particular within three months of her last assignment worked the Respondent on 30 July 2021, which she had confirmed and had made clear would be her last. She had not, and had not brought her complaint until 2024. Holiday pay was paid in the pay run following the completion of each shift and she had knowledge of the Respondent's calculation of her annual leave pay, at the latest, when she received her last pay slip in September 2021.
87. I was not persuaded that **Pimlico Plumbers** decision assisted the Claimant. The Claimant's case appeared now to be, not that she had been prevented from taking leave but rather that she had taken leave (as indicated in all her schedules of loss,) but that she had not been paid the correct amount. In

such a case, **Pimlico Plumbers** did not avail the Claimant of its roll-over provisions.

88. Even if the Claimant was confused at the end of the final hearing, and that is not her claim, and that her claim is actually that she was prevented from taking her leave (which for the avoidance of doubt does not appear to be her case,) in the alternative, I again concluded that this decision did not assist the Claimant. At no time had she been considered self-employed and prevented from taking leave. Rather, the Respondent had accepted that the Claimant was a worker on each assignment and in fact paid her rolled-up annual leave pay. In any event, this case did not assist the Claimant in any argument on extending the time for bringing such a complaint after the date of her last assignment in 2021.
89. In the alternative, on the basis of the claim brought as an unlawful deduction, any claim for unlawful deduction (if there was any merit in the Claimant's arguments on calculation of paid annual leave,) was also not brought in time.
90. I concluded that **Agnew** provided no assistance to the Claimant, there being no claim for unlawful deduction after September 2021. The Claimant had three months from the date of the last of any deduction, September 2021, to bring such a claim (as extended by any early conciliation). She had not.
91. In those circumstances, I concluded that claims brought under both WTR 1998 and ERA 1996 were out of time.
92. Whilst the Claimant tells me that she believed she could bring a claim after her Bank arrangements were terminated, I was not persuaded that this was sufficient to place the Claimant in a position such that it could be said that it was not reasonably practicable for her to bring her claim in time.
93. She was aware on submitting her time sheets and on receiving her payslips in September 2021, as well as from the Terms of Engagement and ancillary documentation from the Respondent, of the methodology that the Respondent had adopted in calculating holiday pay and what they had in fact paid her for holiday pay. That she was ignorant of the arguments that could or would prevail for making such complaints is no argument that would assist the Claimant on reasonable practicability in my view.
94. The Claimant, albeit not legally educated, is an educated woman and could have made enquiries when she determined to stop providing her work to the Respondent in 2021, as to her rights, what her potential claims might be and any relevant time limits for bringing such claims. There was no evidence that she did and in those circumstances I concluded that it had been reasonably practicable for her to have brought her claims within the time periods set out in the WTR 1998 and ERA 1996.
95. Further, and in any event, I was not persuaded that I had jurisdiction to consider the Claimant's complaint brought as an unauthorised deduction

from wages by reason of s.23(4A) ERA 1996 which provides that *‘an employment tribunal is not ...to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.’*

96. Her ET1 claim was filed on 21 March 2024 [8] and the Claimant brings no claim for unlawful deductions after 22 March 2022, being the latest date for a claim to fall outside of s.23(4A) ERA 1996. The complaints relate to deductions made in 2021. On that basis too, the Tribunal has no jurisdiction to consider the complaints brought under the provisions of the ERA 1996.
97. On that basis, the both complaints are dismissed.

**Employment Judge R Brace**

**16 December 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

07 January 2025 Adam Holborn  
FOR EMPLOYMENT TRIBUNALS

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