EMPLOYMENT TRIBUNALS

Claimant: Mr I Akram

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Liverpool **On:** 8 and 9 November 2022 and Tuesday 24 January 2023

Before: Employment Judge Aspinall
Mr G Pennie
Mr R Cunningham

Representation
Claimant: Mr Isaacs (Counsel)
Respondent: Mr Ohringer (Counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of trade union detriment fails.

2. The Claimant's complaint of unauthorised deduction from wages in relation to the proper basis of calculation of holiday pay succeeds in principle. A remedy hearing is needed to determine, having regard to any off-set, whether any payment is due to the Claimant.

REASONS

Background

1. By a claim form dated 22 September 2021 the Claimant, a band 6 phlebotomist at the Respondent and a trade union representative, brought complaints under the Working Time Regulations 1998 (WTR) and under Section 13 Employment Rights Act 1996 that he had not been paid his correct amount of holiday pay, had suffered deductions from his pay, and under Section 146 Trade Union and Labour Relations Consolidation Act 1992 that he had suffered detriment as a trade union representative.

2. The detriment which came to be determined by the Tribunal was late payment of paternity pay.

3. The Claimant withdrew arguments that he had also suffered underpayment of paternity pay and underpayment of holiday pay as a result of his trade union membership. He accepted that in the course of investigating the Claimant's grievance the Respondent found that the basis of calculation of paternity pay for all workers was wrong. It took steps to remedy the error so that all workers who had been underpaid paternity pay received back pay in December 2021. The Claimant accepted that this had been done for everyone irrespective of trade union membership or activity. He also withdrew his argument that underpayment of holiday pay was also a detriment due to his trade union membership as he accepted that everyone at the Respondent was being paid holiday pay in the same way.

4. In relation to his holiday pay complaint he said the formula used by the Respondent, to divide annual salary by 365 days to achieve a daily rate of annual leave entitlement, was wrong. He said that the Respondent should have counted working days, not calendar days. This would have meant a higher rate of pay for his annual leave.

5. Although the List of Issues asked the Tribunal to identify the correct basis of calculation of holiday pay for Section 221(2) workers, the Respondent conceded in closing submissions that the Claimant was a Section 222 worker. The List of Issues was amended and the Tribunal has addressed both the Section 221(2) and Section 222(1) positions.

The List of Issues

6. The parties agreed the following issues between themselves, there had been no case management hearing.

Unlawful deduction from wages – section 13 Employment Rights Act 1996

1. What is the correct method for calculating a day's holiday considering 'the amount payable under the contract of employment' for the purposes of section 221(2) and or section 222(1) ERA 1996 when read to comply with the Working Time Regulations 1998? [The Claimant says it should be 1 divided by the number of working days in the month. The Respondent says it should be divided by the number of calendar days in the month.]

Detriment on grounds related to union membership or activities – section 146 Trade Union and Labour Relations (Consolidation) Act 1992

2. It is agreed that the Claimant participated in strike action in the period starting 7 May 2021. Did this constitute 'activities of an independent trade union at the appropriate time' pursuant to s.146(1)(b)) of the Trade Union and Labour Relations (Consolidation) Act 1992?

3. Was the Claimant subjected to the following treatment:

   a. Delayed payment of paternity pay owed to the Claimant;

4. If so, did this amount to a detriment?

7. If so, was the sole or main purpose of each detriment complained of to prevent or deter the Claimant from taking part in the activities of a trade union at an appropriate time or in order to penalise the Claimant for doing so?

Further discussion of the issues

5. --During closing submissions Mr Ohringer submitted in relation to the holiday pay complaint that the focus in the case was shifting from the divisor point only to a broader consideration of the component parts of the holiday pay calculation. He wished the Tribunal to address the basic pay element only. He said that any argument on underpayment of the enhanced element of holiday pay was not brought within the Claimant's complaint so that an amendment application would be required for the Tribunal to determine it.

6. He submitted that a Tribunal decision on the enhancement element of holiday pay (which the Respondent says is addressed by Agenda for Change) may have implications for NHS workers generally and that the Tribunal may wish to hear from NHS England which might be invited to make representations on the implications of the case. Mr Ohringer wanted the Tribunal to record his concerns. The Tribunal agreed to do so and a note was read back to him and agreed by all parties to accurately reflect his concerns.

7. Mr Isaacs submitted that this was always a case which had the potential to have wide-ranging implications and that it was not acceptable for the Respondent now, after it had closed its evidence, to protest about implications of a decision, when it had been apparent from the outset that the Tribunal would be determining issues as to the proper basis of calculation of holiday pay for the Claimant.

8. Following an adjournment, the Tribunal decided that the issue of undercalculation of holiday pay in all of its component parts was on the Claim Form so that there was no expansion of complaint and no need for an amendment application.

The Hearing

Possible stay in proceedings

9. The case of Agnew, from the Northern Ireland Court of Appeal, on the divisor in holiday pay complaints, was to be heard by the Supreme Court on 14 December 2022. Neither side advocated a stay in proceedings.

10. On the trade union detriment complaint, on the issue of the definition of

union activities, leave to appeal had recently been granted by the Court of Appeal in Mercer v AFG. Again, neither side advocated a stay in proceedings. In the event it was not necessary to determine the activity point in this case, the complaint having failed for other reasons.

Documents

11. The Tribunal saw a bundle of witness statements, a hearing bundle of 293 pages, the Claimant and Respondent each produced a skeleton argument, the Respondent submitted a bundle of authorities and there was the agreed list of issues and each side's worked example of a holiday pay calculation.

Oral evidence

12. The Tribunal heard evidence from Mr Akram, Mr Carter, Ms Middleton and Ms Elliston. Each of them gave their evidence in a straightforward and helpful way.

13. Following closing submissions Ms Middleton sought through Mr Ohringer to revisit her evidence as to the basis of calculation of the enhanced element of holiday pay.

14. The hearing took place in October 2022 but was adjourned and the parties invited to submit worked examples of their calculations of holiday pay. Those worked examples were received and formed the basis of further submissions made on 24 January 2023. The decision was then reserved.

The Facts

15. The Claimant worked for the Trust from 1 November 2013. The Claimant was a Band 6 Phlebotomist employed under a contract of employment with the Respondent. The provisions of the Working Time Regulations applied so that the Claimant was entitled to paid annual leave. His contract of employment incorporated the provisions of Agenda for Change which provides at section 7.1 that the annual salaries of full time employees who are paid monthly shall be paid for each calendar month one twelfth of the annual salary.

16. At section 13 for annual leave it provides that where staff work standard shifts other than seven and a half hours excluding meal breaks, annual leave should be calculated on an hourly basis to prevent staff on these shifts receiving greater or less leave than colleagues on standard shifts.

17. At section 13.9 it provides pay during annual leave will include regularly paid supplements, including… payments for work outside normal hours. It says, "pay is calculated on the basis of what the individual would have received had he been at work". From 6 April 2020 for those who had irregular hours the reference period should be based on the last 52 weeks.

18. The Trust used East Lancashire Financial Services shared services centre (ELFS) to run its payroll. Ms Middleton was the payroll operations manager for ELFS. ELFS used Electronic Staff Record, "ESR", which is a payroll database

system commissioned and run by the Department of Health and Social Care. It is run by a central NHS ESR team which works with IBM to put the formulae for calculations of salary into ESR in accordance with the terms of Agenda for Change terms and conditions of service.

19. The Claimant's contract provided that he worked 37.5 hours per week. He worked a rota that differed from week to week and the remuneration payable to him differed depending on the shift to which he was allocated. His hours were worked on a rota or shift pattern prepared by management. His shifts were of varying duration, sometimes in excess of 7.5 hours. The Claimant was paid an enhanced payment if he worked unsocial hours. He was not required to do any work on his non-working/rest days. The Claimant was permitted to carry forward some annual leave entitlement and if he subsequently sold some of it back to the Respondent it was paid out at 7.5 hours equating to one day's entitlement.

20. If the Claimant agreed to work additional shifts they would be classed as overtime.

21. The Claimant was paid monthly. Each month he received 1/12 of his gross annual salary (subject to deductions) ("basic pay") together with the enhancement payments in respect of the shifts worked in the previous month. The enhancement payments appeared on his pay slip. If he worked overtime, those payments would also appear on his pay slip.

22. When the Claimant took annual leave, his holiday pay included components in respect of both his basic pay and his enhancements. The list of potential components of pay that the Respondent held on its payroll record for the Claimant was as follows:

1	Locally agreed GRP0 NP NT NNI Pay NHS 435 Taxi Fares	
2	Bank Holiday OT pay NHS	
3	Basic Distributed NHS	
4	Basic Pay NHS ARS	
5	Night Duty OT pay NHS	
6	Saturday OT pay NHS	
7	Sunday OT pay NHS	
8	Weekday OT pay NHS	
9	Bank Holiday ENH Pay NHS	
10	Bank Holiday ENH Pay NHS ARS	
11	AfC Absence Pay NHS	
12	AfC Absence Pay NHS ARS	
13	Night Duty ENH Pay NHS	
14	Night Duty ENH Pay NHS ARS	
15	Saturday ENH Pay NHS	
16	Saturday ENH Pay NHS ARS	
17	Sunday ENH Pay NHS	
18	Sunday ENH Pay HNS ARS	

23. The Respondent calculated the basic and enhanced components of holiday pay in different ways.

24. Calculation of basic holiday pay was done by dividing the annual gross pay by twelve. The Respondent then looked at the month in which the annual leave was taken and divided the gross monthly pay by the number of days in the month so that for example in a month in which there were 28 days, assuming a gross annual salary of £ 33587, 33587/12 = 2798.91 which was then divided by 28 and gave a daily rate of basic element holiday pay of £99.96. For a month which contained 30 days the rate would be £93.29 and for a month which contained 31 days the rate would be £ 90.28. The number of days taken as leave was then multiplied by the daily rate pertaining to that month.

25. Enhancement elements of holiday pay were calculated by taking the actual enhancements earned in the previous 52 weeks adding them together and then dividing them by 365 (calendar days) to achieve a daily rate of enhancement, then multiplying that by 7 to give a rate for the week, then dividing by 37.5 (the number of working hours in the week) to give an hourly rate of enhancement element of holiday pay. That was then multiplied by the number of hours that would have been worked during the shift in respect of which leave was taken.

26. On 12 March 2021 the Respondent entered into a Framework Agreement with Unison and GMB locally to make "corrective payments" to NHS employees employed under Agenda for Change terms and conditions by an NHS employer, whose holiday pay had been underpaid to them because it had not included voluntary overtime payments in the calculation of holiday pay. A Court of Appeal decision in Flowers v East of England Ambulance Service NHS Trust had decided that voluntary overtime payments should have been included. The corrective payments related to the holiday years 1 April 2019 – 31 March 2020 and 1 April 2020 – 31 March 2021. The Claimant was paid a corrective payment in September 2021 and in February 2022. The amount of those corrective payments is not known to the Tribunal at this time.

27. Everyone agreed that nothing in the Framework Agreement prevented individuals from pursuing complaints for unpaid or underpaid holiday pay. Unison and GMB agreed not to support individuals in bringing claims based on overtime not having been taken into account in calculating holiday pay after the Framework Agreement payments had been made.

28. The Claimant was a trade union representative for Unite from 2020. He was involved in preparing for and managing industrial action. Mr Carter was his line manager. During May and June 2021 the Claimant organized and participated in industrial action. He was on discontinuous strike which meant that he worked some shifts but did not work night shifts he had been due to work. The Respondent paid him in error for night shifts he had been due to work, this was because the nature of its payroll meant that it did not know until after the dates had passed that he had not in fact worked those shifts. It overpaid him £ 509.28.

29. Prior to the industrial action the Claimant had booked annual leave for 1-4 June and 17-18 June 2021, a total of 6 days. He took that annual leave and the Respondent agreed to pay him holiday pay for those days.

30. The Claimant told the Trust on 17 June 2021 that he was going to take paternity leave. He emailed Mr Carter to say that his paternity pay was due and that he did not want to have to wait till the following month to receive it. Mr Carter sent the request to Ms Middleton and shared her response with the Claimant on 2 July 2021.

31. Mr Carter entered data onto an electronic system called Eroster on or about the 4th of each month which system fed into the payroll run for the Claimant. On 17 June 2021, when the Claimant notified the Respondent that he wanted to take paternity leave for 2 weeks from 24 June 2021, it was too late for Mr Carter to put the information onto Eroster for it to be picked up in the June payroll run.

32. Mr Carter knew that the Claimant had been on strike in the month of June and that he would therefore be paid short pay. There was an exchange of emails between them about this. Mr Carter knew that the Claimant was keen to achieve payment of his paternity pay as soon as possible. Mr Carter emailed Ms Middleton asking her to expedite the paternity pay.

33. Ms Middleton replied promptly. She gave verbal instruction to a payroll officer at ELFS to process the Claimant's paternity pay by way of a same day payroll run. The payroll officer received the instruction to make a payment of paternity pay to the Claimant. That payroll officer did not act on that instruction to process as a same day payment nor did they process it as a supplementary run which would have meant the Claimant being paid on 5 July 2021, but it was processed in error, contrary to Ms Middleton's instruction, as a usual paternity payment which in accordance with the Respondent's procedures was paid through payroll in the month after the paternity leave was taken.

34. The Claimant received his paternity pay on 28 July 2021 through the normal payroll run. The Claimant did not raise this late payment of paternity pay when on 14 July 2021 he raised a grievance about underpayment of holiday pay. Neither Mr Carter nor Miss Middleton, nor Miss Elliston who later dealt with the first stage of his grievance, knew that the Claimant had not been paid his paternity pay early, as they had hoped, but had only received it in the usual way at the end of July 2021.

35. Mr Carter and Ms Middleton thought they were providing for the Claimant treatment that was better than treatment of other colleagues in terms of date of payment of paternity pay.

36. On 14 July 2021 the Claimant brought a grievance saying that he had been underpaid annual leave whilst on strike. There was an unsuccessful informal grievance resolution meeting on 21 July 2021. There was to have been a formal grievance hearing in October 2021 but on 22 September 2022 the Claimant brought his tribunal complaint.

Relevant Law on the Trade Union Detriment Complaint

37. The Trade Union and Labour Relations Consolidation Act 1992 provides protection against detriment for union activities at Section 146.

146 [Detriment] on grounds related to union membership or activities

(1) [A worker] has the right not to [be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place] for [the sole or main purpose] of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …

[(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or]

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection [(1)] "an appropriate time" means—

(a) a time outside the [worker's] working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose "working hours", in relation to [a worker], means any time when, in accordance with his contract of employment [(or other contract personally to do work or perform services)], he is required to be at work.

Relevant Law on the Holiday Pay complaint

38. The Working Time Regulations provide the entitlement to annual leave at Regulations 13 and 13A and to pay for that leave at Regulation 16.

13 Entitlement to annual leave

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(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.

(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture [in Wales or Scotland]) except where, in the case of a worker partly employed in agriculture [in Wales or Scotland], a relevant agreement so provides.

(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.

(6)–(8) …

(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.

(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).]

13A Entitlement to additional annual leave

(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—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(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

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

(8) This regulation does not apply to workers to whom the Agricultural Wages (Scotland) Act 1949 applies (as that Act had effect on 1 July 1999).]

16 Payment in respect of periods of leave

(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 13A], 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)].

(3) The provisions referred to in paragraph (2) shall apply —

(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question; …

(d) as if the references to sections 227 and 228 did not apply.

[(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to —

(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending —

(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.]

[(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.

(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.]

(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.

39. The Employment Rights Act 1996 provides a formula for calculating a week's pay.

221 General

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay 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.

(3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5) This section is subject to sections 227 and 228.

222 Remuneration varying according to time of work

(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

(3) For the purposes of subsection (2)—

(a) the average number of weekly hours is calculated by dividing by 52 the total number of the employee's normal working hours during the relevant period of 52 weeks, and

(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of 52 weeks.

….

223 Supplementary

(1) For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours, shall be brought in.

(2) If for any of the 52 weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to 52 the number of weeks of which account is taken.

(3) Where —

(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime),account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

40. The law on unauthorised deductions from pay is set out in section 13 Employment Rights Act 1996.

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.

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Relevant case law

41. The issue of whether the basis of calculation of holiday pay should be the calendar year or the working year has been considered in conflicting EAT decisions. In Thames Water Utilities v Reynolds 1996 IRLR 186, a case decided prior to the introduction of the Working Time Regulations 1998, the EAT decided that the Apportionment Act 1870 applied so that a day's holiday pay was 1/365 of annual salary.

42. In Leisure Leagues UK Ltd v Maconnachie [2002] IRLR 600 and in Yarrow v Edwards Chartered Accountants UK/EAT/0117/07 the EAT decided that the basis for calculation of holiday pay was working time rather than calendar time. Maconnachie and Yarrow achieved the result that a worker's holiday pay under the Working Time Regulations should be calculated using the working week. IDS Brief helpfully summarised the calculation derived from Yarrow as follows:

> *"the worker's 'week's pay' should be calculated in accordance with the Employment Rights Act 1996. The proportion of a 'week's leave' that the worker has taken should be calculated. A 'week's leave' for this purpose is a working week rather than a calendar week. The worker's 'week's pay' should be multiplied by the proportion of a 'week's leave' that the worker has taken. Applying this approach to a worker who works five days a week, a day's leave equates to one fifth of a week's leave; and to a worker who works two days a week, a day's leave equates to one half of a week's leave. The worker who works five days a week should be entitled to one fifth of a week's pay for a day's leave, and the worker who works two days a week should be entitled to one half of a week's pay for a day's leave. If the two*

> *workers receive the same pay (pro-rated for the part-time worker), the payments they receive in respect of one day's leave should then be the same. If the calculation were carried out with reference to a calendar week instead of a working week, the full-time worker would receive a considerably higher payment than the part-time worker in respect of a day's leave."*

43. In Amey v Peter Symonds College [2013] EWHC 2788 the High Court considered the issue of the appropriate calculation of deductions from pay for days on strike. Historically, the Apportionment Act 1870, which used 365^{ths,} had been used but in this case the High Court found on the facts that the teacher's contract did not create any obligation to work at weekends so the exception in Section 7 Apportionment Act applied and the correct divisor was working days, in that case 260ths. The Court of Appeal considered deductions from pay for striking teachers in Hartley v King Edward VI College [2015] EWCA Civ 455. It found the Apportionment Act was silent as to the rate of accrual which was a matter of construction of contract in each case. The Court of Appeal found that the rate of accrual was the number of working days and paid holiday days in the year. 1/260 of salary would accrue on each working or paid holiday day. The Supreme Court in Hartley reversed this decision *on the facts* on the basis that the teacher's contracts did in fact require work to be done at weekends so that salary accrued over 365 days in their particular case.

44. In Chief Constable of the Police Service of Northern Ireland v Agnew [2019] IRLR 782 the Northern Ireland Court of Appeal, deciding holiday pay under the Working Time Regulations, concluded that using a 365 divisor would leave workers under-compensated. It set out its calculations to show that 20/365 is less than 4/52 and that to achieve the latter (WTR) rate of four weeks in a year it is necessary to use working days not calendar days. Agnew was heard by the UK Supreme Court in December 2022 but as at the date of this judgment, no decision has been promulgated.

Submissions on the Trade Union Detriment complaint

45. Mr Ohringer submitted in reliance on Mercer v Alternative Futures Group [2022] EWCA Civ 379 in the Court of Appeal that taking part in industrial action did not fall within the definition of "activities" within section 146. Mr Isaacs submitted that activities included organising industrial action and therefore the Tribunal could determine the detriment complaints within section 146.

46. The Claimant's position as that his paternity pay had been delayed because of his trade union activities. The Respondent's position was that he was paid in the normal way, in the month after the leave was taken. It said that the fact that there had been an attempt which had failed for administrative reasons, to expedite his payment did not amount to detriment and if it did, was not on trade union membership grounds.

Submissions on the Holiday Pay complaint

Discussion about bases of calculation

The divisor

47. Mr Isaacs' argument was that holiday pay ought to be calculated using a divisor not of 365 days but using the number of working days for both components, basic and enhanced, which was set out in the Claimant's schedule of loss as being 229 days per year. The Tribunal notes that on those positions the Claimant's submission derived from his Schedule of Loss would be that the daily rate of holiday pay for basic pay would be, for example, £ 33857/229 =£147.84

48. Mr Ohringer submitted that the holiday pay had been properly calculated in accordance with agenda for change. He said that meant that, using a divisor of 365 days in the year for the basic element. For the enhancement element he said that the formula used arrived at a weekly and then hourly rate. Ms Middleton's evidence was that there was a divisor of 365 before arriving at the weekly then hourly rate.

49. The parties had agreed, at the request of the Tribunal, to provide a worked example of their respective calculations of holiday pay for a named month to be agreed by them, in respect of which there was a rota pattern in the bundle, and to assume that the Claimant had taken one week's leave in that month and that he had also taken a separate period of 3 days leave in that month and to show their (notional) calculations of holiday pay for those periods of annual leave. It would be desirable to have payslips, if not already provided, for that month and the month after. They chose January 2021 as the example month and a salary of £ 37980.

50. In the Claimant's worked example it was submitted that the Claimant was a Section 222(1) ERA worker with normal working hours whose pay varied according to the time or days on which the work was done. It cited the additional payments for shift enhancements and the wage slips in support of that submission. The Claimant submitted that the enhancement payments therefore formed part of his remuneration earned during normal working hours and so should be included in the calculation of holiday pay.

51. Mr Ohringer for the Respondent, in its worked example, submitted that enhancement payments had been included in the calculation of holiday pay using the formula in Agenda for Change, using a 52 week reference period. The Respondent's worked example showed the basis of calculation for the two component parts; basic and enhancements (which the Respondent referred to as Agenda for Change uplifts)

> <u>Basic element holiday pay calculation</u>
> Annual basic pay £ 37980
>
> One day's basic pay £ 37980 / 12months / 31days = £ 101.85 daily rate
>
> <u>Agenda for Change holiday pay uplift per hour</u>
> Shift premia received in previous 52 working weeks/ number of days in the year x number of days in the week / number of contracted working hours for the week
> £4,429.17/365x7/37.5 = £2.26 uplift per hour

Agenda for Change uplift for a 7.5 hour shift taken as holiday £2.26 x 7.5
AFC uplift for an 11.67 hour shift taken as holiday £2.26 x 11.67

52. Mr Ohringer submitted that the Claimant had erroneously included overtime pay in the calculations and referred to the Flowers case and the corrective payment made.

53. The parties were invited to make submissions as to the effect of the Framework Agreement. The Tribunal expressed a preliminary view that it is an agreement between the Respondent and two trade unions, Unison and GMB that they will not support members to pursue complaints for unauthorised deductions from pay in respect of enhancement payments not included in calculation of holiday pay following the Flowers decision. Mr Ohringer agreed that was his understanding of the impact. He argued for a right of offset for the Respondent in respect of any corrective payments made under the agreement to the Claimant should the Respondent be found to have made any unauthorised deduction. His position was that would be an issue for a remedy hearing.

54. On the section 221 or 222 point, Mr Ohringer submitted that there had been an agreed list of issues but that having heard evidence and Mr Isaac's submissions and in relation to *this Claimant only* the Respondent concedes that the Claimant is a s222(1) worker because "he gets paid different amounts depending upon whether he works day shifts or night shifts". As part of its worked example the Respondent submitted a document showing payments made to the Claimant from February 2020 to February 2021. It revealed different amounts for each month of payment showing a lowest payment in November 2020 of £ 3182.01 to a high in January 2021 of £4423.62 which further corroborated the Claimant's evidence about his working hours.

55. Further, Mr Ohringer reserved the Respondent's position entirely in relation to what he says was an expansion of the issues to consider not just basic holiday pay but the enhancement (which he says is addressed by the Agenda for Change uplift) and any overtime elements (which he says have been addressed by the Corrective Payment) and will have further submissions to make on off-set and any amounts due should remedy become appropriate.

56. The Tribunal accepts this submission and recognizes the difficulty in this case in arriving at a conclusion about "wages properly payable" for determination of the unauthorised deduction complaint where:

a. The Claimant and Respondent may have included different components of pay; basic, enhancements, contractual overtime, voluntary overtime, in the gross basic pay.
b. The holiday pay was calculated by the Respondent in component parts and different formulae used for each component, the basic component using a 365 divisor and the enhancement component using, by Ms Middleton's evidence a 365 divisor and by the evidence of the worked example and oral submission of Mr Ohringer a 52 week average formula.

c. The Claimant acknowledges that payments were made as "corrective payments" for 2020 and 2021 because overtime had not been included in the calculation of holiday pay.

57. Further submissions were invited. The parties confirmed they had made their submissions and set out their positions in their Skeleton Arguments and worked examples. They agreed that despite the complexity in this area of law the key issue for the Tribunal was the appropriate divisor.

58. The parties were thanked for their pragmatic approach and the provision of the worked examples. The Tribunal indicated its intention to give a reserved decision.

Applying the Law to the Facts

59. Dealing first with the second issue on the list in relation to the trade union detriment complaint, as follows:

The trade union detriment complaint

Detriment on grounds related to union membership or activities – section 146 Trade Union and Labour Relations (Consolidation) Act 1992

2. It is agreed that the Claimant participated in strike action in the period starting 7 May 2021. Did this constitute 'activities of an independent trade union at the appropriate time' pursuant to s.146(1)(b)) of the Trade Union and Labour Relations (Consolidation) Act 1992?

3. Was the Claimant subjected to the following treatment:

   a. Delayed payment of paternity pay owed to the Claimant;

4. If so, did this amount to a detriment?

5. If so, was the sole or main purpose of each detriment complained of to prevent or deter the Claimant from taking part in the activities of a trade union at an appropriate time or in order to penalise the Claimant for doing so?

Late payment of paternity pay - section 146 TULRCA

60. Section 146 of TULRCA provides that a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of preventing or deterring him from being or seeking to become a member of an independent trade union or penalised him for doing so, or preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time or penalising him for doing so.

Trade union activities

61. The Tribunal has not found it necessary to decide the point as to whether or not the activities, if any, engaged in by the Claimant in his capacity either as a member of the union or trade union representative fall within section 146 because the detriment complaints fail for other reasons.

62. The Respondent bore the burden of proof under section 148 which provided that on a complaint under section 146 it shall be for the employer to show what was the sole or main purpose which he acted or failed to act.

No detriment

63. The Tribunal finds that there was no detriment to the Claimant in the late payment of his paternity pay until 28 July 2021 for a period which began in June 2021. This was exactly the same payment date as for a non-union member or representative taking paternity leave in June. The complaint fails for lack of detriment. The Respondent offered and tried to put in place a "betterment" by way of a supplementary run of payroll for the Claimant so that he would get his paternity pay sooner than through the normal pay roll run. This was done because the Respondent was aware that he would be losing pay for strike action in his June salary. Ms Middleton tried to make things better for him by instructing a junior colleague to pay his paternity pay as a one off supplementary payment at the end of June.

64. If the Tribunal is wrong about that, so that having offered "betterment" and not delivering it, is a detriment, then the complaint fails on other grounds within Section 146.

Sole or main purpose

65. The Respondent in not paying his paternity pay until the end of July 2021 did not do that for the sole or main purpose of preventing or deterring him from being or seeking to become a member of an independent trade union or penalising him for doing so, or preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time or penalising him for doing so.

66. The payroll officer who processed the payment through normal run may have been aware that the Claimant had participated in strike, he or she could have looked at his payroll record and seen deductions for strike action, but the tribunal accepted the evidence of Ms Middleton that the Claimant's paternity pay was processed in exactly the same way as any other worker entitled to paternity pay.

67. The Claimant himself said "I don't know why they didn't do it" and from that concluded that it must have been because of his trade union activities. The Tribunal accepts the oral evidence of Ms Middleton that reason for non-payment on 5 July 2021 was administrative error when the payroll officer failed to act on Ms Middleton's instruction. This part of the complaint fails.

68. Turning to the first issue on the list in relation to the unlawful deduction from wages complaint, the Claimant said he had been underpaid holiday pay.

The correct divisor / holiday pay complaint

69. The Working Time Regulations provide at Regulation 16 that 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 13A at the rate of "a week's pay" in respect of each week of leave. The Working Time Regulations provide that sections 221 to 224 of the Employment Rights Act 1996 apply for the purpose of determining the amount of "a week's pay" for the purposes of regulation 16.

If the Claimant had been a Section 221 worker

70. The Tribunal has not found the Claimant to be a section 221(2) worker, as had originally been stated by the List of Issues, but even if it had, the Respondent's argument about divisor would have failed for the following reasons.

71. Section 221(2) provides that where remuneration does not vary according to the amount of work done then a week's pay is the amount which is payable under the contract of employment. Under the Claimant's contract he was not required to do any work on his non-working or rest days. The Claimant was entitled to both basic pay and enhancement elements to his holiday pay. Calculation of basic holiday pay was done by dividing the annual gross pay by 12 and then subdividing it into the number of days in the month to give a daily rate of basic pay for holiday purposes for that particular month in which the holiday was taken.

72. The Respondent's worked example showed that for the basic element it divided annual salary £ 37890 by 12 and then 31 to give £101.85 daily rate of holiday pay for a month in which there were 31 days. If the month had had, for example 28 days the daily rate would have been £112.76. The Respondent was using a divisor of calendar days and fell into error in doing so. Applying Section 221(2) where a week's pay is the amount payable under the contract of employment and applying Agnew, using a divisor of 365 would leave the Claimant under compensated.

73. The enhancement elements of holiday pay were calculated by taking the actual enhancements earned in the previous 52 weeks adding them together and then dividing them by 365 calendar days to achieve a daily rate of enhancement. That daily rate was then multiplied by 7 to get a rate for the week, then divided by 37.5 (the number of working hours in the week) to give an hourly rate of enhancement of holiday pay. That was then multiplied by the number of hours that would have been worked during the shift in respect of which leave was taken.

74. If the Claimant had been a section 221(2) worker, and he was not, this would also have left the Claimant undercompensated for holiday pay because it divided by 365, in effect making the week's pay accrue over calendar days and not just working days.

75. In principle then, applying Section 13 ERA this would have meant that the Claimant was paid less than the wages properly payable to him in respect of the

holiday pay he seeks. However, the Tribunal acknowledges the payment of Agenda for Change uplifts and Corrective Payments so that it cannot say that, if the Claimant had been a section 221(2) worker the enhancement element of the wages paid to the Claimant meant that *in total* he received less wages than those properly payable. That would be a matter for remedy.

Section 222 workers

76. Section 222 Employment Rights Act 1996 provides the basis of calculation of a week's pay where remuneration varies according to the time of work. It says that the section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

77. The Tribunal accepted the Claimant's evidence that a late shift might cross into unsocial hours and attract an enhanced payment, a weekend shift might also attract an enhanced payment (these are different from overtime payments). The Claimant might, some weeks, work days, and others predominantly nights. His pay would vary depending upon the incidence of his working days and times.

78. The Tribunal accepts his oral evidence corroborated by Mr Carter's evidence and by shift pattern documents in the bundle that the Claimant worked a rota that differed from week to week and month to month, the remuneration payable to him differed depending on the number, duration, day of the week, and timing of the shifts to which he was allocated. Some weeks he worked three days, others four or five depending on where his rest days fell. Again, under the Claimant's contract he was not required to do any work (unlike the teachers in Hartley in the Supreme Court who were required to work on non teaching days) on his non-working or rest days. The Tribunal accepts Mr Isaac's submission, and the Respondent's concession in closing submissions, and finds the Claimant was a section 222(1) *remuneration varies* worker.

Calculating "a week's pay" for Section 222 "remuneration varies" workers

79. Section 222 provides the basis of calculation of a week's pay for "remuneration varies" workers. It says:

> (2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.
>
> (3) For the purposes of sub-section (2)
>
> (a) the average number of weekly hours is calculated by dividing by 52 the total number of the employee's normal working hours during the relevant period of 52 weeks, and
>
> (b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of 52 weeks.

80. Section 223 provides that in arriving at the average hourly rate of

remuneration only the hours when the employee was working and only the remuneration payable for or apportioned to those hours shall be brought in. So, for example, in counting back 52 weeks for the Claimant from the date of calculation for holiday pay the Respondent must disregard weeks during which the Claimant was not working. The Claimant was on discontinuous strike for parts of May and June 2021 so those strike days or weeks would not count for the purposes of the 52 week period in section 222.

81. The Tribunal does not have the data to calculate the Claimant's average number of weekly normal working hours for the 52 weeks preceding each date of annual leave in respect of which he brings a complaint. (The Respondent's worked example makes an assumption that they were 37.5 hours per week). Nor can the Tribunal calculate the average hourly rate of remuneration for that period because it does not have the total remuneration received nor the total hours worked in the relevant 52 week period. That information will need to be provided for a remedy hearing.

82. The statutory formula for a week's pay does not distinguish, as the Respondent has done, between basic and enhanced elements of pay. However, in responding to submissions the Tribunal sets out its reasoning in relation to each component of holiday pay.

Basic pay element and Section 222

83. Calculation of basic holiday pay was done by dividing the annual gross pay by twelve and then subdividing it into the *number of days in the month* to give a daily rate of basic pay for holiday pay purposes for that particular month in which the holiday was taken. The Respondent calculated "one day's basic pay" being the basic pay component of holiday pay using calendar days and not working days. Where the Respondent in its worked example divides basic pay by 365, it falls into error. The correct divisor is working days.

84. In principle, the Agenda for Change uplifts and the contractual overtime payments ought to have been included in the application of Section 222(3) (a) and (b).

85. Applying section 13 Employment Rights Act 1996, in principle, and without regard to the enhancement components and corrective payments, this formula would result in the Claimant being paid less than the wages properly payable to him.

Enhanced element of holiday pay and Section 222

86. Ms Middleton gave oral evidence, which the Tribunal accepts, that the Respondent used a 365 divisor for the enhanced element of holiday pay.

87. Then, in closing submission information came via Mr Ohringer from the evidence of the worked example, that for the enhancement element of holiday pay the payroll software looks at the enhancements paid to the employee in the previous 52 weeks excluding time that has not been worked (for example maternity

leave or sickness absence) and calculates the total number of enhancements paid in the 52-week reference period divided by the number of hours worked in the year being 1955.36 (37.5×52.14) to achieve an hourly enhancement average. The hourly enhancement average is then applied to the hours taken as annual leave in calculating holiday pay, using the actual shift duration. No criticism is made of Ms Middleton who was doing her best to provide accurate information about complicated matters and the Tribunal acknowledges that Mr Ohringer was right to raise the matter in submission, where his client's position, based on its own enquiry was evolving.

88. For the enhanced element of holiday pay, even though it reduces the calculation to hours, the calculation used by the Respondent as set out in the evidence of Ms Middleton given on oath and which is preferred to the information relayed in the above paragraph does not apply the law correctly because it is dividing by calendar days before it gets to hours. The correct application is to divide by working hours. That is because section 222(2) says that the amount of a week's pay is the amount of remuneration for the average number of *weekly normal working hours* at the average hourly rate of remuneration. Put simply, a week's pay is found by dividing the actual pay received by the actual hours worked for the reference period.

89. The Respondent's worked example shows this error, the Tribunal has italicised for emphasis;

> Agenda for Change holiday pay uplift per hour
> Shift premia received in previous 52 working weeks/ *number of days in the year x* number of days in the week / number of *contracted working hours* for the week
> £4,429.17/365x7/37.5 = £2.26 per hour

90. The Tribunal was asked in the List of Issues;

What is the correct method for calculating a day's holiday considering 'the amount payable under the contract of employment' for the purposes of section 221(2) and or section 222(1) ERA 1996 when read to comply with the Working Time Regulations 1998?

The Tribunal has set out above the correct method for each of the sections and its reasoning as to why, in using a divisor of 365 (*number of days in the year)* and in failing to use the actual hours worked (using instead, in the above example, *contracted working hours*) to achieve the average rate of pay, the Respondent fell into error. What the Tribunal has not been able to do, because of the difficulties set out at paragraph 56 above, is determine the wages properly payable and therefore the amount, if any, of any underpayment to the Claimant in respect of the six days holiday pay shortfall he seeks.

91. The Claimant's complaint of unauthorised deduction succeeds in principle on the basis of the wrong divisor in both basic and enhancement components and wrong formula in relation to enhancements for achieving a week's pay.

92. A remedy hearing will be needed to determine whether taking into account any Agenda for Change provisions and payments, any "corrective" Flowers or other payments, or any right of off-set, or indeed on closer analysis of the calculations of payments made for the enhanced element (the change in Ms Middleton's position point) there has in fact been an underpayment such that any money is due to the Claimant.

93. Prior to that remedy hearing there will be a private case management hearing by telephone to make orders for disclosure so as to allow relevant calculations to be undertaken and orders for a revised schedule of loss and counter schedule. The parties are encouraged to work together prior to the case management hearing to prepare the orders they need for the remedy hearing and to attend the hearing with their non-available dates for the remedy hearing.

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Employment Judge Aspinall

Date: 2 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: 3 May 2023

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FOR EMPLOYMENT TRIBUNALS

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