Case No: 2208177/2017

EMPLOYMENT TRIBUNALS

Claimants: **John Kevill**

Respondent: **Astrea Asset Management Limited**

London Central

Employment Judge Goodman

6 February 2019

RECONSIDERATION JUDGMENT

1. The respondent's application dated 24 December 2018 for reconsideration of the judgment sent to the parties is allowed.

2. The judgement and reasons sent to the parties are varied to include a determination that the contractual provision as to non-payment of accrued and untaken holiday on termination is not void to the extent that it relates to holiday entitlement in excess of the statutory provision.

REASONS

1. Following hearings in October, the judgment and reasons in the claims of four claimants arising from the same business transfer were sent to the parties on 13 December 2018.

2. On 24 December the parties wrote to the Tribunal about errors and omissions in the written reasons, resulting in a certificate of correction as to the numbering of the claimants in the judgment, sent to the parties with the corrected judgment on 1 February 2019.

3. Also on 24 December the respondent wrote identifying that one of the issues as to the successful claimants' holiday pay had not been determined (at the time two claimants were concerned). The claimants wrote on 4 January agreeing that

there had been no express finding with regard to liability for holiday pay, and that "they do not object to the first respondent's proposal that this matter is clarified by the Tribunal".

4. Currently a remedy hearing is listed for hearing on 11 February 2019. The parties informed the tribunal on 5 February that agreement on sums payable has been reached, save for the holiday pay claim of the second claimant, John Kevill.

Rules on Reconsideration

5. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may reconsider any judgement where it is necessary in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied or revoked.

6. The process for reconsideration is set out in rule 72. An employment judge must first consider whether the application has no reasonable prospect of success, and if so, it is refused. Otherwise, "the tribunal shall send a notice to the parties setting a time limit for any response to the application by the parties and seeking the views of the parties or whether the application can be determined without a hearing. The notice may set out the judge' provisional views provisional on the application."

7. It is clear enough that the respondent's point – that no determination was made on the holiday issue not reserved to a remedy hearing was made – is good, and that the interests of justice do require a reconsideration to decide the point.

8. Neither party has expressly referred to reconsideration, nor expressly said that it consents to reconsideration without a hearing. Properly therefore, reconsideration must take place at a hearing, which conveniently may be on 11 February. I am mindful that this may cause the parties unnecessary expense. The facts (other than as to how many days had been taken by the date of termination, expressly reserved to the remedy hearing) have been found, the legal arguments addressed by each side in written submissions on closing, and this is not a reconsideration of existing findings, but of the omission of any explicit determination on the point, and as the parties agree that a determination is needed, so written representations on the reconsideration are not needed. It is also possible that on determination of the issue, there will be no need for the hearing on 11 February at all. The point is therefore reconsidered in this judgment.

9. This is a departure – for the reasons stated – from the strict process. It is done under the overriding objective in the interest of saving costs and expense, and in the interests of finality. If either party did wish to make additional representations, that can be taken on 11 February as an application to reconsider this decision, which would then stand as a provisional view under rule 72.

Determination

10. The holiday pay issue is about the respondent's liability to pay the claimant for holiday due but not taken at the date of termination. The claimant's case on the issue was set out in paragraphs 211-213 of their closing submissions; the respondent's case is in 113-124 of its closing submission.

11. There had been a dispute as to the claimant's contractual entitlement, as the contract of employment had, controversially, been revised in the claimant's favour shortly before transfer of the business and termination of employment.

Paragraphs 161 and 167 concern the holiday pay clause of the contract. It was found that the increase in entitlement was not void. Therefore in principle the claimant on termination was entitled to 38 days, including the 8 public holidays, per annum, pro rata from the beginning of the holiday year, less any holiday he had in fact taken.

12. The point that should been decided, but was not, concerned a clause in the contract of employment providing that he was entitled to payment on termination for any unused holiday entitlement "unless employment is terminated by the company for gross misconduct". His employment was so terminated, and although the tribunal found the respondent's reason for dismissal was the transfer of the undertaking, so automatically unfair, it also held that the claimant's conduct was such that any employer would consider it repudiatory (paragraphs 176, 177) and that with proper process he would have been dismissed for this conduct. The tribunal held there had been gross misconduct, even of that was not the employer's real reason for termination.

13. Under the Working Time Regulations 1998 workers are entitled to 28 days holiday per annum. Regulation 14 confirms a right to receive a payment and you want taken leave entitlement at the date of termination. Regulation 35 (1) (a) provides that any contractual provision which purports to exclude or limit the operation of any provision of the regulations is void.

14. It has been held that statutory holiday pay may be claimed as an unlawful deduction from wages under the employment rights act 1996 as under regulation 30 of the working time regulations because it is a similar character to contractual holiday pay, in revenue and Customs commissioners v Stringer (2009) UKHL 31, whether it included the definition of wages in the employment rights act, which expressly states that the payments may be due under the contract or otherwise.

15. The Regulations provide at regulation 16 (4) that a right to payment does not affect any right of a worker to remuneration under his contract, and (by addition in the 2014 limitation regulations) but paragraph (one) which provides holiday pay "does not confer a right under that contract". Regulation 17 goes on to say that where during any period a worker is entitled to annual leave those under the provisions of the regulations under a separate provision, including the provision of his contract "he may not exercise to write separately, but may, in taking leave from during that period, take advantage of whichever right is, in any particular respect, the more favourable".

16. In other words, a worker may choose whether he is taking holiday under the contract or from his statutory entitlement but he may not have both.

17. The Working Time Regulations not permit a reduction of the entitlement on termination on grounds of conduct, or anything else – **Witley and District Men's Club v Mackay (2001) IRLR 595**. A provision purporting to cut back the statutory entitlement to payment on termination is void by virtue of regulation 35. However, contractual provisions about (contractual) holiday pay which are more favourable than the statutory entitlement are not void by regulation 35 – **Beijing Ton Ren Tang (UK) Ltd v Wang (2009) UKEAT/0024**. This case concerned accrual of untaken holiday pay from year to year – the regulations do not permit payment on termination to more than the current year, but the more favourable contractual provision was not void. Thus the regulations only govern statutory holiday pay. Contractual provisions about contractual holiday pay beyond the statutory pay are unaffected.

18. It follows that in respect of untaken statutory holiday pay, the claimant is entitled to be paid regardless of conduct, but for any untaken holiday in

exceeding the statutory entitlement, the contractual provision removing the right on termination for gross misconduct is not void under regulation 35.

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Employment Judge Goodman

Date 6 February 2019

JUDGMENT SENT TO THE PARTIES ON

7 February 2019

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FOR THE TRIBUNAL OFFICE